IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
This Document Relates to ALL CASES	)	No. 3:89-cv-0095-HRH

O R D E R

Motion to Vacate Plan of Allocation

Sea Hawk Seafoods, Inc. moves to vacate the Plan of Allocation and for approval of a new plan of allocation.[1] This motion is opposed by All Plaintiffs,[2] the Alaska Native class of claimants,[3] and the Exxon defendants.[4] Oral argument was requested and has been heard.

Background

The lengthy history of the punitive damages award against Exxon for the grounding of the Exxon Valdez on March 24, 1989 is well-known and need not be repeated in full here. It will suffice to say that a jury awarded $5 billion in punitive damages against

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[1] Docket No. 8863.

[2] Docket No. 8871.

[3] Docket No. 8876.

[4] Docket No. 8875.

Exxon in 1994. Exxon appealed the award and the Ninth Circuit twice remanded to this court for reconsideration in light of intervening Supreme Court cases which dealt with the constitutionality of punitive damages awards. In 2007, the Ninth Circuit remitted the award to $2.5 billion. See In re Exxon Valdez, 472 F.3d 600, 602 (9th Cir. 2007). Exxon petitioned for certiorari, which the Supreme Court granted.

The Supreme Court did not review the $2.5 billion punitive damages award "under [the] due process standards that every [punitive damages] award must pass." Exxon Shipping Co. v. Baker, 128 S. Ct. 2609, 2626 (2008) ("Baker"). Rather, the Court reviewed the award "for conformity with maritime law[.]" Id. The Court concluded that "a 1:1 ratio ... is a fair upper limit in ... maritime cases." Id. at 2633. The Court accepted this court's calculation of the total compensatory damages at $507.5 million,[5] and applying that ratio to the instant case held that "[a] punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount." Id. at 2634. The Supreme Court remanded to the Ninth Circuit with the direction that the punitive damages award be remitted in accordance with its decision. Id. The Ninth

[5] The $507.5 million calculation was taken from this court's order following the first remand by the Ninth Circuit. See In re Exxon Valdez, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). In its order following the second remand by the Ninth Circuit, the court calculated the actual, compensatory damages to be $513,147,740. In re Exxon Valdez, 296 F. Supp. 2d 1071, 1099-1101 (D. Alaska 2004). The Ninth Circuit reduced this number to $504.1 million. See In re Exxon Valdez, 472 F.3d 600, 623 (9th Cir. 2006). No one knows why the Supreme Court used this court's earlier damages total. Counsel for All Plaintiffs and Exxon have agreed that neither would question the $507.5 million total for compensatory damages.

Circuit in turn ordered this court to enter judgment "remitting the award of punitive damages to five hundred seven million, five hundred thousand dollars,"[6] but that order has been stayed.[7]

In the instant motion, Sea Hawk argues that Baker so changed the landscape of punitive damages in maritime cases that the Plan of Allocation that governs the allocation of punitive damages to the mandatory punitive damages class must be vacated and a new plan must be approved based upon the 1:1 ratio. Sea Hawk advances three different theories as to why, based on its reading of Baker, the Plan of Allocation must be amended so that each plaintiff's punitive damages award does not exceed one times each plaintiff's compensatory recovery.

Upon the motion of the Exxon defendants, the court created a mandatory punitive damages class. The mandatory punitive damages class was conditionally certified on April 14, 1994.[8] The class consisted

> of all persons or entities who possess or have asserted claims for punitive damages against Exxon and/or Exxon Shipping which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill.[9]

Shortly thereafter, and in the midst of trial, virtually all of the members of the mandatory punitive damages class, including

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[6] Order, In re Exxon Valdez, Appellate Case No. 04-35182, Docket No. 8853 at 2.

[7] See Order, In re Exxon Valdez, Appellate Case No. 04-35182, Docket No. 8854.

[8] Order No. 204 (granting conditional final approval and certifying mandatory punitive damages class) (April 14, 1994), Clerk's Docket No. 4856.

[9] Id.

Sea Hawk, concluded a Joint Prosecution Agreement.[10] The first Joint Prosecution Agreement provided that

> [a]ll recoveries from defendants by any plaintiff or group of plaintiffs, whether by settlement or trial, will be shared among all plaintiffs (whether their claims survive or are dismissed and are subject to appeal at the time of payment) in accordance with the allocation matrix attached hereto as Attachment 1....[11]

The Joint Prosecution Agreement divided plaintiffs into 14 claim categories and a matrix share was calculated for each plaintiff group. Sea Hawk was part of the seafood processors group. The Processors' matrix share was 2.1%.[12]

The Joint Prosecution Agreement was revised in 1995.[13] The 1995 Agreement assigned the Processors a 2.33% share of all recoveries and set a "floor" share of 2.1%.[14] The 1995 Agreement provided that the Executive Committee and the Allocation Committee could approve revisions to the shares assigned to groups of plaintiffs, as long as the revised shares did not fall below the "floor" allocation.[15] The 1995 Agreement also provided that

> [i]n the event that this ... Agreement is submitted to a court for approval in connec-

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[10] Joint Prosecution, Settlement and Damages Allocation Agreement, Exhibit 2, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-6.

[11] Id. at 1, ¶2a, Docket No. 8863-6 at 2.

[12] Id., Attachment 1, Docket No. 8863-6 at 11.

[13] Agreement among Counsel Regarding Joint Prosecution, Settlement, and Damages Allocation Agreement, Exhibit 3, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-7.

[14] Id., Attachment 1, Docket No. 8863-7 at 8.

[15] Id. at 1, ¶ 2B, Docket No. 8863-7 at 2.

> tion with either the continuing litigation or a settlement agreement in the consolidated Exxon Valdez Oil Spill Litigation identified above and the court's approval is conditioned on a change in the aggregate allocated share of a plaintiff group which reduces the percentage share of the aggregate allocated share for such plaintiff group below that percentage share of such plaintiff group set forth in Attachment 2, then the adversely affected plaintiff group shall have the right to withdraw from this agreement.[16]

By January 12, 1996, All Plaintiffs had negotiated a detailed and complex Plan of Allocation, and All Plaintiffs moved for court approval of that plan. The Plan of Allocation explained the methodology used to determine each plaintiff group's share:

> [T]he Executive Committee concluded that the fairest, most equitable way to allocate recoveries, both punitive and compensatory damages, was in proportion to plaintiffs' damages, as fairly estimated by plaintiffs themselves rather than by jury verdicts. The Executive Committee also concluded that it was fair to include claims by plaintiffs who had in fact suffered loss as a result of the spill, but whose claims were dismissed for lack of legal causation. These dismissed plaintiffs had rights of appeal, and many had made large contributions to the prosecution of the litigation. However, their damages would be discounted in a manner commensurate to their relative litigation risk.
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> Alternative mechanisms for allocations of punitive damage recoveries were considered and rejected as less fair. For example, per capita distribution among all plaintiffs would not fairly reflect the weight of the harm caused by the spill, given its huge geographic reach and the widely disparate types of losses. Allocation on the basis of the jury verdicts would create unmanageable competition among plaintiff groups to try their cases first, and to commit disproportionate resources and trial time to specific claims. It also would force individual groups (like a

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16 Id.

> single fishery or Native community) to bear the entire risk of adverse trial results in their particular cases.[17]

In general, the Plan of Allocation provided for the same matrix shares specified in the 1995 Agreement, although there were some differences. Most plaintiff groups, including the seafood processors, were allocated their "floor" share from the 1995 revised Joint Prosecution Agreement.[18] Two groups, the oiled fisheries and the tenders, were allocated higher shares in the Plan of Allocation and three groups which had received no shares under the 1995 Agreement, were allocated very minor shares in the Plan.[19] The Plan of Allocation contemplated making offsets during the distribution of punitive damages to "ensure that net recoveries are distributed consistently with Final Percent Shares."[20] After allowing time for notice and objections, the court approved the

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[17] Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation arising from the Exxon Valdez Oil Spill at 2, Exhibit 1, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-3 at 5-6.

[18] Id., Table 4, Docket No. 8863-5 at 23.

[19] Id.

[20] Id. at 39, Docket No. 8863-5 at 18. This offset provision was apparently included in the Plan of Allocation because at the time the Plan was being developed, some plaintiff groups had received more than their targeted allocation of compensatory damages and some had received less. Sea Hawk contends that Baker has superseded any prior offsets agreements. The Alaska Native Class argues that such an outcome would cause "substantial unfairness" to them. See Alaska Native Class's Supplemental Opposition to Motion of Sea Hawk Seafoods to Vacate Plan of Allocation at 2, Docket No. 8876.

Plan of Allocation, with some modifications, on June 11, 1996.[21] Sea Hawk did not object to the Plan of Allocation.

In 1997, All Plaintiffs submitted proposed Plans of Distribution for 51 categories of plaintiffs, including a plan for the seafood processors. Each of the Plans of Distribution was predicated on the allocations made in the Plan of Allocation. The court approved the 51 Plans of Distribution, including the Processors' Plan of Distribution.[22] The Processors' Plan of Distribution excluded plaintiffs which had assigned or ceded their punitive damages claims to Exxon from participating in the allocation of punitive damages.[23]

Exxon and others appealed. The Ninth Circuit held that it was permissible for class members to assign portions of their claims and recoveries to Exxon. See In re Exxon Valdez, 229 F.3d 790 (9th Cir. 2000) ("Icicle Seafoods") and In re Exxon Valdez, 239 F.3d 985 (9th Cir. 2001). The Ninth Circuit remanded for modification of the Plan of Allocation and the Processors' Plan of Distribution.

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[21] Order No. 317, Docket No. 6806, a copy of which is attached as Exhibit 5, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-9.

[22] Final approval of the seafood processors Plan of Distribution was entered on July 23, 1999. See Order No. 348, Docket No. 7319. Because Sea Hawk had assigned its punitive damage claim for 1989 to Exxon, the Plan of Distribution excluded participation by Sea Hawk for 1989 but included Sea Hawk for subsequent years. See Plan of Distribution of Allocations to the Processor Claim Category at 7, Exhibit 5, Order Granting Preliminary Approval of Processor Distribution Plan, Docket No. 7014.

[23] See Plan of Distribution of Allocations to the Processor Claim Category at 6-7, Exhibit 5, Order Granting Preliminary Approval of Processor Distribution Plan, Docket No. 7014.

On remand, All Plaintiffs moved to amend the Plan of Allocation and the Processors' Plan of Distribution.[24] Sea Hawk "support[ed] th[e] motion [to amend the Plan of Distribution] with one exception...."[25] Sea Hawk agreed that the Plan of Distribution "correctly allocates to Sea Hawk .2921 percent of the net judgment amount assigned to the signatories of the Joint Prosecution Agreement (of which Sea Hawk is one)[.]"[26] However, Exxon had claimed that it was entitled to 95.44% of Sea Hawk's share based on the assignment of Sea Hawk's 1989 claims.[27] Sea Hawk contended that "Exxon's proper share is 23.92 percent[.]"[28]

The court approved the Amended Plan of Allocation in Order No. 351.[29] In that order, the court noted that "[t]he proposed Stipulation simply brings the previously approved Plan of Allocation into conformity with the Ninth Circuit's mandate in Icicle Seafoods."[30] The court also observed that the "legal posture" of the case had been "altered by ... appellate rulings, and the

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[24] Docket Nos. 7366 and 7372, copies of which are attached as Exhibits 9 and 10, respectively, to Declaration of David W. Oesting in Support of All Plaintiffs' Response to Motion of Sea Hawk Seafoods to Vacate Plan of Allocation, Docket No. 8872.

[25] Partial Objection of Sea Hawk Seafoods, Inc. to All Plaintiffs' Lead Counsel's Motion for Order Approving Stipulation for Amendment of Processor Plan of Distribution at 2, Docket No. 7412, a copy of which is attached as Exhibit 1 to Oesting Declaration, Docket No. 8872-2 at 2.

[26] Id.

[27] Id. at 4, Docket No. 8872-2 at 4.

[28] Id.

[29] Docket No. 7441, a copy of which is attached as Exhibit 8 to Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-13.

[30] Id. at 4, Docket No. 8863-13 at 5.

Amended Plan accomplishes a fair, adequate and reasonable revision of the original Plan so as to fold into the Plan the holding of the court of appeals."[31]

The court also approved the amended Processors' Plan of Distribution in Order No. 352.[32] In doing so, the court directed that the Processors' Plan of Distribution be amended "to provide th[at] Exxon is entitled to 23.92%" of Sea Hawk's allocation.[33]

At some point after all the foregoing had been accomplished, Sea Hawk began to express to All Plaintiffs' counsel dissatisfaction with the sharing agreement to which it was committed. In the fall of 2004, All Plaintiffs and Sea Hawk entered into an agreement whereby Sea Hawk would be allowed to retain all monies received from Exxon for its post-1989 claims instead of including that money as part of the collective recoveries.[34] In exchange for being allowed to retain its post-1989 claims recovery, Sea Hawk agreed that "the full amount recovered ... shall be set off against Sea Hawk's pro-rata share of the amount of punitive damages allocated to Sea Hawk" on a dollar for dollar basis.[35]

Now, as the long-awaited distribution of the punitive damages in this case is finally ready to commence, Sea Hawk contends that

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[31] Id. at 7, Docket No. 8863-13 at 8.

[32] Docket No. 7443, a copy of which is attached as Exhibit 13 to Oesting Declaration, Docket No. 8872-18.

[33] Id. at 8-9, Docket No. 8872-18 at 8-9.

[34] Letter from John G. Young, Young deNormandie, P.C., to Dave Oesting, Davis Wright Tremaine LLP, Exhibit 7, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-12.

[35] Id. at 2, Docket No. 8863-12 at 5.

the amended Plan of Allocation is no longer valid and must be vacated because it does not comport with Baker. In the instant motion, Sea Hawk asks the court to 1) recalculate the total compensatory recovery received by All Plaintiffs, 2) order a punitive damages award against Exxon in that amount, and 3) order that the punitive damages be allocated amongst members of the mandatory punitive damages class on a 1:1 punitive-to-compensatory damages ratio based upon actual compensatory damages recovered by each plaintiff.

Jurisdiction

As an initial matter, the court must consider whether it has jurisdiction to consider Sea Hawk's motion. When Exxon appealed this court's 2004 judgment awarding punitive damages in the amount of $4.5 billion,[36] this court lost jurisdiction over the punitive damages award. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). The court will not regain jurisdiction over the punitive damages award until the Ninth Circuit issues its mandate. See Beardslee v. Brown, 393 F.3d 899, 901 (9th Cir. 2004). On September 10, 2008, the Ninth Circuit remanded the matter to this court "for entry of judgment remitting the award of punitive damages to five hundred seven million, five hundred thousand dollars."[37] On the same day, the Ninth Circuit stayed its mandate.[38] Because the mandate has been stayed, this court does not

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[36] See Amended Partial Judgment, Docket No. 7836.

[37] See Order, In re Exxon Valdez, Appellate Case No. 04-35182, Docket No. 8853.

[38] See Order, In re Exxon Valdez, Appellate Case No. 04- (continued...)

currently have jurisdiction over the punitive damages award. Thus, the court cannot, as Sea Hawk requests, recalculate the total compensatory recovery received by All Plaintiffs and order a punitive damages award against Exxon in that amount. The amount of the punitive damages award is the precise issue that is still before the Ninth Circuit.

If the mandate of the Ninth Circuit were issued yesterday in its present form (with or without addressing the outstanding interest issue), such that this court had jurisdiction of the punitive damages award, the court would reject Sea Hawk's request that the total compensatory damages be recalculated to include recoveries subsequent to this court's 2004 calculation. The Ninth Circuit's mandate fixes the punitive damages in this case at $507,500,000 and this court is precluded from entering an award of punitive damages against Exxon in any amount other than $507,500,000.[39] See United States v. Thrasher, 483 F.3d 977, 982 (9th Cir. 2007) (quoting Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172 (9th Cir. 2006)) ("'[W]e have repeatedly held ... that a district court is limited by this court's remand in situations where the scope of the remand is clear.'"). For the same reasons, this court cannot order Exxon to pay punitive damages in an amount different from $507,500,000.

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[38](...continued)
35182, Docket No. 8854.

[39] In a footnote in its opening brief, Sea Hawk suggested that the court should recalculate compensatory damages even if it concluded that the punitive damages award was capped at $507,500,000. For the reasons explained below, there is no need to recalculate the compensatory damages for purposes of allocation of the punitive damages award amongst All Plaintiffs.

This court does, however, have jurisdiction to "resolve collateral matters that do not interfere with the appeal."[40] The allocation of the punitive damages award amongst All Plaintiffs is such a matter. How the punitive damages award, in whatever amount it might be, will be allocated was not the subject of the appeal of the court's 2004 judgment. Thus, the court has jurisdiction to consider Sea Hawk's contention that the Plan of Allocation must be vacated because the only way the punitive damages may be allocated amongst the mandatory punitive damages class is on a 1:1 basis.

The 1:1 Allocation Issue

Sea Hawk argues that the current Plan of Allocation must be vacated for three reasons: 1) the Plan of Allocation is inconsistent with the law of the case announced in Baker, 2) Baker announced an intervening change in the law regarding punitive damages, and 3) the current Plan of Allocation is not fair, reasonable, and adequate, as required by Rule 23, Federal Rules of Civil Procedure. These three reasons for vacating the Plan of Allocation are all based on the same contention, namely that Baker bars the court "from allocating punitive damages to any [plaintiff] in an amount that exceeds a 1:1 ratio with that party's compensatory recovery."[41] Sea Hawk contends that the only method of allocation of punitive damages allowed in a maritime case after Baker is one that utilizes a 1:1 ratio for each class member. Sea Hawk argues that Baker requires a group of plaintiffs in a maritime

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[40] 16A Charles Alan Wright, et al., Federal Practice and Procedure § 3949.1 (3d ed. 2008).

[41] Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation at 13, Docket No. 8863.

case to distribute an award of punitive damages amongst themselves using a 1:1 ratio between punitive damages and compensatory damages and that the court may not approve a distribution of punitive damages that contemplates a different method of allocation.

Baker does not stand for the proposition that Sea Hawk asserts. As Sea Hawk itself points out, in Baker, the Court evaluated the history and purposes of punitive damages, as well as mean and median common law awards, in order to reach its conclusion that a 1:1 ratio was fair and reasonable in maritime cases. The Court considered the gross amount of punitive damages that could fairly be awarded against a defendant in a maritime case. The focus in Baker was not on plaintiffs but rather on defendants. The issue of how punitive damages could be allocated amongst plaintiffs was not addressed by the Supreme Court in Baker.[42]

Because Baker does not stand for the proposition that Sea Hawk asserts, Sea Hawk's arguments as to why the Plan of Allocation must be vacated necessarily fail. The Plan of Allocation is not contrary to the law of the case as set forth in Baker. Baker does change the maritime law of punitive damages, but not the law of how punitive damages awards may be allocated or distributed amongst

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[42] In its brief in opposition, Exxon argues that the Supreme Court rejected the argument that Sea Hawk is advancing here, that the allocation of punitive damages should be tied to the economic harm suffered by each individual class member. This argument is based on Exxon's contention that the Baker Court "ruled" in footnote 28 that "individual awards are not the touchstone[.]" Baker, 128 S. Ct. at 2634, n.28. The Court did not make any "ruling" in footnote 28. All it did was observe that individual awards are not the touchstone when considering whether compensatory damages in a class action are substantial. The instant motion does not involve that issue.

plaintiffs.[43] Nothing in Baker renders the Plan of Allocation unreasonable or unfair as between All Plaintiffs.

Withdrawal from Agreements

Not mentioned in the title or text of Sea Hawk's motion to vacate the Plan of Allocation is a fourth contention quite different from the above matters, but again related to the Plan of Allocation. This also is a collateral matter not involved in the pending punitive damages appeal.

By a footnote in its motion,[44] Sea Hawk purported to give "notice" of the exercise of a right to "opt out" of the Joint Prosecution Agreements "to the extent the 1995 Agreement remains in place"[45] on the theory that the allocation to the seafood processors category will fall below the 2.1% floor specified in the Joint Prosecution Agreements and the Plan of Allocation. In the introduction to Sea Hawk's reply memorandum[46] and in a footnote to the conclusion of that reply,[47] Sea Hawk again alludes to the floor allocation to the seafood processors category. On reply, Sea Hawk contends that it is "entitled to withdraw from the Plan of

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[43] As All Plaintiffs point out, plaintiffs are generally allowed to assign causes of action and recoveries therefrom. See Plaintiffs' Response to Sea Hawk Seafoods' Motion at 12, Docket No. 8871 (collecting cases).

[44] See Motion of Sea Hawk Seafoods, Inc., to Vacate Plan of Allocation at 4, n.6, Docket No. 8863.

[45] Id.

[46] Reply Brief in Support of Sea Hawk Seafoods's Motion to Vacate Plan of Allocation, Docket No. 8886.

[47] Id. at 14, n.11.

Allocation."[48] At oral argument, Sea Hawk made no mention of the foregoing subject in either its opening or reply arguments; and no doubt for that reason, All Plaintiffs' counsel made no mention of the subject either. Not until oral argument was actually concluded did Sea Hawk's counsel "remind" the court of the withdrawal issue.

Sea Hawk's contention that it should be permitted to opt out of or withdraw from the Joint Prosecution Agreements and/or the Plan of Allocation has been poorly developed, and ordinarily the court would ignore the "notice" contained in a footnote to Sea Hawk's opening memorandum and would strike the new material with respect to that matter contained in Sea Hawk's reply.[49] In responding to Sea Hawk's motion and also by way of a footnote, All Plaintiffs acknowledge Sea Hawk's "notice" and for reasons stated reject the notion that Sea Hawk is entitled to opt out of the Joint Prosecution Agreement. Opting out of or withdrawing from Sea Hawk's agreements with All Plaintiffs is a sort of stealth issue that has barely surfaced. The court is of the opinion that Sea Hawk did not fairly raise or argue the withdrawal issue in its motion, and that Sea Hawk's reply memorandum and supporting papers go well beyond rebuttal to All Plaintiffs' footnote response to Sea Hawk's footnoted "notice". More important, this is simply not the kind of issue development that the court has come to expect of counsel in this case.

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[48] Id. at 2; see also id. at 14, n.11.

[49] See Local Rule 7.1(b) ("A reply memorandum ... must be restricted to rebuttal of factual and legal arguments raised in the opposition.").

Principally because All Plaintiffs have not objected to the manner in which the withdrawal issue has been presented, and in the interest of the earliest possible decision on issues that may stand in the way of concluding this protracted litigation, the court overlooks the foregoing and chooses to address the merits of this fourth issue raised by Sea Hawk.

Sea Hawk's suggestion that it should be permitted to withdraw from the Plan of Allocation is denied. Neither the Plan of Allocation nor the Amended Plan of Allocation makes any provision for withdrawing from the plan.

Sea Hawk also suggests that it should be permitted to opt out of the 1995 Joint Prosecution Agreement. The 1995 Joint Prosecution Agreement does contain a provision for withdrawal. The 1995 Agreement provides that

> [i]n the event that this ... Agreement is submitted to a court for approval in connection with either the continuing litigation or a settlement agreement in the consolidated Exxon Valdez Oil Spill Litigation identified above and the court's approval is conditioned on a change in the aggregate allocated share of a plaintiff group which reduces the percentage share of the aggregate allocated share for such plaintiff group below that percentage share of such plaintiff group set forth in Attachment 2, then the adversely affected plaintiff group shall have the right to withdraw from this agreement.[50]

Sea Hawk contends that it has a right to withdraw because the matrix share for the seafood processors has fallen below the 2.1% floor.

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[50] Agreement among Counsel Regarding Joint Prosecution, Settlement, and Damages Allocation Agreement at 1, ¶ 2B, Exhibit 3, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-7 at 2.

The joint prosecution of this case has been concluded (except for the interest appeal) and the Plan of Allocation is the operative agreement between All Plaintiffs for purposes of dividing the recoveries between categories of plaintiffs. Because the 1995 Agreement is no longer relevant to the allocation of recoveries between plaintiffs, Sea Hawk's withdrawal from that agreement would be meaningless.

But, even assuming that the 1995 Agreement is still relevant to the allocation issue, the withdrawal provision has not been triggered. The withdrawal provision is triggered if the 1995 Agreement has been submitted to a court for approval and the court conditions its approval on a reduction of a plaintiff group's matrix share. The 1995 Agreement was never put before the court for approval so it necessarily follows that the court has never conditioned the approval of the 1995 Agreement on a change to the seafood processors matrix share of 2.1%. The plain language of the 1995 Agreement withdrawal provision also only allows a plaintiff group to withdraw. It is does not provide that a single plaintiff may withdraw from the 1995 Agreement. Sea Hawk does not represent that it is entitled to speak for the entire seafood processor category of claimants.

But even if the court were to assume 1) that the 1995 Agreement is still relevant to the allocation of recoveries between plaintiffs, 2) that the withdrawal provision had been triggered, and 3) that it allowed a single plaintiff to withdraw from the 1995 Agreement, Sea Hawk would still not be entitled to withdraw from

the 1995 Joint Prosecution Agreement. Sea Hawk has not shown that its matrix share will fall below the 2.1% floor.

The formula for calculating the matrix share for claims categories such as the seafood processors is succinctly stated in the Plan of Allocation of Recoveries,[51] which reflects that the formula flows from All Plaintiffs' Joint Prosecution Agreement.[52] The formula called for a determination in accordance with the plan of the estimated actual damages suffered as a proximate result of the Exxon Valdez oil spill and the discounting of them for litigation risk. Then, "[e]ach Claim Category's 'Matrix Share' would be calculated as the ratio, expressed as a percentage, of that Claim Category's Matrix Damages to the sum total of all Claim Categories' Matrix Damages."[53] The Plan continues:

> The amount of each Claim Category's share of recoveries would be derived by applying its Matrix Share to all recoveries, including punitive and compensatory damages, whether obtained from Exxon defendants, Alyeska defendants, or the Trans Alaska Pipeline Liability (TAPL) Fund. In this way, all recoveries, no matter when obtained, would be allocated according to plaintiffs' collective determination of the best measures for fair and equitable allocation.[54]

In his declaration, Sea Hawk's principal, Mr. Bertoson, opines that based upon information he has obtained from All Plaintiffs'

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[51] Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation arising from the Exxon Valdez Oil Spill, Exhibit 1, Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation, Docket No. 8863-3 at 5-6.

[52] Id. at 1-4, Docket No. 8863-3 at 5-8.

[53] Id. at 3, Docket No. 8863-3 at 7.

[54] Id.

counsel, "the percentage share for the processor group had clearly fallen below the 2.1% floor, entitling the processors, including Sea Hawk, to withdraw from the Plan."[55] Mr. Bertoson contends that under the current Plan of Allocation, the seafood processor category will receive a 1.89% allocation rather than a 2.1% allocation.[56] Mr. Bertoson contends that this reduction in the allocation to the seafood processor category is the result of two actions by class counsel, which were approved by the court.

First, Mr. Bertoson appears to contend that Order No. 351[57] "sets the processor share below the 2.1% floor."[58] Order No. 351 does not set the seafood processor matrix share at a number less than 2.1%. That order, which was necessitated by the Ninth Circuit's ruling in Icicle Seafoods, was preceded by a stipulation with respect to the seafood processor's matrix share by which certain processors became entitled to receive 11% of any punitive damages recovered by the mandatory punitive damages class. It was recognized that incorporation of the requirements of the Ninth Circuit would reduce by 11% the punitive damages share of signatories to the Joint Prosecution Agreement. Contrary to what Mr. Bertoson suggests in his declaration, however, it does not

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[55] Declaration of Terry Bertoson at 6, ¶ 16 (Oct. 31, 2008), which is attached to Reply Brief in Support of Sea Hawk Seafoods's Motion to Vacate Plan of Allocation, Docket No. 8886-2 at 6.

[56] Id. at ¶ 17.

[57] Docket No. 7441, a copy of which is attached as Exhibit 8 to Motion of Sea Hawk Seafoods to Vacate Plan of Allocation, Docket No. 8863-13.

[58] Bertoson Declaration at 7, ¶ 19, which is attached to Reply Brief in Support of Sea Hawk Seafoods's Motion to Vacate Plan of Allocation, Docket No. 8886-2 at 7.

necessarily follow that signatory seafood processors, including Sea Hawk, will receive less than a 2.1% share calculated in accordance with the above-stated formula. Mr. Bertoson's declaration (and certainly not the cursory discussion of this subject by counsel for Sea Hawk) contains no calculation which supports his contention that in the end, seafood processors who are in the processor category will receive less than 2.1% of recoveries under the above-quoted formula.

More importantly, even if Mr. Bertoson is correct in his contention (which, as discussed below, All Plaintiffs dispute) and there is reason for concern that implementation of the Icicle Seafoods decision by the Ninth Circuit will result in the seafood processor category receiving less than 2.1% of all recoveries, Sea Hawk has no legal basis for complaint. All Plaintiffs' counsel went through the laborious process of notifying and working with all involved counsel with respect to implementing the Icicle Seafoods decision.[59] As was done with all such motions, all parties (including Sea Hawk) were served. Various of the parties objected; and, after oral argument, Order No. 351 was entered. Sea Hawk was not one of the objecting parties. By any measure, it is way too late for Sea Hawk to question extensive proceedings that were concluded, without objection from it, in February of 2002.

Secondly, Mr. Bertoson contends that the allocation to the seafood processor category fell below the 2.1% floor because it was

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[59] See Exhibit 9, Oesting Declaration, Docket No. 8872-14. This exhibit consists of: All Plaintiffs' motion; a stipulation amongst lead counsel, counsel for defendants, and certain of the seafood processors; a proposed order on stipulation; and a memorandum in support of motion.

determined that Cook Inlet and Nautilus Marine were not entitled to share in the punitive damages award.[60] In the amended Processors' Plan of Distribution,[61] All Plaintiffs calculated the projected total seafood processor allocation to be $96,546,000. This projected total was based on the 2.1% share provided for in the Plan of Allocation.[62] Using this projected total, All Plaintiffs then calculated two "final percent shares" for each of the 34 participating processors. One final percent share was for the Alyeska Settlement, in which all 34 processors were entitled to share; and one final percent share was for "other recoveries", which included the punitive damages award, in which Cook Inlet and Nautilus were not entitled to share.[63] The total of the final percent shares for "other recoveries" did not add up to 100%, but rather to 95.5560%.[64] All Plaintiffs explained that this was, in part, because Cook Inlet and Nautilus were not allowed to share in the punitive damages award.[65] All Plaintiffs' counsel advised that it thus appeared that the 2.1% matrix share for the seafood

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[60] Bertoson Declaration at 6, ¶ 18, which is attached to Reply Brief in Support of Sea Hawk Seafoods's Motion to Vacate Plan of Allocation, Docket No. 8886-2 at 6.

[61] The court approved the amended Processors Plan of Distribution in Order No. 352, Docket No. 7443, a copy of which is attached as Exhibit 13 to Oesting Declaration, Docket No. 8872-18.

[62] See Amended Plan of Distribution at 6, n.17, Exhibit A, All Plaintiffs' Lead Counsel's Motion for Order Approving the Amended Plan of Distribution of Allocations to the Processor Claim Category, Docket No. 7372, a copy of which is attached as Exhibit 10 to Oesting Declaration, Docket No. 8872-15.

[63] See id., Table 1, Docket No. 8872-15 at 14.

[64] Id.

[65] Id. at 8, n.20, Docket No. 8872-15 at 10.

processors was "slightly too high" and that All Plaintiffs' counsel would "propose to the Court matrix share adjustments...."[66] Because the final percentage shares do not add up to 100%, Sea Hawk contends that it will receive 4.444% less than the floor of 2.1% if money is distributed according to the amended Plan of Distribution.

To the extent that Sea Hawk's argument here is based on All Plaintiffs' counsel's suggestion that they would move to reduce the 2.1% matrix share for the seafood processors, no such motion was ever made or granted.[67] The seafood processors' share remains 2.1%. But even if the court were to get to the numerical merits of Mr. Bertoson's contention, the court is not persuaded. He has drawn conclusions from information obtained from All Plaintiffs' counsel, but those same attorneys, as Mr. Bertoson well knows, have consistently told him, that he is wrong, that the seafood processor category will in fact receive 2.1% of recoveries. When, at the end of oral argument on the instant motion, Sea Hawk's counsel reminded the court of this withdrawal issue, Mr. Oesting was asked for comment, and said unequivocally to the court that the seafood processor category would ultimately receive their 2.1% allocation and distribution.

Finally, Mr. Bertoson in his declaration contends that "Sea Hawk will receive no [recovery] whatsoever" from a distribution of punitive damages which the Exxon defendants have paid into the

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[66] Id.

[67] See Oesting Declaration at 7, ¶ 20, Docket No. 8872.

Exxon Qualified Settlement Fund.[68] This contention may be true; but it has nothing to do with the allocation of recoveries to the seafood processor category.

As Sea Hawk's own exhibits reflect, Sea Hawk bargained with All Plaintiffs for special treatment as regards $2,889,707.63, plus any additional amounts of interest that Sea Hawk might receive from the Exxon defendants in settlement of Sea Hawk's compensatory claims. Most other plaintiffs were required by the Joint Prosecution Agreement and Plan of Allocation to share recoveries amongst All Plaintiffs. Ultimately, All Plaintiffs agreed to release Sea Hawk from that sharing requirement. In return, Sea Hawk committed to All Plaintiffs that they would be entitled to set off all such recoveries received directly by Sea Hawk against Sea Hawk's pro rata share of the amount of punitive damages allocated to Sea Hawk.[69] Accordingly, Sea Hawk has no basis for complaint about receiving no punitive damages distribution unless and until All Plaintiffs have recouped "the full amount recovered by Sea Hawk in settlement of its 1992 and 1993 compensatory damages claims including pre-judgment interest[.]"[70]

Conclusion

The court has no doubt that Sea Hawk, like other plaintiffs, is disappointed that the reduction in the punitive damages award

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[68] Bertoson Declaration at 9, ¶ 26,which is attached to Reply Brief in Support of Sea Hawk Seafoods's Motion to Vacate Plan of Allocation, Docket No. 8886-2 at 9.

[69] Letter of Attorney John Young to Attorney David Oesting (Nov. 24, 2004), Exhibit 7, Motion of Sea Hawk Seafoods to Vacate Plan of Allocation, Docket No. 8863-12 at 4-5.

[70] Id. at 2, Docket No. 8863-12 at 5.

will result in a final distribution much smaller than was anticipated. But that disappointment does not somehow translate into a right to disturb that which Sea Hawk agreed to years ago. Sea Hawk's motion[71] to vacate the Plan of Allocation is denied as is its request to withdraw from the 1995 Joint Prosecution Agreement and/or Plan of Allocation.

DATED at Anchorage, Alaska, this 10th day of November, 2008.

/s/ H. Russel Holland
United States District Judge

[71] Docket No. 8863.