UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-35182
04-35183

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 WITH RESPECT TO COSTS

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006-5403
(202) 420-2200

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

David W. Oesting
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
(907) 257-5300

Attorneys for Plaintiffs

INTRODUCTION

Federal Rule of Appellate Procedure 39(a)(4) provides that when, as here, a judgment is "modified" on appeal, "costs are taxed only as the court orders." In other words, the presumptive rule in appeals with mixed results is that each party bears its own costs. *See* Christopher Goelz & Meredith Watts, Federal Ninth Circuit Civil Appellate Practice ¶ 10:303 (2008) ("In most cases with a 'mixed' disposition, the panel orders parties to bear their own costs."). This Court has the authority to order one party to pay another's costs when the equities demand it. *Id.* But here, "mindful that the equities in this case fall squarely in favor of the plaintiffs," this Court "exercise[d] [its] discretion by requiring each party to bear its own costs." Op. 7088.

Nothing about this discretionary decision warrants further review. The decision rests on particularized and unusual facts. The decision does not conflict with any decision in this or any other circuit. And the subject matter of the decision – appellate costs – rarely involves significant amounts of money. This Court should deny rehearing.

ARGUMENT

A. This Court Properly Exercised Its Discretion In Leaving Each Party To Bear Its Own Costs.

While Exxon asserts that this Court held here that a defendant must bear the full cost of a supersedeas bond "in *any* case involving a 'split decision' on

damages," Pet'n for Reh'g 2 (emphasis added), it is plain that this Court held no such thing. Rather, it simply declined to "apportion costs on the basis of Exxon's proposed mathematical formula" "*in this case.*" Op. 7088 (emphasis added). As Exxon acknowledges, Pet'n for Reh'g 10, the "main justification" for doing so was an assessment that "the equities in this case fall squarely in favor of the plaintiffs." Op. 7088. This fact-specific determination is both consistent with Rule 39(a)(4) and well founded in the circumstances of this litigation.

This Court has long held that costs may be denied even to *completely successful defendants* when one or more of the following factors are present: (1) the case was "extraordinarily important[]" or "involved issues of substantial public importance"; (2) "the issues in the case [were] close and difficult"; (3) "there is great economic disparity between the parties"; or (4) the costs are "extraordinarily high." *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 592-93 (9th Cir. 2000) (en banc). This case involves each of these factors.

1. The public importance of this case is uncontestable. The Supreme Court called the *Exxon Valdez* oil spill "[t]he most notorious oil spill in recent times" and the "largest oil spill in United States history." *United States v. Locke*, 529 U.S. 89, 94, 96 (2000). Exxon's misconduct caused "staggering damage" to tens of thousands of Alaskans. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2632 (2008). And as Exxon told the Supreme Court, the litigation raised legal

issues "of immense importance to the maritime community, and [that] have significance extending far beyond this case or even oil spills generally." Exxon's Pet'n for Cert. 11, *available at* 2007 WL 2383784 (U.S. Aug. 20, 2007).

2. The legal issues were close and difficult. The issue whether shipowners can be liable in punitive damages for acts of managerial agents divided the federal circuits, *see Baker*, 128 S. Ct. at 2615, and merited Supreme Court review. And this Court described as "serious" and "close" the issue whether the Clean Water Act precluded any punitive remedy here. *In re: the Exxon Valdez*, 270 F.3d 1215, 1229, 1230 (9th Cir. 2001). On appellate *de novo* review, plaintiffs prevailed on both issues, preserving their ability to recover punitive damages.

The issue concerning the proper amount of the punitive award raised "an issue of first impression" as well. *Baker*, 128 S. Ct. at 2619. In the end, plaintiffs secured the fourth largest punitive award ever upheld by a federal court and came within a single vote in the Supreme Court of obtaining an even larger judgment.

3. There is great economic disparity between the parties. Exxon is the most profitable corporation in the world; on average over the past few years, it has made over one-half billion dollars per week. The plaintiffs, by contrast, are primarily individuals, tribal corporations, and small businesses. Many suffered severe adverse financial consequences, including bankruptcy, as a result of Exxon's wrongdoing and the lengthy delay in resolving this litigation.

4. Exxon seeks an extraordinary costs award "approach[ing] $70 million." Op. 7086. This estimate includes $60.6 million for letters of credit that Exxon elected to purchase to secure the judgment while it pursued its appeals. Exxon wants plaintiffs to pay at least 90% of the latter amount, thereby reducing the final punitive award by more than 10%.

Contrary to Exxon's suggestion, Pet'n for Reh'g 1, no one "forced" Exxon to post the letters of credit. As the district court said at the time, Exxon could have "deposit[ed] . . . cash to the registry of the court, with provision for investment of that deposit under terms equal to those of a normal supersedeas bond and provision that accrued interest be divided amongst the parties in accordance with their ultimate legal rights to the principal amount of the deposit." Amended Order 325 (Clerk's Dkt. 6875) at 3 n.10 (copy attached as Appendix A). This method of securitizing the judgment while on appeal would not have cost Exxon any money at all. All the district court required was that Exxon, like any other defendant, securitize the judgment in *some* manner while its appeals carried on. *Id.* at 10-11; *see also* Order 330 (Clerk's Dkt. 6905). As the panel opinion notes, Op. 7087, Exxon's appeals did not merely challenge the amount of the judgment, but sought (unsuccessfully) to avoid any punitive liability at all – something that it could not do without depositing or securitizing the full amount of the judgment.

Exxon complains that this Court's costs determination entitles plaintiffs to retain "an interest windfall of *$170-$180 million* beyond what their punitive damages judgment would have earned on the market" over twelve years that the case was on appellate review. Pet'n for Reh'g 11. But Exxon neglects to mention that purchasing the letters of credit in lieu of depositing cash into the registry of the court allowed it to earn more than twenty-two times that much on the $507.5 million punitive judgment by retaining control over the $507.5 million it owed the plaintiffs from 1996 to 2008. Over that time, Exxon earned a net *$3.9 billion* on that money by virtue of the differential between its internal rate of return on capital and the statutory interest rate. *See* Appendix B (chart showing calculations). In light of the enormous benefit to Exxon's bottom line that accrued from the letters of credit it elected to purchase, Exxon cannot seriously claim that requiring it to foot the bill for the letters (a bill totaling a mere 1.5 % of the net earnings they facilitated) inflicts a "severe monetary penalty." Pet'n for Reh'g 10.

B. This Court's Decision Does Not Conflict With Any Other Authority.

Nothing about this Court's decision's relationship to other precedent warrants rehearing en banc.

1. Exxon does not dispute that this Court's decision is consistent with circuit precedent. Nor could it. As the decision notes, Op. 7088, this Court normally leaves each party to bear its own costs when it determines that plaintiffs

are entitled to punitive damages but reduces the amount, including cases in which this Court reduces the amount by a greater percentage than the Supreme Court did here. *See Planned Parenthood v. American Coalition of Life Activists*, 422 F.3d 949, 967 (9th Cir. 2005) (96% reduction); *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, *amended* 423 F.3d 1117 (9th Cir. 2005) (98% reduction; Nov. 17, 2005 mandate silent as to costs on appeal); *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 777 (9th Cir. 2005) (at least 91% reduction).[1]

2. Exxon suggests that this Court's decision conflicts with decisions from the Seventh, Eighth, and D.C. Circuits. But this is incorrect. In *Republic Tobacco Co. v. North Atl. Trading Co.*, 481 F.3d 442 (7th Cir. 2007), and *Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616 (8th Cir. 2003), the Seventh and Eighth Circuits merely affirmed district courts' discretionary decisions to apportion trial court costs on the particular facts of those cases. As this Court recognized, "[w]hether a district court abuses its discretion in awarding costs under similar circumstances is quite different from the question whether we should exercise our own discretion in that manner." Op. 7088. Indeed, in both of those cases, the courts of appeals emphasized that they also would have affirmed had the district courts "den[ied] costs." *Republic Tobacco Co.*, 481 F.3d at 449; *see also*

[1] *See also Mendez v. County of San Bernardino*, 540 F.3d 1109, 1133 (9th Cir. 2008); *Sun Pac. Farming Coop, Inc. v. Sun World Int'l, Inc.*, 277 Fed Appx. 727, 730 (9th Cir. 2008); *Bennett v. American Med. Response, Inc.*, 226 Fed. Appx. 725, 729 (9th Cir. 2007).

Emmenegger, 324 F.3d at 627 ("The District Court always retained discretion to shift the cost of the supersedeas bond."). Here, in contrast, costs are a matter of appellate discretion because the appellate court ordered that the judgment be reduced to a particular amount. Under these circumstances, both circuits regularly leave parties to bear their own costs. *See, e.g.*, *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 453 (7th Cir. 2005); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 664 (7th Cir. 2001); *Barnes v. Bosley*, 828 F.2d 1253, 1260 (8th Cir. 1987).

In *Quaker Action Group v. Andrus*, 559 F.2d 716, 719 (D.C. Cir. 1977), the plaintiffs did not even recover damages; rather, several nonprofit groups sought declaratory and injunctive relief respecting governmental rules regulating demonstrations near the White House. The D.C. Circuit held that the partial injunctive relief plaintiffs obtained on appeal entitled them to recover a portion of their costs from the government. The D.C. Circuit has never applied this decision to any case involving money damages, much less a security bond.[2] Nor is there any warrant for doing so here, where the appellant is the most profitable corporation in the world, not a nonprofit entity, and the appellees are private individuals, native organizations, and small businesses, not the federal government.

[2] To the contrary, the D.C. Circuit regularly leaves parties to bear their own costs when reducing money judgments. *See, e.g.*, *Government of Rwanda v. Johnson*, 409 F.3d 368 (D.C. Cir. 2005) (opinion and mandate silent on costs).

3. Nor is there any tension between this Court's decision and the Supreme Court's order awarding Exxon printing and filing costs of $14,324 for its Supreme Court appeal. The Supreme Court's rule on costs provides that "[t]he Clerk's fees and the costs of printing the joint appendix are the only items taxable in this Court" and establishes a default rule that"[i]f the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders." Sup. Ct. R. 43.2, 42.3. In the absence of any debate on the issue, the Supreme Court in this case simply applied its default rule as a ministerial matter.

As this Court's decision recognizes, Op. 7087, Fed. R. App. P. 39(a)(4) brings many more costs into play and establishes the exact opposite default rule. This Court, accordingly, acted properly – and consistently with precedent – in making an independent decision concerning costs in this Court. *See Berger v. Hanlon*, 188 F.3d 1155 (9th Cir. 1999) (declining to award costs after the Supreme Court partially reversed a decision from this Court).[3]

[3] Exxon cites *Furman v. Cirrito*, 782 F.2d 353 (2d Cir. 1986), for a contrary result, but that case is readily distinguishable. There, the Supreme Court rendered the party who had lost in the court of appeals the complete winner on appeal, so Fed. R. App. P. 39(a)(2) required the appellate court to award costs to that party. This dispute, by contrast, is governed by the "mixed result" provision of Rule 39(a)(4).

C. The Discretionary Issue of Costs on Appeal is Not Important Enough To Warrant *En Banc* Review, and Even if it Were, This Case Would Be a Poor Vehicle For Providing Guidance on the Subject.

The issue of appellate costs resulted in serious litigation in this case only because of the unusual size of the jury verdict and "because of the length of time the case has taken to reach what we hope is now its conclusion." Op. 7086. Had the jury awarded $1 million (a figure still on the high end of monetary judgments in the federal courts), and had the appeal totaled a more usual length of a few years, Exxon's costs would have totaled a few thousand dollars. This more typical costs calculation shows why it is unnecessary – if not unwise – for this Court to expend *en banc* resources to lay down any firm rules beyond Rule 39(a)(4) to govern mixed results on appeal.

Even if this Court did wish to create *en banc* law on the matter, this case would be a particularly poor vehicle for doing so. The size of the judgment and the labyrinth of litigation that led to it – not to mention the uniqueness of the *Exxon Valdez* oil spill, the identities of the parties, and the legal issues involved in the case – would severely limit this Court's ability to provide any meaningful guidance for other cases. The only present or future litigants who have any stake in this costs dispute are Exxon and the plaintiffs, and this Court has already given Exxon due process and reached a fair result on this issue.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing *en banc*.

RESPECTFULLY SUBMITTED this 6th day of August, 2009.

s/ David W. Oesting

David W. Oesting
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
(907) 257-5300

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006-5403
(202) 420-2200

Brian B. O'Neill
FAEGRE & BENSON
90 South Seventh Street, Suite 2200
Minneapolis, MN 55402-3901
(612) 336-3000

Attorneys for Plaintiffs

By s/David W. Oesting
David W. Oesting

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 35-4

I certify that pursuant to Circuit Rule 35-4, the attached answer is proportionately spaced, has a typeface of 14 points or more and contains 2,288 words.

s/David W. Oesting
David W. Oesting

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing Plaintiffs' Response to Exxon's Petition for Rehearing with Respect to Costs with the Clerk of the Court for the United Sates Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 6th day of August, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

In addition, pursuant to an existing stipulation of the parties in this matter, I have caused courtesy copies of the foregoing response to be delivered by overnight courier to those parties to the stipulation who will not be served by the appellate CM/ECF system:

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

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

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

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

Kenneth F. McCallion
McCALLION & ASSOCIATES LLP
24 West 40th Street, 17th Floor
New York, NY 10018

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

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

s/David W. Oesting
David W. Oesting