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SEA HAWK SEAFOODS, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re:

The EXXON VALDEZ

THIS DOCUMENT RELATES TO ALL CASES

MOTION OF SEA HAWK SEAFOODS, INC. TO VACATE PLAN OF ALLOCATION AND TO APPROVE NEW PLAN OF ALLOCATION THAT CONFORMS TO SUPREME COURT'S JUDGMENT

Case No.: 3:89-095-CV(HRH)
(Consolidated)

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I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

After almost two decades of litigation, during which this Court and the Ninth Circuit repeatedly affirmed a multi-billion dollar punitive damages award against Exxon[1] for its role in the most significant environmental disaster in United States history, the Supreme Court greatly reduced the size of that award. The Supreme Court applied an approach not previously analyzed by this Court or the Ninth Circuit. It imposed a limitation not according to constitutional Due Process principles, but as a matter of federal maritime common law. Specifically, the Supreme Court held that "a 1:1 ratio [of punitive to compensatory damages] . . . is a fair upper limit in such maritime cases." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008) (*Baker*). In so doing, the Court reduced the punitive damages award in this case almost ten-fold from the total amount deemed appropriate by the jury.

Not only does the Supreme Court's order affect the amount of punitive damages assessed against Exxon, it also impacts the manner in which those damages will be allocated among the plaintiff class. The limitation imposed by the Supreme Court is clear – maritime law *cannot support* assessment of punitive damages in excess of a 1:1 ratio to compensatory recoveries in this case. The current Plan of Allocation, however, does just that for many members of the mandatory punitive damages class. Under that Plan, numerous members of the class are set to receive a punitive damages award that greatly exceeds in value the compensatory damages they recovered. That excess will necessarily result in other members of the class obtaining an award of punitive damages below the 1:1 ratio. This result would be contrary to maritime common law and contrary to the Supreme Court's mandate in this case. Accordingly, the current Plan of Allocation must be modified.

[1] As used herein, "Exxon" refers to Defendants Exxon Mobil Corporation and Exxon Shipping Company.

Sea Hawk Seafoods, Inc. ("Sea Hawk"), a direct action plaintiff and member of the mandatory punitive damages class, files this motion requesting that the Court vacate the current Plan of Allocation and replace it with a Plan that conforms to the Supreme Court's mandate. The Court has a duty under Rule 23 to insure that the allocation of damages among class members is done in a manner that is fair, reasonable, adequate, and in conformity with existing law. Given the unique circumstances of this case, the only method of allocation that can satisfy this standard is to distribute punitive damages to class members on a 1:1 ratio to the amount of compensatory recovery obtained.[2] Any other method of allocation would necessarily award some individuals greater than 1:1 (at the expense of other members of the class) in direct violation of the Supreme Court's ruling.

Not only is this solution necessary to conform to the Supreme Court's mandate, it is also easy and efficient for the Court to administer. In 2002, and again in 2004, the Court meticulously catalogued the compensatory recoveries obtained by the various members of the mandatory punitive damages class. The share of the punitive damages award to which each class member is entitled has, to a very large extent, already been resolved through that process. Thus, in addition to complying with the Supreme Court's mandate, allocation according to a 1:1 ratio can be efficiently administered by the Court.

In addition, Sea Hawk requests that the Court permit members of the plaintiff class to identify additional compensatory recoveries obtained since January 28, 2004 (the date of this Court's most recent order calculating compensatory recoveries), that the Court recalculate the total compensatory recovery accordingly, and that the Court set the final amount of punitive damages assessed against Exxon at an amount equal to the current total compensatory recovery. This process is consistent with the Court's prior practice with regard to determining the total compensatory recovery by class members.

[2] Attached as Appendix A to this motion is a list of all compensatory recoveries obtained by members of the mandatory punitive damages class as of January 28, 2004, as identified by this Court. This list should form the basis for any revised Plan of Allocation.

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In 2004, after the second remand by the Ninth Circuit, this Court revised its calculation of compensatory recovery to include recoveries obtained since the Court's prior decision. In so doing, it recognized the existence of other claims that had not yet been finalized. To the extent those claims have now been finalized, they should be included in the Court's final calculation of plaintiffs' total compensatory recovery, and the final punitive damages award should be determined according to the updated compensatory calculation.

In sum, Sea Hawk's motion requests that the Court handle the final determination, allocation, and distribution of the punitive damages award in the manner required by the Supreme Court's mandate. The Supreme Court instructed that punitive damages here should be awarded on a 1:1 ratio. To determine the appropriate value of the punitive damages award, the Court should take into account all compensatory recovery, including that received after 2004. Having done so, the Court should then allocate the punitive damages among class members so as to insure that no one receives more (and therefore no one receives less) than the 1:1 ratio that is the maximum permitted by maritime law.[3]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Mandatory Punitive Damages Class and the Joint Prosecution Agreement

On April 14, 1994, the Court certified a mandatory limited fund class of all parties who had claims against Exxon for punitive damages. Order 204 (Dkt. # 4856).[4] This class encompassed thousands of parties from various claim categories – commercial fishermen, cannery workers, Alaska Natives, local municipalities, fish processors, tenders, aquaculture associations, Native corporations, and other entities. Prior to the jury's award of punitive damages, the vast majority of the members of that class entered

[3] Sea Hawk does not challenge class counsel's entitlement to attorneys fees at the rate specified in the current Plan of Allocation. As in the current Plan of Allocation, attorneys fees should be calculated as a percentage of each party's allocated recovery.

[4] The Court stated its reasons for certifying the class over certain objections in a supplement to Order 204 issued April 14, 1994 (Dkt. # 4857), and reaffirmed its decision to certify the class by a second supplement to Order 204 issued May 12, 1994 (Dkt. # 5032).

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into a Joint Prosecution Agreement.[5] Declaration of Paul F. Rugani in Support of Motion of Sea Hawk Seafoods, Inc. to Vacate Plan of Allocation and to Approve New Plan of Allocation that Conforms to Supreme Court's Judgment("Rugani Decl."), Ex. 1 at 3 (Plan of Allocation); Rugani Decl., Ex. 2 (1994 Agreement). This agreement provided the genesis for the manner in which damages recovered from Exxon (both compensatory and punitive) would be allocated among the class. Rugani Decl., Ex. 1 at 3. The initial Agreement was signed in July 1994. Rugani Decl., Ex. 2. This Agreement was amended and re-signed in April 1995. Rugani Decl., Ex. 3 (1995 Agreement).

The 1995 Agreement included two attachments – a "current" proposed allocation of recoveries and a "floor" allocation. *Id*. With regard to the floor allocation, the Agreement permitted signatories to opt out if the Court approved an allocation that awarded a plaintiff group less than its floor share. Specifically, the Agreement provides:

> In the event that this Joint Prosecution, Settlement, and Damages Allocation 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.

Id., at § 2.B.[6] At the time of the 1995 Agreement, there were twelve identified plaintiff groups. *Id*., Attachment 1.

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[5] Among the non-signatories to this agreement are six Native corporations and the Seattle Seven fish processors. Although not signatories to the Joint Prosecution Agreement, those parties are still members of the punitive damages class.

[6] As a result of certain changes to the makeup of the Processor group, that group's share of the total recovery fell below the "floor" share specified in the 1995 Agreement. Specifically, the Processor Group was adjusted to exclude CIP and Nautilus, include Western Alaska, and include settlements between Exxon and CRFC, KSP, and Sea Hawk based on their 1989 damages. *Id*. After these changes, the damages calculated for the Processor group as a whole equaled only 95.556% of the original floor matrix share. The Processor group will therefore receive 4.444% less than its "floor" of 2.1% if the money is distributed according to the current Plan of Allocation.

According to counsel for All Plaintiffs, the 1994 and 1995 Joint Prosecution Agreements were superseded by the Court's approval of the Plan of Allocation. Rugani Decl., Ex. 4 (June 6, 2008 Letter from David Oesting). Nonetheless, to the extent the 1995 Agreement remains in place, Sea Hawk hereby gives notice that it is exercising its right to opt out of that Agreement due to the Processors' share falling below the 2.1% floor specified in that Agreement.

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B. The Plan of Allocation.

On January 12, 1996, counsel for the plaintiff class prepared and submitted a proposed Plan of Allocation for the Court's approval. The Plan of Allocation identified all groups proposed to receive distributions of the punitive damages award and explained the method for calculating each group's share of recovery. It also identified the recoveries that would be shared and distributed according to the Plan of Allocation. The approval process for the allocation of damages took place in two steps. In the first step, the Court approved the overall Plan. The overall Plan dealt primarily with distribution by group; that is, it specified the portion of the overall recovery that would be apportioned to each plaintiff group. The Court approved this Plan, with certain modifications, on June 11, 1996. Rugani Decl., Ex. 5 (Order 317, Dkt. # 6806.) In the second step, the Court was presented with separate distribution plans for allocating each group's share among the individual parties within that group. The Court approved fifty-one of these distribution plans. *See, e.g.*, Order 341 (Dkt. # 7205); Order 343 (Dkt. #7235); Order 352 (Dkt. # 7443).

The method of allocation proposed by the plaintiff class was based in part on the amount of harm each plaintiff claimed. Rugani Decl., Ex. 1 at 1-2 ("[T]he fairest, most equitable way to allocate recoveries . . . was in proportion to plaintiffs' damages . . . ."). For purposes of calculating these damages, the class did not rely on the amount actually recovered by each plaintiff, but instead on each plaintiff's estimate of the damage incurred.[7] Included in these figures were damages suffered as a result of the spill, but for

[7] Relying on what each plaintiff group claimed, rather than what the members of the class actually recovered, created some inequity in the calculation of the percentage of the punitive damages award to which each group was entitled (the "Final Percent Shares"). For example, the plaintiff class argued to the jury during the Phase II trial that the fisheries suffered roughly $900 million in damages. The jury ultimately returned a compensatory verdict in the amount of $286,787,739.22. *See* Minutes from the United States District Court (Aug. 11, 1994), Clerk's Docket No. 5716. When calculating the Final Percent Shares, however, class counsel used $1.658 billion to represent the discounted harm suffered by those fisheries. Rugani Decl., Ex. 2, Attachment A. Thus, the jury awarded those fisheries only a fraction of their weighted harm from Exxon. By contrast, class counsel used $12.2 million to represent the discounted harm suffered by Cannery Workers for purposes of calculating their Final Percent Shares. The Cannery Workers recovered $15,642,744 from Exxon, a number significantly greater than their

(Footnote Continued)

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which this Court concluded the class member had not established legal causation. *Id*. at 12-27. Class counsel applied a discount to the amount of these damages, reducing the "credit" each of those groups received for their claimed damages by 50% to 95%. *Id*. The resulting shares in the Plan of Allocation for each plaintiff group were substantially similar to the shares specified in the 1995 Agreement. Ten groups – the aquaculture associations, area businesses, cannery workers, municipalities, Natives, Native corporations, processors, recreational users, real property owners, and unoiled commercial fisheries – were allocated their "floor" allocation from the 1995 Agreement. *Compare id*., Table 4 *with* Rugani Decl., Ex. 3, Attachment 1. Two groups – the oiled commercial fisheries and the tenders – were allocated more than what was proposed in the 1995 Agreement. *Compare* Rugani Decl., Ex. 1, Table 4 *with* Rugani Decl., Ex. 3, Attachment 1. Finally, three additional groups not identified in the 1995 Agreement – personal injury plaintiffs, personal property plaintiffs, and non-Native subsistence fishermen – were allocated very minor shares of the recovery. Rugani Decl., Ex. 1, Table 4.

The Plan of Allocation indicated that all compensatory and punitive recoveries obtained by signatories to the 1995 Agreement would be allocated according to the shares specified in the Plan:

> This Plan Of Allocation applies to: (1) all punitive damage recoveries; and (2) all compensatory damage recoveries, except those by the United States of America, the State of Alaska, Daniel DeNardo, Donald Ferguson, Tom Lakosh, Rainbow King Lodge, the non-signatory Native corporations and the "Seattle seven" seafood processors.

Id. at 27-28. Many of the compensatory recoveries, however, had already been obtained by members of the plaintiff class prior to the execution of the 1995 Agreement. *See id*. at 38 (". . . Final Percent Shares were not used to distribute net recoveries . . . from Exxon

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weighted harm. *Id*.; *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1100-01 (D. Alaska 2004) (*Remand II*); Rugani Decl., Ex. 6 at 13, ¶ 18 (2002 Oesting Declaration). Nonetheless, because the fisheries' Final Percent Share is based on claimed harm that is vastly greater than the amount that group actually recovered, the current Plan allocates the fisheries a punitive award that is far in excess of their compensatory recovery, and allocates the cannery workers a punitive award that is just a fraction of their compensatory recovery. *See infra*. pp 18-19.

Claims payments, TAPL fund payments or the Alyeska Settlement."). These recoveries were not distributed according to the Final Percent Shares specified in the Plan of Allocation. *Id*.[8] Accordingly, the Plan contemplated making offsets during the distribution of punitive damages to "ensure that net recoveries are distributed consistently with Final Percent Shares." *Id*. at 39.

C. Appeals and Remands

After approving the Plan of Allocation, the Court entered a final judgment on September 24, 1996.[9] Exxon appealed, challenging several aspects of the punitive damages award (among other things). *In re Exxon Valdez (Baker v. Hazelwood)*, 270 F.3d 1215, 1225-1247 (9th Cir. 2001) (*Punitive Damages Opinion I*). Certain members of the plaintiff class also appealed. Some plaintiffs whose claims had been dismissed by the Court for lack of legal causation, including Sea Hawk, sought reversal of those dismissals. *Id*. at 1250. Other plaintiffs who had been excluded from the Plan of Allocation – notably, the Seattle Seven – sought to be included in the distribution of punitive damages. *In re Exxon Valdez (Icicle Seafoods, Inc. v. Baker)*, 229 F.3d 790, 792-93 (9th Cir. 2000). The Ninth Circuit resolved these appeals in several separate orders. It vacated and remanded the punitive damages award in light of intervening case law from the Supreme Court. *Punitive Damages Opinion I*, 270 F.3d at 1241 ("[W]e remand for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW* [*of North America, Inc. v. Gore*, 517 U.S. 559 (1996)]."). It also reversed the dismissal of certain plaintiffs and reinstated their compensatory claims. *Punitive Damages Opinion I*, 270 F.3d at 1253 ("We remand so that the district court can determine whether tenderboat operators and crews, and seafood processors, dealers, wholesalers, and processor employees can establish allowable

[8] Certain compensatory recoveries obtained after approval the Plan of Allocation were also not distributed according to the Final Percent Shares. *See, e.g.*, Rugani Decl., Ex. 7.

[9] The Court entered final judgment as to Phases I and III of the trial on September 16, 1994 (Dkt. # 5891). This judgment was subsequently vacated (Dkt. # 6055). A final judgment covering the entire proceeding was entered on September 24, 1996 (Dkt. # 6911), followed by an amended judgment on January 30, 1997 (Dkt. # 6966).

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damages."). The Ninth Circuit also ruled that the Seattle Seven were entitled to participate in the punitive damages allocation. *Icicle Seafoods*, 229 F.3d at 800-01 (finding that the exclusion of the Seattle Seven from the plan of allocation could not be justified).

On remand, the Court instructed the parties to propose modifications to the Plan of Allocation that were necessary to conform the allocation to the Ninth Circuit's mandate. *See* Rugani Decl., Ex. 8 at 1-2 (Order 351, Dkt. # 7441). The plaintiff class and Exxon submitted a stipulated Amended Plan of Allocation, which the Court approved, again with modifications, on February 12, 2002. *Id*. In approving this Amended Plan of Allocation, the Court noted that the modifications were necessary to bring "the previously approved Plan of Allocation into conformity with the Ninth Circuit's mandate." *Id*. at 4. The Court found that the changes to the "legal posture" of the case mandated certain alterations, and that the "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." *Id*. at 7.

This Court also considered Exxon's renewed motion to remit the punitive damages award (Dkt. # 7487) in light of two intervening cases decided by the Supreme Court – *BMW*, 517 U.S. 559, and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Both these cases addressed constitutional limits on punitive damages awards, and the *BMW* case specifically set forth certain guideposts for a court to consider in assuring that an award does not violate a defendant's right to due process. Applying the *BMW* factors, this Court determined that $5 billion was an appropriate amount, and that there were no "principled means by which it can reduce that award." *In re Exxon Valdez,* 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002) (*Remand I*). Nonetheless, to comply with the direction of the Ninth Circuit that $5 billion was too high, the Court reduced the award to $4 billion. *Id*.

Exxon again appealed. *See* Notice of Appeal (Dkt. # 7605). While the appeal was pending, the Supreme Court issued another decision regarding the constitutional limits of

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punitive damages awards – *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The Ninth Circuit vacated this Court's 2002 order, and remanded for the Court to reconsider the punitive award again in light of the intervening *State Farm* decision. *See* August 18, 2003 Order (Dkt. # 7737). The Court again reconsidered, and again found that the jury's verdict was largely proper. It ordered a small reduction to the jury's verdict, finding that a punitive award of $4.5 billion was both appropriate and consistent with *State Farm* and the other recent Supreme Court decisions concerning the constitutional limits of punitive damages, as well as the Ninth Circuit's rulings in this case. *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004) (*Remand II*).

Among the items taken into consideration by the Court in fixing the final amount of punitive damages was the total compensatory recovery obtained by the plaintiff class. This figure was made relevant to the Court's constitutional analysis by the *BMW* and *State Farm* decisions. *See Remand II*, 296 F. Supp. 2d at 1098. Accordingly, during the briefing prior to the *Remand I* order, counsel for the plaintiff class submitted a detailed declaration itemizing all recoveries obtained by the class, with evidentiary support. *See* Rugani Decl., Ex. 6. The declaration and its exhibits identify the various recoveries obtained by the various class members, including who received money from what sources, and how much they received. *Id.* In 2002, the Court identified twenty-one different sources amounting to a total compensatory recovery of $507,509,094 for the plaintiff class. *Remand I*, 236 F. Supp. 2d at 1060. In 2004, the Court added three additional recoveries to the total to reflect additional money received by class members after the *Remand I* order. *Remand II*, 296 F. Supp. 2d at 1101. These three recoveries were obtained by certain seafood processors, cannery workers, and tenderboat operators and crew whose claims had been reinstated by the Ninth Circuit in 2001. *Id.*; *see also Punitive Damages Opinion I*, 270 F.3d at 1253. The Court calculated the total recovery as of 2004 at $513,147,740. *Remand II*, 296 F. Supp. 2d at 1101. The Court also recognized that there were additional class members whose claims had been reinstated,

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but not yet resolved. *Id*. at 1103. Many of those claims have been resolved since *Remand II*, and the total compensatory recovery by the plaintiff class has thus increased.

Exxon again appealed the Court's order regarding punitive damages to the Ninth Circuit. February 26, 2004 Notice of Appeal (Dkt. # 7862). The Ninth Circuit applied the constitutional principles set forth in *BMW*, *Cooper*, and *State Farm*, and concluded that the punitive damages award should be reduced. *In re Exxon Valdez*, 490 F.3d 1066, 1095 (9th Cir. 2007) (as amended) (*Punitive Damages Opinion II*). It found that a 5:1 punitive-to-compensatory ratio was appropriate, and remitted the award to $2.5 billion. *Id*.[10] Exxon filed a petition for certiorari to the Supreme Court, which was granted. 128 S. Ct. 492 (Mem.) (2007).[11]

Prior to reaching the Supreme Court, the analysis of the punitive damages award before the Ninth Circuit and this Court largely focused on the constitutionality of the award under *BMW*, *Cooper*, and *State Farm*. Neither this Court nor the Ninth Circuit opined on whether the size of the award was appropriate under maritime common law. Nonetheless, Exxon raised this issue before the Supreme Court, and the Supreme Court based its ruling on federal maritime common law. Specifically, the Supreme Court found that maritime common law principles could not support any award of punitive damages that exceeded a 1:1 punitive-to-compensatory ratio. *Baker*, 128 S. Ct. at 2633 ("[A] 1:1 ratio . . . is a fair upper limit in such maritime cases."). The Supreme Court accordingly

[10] On appeal, Exxon challenged this Court's calculation of compensatory harm, specifically challenging the inclusion of voluntary payments by Exxon. *Id*. at 1089-90. The Ninth Circuit rejected that argument, holding that a defendant "cannot buy full immunity from punitive damages by paying the likely amount of compensatory damages before judgment." *Id*. at 1091. However, the Ninth Circuit reduced the total amount by $9 million due to an "apparent overpayment" by the Trans-Alaska Pipeline Liability Fund, and concluded that Exxon caused $504.1 million in compensatory harm. *Id*. at 1092-93. The Ninth Circuit did not identify the specific overpayment in its order and did not explain its conclusion that the amount was "inadvertently included in the district court's findings." *Id*. at 1092.

[11] The plaintiff class filed a cross-petition which was denied. 128 S. Ct. 499 (Mem. 2007).

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ordered the award remitted to match the total compensatory recovery calculated by this Court. *Id*. at 2634.[12]

The case is now once again before this Court for final determination and distribution of the punitive damages award. As set forth below, the Court should calculate the total compensatory recovery received by the plaintiff class to the present, order a punitive damages award against Exxon that matches the compensatory recovery, and distribute the award among the class members on a 1:1 punitive-to-compensatory ratio (based on the amount of compensatory damages actually recovered by each member).

III. LEGAL ARGUMENT

A. The Court Has the Authority and Responsibility to Revisit the Plan of Allocation to Comply With the Supreme Court's Decision in This Case.

Damages recovered by a class in a class action cannot be apportioned among the class members without court approval. The Court's oversight over the allocation of damages is an ongoing process, such that prior decisions may be revisited to take into account significant changes in the circumstances of the case. Here, the Court must revisit the existing Plan of Allocation for three reasons. First, the Plan of Allocation is inconsistent with the law of the case announced by the Supreme Court. Second, the Supreme Court's decision announced an intervening change in the law regarding punitive damages awards in maritime cases. Third, the Court's ongoing responsibility under Rule 23 to assure that any allocation is fair, reasonable, and adequate prevents the Court from approving any allocation that is inconsistent with the law of the case or intervening changes in the law. As shown below, all three of these reasons demonstrate that the existing Plan of Allocation is no longer valid and thus must be vacated.

[12] The Supreme Court "[took] for granted" the calculation of relevant compensatory damages at $507.5 million. *Id*. at 2634 (citing *Remand I*, 236 F. Supp. 2d at 1063). The Court did not explain why it used this Court's calculation from the *Remand I* order, rather than the updated calculation from the *Remand II* order or the amount used by the Ninth Circuit. Regardless, as set forth below in Section III.C, this Court should recalculate the relevant compensatory total to take into account additional recoveries obtained since *Remand II*.

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1. The Law of the Case Doctrine Imposes on This Court a Duty to Follow The Supreme Court's Decision Regarding the Permissible Ratio of Punitive Damages.

The law of the case doctrine is well-established in the Ninth Circuit. It states that the "decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). The doctrine provides for efficiency and consistency in judicial proceedings by precluding lower courts from departing from an appellate court's ruling on a particular issue. *Id*. (citing *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)). The law of the case doctrine extends to all issues decided explicitly or by implication by the appellate court. *Herrington*, 12 F.3d at 904. Thus, the doctrine requires this Court to apply the decisions of the appellate courts in this case and not to take action that is inconsistent with those decisions.

This Court has faithfully followed the law of the case doctrine in prior proceedings in this case. In Order 351, for example, the Court recognized the necessity of amending the Plan of Allocation to bring it "into conformity with the Ninth Circuit's mandate in *Icicle Seafoods*." Rugani Decl., Ex. 8 at 4. Similarly, the Court explicitly invoked the doctrine in rejecting certain objections to the Plan of Allocation raised by Nautilus Marine Enterprises and Cook Inlet Processors: "Clearly, the Ninth Circuit has foreclosed any further litigation on the part of Nautilus and Cook Inlet. Therefore, the 'law of the case' doctrine prohibits the relitigation that Nautilus and Cook Inlet request." *Id*. at 5.

There can be no doubt that the Supreme Court's recent decision sets forth the law of the case with regard to the ceiling on the punitive damages awarded against Exxon. The entire proceedings before the Supreme Court were concerned solely with the award of punitive damages and the amount that Exxon would ultimately be required to pay. *See generally Baker*, 128 S. Ct. 2605. In its capacity as a federal maritime common law court, the Supreme Court considered the facts of this case and the policies related to the imposition of punitive damages and concluded that it should impose an upper limit to the

punitive damages award based on a ratio of punitive damages to compensatory damages. *Id*. at 2629 ("pegging punitive to compensatory damages using a ratio or maximum multiple"). Specifically, the Court held that "a 1:1 ratio . . . is a fair upper limit in such maritime cases." *Id*. at 2633. The $2.5 billion award ordered by the Ninth Circuit exceeded this 1:1 ratio. Accordingly, the Court explicitly ordered that punitive damages in this case should be capped at a "punitive-to-compensatory ratio of 1:1." *Id*. at 2634.[13]

On remand, the law of the case doctrine bars this Court from taking any action inconsistent with the Supreme Court's decision. Most significantly, it bars this Court from allocating punitive damages to any party in an amount that exceeds a 1:1 ratio with that party's compensatory recovery. This Court should accordingly revise the Plan of Allocation to bring it into conformity with the law of the case.

2. The Court Has the Responsibility to Revisit Its Prior Orders In Light of an Intervening Change in the Law Regarding Punitive Damages in Maritime Cases.

Just as courts are bound to ensure that their actions in a case do not deviate from the law of the case, so too are they bound to ensure that their actions remain consistent with intervening changes in applicable law that occur while the case is still pending before the court. And just as this Court has revisited its prior rulings to bring them into conformity with the law of the case, so too has the Court revisited its prior rulings to comply with intervening changes in the law. Indeed, this Court has revisited the specific issue of punitive damages in light of intervening changes in the law. The Ninth Circuit vacated and remanded twice, both times identifying intervening changes in the law that it directed this Court to consider. Specifically, the Ninth Circuit directed this Court to reconsider the size of the punitive damages award under the constitutional principles set forth by the Supreme Court in *BMW*, *Cooper*, and *State Farm*. *See Punitive Damages*

[13] The Court suggested that the maximum punitive damages award should be fixed at $507.5 million, the "total relevant compensatory damages" calculated by this Court in 2002. *Id*. at 2634 (citing *Remand I*, 236 F. Supp. 2d at 1063). As explained below – and as previously recognized by this Court, *see Remand II*, 296 F. Supp. 2d at 1100-01 – the "total relevant compensatory damages" have increased since December of 2002. *See* Section III.C, *infra*.

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Opinion I, 270 F.3d at 1241; August 18, 2003 Order (Dkt. # 7737). This Court's subsequent *Remand I* and *Remand II* orders reevaluated the appropriateness of the punitive damages award in light of the intervening Supreme Court decisions. The Court's ultimate findings with regard to the legality and constitutionality of the punitive damages award were based on that intervening case law.

Nor is this Court alone in revisiting prior decisions relating to class certification or settlement on account of intervening changes in the law. In *Thomas v. Albright*, for example, the D.C. Circuit evaluated a district court's decision to certify a particular settlement class and approve a settlement in light of intervening case law issued during the pendency of the appeal. 139 F.3d 227 (D.C. Cir. 1998). The district court had approved a Rule 23(b)(2) class (traditionally a mandatory class), but permitted certain class members to opt out. While the case was on appeal from that order, the D.C. Circuit ruled in another case that opt-out rights in a 23(b)(2) class could only be permitted under two specific scenarios. *Id*. at 234-35 (citing *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997)). Accordingly, the D.C. Circuit in *Thomas* evaluated the decision to allow opt-out rights under the intervening standards announced in the *Eubanks* decision. *Thomas*, 139 F.3d at 235-37. The court concluded that the findings made by the district court did not give rise to any of the two situations identified in *Eubanks* under which opt-out rights would be appropriate, and therefore reversed the district court's decision approving the settlement to the extent it allowed opt-outs. *Id*.

Along with announcing the law of the case, the Supreme Court's decision announced an intervening change in the law regarding punitive damages awards in maritime cases. The proceedings before the Ninth Circuit (and before this Court on remand) regarding the punitive damages award primarily focused on two separate issues: (1) whether punitive damages were appropriate at all in this case; and (2) whether the award amounted to "grossly excessive or arbitrary punishment" in violation of the Due Process Clause of the Fourteenth Amendment. Neither the Ninth Circuit nor this Court

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evaluated the propriety of the size of the punitive damages award in light of federal maritime common law principles.

On appeal to the Supreme Court, Exxon again raised the two issues identified above. Exxon also argued that the Supreme Court should exercise its authority as a federal common law court to limit punitive damages awarded under maritime law on common law, rather than constitutional, grounds. No court, in this case or any other maritime case, had previously imposed any limitations on punitive damages awards as a matter of maritime common law. *See Baker*, 128 S. Ct. at 2619 ("Finally, Exxon raises an issue of first impression about punitive damages in maritime law . . . ."). Thus, when this Court approved both the Plan of Allocation and the Amended Plan of Allocation, awards of punitive damages were not subject to maritime law limitations.

The Supreme Court accepted Exxon's request to evaluate the size of the punitive damages award under maritime law in its capacity as a federal common law court. *See id.* at 2619-34. Evaluating the history and purposes of punitive damages, as well as the mean and median common law awards, the Court found it appropriate to impose an upper limit to punitive damages awards in maritime cases that is based on a ratio of punitive damages to compensatory damages. *Id*. at 2629. As noted above, the Court ultimately ordered that punitive damages in this case should be capped at a "punitive-to-compensatory ratio of 1:1." *Id*. at 2634. This 1:1 limitation is a dramatic change in the law regarding punitive damages in maritime cases. Most significantly, it imposes a ceiling on a party's entitlement to punitive damages that was not in effect at the time the Court approved the Plan of Allocation and the Amended Plan of Allocation. Accordingly, the Court should revisit the current Plan of Allocation in light of this intervening change in the law to ensure that it is still fair, reasonable, adequate, and consistent with all applicable law.

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3. To Be Fair, Reasonable, and Adequate Under Rule 23, Any Plan of Allocation Must Conform to the Law of the Case and to Intervening Changes in the Law.

Rule 23 imposes on the Court a specific duty to review the Plan of Allocation and insure that it is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2).[14] The purpose of this rule is to protect all class members and ensure that any proposed allocation does not abridge their legal rights. *See* 7B Charles Alan Wright & Arthur B. Miller, *Federal Practice & Procedure* § 1797 at 65 (3rd ed. 2005). Moreover, in approving an allocation plan, "the district court judge functions as 'a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.'" *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). In deciding how the final punitive damages recovery should be allocated among the class members, the Court has an independent duty to adopt a distribution plan that it determines to be fair, reasonable, and adequate. *See In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 179, 182 (2d Cir. 1987). In exercising this duty, the Court cannot rely solely on the arguments and recommendations of class counsel, but instead must undertake an independent analysis to ensure the fundamental fairness of the proposed allocation. *Id*.

The Court faithfully exercised this duty when it approved the original Plan of Allocation in 1996 and insisted on certain modifications to the proposed allocation as necessary to meet the Rule 23 standard. For example, the Court ordered certain modifications to the amount allocated to the Fortier Group so that the allocation "reflect[ed] the Fortier Group's actual recovery in state court." Rugani Decl., Ex. 5 at 49 (ordering that the Fortier Group is entitled to 1.82 % of the punitive damages award, not the 1.85 % specified in the proposed plan of allocation). This duty does not stop once an allocation plan is initially approved, but continues until the Court has finally distributed

[14] In considering whether to approve an allocation plan, the district court applies the same standards used when considering approval of class action settlements. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983).

the money to the class. Indeed, the Plan of Allocation contemplates continued involvement by the Court. It indicates that the Court retains the authority to approve modifications to the proposed share of punitive damages after such damages have been collected from Exxon. *Id*., Ex. 1 at 39 (discussing modifications to Final Percent Shares that will be made before Final Distribution and that will require court approval). The Plan similarly indicates that the Court will be presented with a specific plan for Final Distribution that the Court must again approve before any distribution can be made. *Id*. ("We shall present the Court a specific plan when punitive damage recoveries are collected."). Thus, the Plan expressly indicates that the Court's approval must be obtained by the plaintiff class again before any money can be distributed.

To be fair, reasonable, and adequate, any proposed settlement must necessarily comply with all applicable law. *See* 5 MOORE'S FEDERAL PRACTICE 3D § 23.164[1] at 23-571 (noting that "all courts agree that the terms of a settlement may not violate any applicable federal law"). Indeed, several courts have reviewed and rejected class action settlement agreements that provide for certain relief that would be contrary to law. For example, in *Perkins v. City of Chicago Heights*, the Seventh Circuit reversed approval of a consent decree in a voting rights class action. 47 F.3d 212 (7th Cir. 1995). The consent decree modified the voting map for Chicago Heights and revised the city's form of government. *Id*. at 215. Two class members objected, and subsequently appealed after the district court approved the agreement over their objections. The Seventh Circuit reversed. "While parties can settle their litigation with consent decrees, they cannot agree to disregard valid state laws." *Id*. at 216 (internal quotation marks omitted). The court found that the consent decree would bypass the Illinois statutory scheme regarding modifications to voting maps and forms of local government. *Id*. at 216-17. It concluded that the "decree could not direct changes normally requiring voter approval," and therefore vacated the agreement. *Id*. at 217.

Similarly, the court in *Black Fire Fighters Ass'n of Dallas v. City of Dallas* refused to approve a class action settlement in a hiring discrimination class action where

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a portion of the relief provided would violate the law. 805 F. Supp. 426 (N.D. Tex. 1992). The agreement provided back pay to the class members and specified that the defendants would promote 28 individuals "from among qualified African Americans" to various higher ranks within the Dallas Fire Department. *Id*. at 427-28. The court found that the promotion provision would both overcompensate the plaintiff class and violate law regarding affirmative action programs. *Id*. at 429-30. "Preferential treatment and the use of quotas by public employers can violate the Constitution and, in this instance, the court concludes that the proposed settlement would indeed do so." *Id*. at 430. Accordingly, the court refused to approve the proposed settlement agreement.

Here, it is clear that the Plan of Allocation no longer complies with the law of the case announced by the Supreme Court. The Supreme Court's opinion is clear: an award of punitive damages that exceeds the value of compensatory recovery is not proper under maritime common law and cannot be allowed in this case. Put another way, awarding any individual party punitive damages at a ratio in excess of 1:1 would be contrary to law, and thus fundamentally unfair. Since the current Plan of Allocation awards numerous class members punitive damages in excess of 1:1, it is no longer fair, adequate, and reasonable under the existing law of the case.

B. In Order to Conform to the Supreme Court's Mandate, The Existing Plan of Allocation Must Be Vacated and Punitive Damages Must Be Distributed To Class Members At a Ratio of 1:1 With Each Member's Individual Compensatory Recovery.

The Supreme Court's opinion holds that punitive damages awards in a maritime case – and specifically the punitive damages award in *this* case – may not exceed a 1:1 punitive-to-compensatory ratio. Yet, under the current Plan of Allocation, the punitive damages are set to be apportioned in such a way as to provide certain class members with a punitive award that is greater than the compensatory damages those members recovered. For example, the "Area Business" group was paid a total of $607,901, or 0.12% of the total recovery obtained by the class. *See Remand II*, 296 F. Supp. 2d at 1101; Rugani Decl., Ex. 6 (Oesting Declaration). Under the current Plan of Allocation,

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that group is set to receive 0.28% of the punitive damages award, or more than twice the total of its compensatory recovery. Rugani Decl., Ex. 1, Table 4. Similarly, the commercial fisheries obtained a $287,787,739.22 jury verdict, or 56% of the total recovery obtained by the class. *See Remand II*, 296 F. Supp. 2d at 1099; Rugani Decl., Ex. 9 (Jury Verdict, Dkt. # 5716). Under the current Plan, that group is set to receive over 68% of the punitive damages award, almost a 25% increase from its compensatory recovery. Rugani Decl., Ex. 1, Table 4. These allocations would be flatly inconsistent with the Supreme Court's order that punitive damages in this case may not exceed a 1:1 ratio with the compensatory recovery. By contrast, the cannery workers group obtained $15,642,744, or 3.04% of the total recovery obtained by the class. *See Remand II*, 296 F. Supp. 2d at 1099-1101. This group is slated to receive only 0.53% of the punitive damages award – just one sixth of its total compensatory recovery. Rugani Decl., Ex. 1, Table 4. Accordingly, the current Plan of Allocation is contrary to maritime law and to the law of the case, and should therefore be vacated.

This Court should not permit any allocation of the relief recovered in this case that would be contrary to the Supreme Court's mandate. Thus, the Court cannot properly permit any allocation of punitive damages that would award any class member funds in excess of a 1:1 punitive-to-compensatory ratio. Under the unique posture of this case, only one method of allocation conforms to the Supreme Court's mandate: distribution of punitive damages at a ratio of 1:1 with the amount of compensatory recovery obtained by each class member. Any other allocation would necessarily result in certain plaintiffs recovering more than a 1:1 share (and, correspondingly, other plaintiffs recovering less than a 1:1 share).[15] An allocation that violates the Supreme Court's mandate and the limitations imposed by maritime common law cannot be "fair, reasonable, and adequate."

[15] The offsets contemplated by the Plan of Allocation, see *supra* at pp. 6-7, are no longer appropriate under the revised plan, because any punitive damages award offset from one plaintiff will not be redistributable to the class. Such redistribution would necessarily increase the share of punitive recovery for some class members above the Supreme Court's 1:1 limit. Since recovery of punitive damages must be contiguous with compensatory recovery, the Court should not reduce its distribution of punitive damages to certain parties through offsets. Any prior

(Footnote Continued)

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This method of allocation has the added benefit of being easy and efficient for the Court to administer. The Court has already identified the relevant components of the total compensatory recovery by the plaintiff class. In 2002, in connection with Exxon's renewed motion to remit the punitive damages award, counsel for the plaintiff class submitted a detailed declaration, supported by exhibits, setting forth all recovery obtained to date by the plaintiff class and specifically identifying the amount distributed to each recipient. *See* Rugani Decl., Ex. 6. The Court relied on this information and similar information submitted by Exxon to arrive at the total compensatory recovery. *See Remand I*, 236 F. Supp. 2d at 1058-60. In 2004, the Court revised its calculation based on new recoveries obtained by plaintiffs with reinstated claims. *See Remand II*, 296 F. Supp. 2d at 1099-1101. Thus, the Court already has almost all of the information it needs to administer a fair and expeditious distribution of the final punitive damages amount to class members at a 1:1 ratio with their compensatory recovery.

In short, a revised Plan of Allocation distributing punitive damages among the class members at a ratio of 1:1 with each member's individual compensatory damages recovery conforms to the Supreme Court's order in this case and may be efficiently administered by the Court. This Court should thus vacate the current Plan of Allocation and distribute the punitive damages award at a ratio of 1:1.

C. The Court Should Permit Plaintiffs To Identify Additional Compensatory Recoveries Obtained Since January 28, 2004 And Should Recalculate the Total Compensatory Recovery – And Thus the Final Punitive Damages Amount – Accordingly.

In both *Remand I* and *Remand II*, the Court identified various elements of the total actual compensatory recovery obtained by the plaintiff class and used those elements to arrive at the collective compensatory figures. *See Remand I*, 236 F. Supp. 2d at 1058-60; *Remand II*, 296 F. Supp. 2d at 1099-1101. When the Court performed this process in *Remand II*, it identified three additional recoveries obtained after the *Remand I* Order:

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agreement calling for such offsets is superseded by the Supreme Court's 1:1 limit and, once approved, by the revised Plan of Allocation.

(1) $821,000 paid by Exxon to reinstated seafood processors; (2) $3,067,646 paid by Exxon to reinstated cannery workers; and (3) $1,750,000 paid by Exxon to reinstated tender-boat operators and crew. *Remand II*, 296 F. Supp. 2d at 1101.[16] The Court revised its calculation of the total compensatory recovery to include these figures, and stated a "total actual harm of $513,147,740." *Id*. The Court also expressly recognized that "there are plaintiffs whose claims have been reinstated in *In re Exxon Valdez* and whose claims are not yet determined." *Id*. at 1103.

Sea Hawk is among the plaintiffs referred to by the Court whose claims were reinstated but not yet resolved as of the Court's *Remand II* Order. Sea Hawk's reinstated claims have since been largely resolved through a settlement with Exxon.[17] It is Sea Hawk's understanding that several other reinstated plaintiffs – such as All Alaskan – have similarly resolved their claims and obtained compensatory recovery. The Court should accordingly permit the plaintiff class to identify additional compensatory recoveries obtained since January 28, 2004. Sea Hawk believes that a thirty-day time period for identifying such additional recoveries would provide sufficient time for all interested parties to respond without causing undue delay to the distribution of the punitive damages recovery. Once the additional recoveries have been identified, the Court can recalculate the total compensatory recovery obtained by the plaintiff class – as it did in 2002 and again in 2004 – and then issue a final order remitting the punitive damages award to an amount equal to that total compensatory recovery.[18]

[16] These parties were among those whose claims were reinstated by the Ninth Circuit. *See Punitive Damages Opinion I*, 270 F.3d at 1253 (reversing summary judgment granted against "tenderboat operators and crews, and seafood processors, dealers, wholesalers, and processor employees").

[17] Sea Hawk and Exxon are currently litigating the proper method of calculating pre-judgment interest before the Ninth Circuit.

[18] The Supreme Court's order, which merely takes for granted the compensatory calculation by this Court, does not foreclose recalculation of the appropriate compensatory total and ordering punitive damages at a ratio of 1:1 with the recalculated compensatory amount. Nonetheless, if the Court concludes that Exxon's punitive liability is capped at $507,500,000, the Court should still take recent recoveries into account for purposes of apportioning recovery. Each member of the plaintiff class, instead of receiving a strictly 1:1 payment, would receive a share equal to their compensatory recovery multiplied by $507,500,000 divided by the updated class total compensatory recovery.

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IV. CONCLUSION

For all of the above reasons, Sea Hawk's motion should be granted. The Court should defer issuing final judgment on the amount of punitive damages for thirty days to allow parties to identify additional compensatory recoveries obtained since the Court's January 28, 2004 *Remand II* Order. The Court should then issue a judgment against Exxon awarding punitive damages in an amount equal to the total compensatory recovery identified by the plaintiff class. Finally, and as required by the Supreme Court's judgment, this Court should order that the final punitive damages award be allocated among the mandatory punitive damages class members at a ratio of 1:1 with the class members' individual compensatory recovery.

October 9, 2008

Respectfully submitted,

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I hereby certify that the foregoing **MOTION OF SEA HAWK SEAFOODS, INC. TO VACATE PLAN OF ALLOCATION AND TO APPROVE NEW PLAN OF ALLOCATION THAT CONFORMS TO SUPREME COURT'S JUDGMENT** was served on the following parties in the method specified below this 8th day of October, 2008:

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