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Attorneys for Plaintiff
SEA HAWK SEAFOODS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:
The EXXON VALDEZ

**RESPONSE OF SEA HAWK
SEAFOODS, INC., TO LEAD
COUNSEL’S APPLICATION FOR
AN ORDER DISTRIBUTING
EXXON QUALIFIED
SETTLEMENT FUNDS TO NATV,
NOOS, F00E, S01E, S03E, S04E,
S01H, S03H, S04H, S01K, S02K,
S04K AND S01L CLAIMANTS AND
THEIR ATTORNEYS (Docket No.
8884)**

THIS DOCUMENT RELATES TO ALL
CASES

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

Plaintiff Sea Hawk Seafoods, Inc. (“Sea Hawk”) respectfully submits this response to Lead Counsel’s Application for an Order Distributing Exxon Qualified Settlement Funds to NATV, NOOS, F00E, S01E, S03E, S04E, S01H, S03H, S04H, S01K, S02K, S04K and S01L Claimants and Their Attorneys (Docket No. 8884) (“Application for Distribution”).

Sea Hawk opposes the Application for Distribution to the extent that it is inconsistent with the legal requirements for allocation of punitive damages that were set

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forth in Sea Hawk's Motion to Vacate Plan of Allocation and to Approve New Plan of Allocation That Conforms to Supreme Court's Judgment (Docket No. 8863) ("Motion to Vacate"). In that motion, Sea Hawk argued that the Court should vacate the current plan of allocation and approve a new plan that conforms to the 1:1 punitive-to-compensatory ratio mandated by the Supreme Court in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 & n.28 (2008). Lead Counsel's Application for Distribution should be denied because it conflicts with the Supreme Court's required 1:1 ratio.

Sea Hawk recognizes that the Court denied its Motion to Vacate on November 12, 2008 (Docket No. 8898). Sea Hawk today has filed a Notice of Appeal regarding that Order. (Docket No. 8909). The November 12 Order does not fully resolve this objection to Lead Counsel's Application for Distribution because Sea Hawk also argued that All Plaintiffs should be required to withhold approximately \$60 million from any distribution from the Exxon Qualified Settlement Fund ("EQSF") pending final resolution of Sea Hawk's Motion to Vacate. *See* Reply Brief In Support Of Motion to Vacate Plan of Allocation and to Approve New Plan of Allocation That Conforms to Supreme Court's Judgment (Docket No. 8886) at 13 (seeking a hold-back of "less than \$100 million"). Counsel provided a more detailed hold-back calculation at oral argument on November 5, 2008, explaining that Sea Hawk calculated the hold-back by identifying the classes of plaintiffs who would get more under the plan of allocation than under the 1:1 ratio approved by the Supreme Court, and then finding the cumulative differences between the amount of punitive damages those parties would receive under the plan of allocation and the amount they would receive under the 1:1 ration advocated by Sea Hawk. Those

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cumulative differences, which are based on the \$383 million deposited in the EQSF by Exxon and include amounts designated for attorney's fees, total approximately \$74 million. Once the attorney's fee component is removed, the total hold-back is approximately \$60 million. Additional information regarding Sea Hawk's calculation of the hold-back amount can be found in the Declaration of Terry Bertson, submitted herewith, at ¶¶ 8-9.¹

Requiring All Plaintiffs to withhold \$60 million pending final resolution of Sea Hawk's Motion to Vacate will not cause significant harm to any of the parties that are to receive funds pursuant to Lead Counsel's Application for Distribution. The hold-back amount advocated by Sea Hawk – \$60 million – would still allow significant funds to be distributed to members of the mandatory punitive damages class pursuant to Lead Counsel's Application for Distribution. Moreover, as an alternative, the Court could require All Plaintiffs to withhold approximately \$11.753 million in order to protect Sea Hawk's rights pursuant to the Motion to Vacate (since no other party has joined that motion). *See* Bertson Declaration at ¶¶ 10-11. Either way, Lead Counsel's Application for Distribution should be denied – in part – because it does not withhold any funds pending final appellate resolution of Sea Hawk's Motion to Vacate.

Although All Plaintiffs strongly opposed Sea Hawk's Motion to Vacate, it is clearly in everyone's best interest that sufficient funds be withheld from any distribution to protect parties (like Sea Hawk) who would receive less under the current plan than

¹ This Court did not address or decide whether any funds should be withheld
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they would if Sea Hawk prevails on appeal. If Sea Hawk's appeal is successful, the existing plan of allocation will be vacated and a new plan will be approved that is consistent with the Supreme Court's required 1:1 ratio. If that happens, Lead Counsel will have a duty to administer the new plan and ensure that funds are (*and were*) distributed in conformity with that plan. Thus, the best course of action is to ensure that any party who receives funds at this time does not receive more than the 1:1 punitive-to-compensatory ratio mandated by the Supreme Court. This would avoid any distribution that could result in insufficient funds in the EQSF to comply with a new plan of allocation should Sea Hawk succeed on appeal.

Indeed, All Plaintiffs' counsel indicate in the Application for Distribution that there would be an appropriate hold-back to reflect additional amounts that might become due and owing to Cook Inlet Processors and Nautilus Marine (collectively, "CIP/NM") as a reserve for those parties pending the determination of their appeal of the Court's denial of their motion that they be granted off-the-top status like the Seattle Seven. *See* Docket 8884, at 4-5 (citing Order 371; Docket No. 8622); *see also* Docket No. 8885 (Declaration of Claims Administrator), at ¶ 5 (explaining reserve for CIP/NM). All Plaintiffs and the Claim Administrator therefore propose a 5% (\$21,875,000) hold-back from the proposed distribution to protect CIP/NM pending their appeal. *See* Docket 8884, at 4; Docket No. 8885, at ¶ 5 & Exhibit A (spreadsheet showing the CIP/NM hold-back). The situation involving CIP/NM is analogous to Sea Hawk's situation as it appeals the Court's denial

(...continued)

pending a final resolution of Sea Hawk's Motion to Vacate.

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of its motion to conform the plan of allocation to the Supreme Court's decision in *Baker*. And the hold-back requested by Sea Hawk, like that proposed for CIP/NM by All Plaintiffs, is a reasonable approach for protecting Sea Hawk's interest during the appeal.

In short, this Court, class counsel, and thousands of plaintiffs may be unnecessarily involved in an administrative nightmare if the Ninth Circuit requires a new plan of allocation and no funds are withheld at this time. The affected plaintiffs may suffer grave financial consequences because they will be required to return any "overpayment" they received even if they have already spent their distributions. These significant problems will be avoided if the Court requires an appropriate hold-back as Sea Hawk now requests. For all these reasons, Lead Counsel's Application for Distribution should be denied unless and until sufficient funds are withheld as set forth above and in the Declaration of Terry Bertson submitted herewith.

November 18, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONSE OF SEA HAWK SEAFOODS, INC., TO LEAD COUNSEL’S APPLICATION FOR AN ORDER DISTRIBUTING EXXON QUALIFIED SETTLEMENT FUNDS TO NATV, NOOS, F00E, S01E, S03E, S04E, S01H, S03H, S04H, S01K, S02K, S04K AND S01L CLAIMANTS AND THEIR ATTORNEYS** was served on the following parties in the method specified below this 18th day of November, 2008:

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