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APPENDIX A

United States Court of Appeals
For The Ninth Circuit.

In re: The EXXON VALDEZ,

Grant Baker; Sea Hawk Seafoods, Inc.; Cook Inlet Processors, Inc.; Sagaya Corp.; William Mcmurren; Patrick L. Mcmurren; William W. King; George C. Norris; Hunter Cranz; Richard Feenstra; Wilderness Sailing Safaris; Seafood Sales, Inc.; Rapid Systems Pacific Ltd.; Nautilus Marine Enterprises, Inc.; William Findlay Abbott, Jr.,

Plaintiffs-Appellees,

v.

Exxon Mobile Corp; Exxon Shipping Co.,

Defendants-Appellants.

No. 04-35183

D.C. No.
CV-89-00095-HRH
OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted
January 27, 2006-San Francisco, California

Filed December 22, 2006

[As amended May 23, 2007]

Before Mary M. Schroeder, Chief Judge,
James R. Browning and Andrew J. Kleinfeld, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge Browning.

COUNSEL

Walter Dellinger, O'Melveny & Myers, LLP, Washington, D.C., and John F. Daum, O'Melveny & Myers LLP, Los Angeles, CA, for the defendants-appellants, cross-appellees.

Brian B. O'Neill, Faegre & Benson, Minneapolis, Minnesota, James vanR. Springer, Dickstein Shapiro LLP, Washington, DC, for the plaintiffs-appellees, cross-appellants.

OPINION

PER CURIAM.

I. INTRODUCTION

We look for the third time at the punitive damages imposed in this litigation as a result of the 1989 grounding of the oil tanker *Exxon Valdez,* and the resulting economic harm to many who earned their livelihood from the resources of that area. *See Baker v. Hazelwood (In re the Exxon Valdez),* 270 F.3d 1215 (9th Cir. 2001)[hereinafter *Punitive Damages Opinion I*]; *Sea Hawk Seafoods, Inc. v. Exxon Corp.,* No. 03-35166 (9th Cir., Aug. 18, 2003). We are precluded, as the jury was, from punishing Exxon for befouling the beautiful region where the oil was spilled, because that punishment has already been imposed in separate litigation that has been settled. *See Punitive Damages Opinion I,* 270 F.3d at 1242. As we explained in *Punitive Damages Opinion I,* the plaintiffs' punitive damages case was saved from preemption and res judicata because the award "vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment." *Id.* "The plaintiffs' claims for punitive damages expressly excluded consideration of harm to the environment." *In re the Exxon Valdez,* 296 F. Supp. 2d 1071, 1090 (D. Alaska 2004).

The resolution of punitive damages has been delayed because the course of this litigation has paralleled the course followed by the Supreme Court when, in 1991, it embarked on a series of decisions outlining the relationship of punitive damages to the principles of due process embodied in our

Constitution. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443 (1993) (plurality); *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). Intervening Supreme Court decisions have caused us to remand the matter twice to the district court for reconsideration of punitives in light of evolving Supreme Court law. The district court's opinion, after our last remand for it to consider the impact of the Supreme Court's decision in *State Farm,* is published at *In re the Exxon Valdez,* 296 F. Supp. 2d 1071 (D. Alaska 2004) [hereinafter *District Court Opinion*]. It is the subject of this appeal.

Now, with the guidance of the Supreme Court's decisions, the district judge's thoughtful consideration of the issues, and our own prior decisions in the litigation, we trust we are able to bring this phase of the litigation to an end. While we agree with much of the analysis of the district court, we are required to review de novo the district court's legal analysis in applying the Supreme Court's guideposts. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001).

While the original punitive damages award was $5 billion and in accord with the jury's verdict, the district court reduced it to $4 billion after our first remand. *In re the Exxon Valdez,* 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002), *vacated by Sea Hawk,* No. 03-35166. Then, after our second remand, it entered an award of $4.5 billion. *District Court Opinion,* 296 F. Supp. 2d at 1110. For the reasons outlined further in the factual development and the analysis of this opinion, we conclude that the ratio of punitive damages to actual economic harm resulting from the spill, reflected in the district court's award of $4.5 billion, exceeds by a material factor a ratio that would be appropriate under *Punitive Damages Opinion I* and the current controlling Supreme Court analysis. *See State Farm,* 538 U.S. at 425. We order a remittitur of $2 billion, resulting in punitive damages of $2.5 billion. We do so because, in assessing the reprehensibility of Exxon's misconduct, the most important guidepost according to the Supreme

Court's opinion in *State Farm,* there are several mitigating facts. *See id.* at 419. These include prompt action taken by Exxon both to clean up the oil and to compensate the plaintiffs for economic losses. These mollify, at least to some material degree, the reprehensibility in economic terms of Exxon's original misconduct. *Punitive Damages Opinion I,* 270 F.3d at 1242. In addition, in considering the relationship between the size of the award and the amount of harm, we concluded in our earlier punitive damages opinion that the substantial costs that Exxon had already borne in clean up and loss of cargo lessen the need for deterrence in the future. *Id.* at 1244. We disagree, however, with Exxon's ultimate contention that, as a result of two sentences in *Punitive Damages Opinion I,* written five years ago and before the Supreme Court's opinion in *State Farm,* Exxon is entitled to have punitive damages assessed at no higher than $25 million. *See id.*

Our dissenting colleague goes to the other extreme. Exxon's misconduct was placing a relapsed alcoholic in charge of a supertanker. *Punitive Damages Opinion I,* 270 F.3d at 1234. Yet, the dissent claims that we should ignore our unanimous conclusion in *Punitive Damages Opinion I,* 270 F.3d at 1242, that Exxon's conduct with respect to the spill was not intentional. The dissent effectively treats Exxon as though it calculatingly and maliciously steered the ship into disaster. Purporting to rely on the intervening Supreme Court decision in *State Farm,* the dissent also refuses to apply our earlier holding that Exxon's mitigation efforts reduce the reprehensibility of its conduct. This amounts to a rejection of the bedrock principle of stare decisis.

State Farm was an insurance contract case. Nothing in it suggests that this court's decision in *Punitive Damages Opinion I* was improper. The Supreme Court did not explicitly or implicitly hold that mitigation plays no role in determining the constitutionality of a punitive damages award. Such a lack of discussion in an insurance contract case cannot supplant our express holding in the toxic-tort arena that mitigation efforts are a factor in assessing the punitive dam-

ages award in this case. Controlling authority should not be ignored or distorted. As Learned Hand famously once said, "a victory gained by sweeping the chess pieces off the table is not enduring." Learned Hand, Mr. Justice Cardozo, 52 Harv. L. Rev.. 361, 362 (1939).

We reiterate our previous holding that Exxon's conduct was not willful. Accordingly, a punitive damages award that corresponds with the highest degree of reprehensibility does not comport with due process when Exxon's conduct falls squarely in the middle of a fault continuum.

Because the history of this litigation tracks the recent jurisprudential history of punitive damages, our analysis is best made in light of a thorough understanding of that history. We therefore outline that history with what we hope is sufficient clarity and thoroughness.

II. LEGAL AND FACTUAL BACKGROUND

A. *From the Time of the Accident through the First Punitive Damages Award and Denial of Motion for New Trial: The Common Law through the Supreme Court Decision in* TXO.

The *Exxon Valdez* ran aground on Bligh Reef in Alaska's Prince William Sound on March 24, 1989. Punitive damages at that time were governed by general common law principles. at common law, the jury determined the punitives, and the trial judge conducted a limited review to determine whether the jury's verdict was the product of passion and prejudice, or whether the award was one that shocked the conscience. *See* Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth Century America,* 71 Notre Dame L.Rev. 505, 542-51 (1996); Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages,* 27 Harv. J.L. & Pub. Pol'y 231, 246-48 (2003); *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 278 n. 24 (1989) (affirming district court's application of Vermont's "grossly and manifestly excessive" standard for judicial review); *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 n. 10 (1994).

Although there were cases dating from the *Lochner* era that had suggested that there may be a due process ceiling on punitive damages, at the time of this accident in 1989, the Supreme Court had never invalidated an award on grounds that the size of the award violated due process. *See BMW v. Gore,* 517 U.S. at 600-01 (Scalia, J., dissenting) (discussing the history of due process review of punitive damages awards) (citing *Seaboard Air Line Ry. v. Seegers,* 207 U.S. 73, 78 (1907); *Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 489-91 (1915); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 111-12 (1909); *Standard Oil Co. of Ind. v. Missouri,* 224 U.S. 270, 286, 290 (1912); *St. Louis, I.M. & S.R. Co. v. Williams,* 251 U.S. 63, 66-67 (1919)).

In 1991, however, the Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). There, for the first time in the modern era, the Court conducted a substantive review of an award of punitive damages. *Haslip* was an insurance fraud case, in which the agent pocketed the premiums and caused the plaintiff's insurance to lapse. *Id.* at 4-5. The Court upheld a punitive damages award that amounted to four times the award of compensatory damages and 200 times the out-of-pocket costs of the defrauded insured. *Id.* at 23-24. The Court noted that the ratios might be "close to the line," but said the award had to be upheld because it "did not lack objective criteria." *Id.* The Court therefore concluded that the punitive damages did not "cross the line into the area of constitutional impropriety." *Id.* The Supreme Court did not, at that time, and has not since, defined any bright line of constitutional impropriety. It has, repeatedly, indicated that there is none. *See, e.g., State Farm,* 538 U.S. at 424-25.

In 1993, two years after *Haslip*, the Court took on another major punitive damages case. In *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993), the Court reviewed a jury award of $19,000 in compensatory damages and $10 million in punitive damages. *Id.* at 451. That case arose out of an oil and gas development fraud scheme. *Id.* at 447-51. The case produced no majority opinion. The plurality,

reiterating that due process places some limit on punitive damages, said that the award was not so "grossly excessive" that it should be overturned, thus invoking the standard used in *Haslip*. *Id.* at 462. The Court declined to provide any particular guidance in determining when an award would be "grossly excessive." *Id.* The plurality chose instead to say that the dramatic disparity between the actual financial loss and the punitive award was not controlling. *Id.* The award was upheld. *Id.*

It was against this background that the jury in this case was instructed in 1994. The jury was told to take into account the reprehensibility of the misconduct, the amount of actual or potential harm arising from the misconduct, and, additionally, to take into account mitigating factors such as the clean up costs and fines already imposed as deterrents. *District Court Opinion,* 296 F. Supp. 2d at 1081-82. The instructions were the product of mutual effort of the parties and the district court, and have not been seriously challenged. *Id.* They are not questioned here and were, in retrospect, quite forward looking.

On September 16, 1994, the jury returned a $5 billion punitive damages verdict, having some time earlier imposed a compensatory award of $287 million. The district court accepted the punitive award and entered judgment. Citing *Haslip* and *TXO,* the district court denied Exxon's motion for a new trial in January of 1995.

B. *The Appeal of the Damage Allocation Plan and Our Decisions in* Baker *and* Icicle.

Prior to trial, several plaintiffs, many of the sea food processors, had entered into settlement agreements with Exxon. *Icicle Seafoods, Inc. v. Baker (In re the Exxon Valdez),* 229 F.3d 790, 792 (9th Cir. 2000) [hereinafter *Icicle*]; *Baker v. Exxon Corp. (In re the Exxon Valdez),* 239 F.3d 985, 986 (9th Cir. 2001) [hereinafter *Baker*]. The agreements anticipated a sizable punitive damages award. *See Icicle,* 229 F.3d at 793; *Baker,* 239 F.3d at 986-87. In return for receiving substantial

millions in payments from Exxon, the settling plaintiffs, in two separate agreements, agreed to allocate a portion of their punitive award to Exxon. One agreement was a so called "cede back agreement," *Icicle*, 229 F.3d at 793, and the other was an assignment of the future award, *Baker*, 239 F.3d at 986-87.

The district court, however, did not know of the agreements during trial. *Icicle*, 229 F.3d at 793. When the court did learn of them, during consideration of the parties' proposed damage allocation plan, and after the punitives had been imposed in accordance with the jury's verdict, the district court frowned on the settlements. *Id.* at 794. In the district court's view, Exxon should have told the jury about the agreements so that the jury would have known how much Exxon was actually going to have to pay in punitive damages. *Id.* The district court, therefore, refused to permit the settling plaintiffs to receive any of the punitive damages award, on the theory that Exxon should not benefit from the settlements. *Id.; Baker,* 239 F.3d at 987. Exxon pursued two appeals from the district court's refusal to enforce the agreements: one involving the cede back agreement, *Icicle,* 229 F.3d at 793, and the other involving the assignment agreement, *Baker,* 239 F.3d at 987-88.

The two different forms of agreement were intended to have essentially the same effect: allowing Exxon to keep some portion of the eventual punitive award in exchange for settling compensatory damage claims. In *Icicle,* this panel considered the cede back agreement. In a thorough opinion, we held that the cede back agreement was valid and enforceable and that the jury quite properly was not told of its existence. *Icicle,* 229 F.3d at 800. We reasoned that had the jury been told of the agreement, it might well have compensated for the settlement by imposing more damages. *Id.* at 798. This, in turn, would have frustrated the efforts of parties to reach settlements. We pointed out that settlements should be encouraged, particularly in large class actions like this one. *Id.* "Far from being unethical, cede back agreements make it

easier to administer mandatory class actions for the assessment of punitive damages and encourage settlement in mass tort cases. As a result, such agreements should typically be enforced." *Id.*

The second appeal, *Baker,* considered an assignment agreement. *Baker,* 239 F.3d at 987-88. Following the *Icicle* reasoning, this panel reached the same conclusion. *Id.* at 988.

C. *The Supreme Court's Decision in BMW v. Gore.*

As the parties were beginning their preparation for the first appeal of the $5 billion punitive damages award, the Supreme Court issued its first major due process/punitive damages decision after *TXO.* In 1996, it decided *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). This was the Supreme Court's first attempt to describe specific factors that a court should consider in reviewing a jury's award of punitive damages. *See id.* at 575. The Court invoked the traditional concepts of due process to describe the purpose of the review as an assurance of fair notice to the defendant of the consequences of its conduct. *Id.* at 574.

The Court described three factors to be considered. *Id.* at 575. The first was the reprehensibility of the conduct. *Id.* The Court explained that reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award," and said that an award should reflect "the enormity" of the offense. *Id.* (citations omitted).

The second factor was the disparity between the actual or potential harm to the plaintiffs flowing from that conduct, and the punitive damages assessed by the jury. The Court said that the disparity factor was the most commonly cited. *Id.* at 580. The Court reasoned this factor is important because it "has a long pedigree" extending back to English statutes from 1275 to 1753 providing for double, treble or quadruple damages. *Id.* at 580-81. Thus the critical measure here is the ratio between the punitive award and the amount of harm inflicted on the plaintiff, or plaintiffs, before the court.

The third factor was the difference between the punitives

and the civil and criminal penalties authorized by the state for that conduct. *Id.* at 583. The Court indicated that reviewing courts should use this factor to "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 583 (internal quotations omitted).

In *BMW v. Gore,* the defendant had engaged in a practice of repainting damaged cars and passing them off as never-damaged cars with their original paint. *Id.* at 563-64. The plaintiff who had purchased one of these cars was awarded $4,000 in compensatory damages and $4 million in punitives. *Id.* at 565. The Alabama Supreme Court reduced the punitives to $2 million, and the defendant petitioned for certiorari review. *Id.* at 567. The Supreme Court held the punitives were excessive. *Id.* at 585.

In examining the reprehensibility of the conduct, the Supreme Court in *BMW v. Gore* stressed that the only harm inflicted by the defendant was economic and not physical. *Id.* at 576. The Court also emphasized that the conduct to be considered was only the conduct of the defendant towards the plaintiff in the Alabama case and not other conduct that might be a part of a nationwide practice. *Id.* at 572. Justice Breyer's concurring opinion noted the danger in subjecting a defendant to punishment multiple times for the same conduct. *Id.* at 593 (Breyer, J., concurring).

Thus, in looking at the ratio between the punitives and the harm, and in stressing that the ratio must be a reasonable one, the Court was holding that the ratio must be measured by the ratio of punitive damages to the harm suffered by the plaintiff in that case, without regard to harm that might have been experienced by others and for which the defendant might also be responsible. *Id.* at 580. It concluded that a ratio of 500 to 1 was grossly excessive. *Id.* at 583. Such an excessive ratio resulted from the jury's improperly measuring the punitives in relation to the damage inflicted on a nation of potential plaintiffs rather than the damage to the plaintiff before that jury. *Id.* at 573.

With respect to the third factor, the relationship between the punitive damages and the comparable penalties under state law, *BMW v. Gore* looked to the Court's federalism jurisprudence. The Court's opinion stressed that reviewing courts should be mindful of the need to pay due deference to the legislative judgments of states in assessing the reprehensibility of conduct. *Id.* at 583 ("[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'") (quoting *Browning-Ferris,* 492 U.S. at 3019 (O'Connor, J., concurring in part, dissenting in part)).

Again refusing to draw any kind of mathematical bright line between acceptable and unacceptable ratios, the Court described the 500 to 1 ratio in *BMW v. Gore* as "breathtaking." *Id.* It remanded for further, not inconsistent, proceedings, because, unlike *Haslip,* where the Court affirmed a questionable award, the Court in *BMW* was "fully convinced" that this award was "grossly excessive." *Id.* at 585-86.

D. *The First Punitive Damages Appeal.*

It was against this background that briefing in the first appeal of the original $5 billion punitive damages award in this case went forward. Exxon contended the amount of the award violated due process principles, as described in *BMW v. Gore. Punitive Damages Opinion I,* 270 F.3d at 1241. The district court had not had an opportunity to review *BMW v. Gore* before its original judgment became final and appealable upon denial of Exxon's motion for a new trial. *Id.*

In its appeal from the $5 billion award, Exxon, in addition to challenging the amount of the punitive damages, challenged the sufficiency of the evidence supporting punitive damages; the jury instructions; the allowability of any punitive damages as a matter of public policy, maritime law and res judicata; and the preemption of punitive damages by other federal law. Needless to say, briefing was extensive. After appellate proceedings were stayed from January 1998 to

September 1998 for the parties to pursue a limited remand, this panel heard argument in May of 1999.

While the case was under submission, the Supreme Court granted certiorari in another Ninth Circuit case, and in May 2001, decided *Cooper v. Leatherman Tool Group.* The Court there held our review of punitive damages was to be de novo. *Cooper,* 532 U.S. at 436. This did not ease our task.

E. *Punitive Damages Opinion I.*

We issued our first opinion on punitives damages in November, 2001. Our opinion went in detail through the facts of the disaster and the conduct of Exxon, and of Captain Hazelwood, because they bore so heavily on the consideration of the issues on appeal. *Punitive Damages Opinion I,* 270 F.3d at 1221-24. In an opinion of more than 40 pages, we rejected Captain Hazelwood's separate appeal, and dealt at some length with all of the issues raised by Exxon. We ultimately rejected all of them except the challenge to the amount of punitive damages. *Id.* at 1254.

Referring to the "unique body of law" that governs punitive damages, we focused on the two Supreme Court opinions that had been decided after the district court's decision in the case, and we termed them "critical." *Id.* at 1239. These were *BMW v. Gore* and *Cooper v. Leatherman Tool Group.* We said:

> In *BMW,* the Supreme Court held that a punitive damage award violated the Due Process Clause of the Fourteenth Amendment because it was so grossly excessive that the defendant lacked fair notice that it would be imposed. Dr. Gore's car was damaged in transit, and BMW repainted it but did not tell Dr. Gore about the repainting when it sold him the car. The jury found that to be fraudulent, and awarded $4,000 in compensatory damages for reduced value of the car and $4 million in punitive damages. The Alabama Supreme Court cut the award to $2 million, but the Court held that it was still so high as to deny BMW

> due process of law for lack of notice, because the award exceeded the amounts justified under the three "guideposts." The *BMW* guideposts are: (1) the degree of reprehensibility of the person's conduct; (2) the disparity between the harm or potential harm suffered by the victim and his punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. We apply these three guideposts to evaluate whether a defendant lacked fair notice of the *severity* of a punitive damages award, and to stabilize the law by assuring the uniform treatment of similarly situated persons.

Id. at 1240-41 (internal quotations omitted). We noted that in *Cooper v. Leatherman Tool Group* the Supreme Court decided that "considerations of institutional competence" require de novo review of punitive damages awards. *Id.* at 1240 (quoting *Cooper,* 532 U.S. at 440).

We went on to observe that the district court had not reviewed the award under the standards announced in those cases because neither case had been decided by the time the jury returned its verdict, and Exxon had never challenged the amount of the award on constitutional grounds until after the jury's verdict. *Id.* at 1241. In view of the need for de novo review and the intervening decisions of *BMW v. Gore* and *Cooper v. Leatherman Tool Group,* we remanded for reconsideration of punitive damages. *Id.* We also provided some observations on possible alternative analyses of punitive damages under the *BMW v. Gore* factors. *Id.* at 1241-46.

These observations began with the factor of reprehensibility, quoting the Supreme Court's admonition in *BMW v. Gore* that it is "[p]erhaps the most important indicium of the reasonableness of a punitive damage award." *Id.* at 1241. We pointed to the Court's analogy to criminal cases, and its statement that nonviolent crimes are less reprehensible than violent ones. *Id.* We drew an analogy to the facts of this case, where Exxon's conduct was reckless, but there was no inten-

tional spilling of oil "as in a midnight dumping case." *Id.* at 1242. We agreed with the plaintiffs that Exxon's conduct was reprehensible in that it knew of the risk of an oil spill in transporting huge quantities of oil through the Sound, and it knew Hazelwood was a relapsed alcoholic. *Id.* at 1242. We observed, however, that such reprehensibility went more to justify punitive damages than to justify such a high amount. *Id.* We noted some mitigating factors, including prompt ameliorative action and the millions spent in clean up. *Id.*

We then turned to the ratio of actual harm caused by the misconduct to punitive damages awarded. *Id.* at 1243. Again analyzing *BMW v. Gore,* we said that it was difficult to determine what we called the "numerator," that is, the value of the harm caused by the spill. *Id.* We used the jury award of $287 million in compensatory damages as one possible numerator and also, as alternative numerators, the district court's estimates of harm, which at that time ranged from $290 million to $418 million. *Id.* We noted that if compensatory liability were used, any amounts Exxon had voluntarily paid in settlements should not be taken into account. We said that

> [t]he amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment. "[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large scale class actions."

Id. at 1244 (citing *Icicle,* 229 F.3d at 795; *Baker,* 239 F.3d at 988).

As a final observation on the relationship between the punitive damages award and the harm, we pointed out that the substantial clean up costs and other losses to Exxon from the oil spill had already had considerable deterrent effect. We indicated such deterrence should, depending on the circumstances, call for a lower, rather than a higher ratio. *Id.*

Turning to the third *BMW v. Gore* factor, we observed that the nature of criminal fines, which are potential state and

federal penalties, might be useful in reviewing punitives. *Id.* at 1245. We observed that "[c]riminal fines are particularly informative because punitive damages are quasicriminal." *Id.* We then looked to the general federal statutory measure for fines and discussed a number of alternative guideposts. *Id.* We noted the federal fines could range from $200,000 to $1.03 billion. *Id.* We looked as well at the ceiling of civil liability under the Trans-Alaska Pipeline Act and noted it was $100 million in strict liability for anyone who spills oil from the pipeline. *Id.*

In addition to those possible penalties, we looked at the actual penal evaluation made in the case by the Attorneys General of the United States and of the state of Alaska. *Id.* at 1245-46. Agreeing with the district court that they did not establish a limit, we noted that they did represent an adversarial judgment, by executive officers, of an appropriate level of punishment. *Id.* at 1246. Finally, without necessarily exhausting available analogies in the penalty field, we noted that Congress had subsequently amended the statute to increase the amount of civil penalties for grossly negligent conduct, and that the maximum penalty here under the new federal statute would be a maximum of $786 million. *Id.* The federal penalties are based upon the number of barrels of oil spilled. 33 U.S.C. § 1321(b)(7).

In suggesting various possible guidelines to assess whether the $5 billion was "grossly excessive" we did not imply that any single guidepost would be controlling. Concluding that the $5 billion was too high to withstand the review we were required to give it under *BMW v. Gore* and *Cooper v. Leatherman Tool Group,* and noting that those cases came down after the district court had ruled, we remanded for it to apply the due process analysis required under those decisions, with what we hoped would be helpful guidance from our opinion. *Id.* at 1241. No district court analysis of *BMW v. Gore* was before us and we thus could not have decided any specific issue arising from any such analysis arising from its guideposts. *Id.* We offered only guidance

culled from what was then controlling Supreme Court precedent and general principles applicable to the calculation of damage liability. *Id.*

F. *The District Court Opinion on our First Remand.*

The district court again did an extensive analysis of the relative reprehensibility of Exxon's misconduct and of the harm it caused. *In re the Exxon Valdez,* 236 F. Supp. 2d at 1054-60. Though noting that an accurate assessment of the full extent of the plaintiffs' actual harm was impossible, the district court attempted to reconstruct that harm by adding together the jury's compensatory damages verdict of $287 million, judgments in related cases, as well as payments and settlements made to plaintiffs before and during the punitive damages litigation. *Id.* at 1058-60. The district court concluded that the actual harm was just over $500 million. *Id.* at 1060. The district court also concluded that the circumstances of this case justified a ratio of punitive damages to harm of 10 to 1. *Id.* at 1065. This calculation would have supported the original $5 billion award. *Id.* The district court nevertheless reduced the punitive damages to $4 billion, to conform to what it viewed as our mandate. *Id.* at 1068.

G. *The Second Appeal, the Supreme Court's Opinion in* State Farm, *and our Second Remand.*

Not surprisingly, Exxon appealed again. And, not surprisingly, the Supreme Court issued an opinion in still another punitive damages case while the appeal was pending. *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003).

The plaintiffs in *State Farm,* the Campbells, were involved in a head-on collision and sued their automobile insurer, State Farm, for bad faith. *Id.* at 413. The claim was based on State Farm's rejection of an offer to settle the Campbells' claims at the policy limit, State Farm's assurances to them that they had no liability for the accident, State Farm's resulting decision to take the case to court despite the substantial likelihood of an excess judgment, and its subsequent refusal to pay an adverse judgment over three times the policy

limits. *Id.* at 413-14. The case was similar to *BMW v. Gore* in that there were only two plaintiffs before the jury. *Id.* Nevertheless, as in *BMW v. Gore,* the jury was allowed to consider the effects of similar but unrelated misconduct on many potential plaintiffs who were not before the court. *Id.* at 415. Final judgment after appeal to the Utah Supreme Court was for $1 million in compensatory and $145 million in punitive damages. *Id.* at 412. The United States Supreme Court remanded for the Utah courts to reduce the award. *Id.* at 429.

The Supreme Court in *State Farm* once again emphasized that the "most important indicium" of a punitive damages award's reasonableness is the relative reprehensibility of the defendant's conduct. *Id.* at 419; *see also BMW v. Gore,* 517 U.S. at 575. Yet *State Farm* significantly refined the reprehensibility analysis by instructing courts to weigh five specific considerations: (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct causing the plaintiff's harm showed "indifference to or a reckless disregard of the health or safety of others;" (3) whether the "target of the conduct" was financially vulnerable; (4) whether the defendant's conduct involved repeated actions as opposed to an isolated incident; and (5) whether the harm caused was the result of "intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419. The Court did not rank these factors. It did explain, however, that only one factor weighing in a plaintiff's favor may not be sufficient to support a punitive damages award, and the absence of all factors makes any such award "suspect." *Id.*

As to *BMW v. Gore's* second guidepost, the ratio between harm or potential harm to the plaintiff and the punitive damages award, the Court "decline[d] again to impose a brightline ratio which a punitive damages award cannot exceed." *Id.* at 425. But it provided some sharper guidance than it had in previous cases.

First, it indicated that ratios in excess of single-digits would raise serious constitutional questions, and that single-digit ratios were "more likely to comport with due proc-

ess." *Id.* fact, despite the Court's disclaimer that "there are no rigid benchmarks that a punitive damages award may not surpass," the Court strongly indicated the proportion of punitive damages to harm could generally not exceed a ratio of 9 to 1. *Id.* at 425 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

Second, the Court discussed particular combinations of factors that would justify relatively higher or lower ratios. For example, where a "particularly egregious act has resulted in only a small amount of economic damages" or where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine," ratios in the high single-digits and perhaps even higher might be warranted. *Id.* (quoting *BMW v. Gore,* 517 U.S. at 582). Conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Finally, the Court minimized the relevance of criminal penalties as a guide, saying that they were not particularly helpful in determining fair notice. *Id.* at 428. Indeed, the Court did not analyze State Farm's potential criminal penalty at all, characterizing it as a "remote possibility." *Id.* As to civil penalties, the Court noted only that the $145 million punitive damages award "dwarfed" the $10,000 maximum applicable fine. *Id.*

The Supreme Court's opinion in *State Farm* was filed in 2003, after the district court, on our first remand, had already reviewed the punitive damages award. Because the district court performed its review without the benefit of the more focused guidance provided by the Court in *State Farm,* we remanded the second appeal summarily for the district court to reconsider the punitive damages award in light of *State Farm. Sea Hawk,* No. 03-39166.

H. *The District Court Opinion on our Third Remand and this Appeal.*

On remand for the third time, the district court, in an assessment similar to that in its opinion after our first remand, calculated plaintiffs' harm at $513.1 million. *District Court Opinion,* 296 F. Supp. 2d at 1103. Interpreting *State Farm* as holding that "single-digit multipliers pass constitutional muster for highly reprehensible conduct," and citing our decision in *Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020 (9th Cir. 2003), the district court decided to increase punitives from $4 billion to $4.5 billion. 296 F. Supp. 2d at 1110. The final punitive damages award represented a ratio of just under 9 to 1. *Id.*

Once again, Exxon appealed. The plaintiffs also appealed, seeking to reinstate the jury's full $5 billion punitive damages verdict.

In this appeal, Exxon has focused intensively on the sentences in our earlier opinion where we noted that prejudgment payments generally should not be part of the "numerator" to avoid deterring pre-judgment settlements. *Punitive Damages Opinion I,* 270 F.3d at 1242. Exxon has argued strenuously in the district court and to us that all of its settlement and other pre-judgment compensatory payments to plaintiffs must be subtracted from the over $500 million amount of actual harm in the ratio of punitive damages we use to review the award pursuant to the *BMW v. Gore/State Farm* factors. This would reduce the harm to the relatively paltry figure of $20.3 million.

We recognized in *Punitive Damages Opinion I* that Exxon, soon after the spill, instituted a claims payment system that almost fully compensated plaintiffs for their economic losses and did so promptly. *Id.* We also recognized that Exxon's prompt payment of compensatory damages should be a substantial mitigating factor in our review of punitives. *Id.*

In Exxon's appeal, major issues therefore relate to how, after *State Farm,* to assess the reprehensibility of Exxon's

conduct and the effect of the mitigating factors. An important subsidiary issue is the extent to which we are bound to give literal effect to the sentences in our earlier opinion concerning subtracting the pre-judgment payments from actual harm, even though *State Farm* suggests the mitigating factors should be taken into account differently. For the reasons more fully explained in this opinion, we do not accept the minimal bottom line figure urged by Exxon and properly rejected by the district court. We do, however, conclude there is merit to Exxon's contention that punitives should be reduced.

In their cross appeal, plaintiffs seek a reinstatement of the original $5 billion punitive award. We do not fully adopt their position either because doing so would peg the ratio of punitive damages to harm at a level *State Farm* reserves only for the most egregious misconduct. There was no intentional infliction of harm in this case. In addition, because Exxon's mitigating efforts after the accident diminish the relative reprehensibility of its original misconduct for purposes of reviewing punitive damages, such a high ratio is not warranted in this case.

III. ANALYSIS

A. *Lessons From History.*

The history of the experience of the Supreme Court with punitive damages over the last decade-and-a-half reflects an evolutionary, not a revolutionary, course. In its first opinion in *Haslip,* the Court suggested that there might be a bright line of demarcation between punitive damages that comport with constitutional protections, and punitive damages that do not. *Haslip,* 499 U.S. at 23. Although it did not say what "the line" would be, it termed ratios of punitive damages to compensatory damages of 4 to 1, and to out-of-pocket costs of 200 to 1, to be close to it. *Id.*

In subsequent cases, however, the Court expressly avoided a rigid mathematical formula or limit, while refining its ratio analysis, concluding in *State Farm* that a ratio of punitive damages to actual harm of less than 10 to 1 was more

likely to comport with due process than an award with a higher ratio. *State Farm,* 538 U.S. at 425. Along the way, the Court's experience reflects efforts to comport with the tried and true concepts inherent in due process, i.e., those of notice and fairness. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Int'l Shoe Co. v. Washington,* 326 U.S. 310 (1945).

In *State Farm,* the Court expressly noted its concern that the jury had been allowed to take into account the effect of conduct that may have taken place nationwide on thousands of potential plaintiffs. *State Farm,* 538 U.S. at 422. The unfairness of a defendant being hit with punitive damages many times for the same conduct was central to the Court's analysis in remanding. *Id.* The Court explained, "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case non-parties are not bound by the judgment some other plaintiff obtains." *Id.* at 423.

Indeed, in *State Farm,* the Court stressed that the most important factor is the reprehensibility of the particular conduct in the case. *State Farm,* 538 U.S. at 419. This is because, in assessing the foreseeability of the possible effects of the defendant's conduct as it might bear on punitive damages, the reviewing court is in reality dealing with the traditional concept of the need for fair notice of the possible legal consequences of one's misconduct. *Id.* at 417.

Perhaps because such traditional elements of due process are flexible, the Supreme Court has not often taken on the task of reviewing the amount of punitive damages and has, in fact, overturned only two punitive awards because of their size. Each of them exceeded by a multiple of more than 100 the amount of compensatory payments necessary to compensate a plaintiff for the actual harm caused by the defendant's misconduct. *BMW v. Gore,* 517 U.S. at 582 (striking down a 500:1 ratio); *State Farm,* 538 U.S. at 429 (striking down a 145:1 ratio).

B. *BMW v. Gore/State Farm Guideposts.*

BMW v. Gore identified three guideposts for reviewing punitive damages, and *State Farm* added important refinements. The guideposts are (1) the reprehensibility of the defendant's misconduct, (2) the ratio of punitives to harm, and (3) comparable statutory penalties. They need not be rigidly or exclusively applied, for we agree with our sister circuit that "[t]hese guideposts should not be taken as an analytical straight jacket." *Zimmerman v. Direct Federal Credit Union,* 262 F.3d 70, 81 (1st Cir. 2001). We must, nevertheless, examine them in the context of this case.

1. *Reprehensibility.*

The most important guidepost is the reprehensibility of Exxon's misconduct. *State Farm,* 538 U.S. at 419 (quoting *BMW v. Gore,* 517 U.S. at 575). In our prior opinion, we defined the relevant misconduct supporting punitive damages as Exxon's keeping Hazelwood in command with knowledge of Hazelwood's relapse into alcoholism. We said that "Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound." *Punitive Damages Opinion I,* 270 F.3d at 1237-38. We see no need to reconsider this issue, despite Exxon's invitation to do so.

To evaluate the reprehensibility of the misconduct, *State Farm* refers to five sub-factors: (1) the type of harm, (2) whether there was reckless disregard for health and safety of others, (3) whether there were financially vulnerable targets, (4) whether there was repeated misconduct and (5) whether it involved intentional malice, trickery, or deceit, rather than mere accident. *State Farm,* 538 U.S. at 419.

We must also consider mitigating factors. In *Punitive Damages Opinion I,* in the context of this particular case, we looked to Exxon's response to the catastrophe, including its

prompt cleanup and compensatory payments. We held they were factors mitigating the reprehensibility of the original misconduct. *Punitive Damages Opinion I,* 270 F.3d at 1242. "Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior." *Id.*

The dissent takes issue with two components of our *BMW v. Gore* analysis. Its reasons, however, are surprising, because they contradict our unanimous holding in *Punitive Damages Opinion I,* 270 F.3d at 1242, that the spill was not intentional nor Exxon's conduct malicious. *See Dissent* at 633 [56a] (characterizing Exxon's conduct as "malicious"). Then, the dissent misapplies the Supreme Court's mandate that we must perform an exacting appellate review to ensure that "an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm,* 538 U.S. at 418 (citing *BMW v. Gore,* 517 U.S. at 587).

First, the dissent maintains that the value of defendant's pre-litigation mitigation efforts should not affect punitive damages because the Supreme Court did not explicitly provide for such a calculus in *State Farm. Dissent* at 628 [46a-47a]. Thus, the dissent would reject the principle of *stare decisis* and the law of the case and overturn our holding in *Punitive Damages Opinion I,* 270 F.3d at 1242, that Exxon's voluntary compensation to the plaintiffs effectuated good public policy in making an injured party whole as quickly as possible. We are not prepared to question the soundness of our unanimous conclusion in *Punitive Damages Opinion I* merely because intervening Supreme Court jurisprudence in the insurance context did not address the issue. *See State Farm,* 538 U.S. 408. By contrast here, we have already held that mitigation is both relevant and conscientious in the toxic-tort setting. It would be unwise in reviewing punitive damages to ignore the prompt steps of a defendant to take curative action in a mass tort case.

The dissent also claims that we improperly treat *BMW's* fifth factor, the fault analysis, as a dichotomy with two mutually exclusive options: finding Exxon's conduct intentional and thus grossly reprehensible, or finding it accidental and thus to a large degree excusable. *Dissent* at 630 [51a]. This is not our analysis. We acknowledge that Exxon's conduct was not intended to cause an oil spill, but neither was allowing a relapsed alcoholic to command a supertanker "mere accident." *Majority* at 617 [30a]. Exxon's reckless malfeasance falls in the middle of a continuum between accidental and intentional conduct. Accordingly, the fifth subfactor of the reprehensibility analysis supports neither high nor low reprehensibility on the part of Exxon.

The Supreme Court has reserved the upper echelons of constitutional punitive damages (a 9 to 1 ratio) for conduct done with the most vile of intentions. Thus, an affirmance of the district court's application of such a ratio in this case, where the defendant's conduct was reckless but not intentional, would transgress the requisite constitutional boundaries as the Supreme Court has explained them to date.

We turn now to the specific *State Farm* reprehensibility subfactors. These demonstrate that a 5 to 1 ratio more appropriately comports with due process.

a. *Type of Harm-Physical versus Economic.*

To evaluate the type of harm, *State Farm* instructs us to consider whether "the harm was physical as opposed to economic," because conduct producing physical harm is more reprehensible. *State Farm,* 538 U.S. at 419. In this case the district court found that Exxon's conduct caused no actual physical harm to people, but caused more than mere economic harm to them, because the economic effects of its misconduct produced severe emotional harm as well. We agree with the district court's explanation that "the spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet disrupted the lives (and livelihood) of thousands of claimants for years." *District Court Opinion,* 296 F. Supp. 2d

at 1094.

The Supreme Court has recognized conduct causing emotional as well as economic harm can be more reprehensible than conduct causing mere economic harm. *See BMW v. Gore,* 517 U.S. at 576 n. 24. There it cited *Blanchard v. Morris,* 15 Ill. 35, 36 (1853), a case affirming a $700 punitive award against individuals who caused no physical harm and only $13 of economic harm, but used mental torture to extort it.

In *Bains LLC v. Arco Products Co.,* 405 F.3d 764, 775 (9th Cir. 2005), we held that "intentional, repeated ethnic harassment" increased the level of reprehensibility beyond the merely economic. *See also Swinton v. Potomac Corp.,* 270 F.3d 794, 818 (9th Cir. 2001). The gratuitous, intentional mental oppression of the victims made it "highly reprehensible conduct, though not threatening to life or limb." *Id.* at 777. In *Planned Parenthood v. American Coalition of Life Activists,* 422 F.3d 949, 958 (9th Cir. 2005), we held that a "true threat" increased reprehensibility even though it was not carried out, because the threat was intended to intimidate, and the economic component went beyond reducing the victim's wealth or income to trying to drive the victims away from their practices of medicine. Our *Planned Parenthood* decision was consistent with *BMW's* citation with approval of older decisions upholding awards based on the "mental fear, torture, and agony of mind" caused by the threat of violence. *BMW,* 517 U.S. at 575-76, n. 24.

The district court concluded that the mental distress caused by the oil spill to the fishermen and property owners who were harmed economically justified a higher level of reprehensibility, and Exxon urges that emotional distress damages were not before the jury. Because our review must be *de novo* under *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001), we are not bound by the district court's rationale. The cases discussed above show that punitive damages can-and traditionally do-consider the effects of the tortfeasor's conduct on the victim's mentality,

not just his pocketbook. On the other hand, they may not go so far, and we need not, as to justify punitive damages for accidentally causing mental distress. *State Farm* states that compensatory damages for mental distress generally include a punitive element, so including mental distress in punitive damages may be duplicative. 538 U.S. at 426.

What comes to something near the same result in this case, though it would not in most cases, is the entirely foreseeable disruption to the way tens of thousands people live their lives if a giant oil tanker were to run aground and spill its cargo. When tens of thousands of people have to change the way they make their living, their mental distress is not comparable to a BMW owner, or even a large number of BMW owners, being distressed because their cars were scratched or dented during shipment and repaired without their knowledge. Anyone setting an oil tanker loose on the seas under command of a relapsed alcoholic has to know that he is imposing this massive risk. Though spilling the oil is an accident, putting the relapsed alcoholic in charge of the tanker is a deliberate act. The massive disruption of lives is entirely predictable when a giant oil tanker goes astray. Thus, Exxon's reprehensibility goes considerably beyond the mere careless imposition of economic harm.

b. *Reckless Disregard for Health and Safety of Others.*

The second subfactor we consider in assessing reprehensibility is whether Exxon displayed a reckless disregard for the health and safety of others. *State Farm,* 538 U.S. at 418. We conclude this subfactor also militates toward greater reprehensibility. When Exxon trusted an officer it knew was incompetent to command the *Exxon Valdez* through the treacherous waters of Prince William Sound, Exxon acted with reckless disregard for the health and safety of all those in the vicinity.

The *Exxon Valdez* grounding created a grave risk of physical harm for the crew and those who had to come to its rescue. The district court found that something as simple as an

electro-static discharge could have ignited the crude oil and incinerated everyone in the vicinity. *District Court Opinion,* 296 F. Supp. 2d at 1095. We therefore agree with the district court that Exxon acted with reckless disregard of the health and safety of others when it put in command a person not competent to perform that role.

Exxon argues that *State Farm* requires us to ignore Exxon's disregard of the potential harm to the crew and rescuers because they are not plaintiffs to this litigation. Exxon misreads *State Farm. State Farm* disapproved punishing defendants for conduct in other states in which it might be lawful. 538 U.S. at 421. Likewise, we had held in *White v. Ford Motor Company*, before *State Farm* came down, that a jury's punitive damages award based on extraterritorial conduct (plaintiff's lawyer had made a "send them a message" argument addressing nationwide conduct) violated principles of federalism established in *BMW v. Gore.* 312 F.3d 998, 1013-14 (9th Cir. 2002). These cases do not prohibit consideration of the potential harm to individuals merely because they are not plaintiffs. *See* 538 U.S. at 420-22. The lesson is that the award in the other litigation "should have been analyzed in the context of the reprehensibility guidepost only." *Id.; BMW v. Gore,* 517 U.S. at 574 n.21. *State Farm* therefore holds it is appropriate to look at the risk to others in analyzing reprehensibility. *State Farm,* 538 U.S. at 427.

State Farm does warn against considering dissimilar acts of the defendant, or what is described as acts "independent from the acts upon which liability was premised." *Id.* at 422. The Court explained this is because "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. Here, however, the conduct that threatened the safety of the crew and rescuers is the same conduct that harmed the plaintiffs, and is the conduct that underlies this punitive damages litigation: Exxon's knowingly placing a relapsed alcoholic in charge of the *Exxon Valdez.* The prohibition in *State Farm* against considering dissimilar acts does not apply here be-

cause taking into account the potential harm to the crew and rescuers punishes Exxon for the same conduct that harmed the plaintiffs. We have made this point before. See, for example, *Hangarter v. Provident Life and Accident Insurance Co.*, 373 F.3d 998, 1015 n. 11 (9th Cir. 2004), where we analyzed company-wide policies in a single-plaintiff lawsuit and distinguished *State Farm's* warning against considering dissimilar acts. We said "unlike in *State Farm,* a legally sufficient nexus existed between Defendant's allegedly widespread corporate policies and the termination of [the plaintiff's] benefits." *Id.*

Accordingly, where the same conduct risked harm to all, the risk to all can be considered as a factor in assessing reprehensibility. The district court did not err in recognizing that Exxon recklessly disregarded the physical safety of the crew and rescuers, and thereby increased the reprehensibility of its conduct in putting Hazelwood in command.

c. *Financially Vulnerable Targets.*

The district court found Exxon's conduct harmed financially vulnerable subsistence fishermen. *District Court Opinion,* 296 F. Supp. 2d at 1095. Exxon does not dispute that subsistence fishermen were financially vulnerable or that its reckless actions harmed them. It does contend that this factor applies only in fraud cases when a defendant intentionally defrauds financially vulnerable targets, such as the sick or elderly. While we do not believe the subfactor is so limited, we agree there must be some kind of intentional aiming or targeting of the vulnerable that did not occur here.

The purpose of reprehensibility analysis is to determine "the enormity" of the offense, which "reflects the accepted view that some wrongs are more blameworthy than others." *BMW v. Gore,* 517 U.S. at 575. The notion of "targeting" connotes some element of intent to harm particular individuals or categories of individuals. *See Planned Parenthood,* 422 F.3d at 958-59 (holding plaintiffs were financially vulnerable because the defendants' threats attempted to scare the plain-

tiffs into quitting the jobs on which the plaintiffs' livelihoods depended). Exxon did not intentionally target subsistence fishermen.

We conclude in this case that this consideration does not materially affect our assessment of the reprehensibility of Exxon's conduct.

d. *Repeated Action.*

The district court found that the conduct was repetitive because Exxon repeatedly allowed Hazelwood to command its supertankers for three years after it knew he had resumed drinking. *District Court Opinion,* 296 F. Supp. 2d at 1096. As the district court observed, Exxon did so, even though Exxon was fully aware of the tremendous risk of harm that it entailed. *Id.* "Over and over again, Exxon did nothing to prevent Captain Hazelwood [from sailing] into and out of Prince William Sound with a full load of crude oil." *Id.*

Exxon argues that the relevant conduct is the grounding, not the knowledge of Hazelwood's incapacity to command. That is not consistent with our description of the relevant misconduct in *Punitive Damages Opinion I* as putting (and leaving) Captain Hazelwood in command. *Punitive Damages Opinion I,* 270 F.3d at 1237-38. The district court's finding of repetitive misconduct was not clearly erroneous. *Planned Parenthood,* 422 F.3d at 954. It militates in favor of increased reprehensibility.

e. *Intentional Malice or Mere Accident.*

Putting Captain Hazelwood in command of the supertanker was knowing and reckless misconduct. We agree with the district court that this misconduct was not "mere accident." *District Court Opinion,* 296 F. Supp. 2d at 1096.

Exxon points out that relieving Hazelwood of command would have denied Hazelwood an employment opportunity on the basis of alcoholism and theoretically subjected Exxon to a disability discrimination lawsuit. While Exxon's concerns may have been appropriate considerations in its evaluation of the risk, they do not justify the dangers its decision created to

the livelihoods of tens of thousands of individuals. Spilling the oil was an accident, but putting a relapsed alcoholic in charge of a supertanker was not. And anyone doing so would know they were imposing a tremendous risk on a tremendous number of people who could not do anything about it. Exxon's knowing disregard of the interests of commercial fishermen, subsistence fishermen, fish processors, cannery workers, tenders, seafood brokers and others dependent on Prince William Sound for their livelihoods, cannot be regarded as merely accidental.

At the same time, we must acknowledge that Exxon acted with no intentional malice towards the plaintiffs. We have consistently treated intentional conduct as more reprehensible than other forms of conduct subject to punitive damages. *See Zhang,* 339 F.3d at 1043; *Bains LLC v. Arco Products Co.,* 405 F.3d 764, 775 (9th Cir. 2005); *Southern Union Co. v. Southwest Gas Corp.,* 415 F.3d 1001, 1011 (9th Cir. 2005). In this case, however, as we have already recognized, "as bad as the oil spill was, Exxon did not spill the oil on purpose." *Punitive Damages Opinion I,* 270 F.3d at 1242-43. While the reprehensibility of Exxon's conduct that produced economic harm to thousands of individuals is high, the conduct did not result in intentional damage to anyone. This subfactor thus militates against viewing Exxon's misconduct as highly reprehensible. *Id.*

f. *Mitigation of Reprehensibility.*

In assessing reprehensibility, we must not only take into account the reprehensibility of the original misconduct, but we have held that we must also take into account what has been done to mitigate the harm that the misconduct caused. *Punitive Damages Opinion I,* 270 F.3d at 1242; *see also Swinton,* 270 F.3d at 814-15 (discussing weight and relevance of post-tort mitigation evidence). As we said in *Punitive Damages Opinion I,* mitigation is to be considered "in order to encourage such socially beneficial behavior." *Punitive Damges Opinion I,* 270 F.3d at 1242. Here, Exxon instituted a system of voluntary payments to plaintiffs and it undertook

prompt cleanup efforts. We agree with what we said before: "Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct." *Id.*

g. *Evaluation of Reprehensibility.*

Placing a relapsed alcoholic in control of a supertanker was highly reprehensible conduct. As a result, Exxon disrupted the lives of thousands of people who depend on Prince William Sound for their livelihoods, and endangered its own crew and their rescuers. Over the span of three years, Exxon could and should have relieved Captain Hazelwood of command of supertankers, but it did not do so. at the same time, however, Exxon did not act with malice toward plaintiffs or anyone else; Exxon did not intend to damage plaintiffs' livelihoods or cause them the emotional grief that went with the economic loss.

Thus, Exxon's conduct is in the higher realm of reprehensibility, but not in the highest realm. In addition Exxon's post-grounding efforts to mitigate the harm serve materially to reduce the reprehensibility of the original misconduct. They reduce the reprehensibility for purposes of our review to, at most, a mid range.

2. *Ratio of Harm to Punitives.*

The second *BMW* guidepost, as reiterated and refined by *State Farm,* is the "ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm,* 538 U.S. at 424. The goal of our review at this guidepost is to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426.

a. *Calculating The Harm.*

In this case, the figure the district court used to represent the harm to plaintiffs was $513.1 million. *District Court Opinion,* 296 F. Supp. 2d at 1103. Calculating the total harm to plaintiffs proved to be difficult because, in addition to considerable economic losses, the spill caused other undeni-

able, if not easily quantifiable, harms. *See id.* at 1094. The district court eventually calculated the harm figure by adding the compensatory damages verdict from the second phase of the trial to the actual judgments, settlements, and other recoveries various plaintiffs obtained as a result of the spill. *Id.* at 1099-1101.

Exxon does not dispute that the district court's finding of $513.1 million in harm is fundamentally a valid measure of the actual harm caused by the spill. However, it disagrees that it should be the figure we ultimately use as part of the ratio of punitive damages to harm that we review as the second guidepost.

Exxon's principal contention is that, before establishing the harm figure in the ratio, we must first deduct millions of dollars of payments and costs from the figure representing the total actual harm caused by the spill. Exxon would have us subtract a sum of about $493 million representing amounts paid to plaintiffs through Exxon's voluntary claims program and other settlements. Exxon would then have us use that reduced figure to represent the total harm in assessing the ratio of punitives to harm.

This brings us to the central argument Exxon makes in this appeal. Exxon focuses on the language of our prior opinion in Punitive *Damages Opinion I* where we said, in a lengthy discussion of formulating possible ratios pursuant to *BMW v. Gore,* "[t]he amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would generally deter settlements prior to judgment." 270 F.3d at 1244. Exxon contends this now means that in assessing the ratio of harm to punitives after *State Farm,* we should ignore the total harm in favor of a figure that in fact more closely approximates Exxon's remaining post-judgment liability for compensatory damages.

If we were to adopt Exxon's interpretation of that sentence as binding us now, the measure of harm would be a meager $20.3 million. Applying the ratio of close to 1 to 1 that Exxon

asserts is appropriate, Exxon contends we should cap punitive damages at $25 million. Under Exxon's theory, even using a ratio of 9 to 1, which approaches the highest allowable under *State Farm,* punitive damages would be capped at $182.7 million. This would be the limit, even though Exxon's recklessness led to more than $500 million in harm. We said, in discussing the nature of the relationship between punitive damages and harm:

> The "reasonable relationship" is intrinsically somewhat indeterminate. The numerator is "the harm likely to result from the defendant's conduct." [*BMW v. Gore,* 517 U.S. at 581]. The denominator is the amount of punitive damages. Because the numerator is ordinarily arguable, applying a mathematical bright line as though that were an objective measure of how high the punitive damages can go would give a false suggestion of precision. That is one reason why the Supreme Court has emphasized that it is not possible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." [*BMW v. Gore,* 517 U.S. at 576]....
>
> Although it is difficult to determine the value of the harm from the oil spill in the case at bar, the jury awarded $287 million in compensatory damages, and the ratio of $5 billion punitive damages to $287 million in compensatory damages is 17.42 to 1. The district court determined that "total harm could range from $287 million to $418.7 million," which produces a ratio between 12 to 1 and 17 to 1. This ratio greatly exceeds the 4 to 1 ratio that the Supreme Court called "close to the line" in *Pacific Mutual Life Ins. Co. v. Haslip* [, 499 U.S. at 23].
>
> The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment. "[T]he general policy of federal

> courts to promote settlement before trial is even stronger in the context of large scale class actions," such as this one. [*Cf. Icicle,* 229 F.3d at 795; *Baker,* 239 F.3d at 988].

Punitive Damages Opinion I, 270 F.3d at 1243-44.

The district court rejected the proposition that voluntary payments before judgment should not generally be used as part of the calculation of harm. But our prior decision did not constrain the ratio analysis so firmly as Exxon contends. We did not say that voluntary payments before judgment could not be considered in calculating the numerator for purposes of comparing the numerator with the amount of the award; we said that they "generally" could not. Considerations of settlement, critical to our analysis in *Icicle,* 229 F.3d 790, bear on the due process concerns at the heart of *BMW's* discussion. Whenever a defendant governed by a board is sued for conduct egregious enough to create a genuine risk of punitive damages, those making its litigation decisions have to try to predict what may happen in court. Some may recommend obdurate resistance, and some may recommend settlement, or prejudgment payments even without settlement, each making arguments based on predictions. Those recommending payment can reasonably predict that the entity will not be hammered as hard as if it obstinately resisted acceptance of any responsibility. And their prediction would be reasonable. Criminal penalties have always been somewhat more lenient for those who accepted responsibility prior to judgment, *see United States v. Gonzalez,* 897 F.2d 1018, 1021 (9th Cir. 1990) (upholding the constitutionality of U.S.S.G. § 3E1.1), and punitive damages are but a civil version of punishment for wrongdoing. It makes no practical sense to disarm all those in the future who want their boards to accept some responsibility by cutting out all the benefit their firms would get.

There is a limit, however, to how far acceptance of responsibility goes in both contexts. No criminal defendant guilty of a serious wrong ordinarily resulting in lengthy imprisonment could reasonably assume that he would receive no

imprisonment at all if he promptly pleaded guilty. And no defendant's board could reasonably predict that the defendant could escape all punishment by paying predicted compensatory damages before judgment. While "generally" prepayments should not be used as part of the calculation of harm, *Punitive Damages Opinion I,* 270 F.3d at 1244, that is not a mechanical arithmetic limit, just as the nine to one limit is not a mechanical arithmetic limit. *See State Farm,* 538 U.S. at 425; *Planned Parenthood,* 422 F.3d at 962; *Bains,* 405 F.3d at 776-77. Due process considerations limit punitive damages to what the wrongdoer could reasonably foresee, and that works both ways.

Therefore, Exxon's argument goes too far. It would produce, in Exxon's analysis, a $25 million limit on punitive damages where the harm was $513 million but $493 million was paid before judgment. For purposes of notice to a tortfeasor of its liability risk, $25 million for causing a half billion loss would obviously be too good to be true. A defendant cannot buy full immunity from punitive damages by paying the likely amount of compensatory damages before judgment.

There are also some secondary issues relating to calculating harm. One concerns payments made by Alyeska Pipe Lines Service Corporation. Exxon asks us to set off $98 million that its original co-defendant Alyeska Pipe Lines Service Corporation paid in settlement of plaintiffs' claims. A consortium of oil companies, including Exxon, had contracted with Alyeska to respond to any oil spill in the area. After the *Exxon Valdez* disaster, plaintiffs sued Alyeska for negligence in its response to the spill, and eventually settled all claims against Alyeska, including punitive damages, for $98 million. Exxon's argument here is that this $98 million payment represents harm attributable to Alyeska's negligence, not Exxon's recklessness, and therefore should not be used to calculate damages designed to punish and deter Exxon's own harmful conduct.

There are two major reasons why Exxon's position is not correct. First, the harm caused by the oil spill is attributable to

Exxon under tort law principles. Exxon knowingly placed a relapsed alcoholic in control of a supertanker loaded with millions of gallons of oil. When it did so, Exxon accepted the foreseeable risk from its choice of captain that the tanker would have an accident causing an oil spill, and that Alyeska might further aggravate the harm. *See* Restatement (Second) of Torts §§ 433(a) cmt. c, 447(c),[1] cmt. e.[2] In fact, William Stevens, the President of Exxon, testified before Congress that Exxon knew Alyeska was not prepared to contain a spill of the size caused by the *Exxon Valdez.* Because Exxon could be held liable for this foreseeable risk, the district court properly included the harm caused by Alyeska's response as the natural consequence of the harm caused by Exxon.

Second, the situation Exxon now complains of is strictly of its own making. In 1994, the Supreme Court held that the proportional fault rule governs calculation of non-settling defendant's liability for compensatory damages in maritime torts. *See McDermott, Inc. v. AmClyde,* 511 U.S. 202 (1994). Instead of following *McDermott,* Exxon agreed with plaintiffs to proceed as if a pro tanto rule with respect to co-defendants' settlements still governed.[3] Exxon apparently thought it more

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[1] "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if ... (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

[2] "The words 'extraordinarily negligent' denote the fact that men of ordinary experience and reasonable judgment, looking at the matter after the event and taking into account the prevalence of that 'occasional negligence,' which is one of the incidents of human life,' would not regard it as extraordinary that the third person's intervening act should have been done in the negligent manner in which it was done. Since the third person's action is a product of the actor's negligent conduct, there is good reason for holding him responsible for its effects, even though it be done in a negligent manner, unless the nature of the negligence is altogether unusual."

[3] The stipulation between the parties reads in relevant part:

advantageous at the time to have the $98 million deducted from the final compensatory damage award after the fact, rather than have the jury make a proportionate fault finding. Since Exxon has already agreed that the $98 million does not represent harm attributable to Alyeska, Exxon is not warranted in asserting that this is what it represents now.

Exxon also contends that some $34 million included in the district court's harm finding should not properly be considered harm at all. This figure represents an apparent $9 million overpayment by the Trans-Alaska Pipeline Liability Fund, $13.4 million from the Phase IV settlement Exxon claims is already accounted for elsewhere in the district court's calculations, and $11.5 million paid to Native corporations and municipalities for environmental clean up.

We conclude that the $9 million overpayment, inadvertently included in the district court's findings, should be subtracted from the total harm. Because Exxon does not specify where the $13.4 million in double-counting is reflected in other parts of the district court's calculation, however, we are unable to determine from our own review of the record where they might be included. Therefore, Exxon has failed to convince us that this figure should be reduced from the harm.

Finally, the $11.5 million Exxon paid to the plaintiffs for

"[N]otwithstanding the rule of proportionate shares set out in *McDermott, Inc. v. AmClyde,* credit for the Aleyska settlement ... shall be deducted from the sum that would, in the absence of this stipulation, be the aggregate amount of any judgment or judgment in favor of plaintiffs ... and the liability of Exxon and Shipping for compensatory damages to any and all plaintiffs herein shall be reduced by the aggregate sum of $98 million.... The parties expressly recognize and agree that the sum of $98 million is not necessarily a fair measure of what would be Alyeska's proportionate share of liability to plaintiffs[,] but the parties are entering into this Stipulation in order to avoid the alteration of their trial preparation that would result from a last-minute overturning of the parties' assumption that[the pro tanto approach] would govern at trial and from requiring litigation of Alyeska's proportionate share."

clean up, like its early settlement of plaintiffs' prospective commercial losses, is a mitigating factor relevant to our judgment about whether this punitive damages award is appropriate. Like the earlier settlements the proper place for its influence is as a mitigating circumstance to be considered in our overall determination of the ratio's reasonableness. It does, however, represent a part of the total harm for which Exxon is accountable.

In sum, the district court's attempt to approximate the actual harm by adding together the various judgments, settlements, and liabilities that Exxon had already acknowledged was sound. Subtracting the $9 million Trans-Alaska Pipeline Liability Fund overpayment that the district court inadvertently overlooked, we conclude this record supports a total harm component of $504.1 million for purposes of analyzing the ratio of harm to punitives.

b. *Evaluating the Reasonableness of the Ratio of Harm to Punitives.*

After our second remand, the district court reduced the original punitive damages award of $5 billion to $4.5 billion. This yielded a punitive damages to harm ratio of 8.77 to 1. After our $9 million adjustment to the harm figure, that ratio now stands at 8.93 to 1-a proportion bordering on the presumption of constitutional questionability. *See State Farm,* 538 U.S. at 425

In *State Farm,* the Supreme Court explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. Relatively high single-digit ratios and perhaps even double-digit ratios may comply with due process where "a particularly egregious act has resulted in only a small amount of economic damages" or where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine." *Id.* (quoting *BMW v. Gore,* 517 U.S. at 582). Conversely, lower single-digit ratios, even as low as 1 to 1, might mark the outer

limits of due process where compensatory damages are substantial. *Id.* This strongly suggests the ratio here is too high.

Our own decisions are also helpful. In *Planned Parenthood,* we used this guidance from *State Farm* to construct a "rough framework" for determining the appropriate ratio of punitive damages to harm. *See* 422 F.3d at 962. We held that in cases where there are "significant economic damages" but behavior is not "particularly egregious," a ratio of up to 4 to 1 "serves as a good proxy for the limits of constitutionality." *Id.* (citing *State Farm,* 538 U.S. at 425). In cases with significant economic damages and "more egregious behavior," however, a single-digit ratio higher than 4 to 1 "might be constitutional." *Id.* (citing *Zhang,* 339 F.3d at 1043-44; *Bains,* 405 F.3d at 776-77). Finally, in cases where there are "insignificant" economic damages and the behavior is "particularly egregious," we said that "the single-digit ratio may not be a good proxy for constitutionality." *Id.*

The circumstances of this case fit into the second class of cases in the *Planned Parenthood* framework. Exxon's reckless decision to risk the livelihood of thousands by placing a relapsed alcoholic in command of a supertanker, while mollified by its prompt settlement and clean up policies, was "particularly egregious." Moreover, the $500 million of loss is well within the range of "significant" economic damages. Thus, under *Planned Parenthood,* an appropriate ratio would be above 4 to 1.

Our review of the reprehensibility and mitigation under the first guidepost of reprehensibility, however, compels us to conclude the award should be toward the lower end of that range. Our cases have generally reserved high single-digit ratios for the most egregious forms of intentional misconduct, such as threats of violence and intentional racial discrimination. *See Zhang,* 339 F.3d at 1044 (upholding a ratio of 7:1 for intentional racism); *Bains,* 405 F.3d at 776-77 (remanding for district court to set a ratio between 6:1 and 9:1 for intentional racism); *Planned Parenthood* 422 F.3d at 952, 963 (remitting to a 9:1 ratio for threats of violence). Exxon's conduct in this

case, while inexcusable, did not involve any intentional conduct that would normally be required to support a punitive damages award with a high single-digit ratio.

Here mitigating factors also come into play. Exxon instituted prompt efforts to clean up the spill and to compensate the plaintiffs for their economic harm. As we earlier observed, if a defendant acts promptly to ameliorate harm for which it is responsible, the size of a punitive damages award should be reduced to encourage socially beneficial behavior. *Punitive Damages Opinion I,* 270 F.3d at 1242. Moreover, the costs that Exxon incurred in compensating the plaintiffs and cleaning up the oil spill have already substantially served the purposes of deterrence, lessening the need for a high punitive damages award. *Id.* at 1244.

Thus, Exxon's conduct was particularly egregious and involved significant economic damages. Nevertheless, its conduct was not intentional and it promptly took steps to ameliorate the harm it caused. With these considerations in mind, we conclude that a punitive damages to harm ratio of more than 5 to 1 would violate due process standards under current controlling Supreme Court and Ninth Circuit authority.

3. *Comparable Penalties.*

The third *BMW v. Gore/State Farm* guidepost is comparable legislative penalties. Given the emphasis on this factor in *BMW v. Gore,* we went to some lengths in *Punitive Damages Opinion I* to extrapolate the comparable penalties that would be imposed under state and federal law for the spill, the highest being approximately $1.03 billion dollars.

In *State Farm,* however, the Supreme Court stated that "need not dwell long on this guidepost." *State Farm,* 538 U.S. at 428. In that case, the comparable penalties were not particularly informative: the comparable civil penalty was easily "dwarfed" by the punitive award, and as to criminal penalties, the Court explained that although their existence "does have bearing on the seriousness with which a State views the

wrongful action," they had "less utility" "[w]hen used to determine the dollar amount of the award." *Id.*

In our own circuit's more recent post-*BMW v. Gore* and *State Farm* cases, we have generally not attempted to quantify legislative penalties. We have looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws. *See, e.g., Planned Parenthood,* 422 F.3d at 963. In several recent decisions we have not discussed the factor at all. *See Southern Union Co.,* 415 F.3d at 1009-11 (9th Cir. 2005); *Hangarter,* 373 F.3d at 1014-15. This may be because legislative judgments, unlike jury verdicts, do not represent an individualized assessment of reprehensibility.

Here, the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures, with Congress enacting a specific statute after the spill, and state and federal law having already authorized substantial penalties. *See Punitive Damages Opinion I,* 270 F.3d at 1245-46. Thus, the third *BMW v. Gore/State Farm* factor, substantial legislative penalties, supports our conclusion that Exxon's reckless conduct merits substantial punitive damages.

IV. CONCLUSION

For the foregoing reasons, Exxon's reckless misconduct in placing a known relapsed alcoholic in command of a supertanker, loaded with millions of barrels of oil, to navigate the pristine and resource abundant waters of Prince William Sound was reckless and warrants severe sanctions. The misconduct did not, however, warrant sanctions at the highest range allowable under the due process analysis, as explained in the Supreme Court's most recent opinion in *State Farm.*

The district court's imposition of punitive damages of $4.5 billion, entered after our remand to reconsider due process in light of *State Farm,* represents damages at the very highest range, and is not warranted. It is not consistent with the Supreme Court's opinion in *State Farm* or with the most important tenets of our prior opinion in *Punitive Damages Opinion I* relating to Exxon's mitigation of reprehensibility.

Although a one to one ratio marked the upper limit in *State Farm,* the conduct here was far more egregious and justifies a considerably higher ratio. An award of damages representing a ratio of punitives to harm of 5 to 1 is consistent with both.

The judgment of the district court is VACATED, and the matter is remanded with instructions that the district court further reduce the punitive damages award to the amount of $2.5 billion. We have decided pursuant to the *de novo* standard of review imposed by *Leatherman,* 532 U.S. at 436, that this is the appropriate limit on punitive damages in this case under the prevailing legal precedent. Thus, we do not remand for further consideration of what the limit may be. It is time for this protracted litigation to end.

VACATED AND REMANDED.

BROWNING, Circuit Judge, dissenting.

Because I believe the punitive damages award in this case is not "grossly excessive," I would affirm. In reviewing the size of a punitive damages award, our sole duty is to ensure its imposition does not violate due process. Where an award lies within the bounds of due process, as this one does, we may not substitute a figure we consider more reasonable for one fairly awarded by a jury and properly reviewed by a district court. Therefore, I respectfully dissent.

1. Due Process Review of Punitive Damages

To comport with the Constitution, a punitive damages award must strike the proper balance between the state goals of deterrence and retribution and a defendant's due process right to be free from arbitrary punishment. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416-17 (2003). The Supreme Court has determined the balance is upset at the point an award becomes "grossly excessive," reasoning that, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417 (citing *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 42 (1991)).

But as the majority notes, *ante* at 612 [20a], the Court has shown little inclination to define "grossly excessive" more concretely. *See State Farm,* 538 U.S. at 424; *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 582 (1996). While it has several times hinted at the possibility of establishing a 4 to 1 bench-mark ratio of punitive damages to compensatory damages, it has never explicitly done so. *See State Farm,* 538 U.S. at 425 (citing *BMW,* 517 U.S. at 581; *Haslip,* 499 U.S. at 23-24). Instead, the one constitutional limit the Court has identified is that generally found between single-digit and double-digit multipliers. *See id.* ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.... Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [or] 145 to 1." (internal citations omitted)).

The Supreme Court's reluctance to establish a more concrete limit, or to adopt any other sort of categorical approach, counsels that in cases such as the one at bar, "[t]he judicial function is to police a range, not a point." *Mathias v. Accor Econ. Lodging, Inc.,* 347 F.3d 672, 678 (7th Cir. 2003) (citing *BMW,* 517 U.S. at 582-83; *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443, 458 (1993)). We should let this punitive damages award stand unless the *BMW* factors indicate with some certainty that it was the product of caprice or bias such that its imposition violates Exxon's right to due process.[4] "Assuming that fair procedures were followed, a judgment

[4] The majority correctly recognizes, *ante* at 602 [3a], that a determination that an award is "grossly excessive" is reviewed de novo. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001). De novo review, however, is only applied to determine the constitutional upper limit on a punitive damages award in a given case. If the award does not exceed this ceiling, we owe deference to the determination of the district court and jury. *See id.* at 433-34 (noting that within substantive limits on an award, the jury has discretion in establishing the precise number). *Cooper* does not give us free reign to pick the number we would have chosen had we sat as the jury or district court.

that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so." *TXO,* 509 U.S. at 457 (plurality opinion) (internal citations omitted).

No procedural concerns are present here that, at the outset, might weaken the "strong presumption of validity" to which this award is entitled. *See BMW,* 517 U.S. at 586-87 (Breyer, J., concurring) (citing *TXO,* 509 U.S. at 457; *Haslip,* 499 U.S. at 40-42); *see also id.* at 583("In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."). The jury received thorough, almost prescient, punitive damages instructions.[5] And although Exxon is a large corporation, there is no indication that the size of this punitive damages award resulted from an improper "emphasis on the wealth of the wrongdoer" at trial, *see TXO,* 509 U.S. at 464, or from an attempt by Plaintiffs or the jury to "make up for the failure of other factors, such as 'reprehensibility,'" *see BMW,* 517 U.S. at 591 (Breyer, J., concurring).[6]

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[5] The district court explained the retributive and deterrent purposes of punitive damages and the "appropriate," i.e., non-environmental, countervailing "Alaska-oriented" interests of the plaintiffs; cautioned the jury that punitive damages must have a rational basis in the record and bear a reasonable relationship to the harm; admonished the jury not to be arbitrary; and, perhaps most importantly, alerted them that they could take Exxon's mitigation efforts into account when determining both whether punitive damages were warranted and, if so, the size of the award. *See In re Exxon Valdez,* 296 F. Supp. 2d 1071, 1091 (D. Alaska 2004). Considering that *BMW* and *State Farm* were decided after the jury trial, these instructions indeed were, as the majority notes, *ante* at 604 [7a], "in retrospect, quite forward looking."

[6] Indeed to the contrary, there is evidence in the record comparing this award to Exxon's wealth in a manner that suggests the award was neither capricious nor an instance of over-deterrence. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1105-06 ("[A]fter judgment was entered on the punitive damages award, Exxon's treasurer advised the court that 'the full payment of the Judgment would not have a material impact on the corporation or its credit quality.'").

Furthermore, Exxon's conduct implicates a strong state interest in punishing reckless behavior and deterring its future repetition. Our constitutional review must consider punitive damages in the context of these state interests. *See id.* at 568 ("Only when an award can fairly be categorized as 'grossly excessive' *in relation to these interests* does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (emphasis added)). In both *State Farm* and *BMW,* the Court's guidepost analysis was not an entirely separate endeavor, but instead gave structure to its constitutional concern that the defendants' due process rights were violated by judgments incorporating punishment for conduct not properly before the awarding court. *See State Farm,* 538 U.S. at 419-24 (discussing out-of-state conduct and conduct unrelated to plaintiffs' injuries); *BMW,* 517 U.S. at 568-73 (describing out-of-state conduct).

In stark contrast, there is no concern here that the scope of appropriate state interests has been exceeded. This punitive damages award was imposed pursuant to strong, but properly circumscribed, state interests. As the district court noted, Plaintiffs' collection of federal and state claims all arise out of harm to "Alaska fisheries, Alaska business,[and] Alaska property" caused by Exxon's conduct having "a direct nexus with the grounding of the Exxon Valdez on Bligh Reef in Prince William Sound." *See In re Exxon Valdez,* 296 F. Supp. 2d at 1090-91.

Thus, before engaging in the multi-factored analysis introduced in *BMW* and reiterated in *State Farm,* it is important to note that we are not faced here with any of the major constitutional concerns present in those cases.

2. BMW *Guidepost Analysis*

Although I agree with much of the majority's analysis under *BMW* and *State Farm,* I cannot agree with it all. Despite clear guidance from the Court that reprehensibility is the critical factor, the majority, *ante* at 613 [22a], 618 [30a], gives defining weight to a consideration entirely of its own creation.

It then engages, *ante* at 623-24 [38a-40a], in what appears to be the very "categorical approach" the Supreme Court has consistently rejected. *See BMW,* 517 U.S. at 582. An appropriate evaluation of the award in question demonstrates it is constitutionally permissible.

(a) Reprehensibility

In its most recent punitive damages opinion, the Supreme Court gave direct instruction to courts evaluating reprehensibility. *State Farm,* 538 U.S. at 419. As the majority correctly notes, *ante* at 610 [17a], we must weigh five factors: (1) whether the harm was solely economic, (2) whether the conduct showed indifference to or reckless disregard for others' health and safety, (3) whether the conduct's target was financially vulnerable, (4) whether the conduct involved repeated actions, and (5) whether the harm resulted from intentional malice or mere accident. *State Farm,* 538 U.S. at 419. Somewhat inexplicably, though, the majority adds to the *State Farm* factors one of its own creation-post-tort mitigation. *See ante* at 613 [22a] ("We must also consider mitigating factors."); *id.* at 618 [30a]. I do not agree that mitigation should be considered in a reprehensibility analysis. Furthermore, unlike the majority, I believe that all five *State Farm* factors weigh in favor of finding that Exxon's reckless conduct was highly reprehensible.

(i) Mitigation

I cannot agree with the majority's assertion that we must consider Exxon's post-tort mitigation in evaluating the reprehensibility of its original misconduct. *See ante* at 613 [22a]. The majority is correct that when we previously considered Exxon's conduct, we suggested mitigation should be considered as part of the reprehensibility analysis. *See Baker v. Hazelwood (In re the Exxon Valdez)*, 270 F.3d 1215, 1242 (9th Cir. 2001) [hereinafter *Punitive Damages Opinion I*]. However, subsequent to our decision in *Punitive Damages Opinion I,* the Supreme Court decided *State Farm,* which significantly refined the Court's punitive damages jurispru-

dence. The analysis of reprehensibility in *State Farm* differs from our analysis in *Punitive Damages Opinion I*, and, as intervening controlling authority, gives us reason to reconsider our prior approach. *See United States v. Bad Marriage*, 439 F.3d 534, 538 (9th Cir. 2006) (noting that a court may reexamine an issue it previously decided if "intervening controlling authority makes reconsideration appropriate").

When we considered mitigation in *Punitive Damages Opinion I*, Supreme Court precedent provided limited guidance for the reprehensibility analysis. In *State Farm*, however, the Supreme Court explained that courts should use five specific factors to evaluate reprehensibility. 538 U.S. at 419. Although there was evidence of mitigation in *State Farm*, *id.* at 426, the Court did not include mitigation as one of the factors in the reprehensibility analysis. Given such explicit guidance, this omission acquires particular significance and suggests we reconsider our prior statement about mitigation.[7] As explained below, upon reconsideration I find that including mitigation in the reprehensibility analysis is neither good law nor good policy.

Aside from a single mention of mitigation in *Punitive Damages I*, the majority's approach is supported by neither Supreme Court precedent nor our own precedent. The majority cites *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), as support, even though *Swinton,* like *Punitive Damages Opinion I,* was decided prior to *State Farm.* Therefore, it did not have the benefit of the Supreme Court's most recent and comprehensive analysis of reprehensibility. Furthermore, *Swinton* did not consider whether mitigation warrants a reduction in a punitive damages award imposed by a jury. Rather, our analysis was limited to the question of whether the district court erred in excluding evidence of mitigation efforts

[7] The majority suggests *State Farm* is distinguishable because the dispute concerned an insurance contract rather than a toxic tort. *See ante* at 602 [4a], 614 [23a]. However, the five-part reprehensibility analysis in *State Farm* is designed to evaluate a broad range of conduct, and nothing in the opinion indicates this framework applies only to insurance cases.

in an employment discrimination suit. *See id.* at 811, 815. We refused in that case to create a generalized rule in the employment context or anywhere else. *See id.* at 814-15. Instead, we left it to the discretion of the district courts to decide the relevancy of mitigation efforts on a case-by-case basis.

We also expressly rejected the idea that the Supreme Court endorses the categorical relevance of mitigation in punitive damages calculations. *See id.* at 812 ("We do not interpret the language in *BMW* and *Cooper* as relying on evidence of post-occurrence remediation for overturning the punitive damages awards; rather the Court appears simply to have been recounting a full history of the litigation to give a complete picture of the proceedings."). While post-tort mitigation by a defendant may or may not be relevant to a jury's determination of whether and in what amount to award punitive damages, *Swinton* gives no support to the majority's position that mitigation is properly considered as part of the reprehensibility analysis in a constitutional review.

Additionally, the majority's approach makes little sense as a matter of policy, for it runs directly counter to the twin goals of punitive damages: deterrence and retribution. *See State Farm,* 538 U.S. at 416 ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution."); Theodore Eisenberg, *Damage Awards in Perspective,* 36 Wake Forest L.Rev. 1129, 1145 (2001) ("[A] wrongdoing party's voluntary-to the extent payments are truly voluntary after being 'caught'-remediation payment does not reduce the propriety of punishing or deterring."). While including mitigation in the reprehensibility analysis doubtlessly increases the incentive to remediate, it does so at the expense of undermining deterrence and retribution. The majority's approach minimizes deterrence by creating a post-tort means of limiting punitive damages. This allows potential tortfeasors to engage in risky behavior, safe in the knowledge they can minimize liability for any resulting harm by prompt payment of foreseeable damages. It also cripples the state's interest in retribution, as it allows the tortfeasor, rather than the jury, to

recharacterize the reprehensibility of its misconduct after a tort has been committed. *Cf. Cooper,* 532 U.S. at 432 (recognizing that the "imposition of punitive damages is an expression of [the jury's] moral condemnation").

Nonetheless, the majority insists that including mitigation in the reprehensibility analysis is good public policy because it encourages socially beneficial conduct. *Ante* at 618 [30a]. A company in Exxon's position, however, already has significant incentives to clean up its mess. Had Exxon not taken prompt action to clean up the oil spill and compensate injured parties, *see ante* at 602 [4a], the actual harm caused could well have exceeded the $504.1 million figure we use as the numerator in our ratio analysis. *See ante* at 623 [38a]. Specifically, if eleven billion gallons of oil were left indefinitely in Prince William Sound, and injured parties were without resources to start their lives anew, both economic and social harm would have grown. This would have increased Exxon's liability not only for compensatory damages, but also for punitive damages. Greater actual harm translates to a larger punitive damages numerator and a higher ceiling for the punitive damages award. Thus, mitigation is already reflected in the calculation of compensatory damages and in our constitutional review of the jury's punitive damage award.

Moreover, I am not convinced the majority's approach will ultimately encourage defendants to settle. *Cf. Franklin v. Kaypro Corp.,* 884 F.2d 1222, 1229 (9th Cir.1989) (noting there is an "overriding public interest" in promoting settlement). Instead, I fear it has the unintended consequence of giving tortfeasor defendants a way to reduce the risk of litigation *without* reaching a settlement with injured parties. Under our past precedent, the threat of a significant punitive damages award created a strong incentive for defendants to pay injured parties in exchange for a release or similar arrangement.[8] The majority's approach, however, allows de-

[8] In this case, the certification of a mandatory punitive damages class meant that individual plaintiffs could not reduce the ultimate punitive

fendants to limit their exposure to punitive damages by taking unilateral steps, even token ones, to remediate harm. I am concerned this will frequently lead to more protracted litigation, as injured parties will not necessarily be satisfied with defendants' mitigation efforts, and defendants will have less incentive to reach settlement agreements. Thus, policy implications support the legal conclusion that it is not appropriate to add mitigation to the *State Farm* factors.

(ii) State Farm *Factors*

Because I see no basis for the majority's inclusion of mitigation in our due process reprehensibility analysis, I consider only the five factors outlined by the Supreme Court. I agree with the majority that the first, second, and fourth factors[9] suggest Exxon's conduct was highly reprehensible and capable of supporting a substantial award. However, I cannot agree with the analysis concerning the fifth factor, whether

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damages award by releasing their claims. *See In re Exxon Valdez,* 229 F.3d 790, 793 (9th Cir. 2000) ("Claims for compensatory damages could be easily disposed of by exchanging payment for releases, but a plaintiff's release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself."). However, several plaintiffs nonetheless used the looming punitive damages award as a bargaining chip by allocating Exxon a portion of any award they might receive. *See ante* at 604 [7a-8a].

[9] I am not convinced by the majority's analysis of the third factor, but I do agree that it plays a relatively small role in this case and therefore does not warrant an extended discussion. The majority classified as neutral the third factor, whether "the target of the conduct had financial vulnerability," *see State Farm,* 538 U.S. at 419. As the majority admits, *ante* at 617 [30a], by recklessly placing a "relapsed alcoholic in charge of a supertanker," Exxon knew that it was "imposing a tremendous risk on a tremendous number of people who could not do anything about it." Not only were many of those people "financially vulnerable" by virtue of being subsistence fishermen, but they were also particularly vulnerable to the specific risk imposed on them by Exxon. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1094-95. Thus, I would find this factor indeed suggests Exxon's reckless conduct was highly reprehensible. *See BMW,* 517 U.S. at 576 ("To be sure, infliction of economic injury, especially ... when the target is financially vulnerable, can warrant a substantial penalty.")

"the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm,* 538 U.S. at 419. As the majority recognizes, Exxon's decision to put a relapsed alcoholic in charge of a supertanker constituted knowing and reckless misconduct, which was neither intentionally malicious nor a mere accident. *Ante* at 617-18 [30a]. However, faced with conduct that does not fit squarely in either category mentioned in *State Farm,* the majority arbitrarily determines this factor weighs against high reprehensibility because Exxon "did not spill the oil on purpose." *Id.,* at 618. I cannot agree with this conclusion for two reasons.

First, if we read this *State Farm* factor to recognize only two categories of conduct, the fact that Exxon's acts fall in neither category could suggest this is a neutral factor, weighing neither for nor against high reprehensibility. However, if the majority is correct that we must determine whether Exxon's conduct is more similar to one category or the other,[10] I believe it is closer to "intentional malice, trickery, or deceit" than to "mere accident." *State Farm,* 538 U.S. at 419; *Cf. Black's Law Dictionary* 968 (7th ed.1999) (defining malice as, *inter alia,* "[r]eckless disregard of the law or of a person's legal rights"). The jury held Exxon responsible not merely for spilling oil, but rather for knowingly giving command of a supertanker "carrying over 53 million gallons of volatile, toxic, crude oil" to a relapsed alcoholic. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1097. Exxon did so for three years with full knowledge of the tremendous risk of serious harm to the health, safety, and livelihood of many people. *See ante* at 615-16 [26a]. This cannot fairly be described as an

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[10] Contrary to the majority's assertion, *ante* at 614 [24a], I do not suggest it views Exxon's conduct as a largely excusable accident. Rather, I note that in finding this factor "militates against viewing Exxon's misconduct as highly reprehensible," *ante* at 618, the majority treats Exxon's reckless misconduct as it would treat an accident. This is not consistent with the majority's own statement that "the reprehensibility of Exxon's conduct that produced economic harm to thousands of individuals is high ..." *Id.*

accident. Given the extreme recklessness of Exxon's conduct, I would conclude the fifth factor militates in favor of finding Exxon's behavior highly reprehensible. *Accord Swinton,* 270 F.3d at 818 (holding that conduct which was, at most, reckless disregard for others' health and safety, easily "constitutes highly reprehensible conduct justifying a significant punitive damages award").

Thus, unlike the majority, I find that all five of *State Farm's* reprehensibility factors suggest that Exxon's reckless conduct in this case-the malicious endangerment of the property and livelihood of thousands of Alaskans-was highly, if not extremely, reprehensible and capable of "warrant [ing] a substantial penalty." *See BMW,* 517 U.S. at 576.

(b) Ratio

Under the second *BMW* guidepost, we must analyze "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *See id.* at 418. While I agree with the majority's "calculation of harm," or "numerator," analysis, *ante* at 623 [38a], I cannot agree with its conclusion, *id.* at 624 [40a], that the Constitution prohibits a ratio in this case above 5 to 1. The majority arrives at this constitutional limit through two steps. First, it uses the "rough framework" of *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,* 422 F.3d 949 (9th Cir. 2005), to arrive at the conclusion that the appropriate ratio in this case is above 4 to 1, but no greater than 9 to 1. *Ante* at 623 [39a-40a]. However, it then asserts the proper ratio cannot be much greater than 4 to 1 because Exxon's conduct was not intentional and because Exxon attempted to mitigate the harm it caused. *Ante* at 623-24 [40a]. I cannot agree with this.

In *Planned Parenthood*, we established a three-tiered "rough framework" to guide us in determining an appropriate ratio.[11] Applying *Planned Parenthood* to this case, the ma-

[11] Where the economic damages are significant but the behavior not "particularly egregious," a ratio of less than 4 to 1 is warranted. *Planned*

jority concludes a 4 to 1 benchmark is appropriate based on its determination that the economic damages are "significant." *Ante* at 623 [39a]. As an initial matter, the majority's assessment of economic damages focuses on a number devoid of its context. An award is significant not because it is numerically large, but rather because it approaches full compensation for the plaintiff's harms. *See State Farm*, 538 U.S. at 426 ("The compensatory award in this case was substantial;[the plaintiffs] were awarded $1 million for a year and a half of emotional distress. This was complete compensation."). I am not convinced that a compensatory damages award that equates to a mere $10,000 per plaintiff is actually "substantial" in the way the Supreme Court uses the term. *Cf. id.* at 425 (providing, as an example of "small" economic damages, cases where the injury was hard to detect or not fully economic in nature).

Even if the majority were correct that the economic damages awarded in this case are "significant," *Planned Parenthood* still does not support a 4 to 1 benchmark in this case. In *Planned Parenthood*, we refused to remit the award to less than a 9 to 1 ratio because not all of the plaintiff's damages were quantifiable, not all of it was compensated, and the plaintiffs were likely to incur further costs. 422 F.3d at 963. All three are true here as well. The oil spill disrupted the social fabric of the plaintiffs' community. *See In re Exxon Valdez*, 296 F. Supp. 2d at 1094. This type of harm is not easily quantifiable. Moreover, the plaintiffs' recovery in this case was limited to economic harm. It therefore did not compensate the plaintiffs for harm attributable to increased "social conflict, cultural disruption and psychological stress." *Id.* Finally, there is evidence the plaintiffs have incurred substantial further costs. *See id.* Thus, it cannot be said the

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Parenthood, 422 F.3d at 962. If the economic damages are significant but the behavior "more egregious," a ratio greater than 4 to 1 might be acceptable. *Id.* Finally, if the economic damages are insignificant but the behavior is "particularly egregious," ratios beyond single digits may be appropriate. *Id.*

compensatory damages in this case are so large or sufficiently comprehensive they warrant a lower punitive damages award.

Nor, in my mind, does the majority find support in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), or *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005). That we upheld an award in the 7 to 1 range in *Zhang*, and remanded for a similar award in *Bains*-both for intentional racial discrimination in the employment context-says little if nothing about the constitutionality of this award for the reckless endangerment of the property and livelihood of tens of thousands of people. While it is true any given conduct is more reprehensible if intentional than if reckless, it does not necessarily follow that all intentional conduct is more reprehensible than all reckless conduct. Indeed, because we are the first court to review an award for misconduct resulting in harm of the type and scale at issue here, I find it unhelpful to note that our cases to date "have generally reserved high single-digit ratios for the most egregious forms of intentional misconduct, such as threats of violence and intentional racial discrimination." *See ante* at 623 [39a]. Instead, every indicator in this case suggests that Exxon's reckless conduct-leaving for three years a known alcoholic in command of a supertanker in treacherous waters upon which thousands of people depend-is egregious enough to support an award within the 9 to 1 range. *Accord Swinton*, 270 F.3d at 818-20 (upholding a 28 to 1 ratio despite recognizing that the conduct at issue involved no acts or threats of violence and, therefore, "[did] not amount to the worst kind of tortious conduct a defendant can commit").

One final consideration convinces me that the 8.93 to 1 ratio in this case does not indicate that Exxon has been subject to a "grossly excessive" punitive damages award. In State Farm, the Supreme Court reiterated that it is appropriate to consider for purposes of ratio calculation not only the actual harm caused, but the potential harm that a defendant's misconduct could have foreseeably caused. *See* 538 U.S. at 418 (describing the second guidepost as requiring consideration of

"the actual or potential harm suffered" (emphasis added) (citing *BMW*, 517 U.S. at 575)); *accord TXO*, 509 U.S. at 460 ("Taking account of the potential harm that might result from the defendant's conduct in calculating punitive damages was consistent with the views we expressed in *Haslip*." (internal citation omitted)). As the majority recognizes, *ante* at 615 [26a], the potential harm from Exxon's decision to keep Hazelwood in command of the *Exxon Valdez* was both massive and foreseeable. But despite the propriety of such consideration, the calculation of harm in this case explicitly incorporates only an estimate of actual, and not of potential, harm. *See In re Exxon Valdez*, 296 F. Supp. 2d at 1103; *ante* at 623 [38a]. Thus, if anything, the jury's punitive damages award potentially undervalued the harm.

Conclusion

In accordance with *State Farm* and its predecessors, we are required to subject this award to "exacting [de novo] appellate review" in order to ensure it is "based upon an application of law, rather than a decisionmaker's caprice." *See* 538 U.S. at 418 (internal quotation marks omitted) (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). But that review does not empower us to substitute our own, perhaps more finely-tuned, award for one that was fairly awarded and already lies within the range of constitutional awards. *See BMW*, 517 U.S. at 583 (noting that most awards fall within a "constitutionally acceptable *range*" (emphasis added)).

After thorough and concerned analysis of this punitive damages award, I conclude that its imposition does not violate Exxon's constitutional right to due process. The award was levied as a result of fair procedure and in pursuit of the undisputedly strong, and properly circumscribed, state interests in punishing Exxon for its misconduct, and in deterring any similar behavior by Exxon in waters it continues to frequent. While the award is large, it addresses what must be characterized as extremely reprehensible misconduct. There is simply no excuse for allowing a relapsed alcoholic to pilot a supertanker in any waters, much less for three years in the

treacherous and treasured waters of Prince William Sound. Exxon's knowing decision to do so was a malicious one that placed at massive risk, and ultimately seriously injured, the property and livelihood of tens of thousands of Alaskans. There is every indication the award before us reasonably addresses that egregious behavior, and nothing in the record that suggests it resulted from passion, bias, or caprice. I therefore agree with the district court's assessment that there is no principled means by which this award should be reduced. *See In re Exxon Valdez,* 296 F. Supp. 2d at 1110. Accordingly, and with respect, I dissent.

APPENDIX B

United States Court of Appeals,
for the Ninth Circuit.

In re: The EXXON VALDEZ, Grant Baker, et al., as representatives of the Mandatory Punitive Damages Class, *Plaintiffs-Appellees*, *v.* Joseph Hazelwood, *Defendant*, and Exxon Corporation; Exxon Shipping Company, *Defendants-Appellants.* Grant Baker, et al., as representatives of the Mandatory Punitive Damages Class, *Plaintiffs-Appellees*, *v.* Exxon Corporation; Exxon Shipping Company, *Defendants*, And Joseph Hazelwood, *Defendant-Appellant.* Daniel R. Calhoun; Bradford J. Chisholm; David P. Clarke; Thomas S. McAllister; Phillip G. McCrudden;	No. 04-35183 D.C. No. CV-89-00095-HRH OPINION

Michael J. McClenaghan;
Guy Piercey;
Hugh Wisner;
Grant C. Baker;
Larry L. Dooley;
Kim J. Ewers;
John W. Herschleb;
Kent Herschleb;
David B. Horne;
Michael J. Owecke;
Gerald E. Thorne;
George A. Gordaoff;
Old Harbor Native Corporation;
Timberline, Inc.; Barbara Brown;
John Foges; Jamie L. Halladay;
Charles McMahon;
Jennifer Briggs; Terri Mast;
Mark T. Coles; Fred Galicano;
Mike Hollerbeke; Kathy Bryan;
Vincent Libed; Art Huddleston;
Robert Love; Roxane Villaueva;
Marcelo Rombaoa; Scott Hulbert;
Brian Gillis;
Frank Michael Carlson;
Elenor McMullen;
Native Village of Larsen Bay;
Native Village of Chenega Bay,
Plaintiffs-Appellants,

v.

Exxon Corporation;
Exxon Shipping Company; Joseph Hazelwood,
Defendants-Appellees.

Nos. 97-35191 to 97-35193 and 97-35235.

Appeal from the United States District Court
for the District of Alaska;
H. Russell Holland, District Judge, Presiding.
D.C. Nos. CV-89-00085-HRH, CV-89-00095-HRH.

Argued and Submitted May 3, 1999
Filed Nov. 7, 2001
Affirmed in part, vacated in part, and remanded.

COUNSEL

John F. Daum, O'Melveny & Myers, LLP, Los Angeles, California, for appellant Exxon Corporation.

David M. Heilbron (briefed), McCutchen, Doyle, Brown & Enersen, LLP, San Francisco, California, for appellant Exxon Shipping Company.

Thomas M. Russo (briefed), Chalos & Brown, P.C., New York, New York, for appellant Joseph Hazelwood.

David C. Tarshes (briefed), David W. Oesting, Stephen M. Rummage, Davis, Wright, Tremaine, LLP, Anchorage, Alaska, for the appellees.

Brian B. O'Neill (argued), Faegre & Benson, Minneapolis, Minnesota, James vanR. Springer, Dickstein Shapiro Morin & Oshinsky LLP, Washington, DC, for the appellees.

Before: SCHROEDER, Chief Judge,
BROWNING and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

This is an appeal of a $5 billion punitive damages award arising out of the *Exxon Valdez* oil spill. This is not a case about befouling the environment. This is a case about commercial fishing. The jury was specifically instructed that it could not award damages for environmental harm. The reason is that under a stipulation with the United States and Alaska,

Exxon had already been punished for environmental harm.[1] The verdict in this case was for damage to economic expectations for commercial fishermen.

The plaintiffs here were almost entirely compensated for their damages years ago. The punitive damages at issue were awarded to punish Exxon,[2] not to pay back the plaintiffs. Among the issues are whether punitive damages should have been barred as a matter of law and whether the award was excessive. The law began changing shortly after judgment, and important aspects of this opinion are controlled by a Supreme Court decision that came down only last term, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[3]

Facts

Bligh Island and Bligh Reef have been known to navigators for a long time. Captain George Vancouver charted and named the island on his third voyage to the North Pacific on the *Discovery* in 1794.[4] The Bligh Island Reef has long been mapped on U.S. Coast and Geodetic Survey maps, shortened to Bligh Reef by the Coast and Geodetic Survey in 1930.[5] Captain William Bligh and Vancouver had been officers together sixteen years earlier, on the *Resolution,* when Captain

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[1] *See Eyak Native Village v. Exxon Corp.,* 25 F.3d 773, 774 (9th Cir.1994).

[2] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S. Ct. 1678, 1683 (2001); *Morgan v. Woessner,* 997 F.2d 1244 (9th Cir. 1993); *see also Hawkins v. United States,* 30 F.3d 1077, 1083-84 (9th Cir. 1994) (describing punitive damages as a windfall).

[3] 532 U.S. 424, 121 S. Ct. 1678 (2001).

[4] Hubert Howe Bancroft, *History of Alaska* 277-81 (1886); Donald J. Orth, *Dictionary of Alaska Place Names,* entries for Bligh Island, Bligh Reef (Geological Survey Professional Paper 567 1971), *available in Alaska Place Names Dictionary on CD-ROM* (Scarp Exploration, Inc.1998).

[5] Donald J. Orth, *Dictionary of Alaska Place Names,* entries for Bligh Island, Bligh Reef (Geological Survey Professional Paper 567 1971), *available in Alaska Place Names Dictionary on CD-ROM* (Scarp Exploration, Inc.1998).

James Cook, among the greatest navigators in history, explored Alaska and the South Pacific.[6]

Captain William Bligh is infamous from Fletcher Christian's mutiny on the *Bounty.*[7] The infamy was refreshed in 1989, the 200th anniversary of the mutiny on the *Bounty,* by Captain Joseph Hazelwood of the *Exxon Valdez.*

On March 24, 1989, the oil tanker *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, Alaska. It has never been altogether clear why the *Exxon Valdez* ran aground on this long known, well-marked reef. Because we are reviewing a case that resulted in a jury verdict, we interpret the evidence, and state our account, most favorably to the parties successful at trial.[8]

The vessel left the port of Valdez at night. In March, it is still dark at night in Valdez, the white nights of the summer solstice being three months away. There is an established sea lane that takes vessels well to the west of Bligh Reef, but Captain Hazelwood prudently took the vessel east of the shipping lanes to avoid a heavy concentration of ice in the shipping lane, which is a serious hazard. Plaintiffs have not claimed that Captain Hazelwood violated any law or regulation by traveling outside the sea lane. The problem with being outside the sea lane was that the ship's course was directly toward Bligh Reef.

Bligh Reef was not hard to avoid. All that needed to be done was to bear west about the time the ship got abeam of the navigation light at Busby Island, which is visible even at night, some distance north of the reef. The real puzzle of this case was how the ship managed to run aground on this known and foreseen hazard.

There was less than a mile between the ice in the water,

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[6] David Waters, Navigational Problems in Captain Cook's Day, *in Exploration in Alaska* 41, 55 (Antoinette Shalkop, ed.1980).

[7] IV*Encyclopdia Britannica* (11th Ed.1910).

[8] *See Underhill v. Royal,* 769 F.2d 1426, 1435 (9th Cir. 1985).

visible at night only on radar, and the reef. Captain Michael Clark, an expert witness for the plaintiffs, testified that an oil tanker is hard to turn, more like a car on glare ice than a car on asphalt:

> Q: Let's talk a minute about how you turn one of these vessels. Now, this we're talking about a vessel here that's in excess of 900 feet long, all right? Over three football fields.
>
> What's it like to turn one of these?
>
> A: Well, it's not like turning a car or a fishing boat or something. There is a-as you are traveling in one direction and you put the rudder over, even though the head of the vessel will turn, your actual direction of travel keeps going in the old direction. Sort of like you're steering a car on ice; you turn the wheel and you just keep going in the same direction. Eventually you'll start to turn and move in the direction you're headed for.
>
> Q: Okay. Is it just as easy as turning a car?
>
> A: No.
>
> Q: And does it make any sense to try to compare changing course in one of these vessels fully laden to that of turning a corner with a car?
>
> A: No.
>
> Q: To make it turn on a vessel, there has to be a rudder command given?
>
> A: Yes.
>
> Q: And once you give that rudder command, is that the end of the turn?
>
> A: No. No, you have to watch and make sure that the rudder command is made as you ordered it and to make sure that it's having the desired effect.
>
> Q: Is there anything else that has to be done in order to put it on the course that you want it on?
>
> A: Yes, you usually have to give counter rudder to

slow the turn down.[9]

Considering the ice in the water, the darkness, the importance of turning the vessel away from Bligh Reef before hitting it, and the tricky nature of turning this behemoth, one would expect an experienced captain of the ship to manage this critical turn.

But Captain Hazelwood left the bridge. He went downstairs to his cabin, he said, to do some paperwork. A special license is needed to navigate the oil tanker in this part of Prince William Sound, and Captain Hazelwood was the only person on board with the license. There was testimony that captains simply do not leave the bridge during maneuvers such as this one and that there is no good reason for the captain to go to his cabin to do paperwork at such a time. Captain Hazelwood left the bridge just two minutes before the turn needed to be commenced, which makes it all the more strange that he left at all.

Before leaving, Captain Hazelwood added to the complexity of the maneuver that needed to be made: he put the vessel on autopilot, which is not usually done when a vessel is out of the shipping lanes, and the autopilot program sped the vessel up, making it approach the reef faster and reducing the time during which error could be corrected. As Captain Hazelwood left, he told Cousins, the third mate, to turn back into the shipping lane once the ship was abeam of Busby Light. Though this sounds plain enough, expert witnesses testified that it was a great deal less clear and precise than it sounds.

Captain Hazelwood's departure from the bridge, though unusual, was not inexplicable. The explanation put before the jury was that his judgment was impaired by alcohol. He was an alcoholic. He had been treated medically, in a 28 day residential program, but had dropped out of the rehabilitation program and fallen off the wagon. He had joined Alcoholics Anonymous, but had quit going to meetings and resumed

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[9] D.R. 10/1149.

drinking. Testimony established that prior to boarding his ship, he drank at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars in Valdez. The jury could have concluded from the evidence before them that leaving the bridge was an extraordinary lapse of judgment caused by Captain Hazelwood's intoxication. There was also testimony that the highest executives in Exxon Shipping knew Hazelwood had an alcohol problem, knew he had been treated for it, and knew that he had fallen off the wagon and was drinking on board their ships and in waterfront bars.

There are supposed to be two officers on the bridge, but after Hazelwood left, there was only one. The bridge was left to the fatigued third mate, Gregory Cousins, a man in the habit of drinking sixteen cups of coffee per day to keep awake. Cousins was not supposed to be on watch-his watch was ending and he was supposed to be able to go to sleep-but his relief had not shown up, and Cousins felt that it was his responsibility not to abandon the bridge. He was assisted only by the helmsman, Robert Kagan. Kagan, meanwhile, had forgotten his jacket, ran back to his cabin for it, and returned to the bridge a couple of minutes before the time the turn had to be initiated. Cousins and Kagan thought they had conducted the maneuver, but evidently they had not. When Cousins realized that the vessel was not turning, he directed an emergency maneuver that did not work.

Shortly after midnight on March 24, 1989, the tanker ran onto Bligh Reef. The reef tore the hull open. Prince William Sound was polluted with eleven million gallons of oil.

Exxon spent over $2 billion on efforts to remove the oil from the water and from the adjacent shores, and even from the individual birds and other wildlife dirtied by the oil. It also began an extensive program of settling with property owners, fishermen and others, whose economic interests were harmed by the spill. Some were paid cash without providing releases, some released some claims but not all, and some released all claims. Exxon spent $300 million on voluntary settlements prior to any judgments being entered against it.

The State of Alaska and the United States brought actions against Exxon for the injury to the environment. Those cases were resolved by entry of a consent decree on October 8, 1991, under the terms of which Exxon agreed to pay at least $900 million to restore damaged natural resources.[10] Hundreds of private civil actions were filed in federal and state court.[11] Numerous issues have been resolved on appeal regarding various aspects of the complex litigation arising out of the disaster.[12]

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[10] *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 774 (9th Cir. 1994).

[11] *Id.* at 774.

[12] *See Baker v. Exxon Corp.*, 239 F.3d 985 (9th Cir. 2001) (explaining that a defendant may require settling plaintiffs to assign their right to share in any punitive damage award as a condition of settlement); *In re Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000) (holding that cede-back agreements are enforceable and should not be revealed to a jury); *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*, 206 F.3d 900 (9th Cir. 2000) (holding that the defendants were not prejudiced by a bailiff's inappropriate ex parte contact with a juror and that a district court's findings about alleged threats to one juror by other jurors were not clearly erroneous); *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997) (concluding that the district court had the authority to dismiss the plaintiff's maritime negligence claim against the second defendant even though the first defendant had made discovery requests of the second defendant); *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166 (9th Cir. 1997) (vacating declaratory judgment on certain issues from the spill for improperly preempting the state court); *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997) (holding that the Alaska natives failed to prove special injury to communal life warranting recovery of non-economic damages for public nuisance); *Allen v. Exxon Corp.*, 102 F.3d 429 (9th Cir. 1996) (holding that the district court did not abuse its discretion in dismissing cases with prejudice as a discovery sanction); *Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86 (9th Cir. 1996) (stating that the Fund rule limiting the time to request reconsideration and barring the submission of new documents did not violate due process and that the Fund properly denied claims that were too causally or geographically remote); *Youell v. Exxon Corp.*, 74 F.3d 373 (2d Cir. 1996) (explaining that a federal court is required to hear the case of whether global corporate excess insurance covered the loss from the spill despite parallel state court proceedings because it concerns a novel issue of federal admiralty law); *Exxon Shipping Co. v.*

U.S. Dept. of Interior, 34 F.3d 774 (9th Cir. 1994) (explaining that the federal housekeeping statute permitting an agency head to regulate employee conduct and have custody of certain records does not create a privilege or shield an employee from subpoena); *Alaska Sport Fishing Ass'n v. Exxon Corp.,* 34 F.3d 769 (9th Cir. 1994) (holding that the United States and the State of Alaska as public trustees under the CWA and CERCLA could recover all lost use damages caused by the spill and that private claims for lost recreational use were barred under res judicata); *Eyak Native Village v. Exxon Corp.,* 25 F.3d 773 (9th Cir. 1994) (holding that the pipeline company's notice of removal more than a year after it became aware of the nature of the plaintiffs' claims was untimely); *Benefiel v. Exxon Corp.,* 959 F.2d 805 (9th Cir. 1992) (affirming the dismissal for failure to state a claim of consumers who sought damages for the increased prices they had to pay for gas because of the spill); *SeaRiver Maritime Financial Holdings, Inc. v. Slater,* 35 F. Supp. 2d 756 (D. Alaska 1998) (stating that the dispute over whether the *Exxon Valdez* had been unconstitutionally barred from Prince William Sound was barred by the consent decree which provided that the parties were settling all claims); *Seariver Maritime Financial Holdings, Inc. v. Pena,* 952 F. Supp. 9 (D.D.C.1997) (holding that forum non conveniens counseled transfer to Alaska of the case challenging a section of the Oil Pollution Act which prohibited the oil tanker from traveling in the Prince William Sound); *Seariver Maritime Financial Holdings, Inc. v. Pena,* 952 F. Supp. 455 (S.D.Tex.1996) (dismissing complaint without prejudice for improper venue); *In re Exxon Valdez,* 142 F.R.D. 380 (D.D.C.1992) (granting plaintiffs' request for an order enforcing a non party subpoena of American Petroleum Institute's documents); *In re Exxon Valdez,* 767 F. Supp. 1509 (D. Alaska 1991) (denying pipeline company's motion for judgment on the pleadings); *Chenega Corp. v. Exxon Corp.,* 991 P.2d 769 (Alaska 1999) (concluding that the Oil Pollution Act assigned to a native corporation federal claims for spill related harm to federal lands and that the superior court erred by precluding the jury from considering these claims); *Kodiak Island Borough v. Exxon Corp.,* 991 P.2d 757 (Alaska 1999) (reversing summary judgment against municipalities seeking to recover diverted services damages from their response to the oil spill because their claims were authorized by state statute); *State v. Hazelwood,* 946 P.2d 875 (Alaska 1997) (stating that the mens rea requirement for the negligent discharge of oil could be satisfied by the civil negligence standard without violating the defendant's due process rights under the Alaska constitution); *State v. Hazelwood,* 866 P.2d 827 (Alaska 1993) (explaining that the doctrine of inevitable discovery applies to statements immunized because they involved the report of an oil spill); *Hazelwood v. State,* 962 P.2d 196 (Alaska App.1998) (affirming Hazelwood's conviction for the negligent

This case involves the action for compensatory and punitive damages by entities affected by the spill. The District Court certified a Commercial Fishing Class, a Native Class, and a Landowner Class for compensatory damages. The district court also certified a mandatory punitive damages class, so the award would not be duplicated in other litigation and would include all punitive damages the jury thought appropriate. For purposes of this litigation, Exxon stipulated that its negligence caused the oil spill. The district court, which did a masterful job of managing this very complex case, tried the case to the jury in three phases. In the first phase, the jury found that Hazelwood and Exxon had been reckless, in order to determine liability for punitive damages. The second phase assessed the amount of compensatory damages attributable to the spill to commercial fishermen and Alaska Natives. The third phase established the amount of punitive damages. A fourth phase, which settled before trial, was to determine the compensatory damages of plaintiffs whose damages were not determined in Phase II, including landowners and participants in other commercial fisheries.

The jury awarded $287 million in compensatory damages, from which the court deducted released claims, settlements, and payments by the Trans-Alaska Pipeline Liability Fund to find net compensatory damages of $19,590,257. The jury also awarded, in what was then the largest punitive damages award in American history, $5 billion in punitive damages against Exxon, as well as $5,000 in punitive damages against Hazelwood.

After extensive post-trial motion litigation, the district court entered judgment for the plaintiffs against Hazelwood and Exxon. Exxon and Hazelwood timely appealed. Plaintiffs cross appealed.

Analysis

To assure that we respond to all the points raised in the

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discharge of oil because the erroneous admission of evidence was harmless beyond a reasonable doubt).

very lengthy briefs, we treat the issues in the order that the appellants and cross appellants raise them.

I. Punitive Damages Permissibility.

Exxon argues that punitive damages ought to have been barred as a matter of law because as a matter of policy they are inappropriate in the circumstances, and because other principles of law bar them.

A. Policy.

Exxon argues that as a matter of due process, no punitive damages can be awarded in this case because the criminal and civil sanctions, cleanup expenses and other consequences of the spill have already so thoroughly punished and deterred any similar conduct in the future that no public purpose is served by the award. Exxon was sanctioned with a fine and restitution award of $125 million for environmental crimes. The prosecutors and the district court, in approving the plea agreement and sentence, emphasized its sufficiency. Exxon also spent $2.1 billion cleaning up the spill, a massive deterrent to repeating the conduct that led to it. The expenses associated with the spill hurt Exxon's profits, even though the punitive damages award has not yet been paid pending resolution of this appeal.

As plaintiffs correctly point out, a prior criminal sanction does not generally, as a matter of law, bar punitive damages.[13] Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. Because we have not been made aware of a principle of law pursuant to which we should strike a punitive damages award on the ground that the conduct had already been sufficiently punished and deterred, we reject the argument.

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[13] *Restatement (Second) of Torts* § 908, cmt. a (1979) (explaining that punitive damages in a civil case are not to be granted or not granted based on a prior criminal conviction).

B. Punitive Damages in Maritime Law.

Exxon argues that punitive damages are not traditionally allowable in admiralty law. The argument is mistaken. Sometimes punitive damages are allowable, sometimes they are not.[14]

Exxon also argues that our decision in *Glynn v. Roy Al Boat Management Corp.* requires reversal of the punitive damages award.[15] That case is plainly distinguishable and

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[14] *See, e.g., The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (explaining that "if this were a suit against the original wrong-doers," punishment by exemplary damages might be appropriate); *South Port Marine, LLC v. Gulf Oil Limited Partnership,* 234 F.3d 58, 64-65 (1st Cir. 2000) (explaining that general admiralty and maritime law "has traditionally provided for the general availability of punitive damages for reckless conduct" but holding that punitive damages are not available under the Oil Pollution Act); *In re Amtrak "Sunset Limited" Train Crash,* 121 F.3d 1421, 1423 (11th Cir. 1997) (" [T]he general maritime law does not allow for the recovery of punitive damages except on a showing of willful and wanton misconduct."); *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 699 (1st Cir. 1995) ("Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others."); *Churchill v. F/V Fjord,* 892 F.2d 763, 772 (9th Cir. 1988) ("Punitive damages are available under the general maritime law."); *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc.,* 767 F.2d 1379, 1385 (9th Cir. 1985) (holding that the dock owners were vicariously liable for punitive damages); Thomas J. Schoenbaum, *Admiralty and Maritime Law,* Practitioner's Edition § 4-14 (1987) ("Punitive damages are available under the general maritime law if the conduct causing the injury is willful, wanton, grossly negligent, or unconscionable so as to evince a callous disregard for the rights of others.").

[15] 57 F.3d 1495 (9th Cir. 1995); *see also Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1503 (5th Cir. 1995) (en banc) (holding that because the Jones Act limitations did not provide for punitive damages in the wrongful death and personal injury area, the plaintiff could not get punitive damages under general maritime law); *Bergen v. F/V St. Patrick,* 816 F.2d 1345, 1349 (9th Cir. 1989) ("We hold that where an action under DOSHA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law" to allow an award of punitive damages).

carries no such implication. *Glynn* was not a maritime tort case such as the one at bar. *Glynn* was about maintenance and cure, which "is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery."[16] We held there that punitive damages were unavailable in maintenance and cure cases, for three reasons: (1) under *Vaughan v. Atkinson,*[17] attorneys' fees were available to deter the same kind of misconduct for which punitive damages may be used; (2) maintenance and cure is "pseudo-contractual" and punitive damages are traditionally unavailable for breach of contract; and (3) under *Miles v. Apex Marine Corp.,*[18] we were not free to expand seamen's remedies at will.[19] *Glynn* concerns an entirely different cause of action and none of the reasons for the *Glynn* rule apply here. It would thus be inappropriate for us to apply the *Glynn* rule to a general maritime tort case such as this one.

C. Res Judicata.

Exxon argues that the punitive damages award must be vacated as a matter of law because it is barred by res judicata. The State of Alaska and the United States sued Exxon and related defendants under a provision of the Clean Water Act. The Act, as it stood at the time of the spill,[20] entitled federal and state representatives to "act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources,"[21] as well as establishing

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[16] *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962).

[17] 369 U.S. 527 (1962).

[18] 498 U.S. 19 (1990).

[19] *Glynn,* 57 F.3d at 1505.

[20] *See* 33 U.S.C. § 1321 (1994) historical and statutory notes ("applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub.L. 101-380, set out as an effective date note under section 2701 of this title.").

[21] 33 U.S.C. § 1321(f)(5) (1990).

civil penalties.[22] Claims were allowed against the owner or operator of a vessel from which oil was illegally discharged.[23] Recovery of penalties and costs was limited to a monetary ceiling unless the spill resulted from "willful negligence or willful misconduct," in which case the ceiling on costs was removed and the owner or operator may be liable "for the full amount."[24]

The consent decree pursuant to which the case was settled states that the $900 million settlement is "compensatory and remedial," and none of the amounts are described as punitive. Though the government signatories released all government claims, the consent decree provides explicitly that "nothing in this agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement."

Exxon's argument is essentially that the governments released plaintiffs' private claims, even though plaintiffs did not consent to any such release, because the governments were acting as *parens patriae* for the private claimants, and because punitive damages plaintiffs act as "private attorneys general," a prohibited exercise when the actual public attorneys general have already discharged the claims.

The authority on which Exxon relies, *Alaska Sport Fishing Ass'n v. Exxon Corp.*, though, is distinguishable.[25] The sport fishermen there did not claim any damages to any property they owned or economic interests, just to the *ferae naturae,* the natural resource of fish in the wild.[26] The sport fishermen's claims made were on behalf of the general public

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[22] 33 U.S.C. § 1321(b)(6)(B).

[23] 33 U.S.C. § 1321(b)(6)(A)-(B) (1990); 33 U.S.C. § 1321(f)(1) (1990).

[24] 33 U.S.C. § 1321(f)(1) (1990).

[25] 34 F.3d 769 (9th Cir. 1994).

[26] *Id.* at 770; *see also Alliance Against IFQ's v. Brown,* 84 F.3d 343, 344 (9th Cir. 1996) (citing *Pierson v. Post,* 3 Caines 175, 2 Am. Dec. 264 (N.Y.1805)).

as to the lost use of un-owned natural resources, and we held that the state acted as *parens patriae* to protect its sovereign interest in these natural resources, so the plaintiffs were in privity with the state and were barred by the consent decree.[27]

By contrast, here the plaintiffs sued to vindicate harm to their private land and their ability to fish commercially and fish for subsistence. The consent decree was expressly not "intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." The consent decree did not affect claims regarding private land. It also did not affect the individual claims of commercial and subsistence fishermen involving lost income and lower harvests, which are distinguishable from the rights of recreational fishermen. Commercial and subsistence fishermen are "favorites of admiralty" and their rights are frequently given special protection.[28] The Tenth Circuit has similarly decided such an issue.[29]

As for the "private attorneys general" metaphor, it is just that, a metaphor, and "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[30] The metaphor is faulty here. The consent decree in the case at bar explicitly covered payments that are "compensatory and remedial in nature," not punitive, so there can be no serious claim that the actual attorneys general already obtained the punishment that the plaintiffs obtained in the case at bar.

The parties must have intended to preserve private claims

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[27] *Id.* at 773.

[28] *Cf. Carbone v. Ursich*, 209 F.2d 178, 182 (9th Cir. 1953).

[29] *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (holding that a consent decree between Colorado and a polluting corporation had a res judicata effect on all claims brought by the state but not on the private damage claims an individual might bring that differed from the claims in the consent decree).

[30] *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 94, 155 N.E. 58 (1926).

by their language expressly excluding them from the settlement. The *Alaska Sport Fishing* case does compel the conclusion that Exxon cannot be punished in this case for harming the environment and the general public. That is why we mentioned at the outset that this is not a case about befouling the environment. The punitive damages in this case are for harming the economic interests of commercial fishermen, the availability of fish to native subsistence fishermen, and private land. As such, the harm and the punishment is distinct from the harm to the environment and natural resources that we held in *Alaska Sport Fishing* had already been vindicated.

D. Statutory preemption of common law.

Exxon argues that the common law punitive damages remedy has been preempted by the comprehensive scheme for oil spill remedies in the Clean Water Act. Plaintiffs argue that Exxon waived this argument, and that even if Exxon did not waive it, far from preempting additional remedies, the statutory scheme expressly preserves them.

First, we consider waiver. Plaintiffs correctly point out that before the case went to trial on punitive damages, Exxon's statutory preemption argument focused only on the Trans-Alaska Pipeline Authorization Act,[31] not the Clean Water Act.[32] Exxon does not maintain on appeal its argument based on the Trans-Alaska Pipeline Authorization Act, so we do not consider that Act.

After the $5 billion verdict came back in the punitive damages case on October 23, 1995, Exxon tendered for filing a motion for judgment on punitive damages, along with a motion to lift a stay then in effect. Exxon argued that the verdict should be vacated as a matter of law, because common law punitive damages were preempted *both* by the Trans-Alaska Pipeline Authorization Act *and* by the Clean Water Act. Plaintiffs erroneously argued that the stay should

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[31] 43 U.S.C. §§ 1651-56.

[32] 33 U.S.C. §§ 1251-1387.

not be lifted on the ground that the motion argued nothing new and merely reiterated the punitive damages argument previously ruled upon. The district court denied the motion to lift the stay and to file the motion.

We conclude that the issue should not be treated as waived. Exxon clearly and consistently argued statutory preemption as one of its theories for why punitive damages were barred as a matter of law, and argued based on the Clean Water Act prior to entry of judgment. Because the issue is massive in its significance to the parties and is purely one of law, which requires no further development in district court, it would be inappropriate to treat it as waived in the ambiguous circumstances of this case.[33]

Exxon further argues that because the Clean Water Act does not provide for punitive damages and does provide a comprehensive remedial scheme, punitive damages should be deemed preempted. Before and after the *Exxon Valdez* oil spill, the Clean Water Act's section on "Oil and hazardous substance liability" provided a carefully calibrated set of civil penalties for oil spills, generally with ceilings on penalties, even if the spills were grossly negligent or willful.[34]

Exxon's argument is that this carefully graduated and limited set of liabilities by implication precludes such unlimited and non-compensatory liability as the $5 billion punitive damages award in this case. In support of this inference, Exxon points to the Supreme Court decisions in *Miles v. Apex Marine Corp.*[35] and in *Middlesex County Sewerage Authority*

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[33] *United States v. Northrop Corp.*, 59 F.3d 953, 957 n. 2 (9th Cir. 1995).

[34] *See* 33 U.S.C. § 1321(b)(6)(B) (1990). Exxon also points to 33 U.S.C. § 1319, which provides for fines and civil penalties for violations of effluent standards and permits. Civil penalties cannot be assessed under both § 1321 and § 1319 for the same discharge. 33 U.S.C. § 1321(b)(6)(E) (1990). Because § 1321 directly treats oil spills from vessels, that is the section with which we concern ourselves.

[35] 498 U.S. 19 (1990).

v. National Sea Clammers Ass'n,[36] as well as to two circuit court cases.

Miles does not offer substantial support for Exxon's argument. It holds that loss of society and loss of future income are not compensable in a seaman's wrongful death case.[37] The reasoning is based on the long and technical history of wrongful death actions, and the traditional restrictions of wrongful death remedies in Lord Campbell's Act.[38] True, the Congressional limitations were held to prevent an inference of broader remedies in the general maritime law, but the tort was the specialized and traditionally limited one of wrongful death.

Sea Clammers raises a serious question. In *Sea Clammers,* plaintiffs claimed that the EPA and Army Corps of Engineers had permitted discharge of sewage into New York Harbor and the Hudson beyond what the statutes allowed, and that the permittees had violated their permits.[39] The Court held that the Clean Water Act and the Marine Protection, Research, and Sanctuaries Act provided a carefully structured set of citizens' remedies,[40] but not the private action for monetary and injunctive relief sought in the case, so Congress must not have meant to provide for this additional remedy.[41] A common law nuisance remedy was precluded.[42]

Though the question is not without doubt, we conclude that the better reading of the Clean Water Act is that it does not preclude a private remedy for punitive damages. The Clean Water Act section on oil and hazardous substance liability states:

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[36] 453 U.S. 1 (1981).

[37] *See Miles,* 498 U.S. at 37.

[38] *See id.* at 32.

[39] *See Sea Clammers,* 453 U.S. at 12.

[40] 33 U.S.C. §§ 1401-45.

[41] *See id.* at 14, 21-22.

[42] *See id.* at 21-22.

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.[43]

In section 1365, the Clean Water Act expressly provides that it does *not* preempt common law rights to other relief:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief* ...."[44]

The section 1365 savings clause was held in *Sea Clammers* *not* to preserve the claims plaintiffs made, but there the claims were for violations of the Act in which the savings clause was found, and the Court explained that "[i]t is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained."[45] By contrast, the action in the case at bar is entirely at common law and not for violation of the statute in which the savings clause is found.

The nuisance action, more analogous to the claims in the case at bar, was also held in *Sea Clammers* to be preempted by the Clean Water Act, following *Milwaukee v. Illinois.*[46] *Milwaukee* held that a federal district court could not impose and enforce more stringent effluent limitations than those established by the administrative agency charged with enforcement of the Clean Water Act, so for purposes of a claim seeking that relief, the Clean Water Act preempted the

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[43] 33 U.S.C. 1321(*o*)(1) (1990).

[44] 33 U.S.C. § 1365(e) (emphasis added).

[45] *Sea Clammers*, 453 U.S. at 15-16.

[46] 451 U.S. 304 (1981).

common law remedy.[47] That is, the administrative agency decided to subordinate to some degree the interest in protecting shellfish and bottomfish to the interest in allowing a city to dispose of its sewage, and the district court was not allowed to change that balance and allow bottomfish protection to trump safe disposal of sewage. In the case at bar, Exxon does not argue that the plaintiffs seek any remedies that might conflict with the decision of an administrative agency charged with enforcement responsibility.

The issue is close, particularly because the Clean Water Act effective at the time of the *Exxon Valdez* spill provides for civil penalties for oil spills and limits them to $50,000, or "where the United States can show that such discharge was the result of willful discharge or willful misconduct," $250,000.[48] One reading of this limit is that Congress decided that the most a willful oil polluter should be liable for is $250,000. But that is not the only sensible reading. This penalty is for damage to public resources, enforceable by the United States, and the monetary limit does not necessarily conflict with greater punitive amounts for private interests harmed. After all, if the government could take all the money a defendant had, the private plaintiffs would be left out in the cold with uncollectable judgments.

Where a private remedy does not interfere with administrative judgments (as it would have in *Milwaukee*) and does not conflict with the statutory scheme (as it would have in *Sea Clammers*), a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy. It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so. The absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them.

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[47] *See id.* at 320.

[48] 33 U.S.C. § 1321(b)(6)(B) (1990).

Exxon also cites First and Second Circuit decisions, *Conner v. Aerovox*[49] and *In re Oswego Barge Corp.*,[50] for the proposition that the Clean Water Act preempts common law remedies such as those upon which the plaintiffs relied. Both cases are distinguishable.

Conner holds that fishermen cannot recover for pollution on a nuisance theory, under *Sea Clammers* and *Milwaukee.*[51] Exxon does not argue that the plaintiffs' recovery in the case at bar is on a common law nuisance theory. The reason this distinction makes a difference is that, as the Supreme Court explained in *Milwaukee,* a nuisance theory would enable a federal district judge to substitute a different balancing of interests from the one made by the agency to which Congress assigned the job in the NPDES permit system.[52]

Oswego Barge is distinguishable for a different reason. There the common law remedies sought were by the government, not by private parties.[53] The government itself wanted a broader range of remedies and more damages than were permitted by the Clean Water Act.[54] The Second Circuit read the Clean Water Act as we do, and concluded that its remedies section "preempted *the Government's* non-FWCPA remedies against a discharging vessel for cleanup costs."[55] It does not speak at all to private remedies for private harms, just to whether the government can seek remedies unfettered by the limitations on the government's own remedies promulgated in the Clean Water Act.[56]

We conclude that the Clean Water Act does not preempt a

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[49] 730 F.2d 835 (1st Cir. 1984).

[50] 664 F.2d 327 (2d Cir. 1981).

[51] *Conner,* 730 F.2d at 842.

[52] *Milwaukee v. Illinois,* 451 U.S. 304, 320 (1981).

[53] *Oswego Barge,* 664 F.2d at 331.

[54] *See id.* at 331.

[55] *Id.* at 344 (emphasis added).

[56] *See id.* at 331.

private right of action for punitive as well as compensatory damages for damage to private rights. Again, what saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

II. Jury Instructions.

A. Standard of Proof.

Exxon requested that the judge instruct the jury that to find malicious or reckless action, it must be satisfied "that plaintiffs have shown by clear and convincing evidence that the spill was the proximate result of malicious or reckless conduct and that the Exxon defendants are legally responsible for that conduct." The judge declined to instruct on a "clear and convincing" standard. The jury was instructed that the plaintiffs had the burden of proving "by a preponderance of evidence" that the conduct manifested reckless or callous disregard for the rights of others, and was a legal cause of the grounding of the *Exxon Valdez.*

Exxon argues for a clear and convincing standard on various policy grounds, such as that it would be more consistent with the traditional purpose of admiralty law of limiting liability, and the greater harm caused by an erroneous award than erroneous denial of an award because punitive damages are a windfall rather than compensation to plaintiffs.

The standard of proof generally applied in federal civil cases is preponderance of evidence.[57] Congress has in special instances, such as habeas corpus and deportation, required proof by clear and convincing evidence,[58] but it has not so

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[57] *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.").

[58] *See* 19 U.S.C. § 1592(e)(2) (Court of International Trade); 28 U.S.C. § 2244(b)(2)(B)(ii) (habeas petition); *see also Santosky v. Kramer,* 455 U.S. 745 (1982) (applying a clear and convincing standard in a proceeding to terminate parental rights); *Addington v. Texas,* 441 U.S. 418 (1979)

legislated for maritime cases.

The Supreme Court has noted that "clear and convincing" standards in state law are "an important check against unwarranted imposition of punitive damages."[59] But when specifically faced with the question whether a preponderance of evidence standard denied due process of law to defendants, it held that the looser standard was permissible.[60] In *Haslip,* the Court stated in dictum that "[t]here is much to be said in favor of a State's requiring" a higher standard of proof, but held that Alabama's much lower standard, that the jury be "reasonably satisfied from the evidence," was constitutionally permissible.[61]

While the common law of admiralty could require a higher standard of proof for punitive damages than the Constitution requires, we have been presented with no authority for creating an exception to the general federal standard, and the arguments for doing so are not so compelling as to persuade us, in the absence of precedent, that the district court abused its discretion by instructing on the preponderance of evidence standard.

B. Vicarious Liability.

Exxon argues that the district court erroneously instructed the jury that it could impose punitive damages on Exxon even if all the recklessness was by its employee Captain Hazelwood rather than by Exxon itself. The district court instructed

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(using a clear and convincing standard in an involuntary commitment proceeding); *Woodby v. INS,* 385 U.S. 276, 285-286 n. 18 (1966) (requiring a clear and convincing standard in a deportation hearing and stating "[t]his standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like.") (citing 9 Wigmore, Evidence § 2498 (3d ed.1940)).

[59] *Honda Motor Co. v. Oberg,* 512 U.S. 415, 433 (1994).

[60] *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23 n. 11 (1991).

[61] *See id.* ("We are not persuaded, however, that the Due Process Clause requires [a clear and convincing standard].").

the jury twice on vicarious liability.

Phase I of the trial established that Exxon was "reckless" and that its recklessness was "a legal cause of the grounding of the Exxon Valdez." Had the jury not so found, the district court would not have allowed the jury to return a punitive damages verdict against Exxon.

Exxon argues that the Phase I instructions 33, 34 and 36 were incorrect. Instruction 33 said that a "corporation is not responsible for the reckless acts of all of its employees," but is for "those employees who are employed in a managerial capacity while acting in the scope of their employment." Instruction 34 defined a "managerial capacity" employee as one who "supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." Instruction 36 said that acts contrary to the corporation's policies "are not attributable to the employer" provided that "adequate measures were taken to establish and enforce the policies or directions," but that "[m]erely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions."

Phase III of the trial set the amount of punitive damages. The jury had a second chance in Phase III to deny punitive damages altogether despite its prior verdict that Exxon was reckless. Exxon does not directly challenge any of the Phase III instructions, but argues that they failed to correct the claimed error in the Phase I instructions, which allowed vicarious liability for punitive damages. The court stated in Phase III instruction 30 that if "corporate policy makers did not actually participate in or ratify the wrongful conduct," or if it "was contrary to company policies," then the jury "may consider" these facts "in mitigation or reduction of any award of punitive damages."

Exxon cites a line of authority beginning with a War of

1812 decision by Justice Story, *The Amiable Nancy.*[62] The Amiable Nancy was a neutral Haitian vessel carrying corn in the Carribean.[63] The Scourge was an American privateer commissioned to act as a private armed vessel in the war.[64] The captain of the Scourge sent his lieutenant and a crew merely to check the Amiable Nancy's papers, but, as midnight approached, the armed Americans boarded the Haitian vessel, and stole money, clothing, poultry, and other goods.[65] The Court held that "the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals."[66] And, the Court said, "if this were a suit against the original wrong-doers," proper punishment by exemplary damages might be appropriate.[67] But the Court held that the owners of the privateer could not be held liable for "vindictive" (that is punitive) damages, because "[t]hey are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree."[68]

The Amiable Nancy, on its face, has no application to the case at bar. It is based in significant part on the fact that allowing punitive damages against privateers who engaged in improper conduct would defeat the government's War of 1812 policy to commission privateers.[69] But *The Amiable Nancy* rule has been interpreted more broadly in a number of decisions as a widely applicable shield against vicarious liability for punitive damages. In 1893, the Supreme Court held in *Lake Shore & Michigan Southern Railway Co. v. Prentice* that a national corporation could not be held liable for puni-

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[62] 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1818).

[63] *See id.* at 547.

[64] *See id.* at 547, 550.

[65] *See id.* at 547-48, 551.

[66] *Id.* at 558

[67] *Id.*

[68] *Id.* at 559-60.

[69] *Id.*

tive damages because of the abusive conduct of a conductor toward a passenger.[70] It explained that *The Amiable Nancy* rule was a general common law rule prohibiting vicarious liability for punitive damages for an owner "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree."[71] Because there was no evidence that the corporation had any notice that the conductor was unsuitable in any way, or that the corporation "participated in, approved, or ratified" the conductor's misconduct, the judgment had to be reversed.[72]

Exxon is not in the position of the owners in *The Amiable Nancy* or *Lake Shore* of "having neither directed ... nor countenanced ... nor ... participated in the slightest degree" in the wrong.[73] Here the jury found that the corporation, not just the employee, was reckless. The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies. Thus the liability is not that of an owner shielded by *The Amiable Nancy* "nor participated in the slightest degree" rule.[74]

In 1905, we addressed *The Amiable Nancy* in *Pacific Packing & Navigation Co. v. Fielding.*[75] During the Nome gold rush, the captain of a steamship bringing people back to

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[70] 147 U.S. 101, 117 (1893).

[71] *Id.* at 108 (quoting *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546, 559 (1818)).

[72] *Id.* at 117.

[73] *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546, 559 (1818).

[74] *Id.; cf. Kolstad v. American Dental Assoc.,* 527 U.S. 526 (1999) (explaining that, in a punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII).

[75] 136 F. 577 (9th Cir. 1905).

Seattle at the end of the mining season imprisoned his purser, after the purser became deranged as they sailed through the Bering Sea.[76] We held that under *The Amiable Nancy,* the captain of a ship could not be treated as though he wielded "the whole executive power of the corporation" like a president, despite his sole command of the ship while at sea, so the owner of the vessel could not be vicariously liable for punitive damages merely and entirely on the basis of the captain's malice.[77]

We next considered this issue eighty years later in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*[78] A grossly negligent dock foreman for North Pacific caused a fireman's death and Protectus Alpha's ship and cargo to be destroyed.[79] We expressed approval of the Restatement (Second) of Torts § 909 position, which stated that punitive damages can be awarded against a principal for an agent's torts, not only where they are authorized, ratified or approved and not only where the agent was unfit and the principal was reckless in employing him, but also where he was "employed in a managerial capacity and was acting in the scope of employment."[80] We affirmed a punitive damages judgment because the foreman was a managerial employee acting within the scope of his employment and had discretion in what he did.[81]

The district court in the case at bar instructed the jury precisely in accord with *Protectus Alpha.* To say that the court abused its discretion in so doing requires that we hold that

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[76] *See id.*

[77] *See id.* at 579-80.

[78] 767 F.2d 1379 (9th Cir. 1985).

[79] *See id.* at 1384

[80] *Id.* at 1386 (quoting *Restatement 2d of Torts* § 909 (1979)).

[81] *See id.* at 1387.

Protectus Alpha is no longer the law.[82] That we cannot do. One of the amicus curiae urges that we do so, on the ground that *Protectus Alpha* was inconsistent with *Pacific Packing.*

We held *en banc* in *United States v. Hardesty* that if there is an irreconcilable conflict between two cases from this circuit, a panel's only choice is to call for rehearing en banc.[83] We do not conclude that the conflict between *Pacific Packing* and *Protectus Alpha* is "irreconcilable," though the question is close.[84] One three judge panel may reconsider the decision of a prior panel only when "an intervening Supreme Court

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[82] *See Beachy v. Boise Cascade Corp.,* 191 F.3d 1010, 1013 (9th Cir. 1999), *cert. denied,* 529 U.S. 1021 (2000) (noting that we review a district court's formulation of civil jury instructions for an abuse of discretion).

[83] 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) ("Unless an alternative method is provided by rule of this court, '[a] panel faced with such a[n] [intra-circuit] conflict *must* call for en banc review, which the court will normally grant.'") (internal citations omitted).

[84] *Protectus Alpha* was specifically rejected by the Fifth Circuit, and accepted only in part by the First Circuit. *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 705 (1st Cir. 1995); *Matter of P & E Boat Rentals, Inc.,* 872 F.2d 642, 652 (5th Cir. 1989) (en banc). The Sixth Circuit followed *The Amiable Nancy, Lake Shore,* and this circuit's opinion in *Pacific Packing* to hold that "punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143, 1148 (6th Cir. 1969). Arguably *Protectus Alpha,* in relevant part, could have been dictum. Although it was not mentioned in the panel opinion, there was an express company policy that required the foreman to do exactly what he did, and the company expressly ratified what the foreman had done. *See Protectus Alpha Nav. v. Pacific Grain Growers,* 585 F. Supp. 1062, 1068 (1984). The district judge held the company liable for punitive damages on that basis, not on the basis that the foreman was a managerial employee. *See id.* at 1069. With this finding of fact, which was not challenged on appeal, there was no need to reach the question of whether the company would be vicariously liable for a managerial employee's conduct in the absence of a corporate policy authorizing and ratifying his conduct. But our decision in *Protectus Alpha* did not rely on that finding. We must leave whatever challenge might be made to *Protectus Alpha* to our court if it rehears this case en banc or to a higher court. We cannot hold that the district court abused its discretion by following our decision in *Protectus Alpha.*

decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point."[85]

Subsequent to *Protectus Alpha,* the Supreme Court held in *Pacific Mutual Life Insurance Co. v. Haslip* that a punitive damages award against a corporation based purely on *respondeat superior,* with no wrongful conduct whatsoever on the part of the corporation, did not violate the corporation's due process rights.[86] The constitutional issue resolved there is not the same as the maritime law at issue here, but it is close. For one thing, *Lake Shore* held that *The Amiable Nancy* was common law, not just maritime law, so what goes for an insurance company in *Haslip* goes for an oil company in this case.[87] For another, the considerations bearing on the constitutional question in *Haslip* are hard to distinguish from the common law issues here. The only substantial distinction that is apparent is that if Congress disagrees with our resolution of the common law question, it can easily bring the law into accord with its view. Thus, *Haslip* lends further support to the conclusion reached in *Protectus Alpha.*

Exxon argues that even if *Protectus Alpha* is good law, it can be reconciled with *The Amiable Nancy* only by confining it to acts done on shore. The reckless dock foreman in *Protectus Alpha* acted on the dock, the reckless crew and subordinate officer in *The Amiable Nancy* on the sea. But *Protectus Alpha* did not explain its conclusion with reasoning supporting this distinction. We conclude that we are bound by *Protectus Alpha.*

III. Sufficiency of the Evidence.

A. Hazelwood.

Exxon argues that there was insufficient evidence for the

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[85] *United States v. Gay,* 967 F.2d 322, 327 (9th Cir. 1992) (quoting *United States v. Lancellotti,* 761 F.2d 1363, 1366 (9th Cir. 1985)).

[86] 499 U.S. 1, 15 (1991).

[87] *Lake Shore & Michigan Southern Railway Co. v. Prentice,* 147 U.S. 101, 108 (1893).

jury to award punitive damages against Hazelwood or against itself for Hazelwood's conduct. Its theory is that the evidence, which it concedes established negligence, can establish no more. As Exxon portrays it, Hazelwood left the vessel in the hands of an experienced mate, with a clear instruction to turn right at the Busby Island light, and the mate unaccountably failed to carry out this simple instruction.

A jury could have interpreted the evidence as Exxon suggests, but it plainly did not. A far more damning account was well supported by testimony, exhibits, and reasonable inferences from them. The jury reasonably could have concluded that Hazelwood took command of the ship so drunk that a non-alcoholic would have passed out, made it harder to avoid the reef by taking the course east of the ice, made it harder to maneuver between the ice and the reef by putting the ship on an autopilot program that sped the vessel up, then left the ship in the hands of an overtired third mate just two minutes before the critical maneuver, barely enough time to calculate what to do and conduct the maneuver. Hazelwood's instructions were vague, and turning a supertanker right at the light is not like turning a car right at the light on dry pavement, more like turning right on glare ice. In so doing, Hazelwood violated numerous legal regulations as well as common sense in caring for his vessel.

We review a jury's verdict for substantial evidence, which "is such reasonable evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence."[88] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions ... [and] all justifiable inferences are to be drawn in [the prevailing party's] favor."[89] The jury reasona-

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[88] *Lambert v. Ackerley,* 180 F.3d 997, 1012 (9th Cir. 1999) (en banc); *see also Three Boys Music Corp. v. Bolton,* 212 F.3d 477, 482 (9th Cir. 2000).

[89] *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 554-55 (1990) (quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986)).

bly could have concluded that Hazelwood knew he was being extremely careless and testified falsely about his knowledge, or that he did not realize how dangerous his acts were because he had impaired his own judgment by taking the bridge drunk.[90]

Exxon also argues that even operating a boat drunk and high on marijuana is not enough for punitive damages under our decision in *Churchill v. F/V Fjord,*[91] but that is not a correct reading of *Churchill. Churchill* held that despite the impaired condition of a youth operating a skiff, the district court's finding that the skiff's owner did not act willfully, recklessly, maliciously or with gross negligence was not clearly erroneous.[92] It is one thing to uphold a factual finding on appeal as we did in *Churchill,* quite another to set it aside, which Exxon requests here. A trial determination has a great deal of force, whichever way it goes.

B. Exxon.

Exxon argues that the evidence was insufficient to establish a predicate for punitive damages based on its own actions. It is true that if the jury granted punitive damages on the basis of the vicarious liability instructions discussed above, Exxon's own recklessness would not be essential to the outcome. But the instructions allowed the jury to award them based on Exxon's own conduct, so the jury may well have granted them based only on Exxon's own recklessness. We therefore consider whether there was sufficient evidence to establish it.

There was, as Exxon argues, an alternative interpretation the jury could have made of the evidence. It could have decided that Exxon followed a reasonable policy of fostering

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[90] *See Koirala v. Thai Airways Intl., Ltd.,* 126 F.3d 1205, 1211 (9th Cir. 1997) (explaining that a factfinder could infer from failure to perform fundamental duty of safe navigation that flight crew *consciously* disregarded that duty).

[91] 892 F.2d 763 (9th Cir. 1988).

[92] *Id.* at 772.

reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk. But of course, we review a jury's verdict for substantial evidence, not for whether the evidence could have supported a different verdict.[93]

There was substantial evidence to support the jury verdict. The jury could infer from the evidence that Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound.

Exxon had published policies that an employee with alcohol dependency would not be terminated for seeking rehabilitation. Its policies also provided that no crew member could attempt to perform any duties on one of its vessels within four hours of consuming any alcohol. Both sides attempt to make something of this. Plaintiffs stress that Exxon did not strictly enforce the four hour rule despite knowing that Hazelwood and others performed duties on its vessels within four hours of consuming alcohol, and Exxon contends it reasonably did not fire Hazelwood just because it knew he had an alcohol problem and participated in a rehabilitation program.

Both arguments are of little significance in the factual context of this case. Arguably knowing that a non-alcoholic had commanded a vessel three hours after consuming a few ounces of wine at dinner could not support punitive damages. As Exxon says, "if plaintiffs mean that sailors on shore leave occasionally visit bars, their discovery is as startling as Captain Renault's discovery that gambling was going on in Rick's Cafe." But knowing that an alcoholic has resumed drinking is far more serious. The jury could conclude from the evidence that Hazelwood's alcoholism required him to abstain totally,

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[93] *Lambert,* 180 F.3d at 1012.

so that he could not have wine with dinner, let alone enough whiskey at waterfront bars to make most people unconscious. Arguably, it would have been improper and perhaps actionable to fire or transfer Hazelwood just for being an alcoholic who had sought treatment, but knowing that he had violated his treatment regimen by subsequently resuming drinking is far more serious, and he could have been fired, or at the very least transferred to less dangerous duty, for violating Exxon's policies.

The parties also dispute whether Exxon's tolerance of overtired employees who worked after exceeding the maximum permitted hours could support the verdict. Because of the evidence regarding Captain Hazelwood's drinking and Exxon's top executives' knowledge of it, we need not consider whether Cousin's fatigue and Exxon's knowledge of the routine use of fatigued crew could support the verdict.

IV. Amount of the Punitive Damages Award.

The jury awarded $5 billion in punitive damages against Exxon (as well as $5,000 in punitive damages against Captain Hazelwood). At the time, it was the largest punitive damages award in American history, so far as the litigants were able to determine. Exxon challenges the $5 billion award as excessive.

Ordinarily appellate courts must defer to juries.[94] If a reasonable mind could reach the result the jury reached on the evidence before them, that is ordinarily the end of it.[95] If there were no constitutional issue here, that might be the end of this discussion. This was a very bad oil spill. Captain Hazelwood's conduct, interpreting the evidence most strongly against him, was extremely reckless considering the difficulty and potential risk of his task, and Exxon was reckless to allow him to perform this task despite its knowledge that he was

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[94] *See, e.g., Morgan v. Woessner,* 997 F.2d 1244, 1257 (9th Cir. 1993).

[95] *Three Boys Music Corp. v. Bolton,* 212 F.3d 477, 482 (9th Cir. 2000); *Lambert v. Ackerley,* 180 F.3d 997, 1012 (9th Cir. 1999) (en banc).

drinking again. The punitive damages amount, $5 billion, is about one year's net profits for the entire world-wide operations of Exxon, and the jury may well have decided that for such egregious conduct the company responsible ought to have a year without profit.

But a unique body of law governs punitive damages. In particular, under the Supreme Court's decision in *Honda Motor Co. v. Oberg,* a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards.[96] In *Oberg,* the Oregon Constitution prohibited judicial reduction of punitive damages awards "unless the court can affirmatively say that there is no evidence to support the verdict."[97] The Court held that the state constitutional denial of judicial review of the size of the award violated the due process clause of the Fourteenth Amendment.[98] Review limited to a "no substantial evidence" test "provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts."[99] The Court, explaining the importance of appellate review of punitive damages awards, noted that "more than half of those [punitive damages awards] appealed resulted in reductions or reversals of the punitive damages," and that this understated the importance of review, because so many awards are reduced by the trial court or settled for less pending appeal.[100]

Before *Oberg,* we would not disturb punitive damage awards unless it appeared that the jury was influenced by passion or prejudice.[101] However, as we explained in *Ace v.*

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[96] 512 U.S. 415, 432 (1994).

[97] *Id.* at 418.

[98] *Id.* at 432.

[99] *Id.* at 429.

[100] *Id.* at 433, n. 11.

[101] *See, e.g., Harmsen v. Smith,* 693 F.2d 932, 947 (9th Cir. 1982); *Glovatorium Inc. v. NCR Corp.,* 684 F.2d 658, 663 (9th Cir. 1982) (citing *Moore v. Greene,* 431 F.2d 584, 593-94 (9th Cir. 1970)). *But see, e.g.,*

Aetna Life Insurance Co., under *Oberg*, we must consider whether a punitive damages award passes "muster under federal due process analysis" in addition to reviewing whether the evidence is sufficient as a matter of law to support the award.[102] The test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it, under *Oberg*.

Two critical Supreme Court opinions, decided after the district court's decision in this case, have expanded the way courts review constitutional challenges to large punitive damage awards. In 1996, the Court decided *BMW of North America, Inc. v. Gore* and articulated, for the first time, factors that courts must consider when conducting a substantive review of a jury's punitive damages award.[103] In *BMW*, a jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages for the defendant's fraudulent conduct. The Court held that the amount of the punitive damage award was unconstitutional because the defendant lacked fair notice that such a severe award would be imposed.[104] In concluding the award violated the Due Process Clause, the Court established three "guideposts" for courts to use in determining whether a punitive damage award is grossly excessive: (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.[105]

Boyle v. Lorimar Productions., Inc., 13 F.3d 1357, 1360 (9th Cir. 1994) (approving, under *Haslip*, California's passion and prejudice standard because the jury was also instructed to apply other criteria, including reprehensibility and ratio of punitive damages to compensatory damages).

[102] 139 F.3d 1241, 1248 (9th Cir. 1998); *see also Barnes v. Logan*, 122 F.3d 820, 823-24 (9th Cir. 1997) (considering first if the punitive damages award was in manifest disregard of the law, then considering whether the award violated due process).

[103] *See* 517 U.S. 559 (1996).

[104] *See id.* at 574, 585-86.

[105] *See id.* at 575-83.

The Court reaffirmed the importance of the *BMW* guideposts several months ago in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[106] Following a large punitive damages jury verdict, the defendant in that case challenged the amount of the award in the district court. Relying on *BMW,* the district court considered and rejected the argument that the award was grossly excessive.[107] On appeal, we reviewed the district court's determination for an abuse of discretion and affirmed. The Supreme Court reversed.

Cooper Industries examined the *BMW* factors to determine whether trial courts or appellate courts are in a better position to rule on the constitutionality of punitive damages awards, and ultimately concluded that "considerations of institutional competence" weigh in favor of independent appellate review.[108] Specifically, the Court held that "courts of appeal should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."[109] Because the Court's consideration of the *BMW* factors revealed "a series of questionable conclusions by the District Court," the Court remanded the case for us to conduct a thorough review of the district court's application of *BMW*.[110] *Cooper Industries* said "unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."[111] Thus, reduction of a punitive damages award does not implicate the Seventh Amendment. The Court in *BMW* and in *Cooper Industries* set out criteria for judicial review of jury awards for punitive damages.

In *BMW,* the Supreme Court held that a punitive damage

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[106] 532 U.S. 424, 121 S. Ct. 1678.

[107] *See id.* at 1681-82.

[108] *Id.* at 1687-89.

[109] *Id.* at 1685-86.

[110] *Id.* at 1688.

[111] *Id.* at 1687-89.

award violated the Due Process Clause of the Fourteenth Amendment because it was so grossly excessive that the defendant lacked fair notice that it would be imposed. [112] Dr. Gore's car was damaged in transit, and BMW repainted it but did not tell Dr. Gore about the repainting when it sold him the car. [113] The jury found that to be fraudulent, and awarded $4,000 in compensatory damages for reduced value of the car and $4 million in punitive damages. [114] The Alabama Supreme Court cut the award to $2 million, but the Court held that it was still so high as to deny BMW due process of law for lack of notice, because the award exceeded the amounts justified under three "guideposts." [115] The *BMW* guideposts are: (1) the degree of reprehensibility of the person's conduct; (2) the disparity between the harm or potential harm suffered by the victim and his punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. [116] We apply these three guideposts to evaluate whether "a defendant lacked 'fair notice' of the *severity* of a punitive damages award," [117] and to stabilize the law by assuring the uniform treatment of similarly situated persons. [118]

In this case, the district court has not reviewed the award under the standards announced in *BMW* and *Cooper Industries*. This is because neither case had been decided at the time the jury returned its verdict, and, equally important, Exxon

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[112] *Id.* at 574, 585-86.

[113] *Id.* at 562-63.

[114] *Id.* at 565.

[115] *Id.* at 567, 574-75

[116] *Id.* at 574-575.

[117] *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997); *see also Pavon v. Swift Trans. Co.*, 192 F.3d 902, 909-10 (9th Cir. 1999); *Ace v. Aetna Life Insurance Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998).

[118] *Cooper Indus., Inc. v. Leatherman Tool*, 532 U.S. 424, 121 S. Ct. 1678, 1685 (2001) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (Breyer, J., concurring)).

raised no direct constitutional challenges to the amount of the award until after the judgment. We therefore have no constitutional analysis by the district court over which to exercise any de novo review.[119] Because we believe the district court should, in the first instance, apply the appropriate standards, we remand for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*. We think on these facts, this is the better approach, and we provide the following analysis to aid their consideration.

A. Reprehensibility.

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[120] The Supreme Court explained that "[p]erhaps the most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[121] "[E]xemplary damages should reflect the enormity of [the defendant's] offense,"[122] and "punitive damages may not be grossly out of proportion to the severity of the offense."[123]

Degree of reprehensibility did not justify a $2 million punitive damages award in the BMW case for two reasons. First, the harm inflicted on Dr. Gore was "purely economic."[124] BMW's recklessness was toward a person's economic interest in getting a car that had never been damaged, not toward his health or safety. The court drew an analogy to criminal cases, noting that for purposes of reprehensibility, "'nonviolent crimes are less serious than crimes marked by

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[119] *Cf. id.* at 1685-86.

[120] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

[121] *BMW*, 517 U.S. at 575.

[122] *Id.* (citing *Day v. Woodworth*, 13 How. 363, 371 (1852)).

[123] *Id.* (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993)).

[124] *Id.* at 576.

violence.'"[125] Second, though fraudulent, BMW's conduct did not include active "trickery or deceit," just silence where there should have been disclosure.[126] Likewise in the case at bar, there was no violence, no intentional spilling of oil (as in a "midnight dumping" case), and no executive trickery to hide or facilitate the spill. Although the huge oil spill obviously caused harm beyond the "purely economic," the punitive damages award was expressly limited by the instructions to exclude environmental harm, as it had to be to avoid the res judicata bar discussed in Section I(C). The district court instructed the jury that in determining punitive damages "you should not consider any damage to natural resources or to the environment generally."[127] It explained that "[a]ny liability for punitive damages relating to these harms has been fully resolved in proceedings involving the Exxon defendants and the Natural Resource Trustees."[128] No party has challenged this instruction on appeal. The $5 billion punishment in this case was for injury to private economic interests-claims of commercial fishermen that they made less money from fishing on account of the spill, claims of land owners that their shores were polluted with spilled oil, and claims of Alaska

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[125] *Id.* at 575-76 (quoting *Solem v. Helm,* 463 U.S. 277, 292-93 (1983)).

[126] *Id.* at 576, 579; *see also TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993) (affirming an award of $10 million in punitive damages in a title dispute case involving trickery); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 6-7 (1991) (affirming a punitive damage award of not less than $840,000 million in a breach of contract case involving fraud); *Neibel v. Trans World Assurance Co.,* 108 F.3d 1123, 1132 (9th Cir. 1997) (holding that punitive damages award was not excessive given that the defendants received warnings that the scheme was a scam and the fraud lured the plaintiffs to their financial ruin); *Hopkins v. Dow Corning Corp.,* 33 F.3d 1116, 1127-28 (9th Cir. 1994) (affirming a $6.5 million punitive damages award because Dow exposed thousands of women to painful and debilitating disease, gained financially from its conduct, and knew of the possible defects but concealed the information for years).

[127] Phase III Instruction 29.

[128] *Id.*

Natives that their subsistence fishing was impaired by the spill.

Plaintiffs correctly argue that Exxon's conduct was reprehensible because it knew of the risk of an oil spill in the transportation of huge quantities of oil through the icy waters of Prince William Sound. And it knew Hazelwood was an alcoholic who was drinking. But this goes more to justify punitive damages than to justify punitive damages at so high a level.

Also, the $5 billion punitive damages award at issue was against Exxon, which had some direct responsibility because it did not fire or transfer Hazelwood after learning that he was drinking and taking command despite his alcohol treatment, as well as vicarious responsibility. However, the difference between the $5,000 awarded as punitive damages against the man who directly caused the oil spill, and the $5 billion awarded as punitive damages against his employer gives rise to concern about jury evaluation of their relative reprehensibility.[129]

Some factors reduce reprehensibility here compared to some other punitive damages cases. Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct. Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.

Also, as bad as the oil spill was, Exxon did not spill the oil on purpose, and did not kill anyone. By contrast, in *Protectus*

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[129] *Cf. Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994) (" Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses.").

Alpha, a man was foreseeably killed by a deliberate act.[130] And in *Hilao v. Estate of Marcos,* a $1.2. billion punitive damages award, the defendant intentionally caused thousands of people to be tortured and killed.[131]

B. Ratio.

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[132] This analysis is based upon the "principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages."[133] The harm to be considered includes both the actual harm to the victim and the harm that was likely to occur.[134]

The "reasonable relationship" ratio is intrinsically somewhat indeterminate. The numerator is "the harm likely to result from the defendant's conduct."[135] The denominator is the amount of punitive damages. Because the numerator is ordinarily arguable, applying a mathematical bright line as though that were an objective measure of how high the punitive damages can go would give a false suggestion of precision. That is one reason why the Supreme Court has emphasized that it is not possible to "draw a mathematical bright line between the constitutionally acceptable and the constitution-

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[130] *Protectus Alpha,* 767 F.2d at 1381-1382.

[131] 103 F.3d 767, 771 (9th Cir. 1996).

[132] *BMW,* 517 U.S. at 580.

[133] *Id.*

[134] *See id.* at 581 ("*TXO,* following dicta in *Haslip,* refined this analysis by confirming that the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'") (quoting *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993)).

[135] *BMW,* 517 U.S. at 581 (quoting *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993)). Harm "likely" to occur is, of course, less than harm that is possible but unlikely to occur. *Cf. Leatherman,* 121 S. Ct. at 1688-89.

ally unacceptable that would fit every case."[136] Nevertheless, a "general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus."[137] Part of why the Court held that the punitive damages were excessive in *BMW* was a "breathtaking 500 to 1" ratio between the harm to the plaintiff himself and the award.[138]

Although it is difficult to determine the value of the harm from the oil spill in the case at bar,[139] the jury awarded $287 million in compensatory damages, and the ratio of $5 billion punitive damages to $287 million in compensatory damages is 17.42 to 1. The district court determined that "total harm could range from $288.7 million to $418.7 million,"[140] which produces a ratio between 12 to 1 and 17 to 1. This ratio greatly exceeds the 4 to 1 ratio that the Supreme Court called "close to the line" in *Pacific Mutual Life Ins. Co. v. Haslip.*[141]

The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment. "[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions," such as this one.[142]

The cleanup expenses Exxon paid should be considered as part of the deterrent already imposed. Depending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses. For example, a person painting his trim may not carefully mask window glass, because it is cheaper and easier

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[136] *BMW,* 517 U.S. at 576.

[137] *See BMW,* 517 U.S. at 582-83; *see also Boyle v. Lorimar Prods., Inc.,* 13 F.3d 1357, 1361 (9th Cir. 1994).

[138] *See id.* at 583.

[139] *Cf. Leatherman,* 121 S. Ct. at 1688.

[140] Order No. 267, at 13.

[141] 499 U.S. 1, 23 (1991).

[142] *Cf. In re Exxon Valdez,* 229 F.3d 790, 795 (9th Cir. 2000); *see also Baker v. Exxon,* 239 F.3d 985, 988 (9th Cir. 2001).

to scrape the paint off the glass than to mask it carefully. But if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him "only" $10,005 and he was not otherwise punished.

Exxon's casualty losses for the vessel and cargo (approximately $46 million),[143] the costs of clean up (approximately $2.1 billion), the fine and restitution (approximately $125 million), settlement with the government entities (approximately $900 million), settlements with private parties (approximately $300 million), and the net compensatory damages (approximately $19.6 million) totaled over $3.4 billion. Whether cost of cleanup and compensatory damages, damage to the vessel, and lost oil deters bad future acts depends on whether it greatly exceeds the expense of avoiding such accidents, not whether the amounts are compensatory or punitive. A company hauling a cargo worth around $25.7 million has a large incentive to avoid a $3.4 billion expense for the trip. This case is like the ink on the rug example, not the paint on the window example. Just the expense, without any punishment, is too large for a prudent transporter to take much of a chance, given the low cost of making sure alcoholics do not command their oil tankers. Because the costs and settlements in this case are so large, a lesser amount is necessary to deter future acts.

Ratio analysis as required by *BMW* helps avoid overdeterrence. Justice Breyer's concurrence in *BMW* notes that "[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would over-deter by leading potential defendants to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself."[144] It is hard to deter bad conduct without also deterring

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[143] Salvage of a vessel can be very difficult and expensive. *See, e.g., Hendricks v. Gordon Gill,* 737 F. Supp. 1099, 1101 (D. Alaska 1989).

[144] *BMW,* 517 U.S. at 593.

some good conduct that risks being misunderstood as bad, or that will look bad in retrospect. Every large company knows that it cannot exercise absolute control over all its employees, so if there is too much risk in performing some activity, the entire activity may be avoided as a preferable alternative to bearing potentially infinite costs of avoiding the harm, and society would lose the benefit of the productive activity. As bad as the oil spill is, fuel for the United States at moderate expense has great social value and that value as well as the value of avoiding horrendous oil spills can be reconciled by ratio analysis.

C. Comparable penalties.

The third *BMW* "indicium of excessiveness" is the penalties, civil or criminal, "that could be imposed for comparable misconduct."[145] The purpose of this particular indicium is to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[146] One reason the Court held that the $2 million punitive damages award was so excessive as to deny BMW due process of law, even though the corporation could easily pay it, was that the statutory sanctions were much lower than the punitive damages award.[147]

This case is unusually rich in comparables. Both the state and federal governments pursued sanctions and obtained judicial approval for the amounts. Thus, we know the state and federal legislative and executive judgments, both in general and as applied to this case, about what sanctions were appropriate.

Criminal fines are particularly informative because punitive damages are quasi-criminal.[148] The parties agree that 18 U.S.C. § 3571 is the federal measure for fines in this case. It

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[145] *Id.* at 582.

[146] *Id.* (internal citations omitted).

[147] *Id.* at 583.

[148] *Leatherman,* 121 S. Ct. at 1683.

provides for up to a $500,000 fine for a felony, or for a misdemeanor resulting in death, or $200,000 for a class A misdemeanor not resulting in death.[149] If $200,000 is the relevant legislative comparable judgment, then the punitive damages were twenty-five thousand times the legislative judgment, an excessiveness problem like *BMW*. Plaintiffs argue that we should use subsection (d) instead. That subsection provides an alternative fine where a "person derives pecuniary gain from the offense," or the offense "results in pecuniary loss" to another person, "not more than the greater of twice the gross gain or twice the gross loss."[150] The district court calculated damages to others as $386.7 million to $516.7 million. Doubling the highest number suggests an exposure to a criminal fine of $1.03 billion. The plaintiffs would double various additional figures, most importantly the $2.1 billion Exxon spent cleaning up the spill, but that would not be included in the § 3571(d) fine, because it is damage to Exxon itself, and the fine doubles only "loss to a person other than the defendant."[151]

Ceilings on civil liability are also instructive. Congress provided in the Trans-Alaska Pipeline Act that "if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel ... shall be strictly liable ... for all damages, including clean-up costs, sustained by any person or entity, public, or private, including residents of Canada, as the result of discharges of oil from such vessel."[152] However, "[s]trict liability for all claims arising out of any one incident shall not exceed $100,000,000."[153] That $100 million sanction is only 1/50 of the punitive damages award.

In addition to the legislative judgment, we have an actual

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[149] 18 U.S.C. § 3571(c).

[150] 18 U.S.C. § 3571(d).

[151] *Id.*

[152] 43 U.S.C. § 1653(c)(1).

[153] 43 U.S.C. § 1653(c)(3).

penal evaluation made in this case by the attorneys general of the United States and the State of Alaska. Exxon and the United States entered a plea agreement for $150 million, which was subsequently reduced to a $25 million fine plus $100 million in restitution. This plea agreement was approved by the district court. At Exxon's sentencing hearing, the U.S. Attorney explained that "[a]s a result [of the money Exxon agreed to pay under the Consent Decree], the total amount of the penalties, compensatory payments, and other voluntary expenditures will exceed 3.5 billion dollars" and that it was "hard to imagine a more adequate deterrence for negligence, [sic] but unintentional conduct." The Alaska Attorney General expressed similar views, indicating that the $150 million fine was "a number which the State can hold up to whether [sic] polluters that this is the fine which you face, 150 million dollars, and that certainly should be sufficient, the State believes to give pause to those who do not show the proper regard for the Alaska environment." In approving the consent decree, the district judge indicated that "it contain[ed] an appropriate amount of punishment."

The district judge subsequently explained why the $150 million was not, after all, the appropriate amount of punishment, when he denied the motion for new trial on punitive damages, by noting that "the criminal payment was made before the harm to plaintiffs was quantified." While not a limit, the fine is nevertheless a significant datum, because the massiveness of the spill was apparent immediately, and the $150 million represents an adversarial judgment by the executive officers of the state and federal governments who had the public responsibility for seeking the appropriate level of punishment.

Because of the importance of the *Exxon Valdez* oil spill, Congress revised federal law to assure that such spills would be adequately deterred and punished in the future.[154] Obviously Exxon could not have had notice of an Act passed after

[154] 33 U.S.C. § 1321(b)(7).

the spill. Nevertheless, the Oil Pollution Act has value as a legislative judgment, made in the course of legislative evaluation of this particular oil spill, of what amount of punishment serves the public interest in deterring and punishing, but not overdeterring, the conduct that caused the spill.[155] Congress sought to deter pollution, but not so aggressively as to deter transporting oil. Under the Act, the owner of vessels from which oil is discharged on account of "gross negligence or willful misconduct" is subject to a civil penalty of "not more than $3,000 per barrel of oil ... discharged."[156] The *Exxon Valdez* spilled 11 million gallons, which is 261,905 barrels.[157] Thus, Congress's retrospective judgment made as it considered this oil spill was that the maximum permissible civil penalty for a grossly negligent spill as big as the *Exxon Valdez* ought to be no more than $786 million.

D. Summary.

The $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW*[158] and *Cooper Industries.*[159] It must be reduced. Because these Supreme Court decisions came down after the district court ruled, it could not apply them. We therefore vacate the award and remand so that the district court can set a lower amount in light of the *BMW* and *Cooper Industries* standards.

V. Juror misconduct.

Exxon argues that the jury improperly considered material somehow obtained outside the evidence, which showed that Hazelwood had either been convicted of driving under the influence or had his driver's license revoked. About a year after the trial and following extensive motion practice, the

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[155] *Id.; see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law,* vol. 2 418 (1987).

[156] 33 U.S.C. § 1321(b)(7)(D).

[157] 33 U.S.C. § 1321(a)(13) ("'barrel' means 42 United States gallons at 60 degrees Fahrenheit.").

[158] 517 U.S. 559 (1996).

[159] 532 U.S. 424, 121 S. Ct. 1678.

district court held an evidentiary hearing in which ten of the jurors and the husband of the eleventh were questioned under oath to find out whether jurors had been exposed to any extrinsic evidence.

Most of the jurors said they had no information about Hazelwood's driving record in the evidence, a few thought they had learned about it or inferred it from the evidence such as Hazelwood's personnel record, and a few knew about it but were uncertain when or where they had learned about it. Based upon an affidavit describing an examination of all the transcripts and exhibits, the district court found that there was no evidence of Hazelwood's conviction or license revocation, so the jurors who testified to the contrary were confused about where they had learned it. The court therefore made a finding of fact that "the jurors were not exposed to extraneous information about Captain Hazelwood."

> "Where extraneous information is imparted, as when papers bearing on the facts get into the jury room without having been admitted as exhibits, or when a juror looks things up in a dictionary or directory, the burden is generally on the party opposing a new trial to demonstrate the absence of prejudice, and a new trial is ordinarily granted if there is a reasonable possibility that the material could have affected the verdict."[160]

Before we apply the standard for what to do when extraneous information was imparted, it has to have been imparted. The district court found that it was not. The district court's findings of fact are reviewed for clear error.[161] Exxon argues that the district court "inexplicably" so found because some jurors had testified to the contrary and some of the judge's questions were not well phrased. The argument is weightless. There is nothing inexplicable about a person having trouble

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[160] *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000).

[161] *Id.* at 911 n. 19; *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000).

recalling accurately whether he learned something during a trial or deliberations, or during a subsequent year of intensive media publicity about the trial. The questions were well within the district court's discretion and appear to us to have been carefully designed to determine the truth. There is no basis for the argument that the district court's finding of no extraneous information was clearly erroneous.

VI. Compensatory Awards.

Exxon argues that the jury verdict "contained indefensible awards" of compensatory damages of $22 million for chum salmon fishermen and of $30 million for setnetter fishermen. Exxon argues that it should have been granted judgment as a matter of law to correct these "errors" by the jury.

We review a jury verdict of compensatory damages for substantial evidence,[162] and "will not disturb an award of damages unless it is clearly unsupported by the evidence."[163] We afford "substantial deference to a jury's finding of the appropriate amount of damages,"[164] and we "*must* uphold the jury's findings unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork."[165]

Exxon's argument is that when we apply the theories offered by its expert witnesses to the data on fish catches in different years, it is not possible to arrive at the numbers the jury did. These numbers and theories depended on several unknown factors, such as whether the price of certain kinds of fish went down because buyers feared oil contamination or because farmed salmon became a significant competitor of wild salmon, and how much fish would have been caught over the course of several years had there not been an oil spill.

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[162] *Three Boys Music Corp. v. Bolton,* 212 F.3d 477, 482 (9th Cir. 2000); *Lambert v. Ackerley,* 180 F.3d 997, 1012 (9th Cir. 1999) (en banc).

[163] *Stinnett v. Damson Oil Corp.,* 813 F.2d 1394, 1398 (9th Cir. 1987).

[164] *Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422, 1435 (9th Cir. 1996).

[165] *Id.* (emphasis added).

Exxon argues that a jury may not reject all the expert testimony and "pick out of the air a number," citing for that proposition our decisions in *Rebel Oil Co. v. Atlantic Richfield Co.*,[166] *Claar v. Burlington Northern Railroad Co.*,[167] and the District of Columbia Circuit's decision in *Lewis v. Washington Metropolitan Area Transit Authority*.[168]

Exxon's citations are not at all in point, and it is puzzling that the brief uses them for the proposition for which they are cited. *Rebel Oil* is an appeal from a summary judgment, and has nothing to do with whether a jury has to follow an expert.[169] Likewise *Claar*.[170] *Lewis* at least has the relevance that it involves an appellate challenge to a jury verdict,[171] but it is also not in point. The question was whether a woman's wrist and knee injuries were caused by a bus accident, and it was controlled by District of Columbia law requiring expert testimony to support causation, which the plaintiff had failed to present.[172] No such principle of law has been cited to us in this case.

Nor is Exxon's argument on the facts so compelling as to exclude the possibility that a reasonable jury could go any other way. While Exxon presents a plausible argument against the soundness of the damages awards, the complexity and uncertainty of these damages questions left room for reasonable jurors to take many paths. Reasonable jurors need not accept the views of one side's expert or the other's, but may make their own reasonable judgment on the evidence, accepting part, all, or none of any witness's testimony.

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[166] 51 F.3d 1421 (9th Cir. 1995).

[167] 29 F.3d 499 (9th Cir. 1994).

[168] 19 F.3d 677 (D.C.Cir. 1994).

[169] *Rebel Oil*, 51 F.3d at 1429-30.

[170] *Claar*, 29 F.3d at 500.

[171] *Lewis*, 19 F.3d at 678.

[172] *Id.* at 679, 680-82.

VII. Hazelwood's separate appeal.

Hazelwood's separate appeal challenges two evidentiary rulings.

A. Blood Test Results.

Exxon and Hazelwood moved *in limine* to exclude evidence of a .061% blood alcohol level in samples taken eleven hours after the *Exxon Valdez* ran aground on Bligh Reef. Expert testimony was offered to show that if he still had that much alcohol in his blood eleven hours later, he must have been deeply under the influence when he abandoned the bridge to the third mate.

The district court, despite noting "remarkable mishandlings" of the blood samples, denied the motion *in limine*.[173] Its reasons were that any change in the blood from bad storage would have been observed and noted by the laboratory technicians, and that the evidence on chain of custody regarding sealed tubes with Hazelwood's name and social security number on them was good enough so that reasonable jurors could conclude that the tubes contained Hazelwood's blood. Hazelwood argues on appeal that because of improper storage and because of a discrepancy between the color of the stoppers in the evidence log and the lab notes, the evidence should not have been admitted.

We review evidentiary rulings for abuse of discretion.[174] The authentication of evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[175] The district court properly exercised its discretion according to the correct standard, which is whether "a reasonable juror could find" that the tested specimens were Hazelwood's.[176]

Hazelwood argues that authentication was inadequate as a

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[173] *See* Order No. 215, at 2-3.

[174] *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 927 (9th Cir. 2000).

[175] *United States v. Harrington,* 923 F.2d 1371, 1374 (9th Cir. 1991).

[176] *See id.*

matter of law, under *Iran v. INS.*[177] *Iran* is not in point. It merely rejects the contention made by the Immigration and Naturalization Service that no authentication of documents at all was necessary to have them admitted at deportation hearings.[178] In this case, there was authentication.[179] Though the challenge to authenticity was plausible, the challenge was not so compelling as to render admission an abuse of discretion. If a witness offers testimony from which a reasonable juror could find in favor of authenticity, the trial court may properly admit the evidence to allow the jury to decide what probative force it has.[180]

B. Individual Disability Report.

Hazelwood and Exxon sought an *in limine* order to exclude a physician's report from 1985 that diagnosed him as having "dysthemia" and "alcohol abuse-episodic." Hazelwood argues on appeal that admission of the report violated his state physician-patient privilege and federal regulations relating to alcohol treatment.

The report was made on an Exxon form called an Individual Disability Report that Hazelwood provided. It is a doctor's excuse that the company requires when an employee misses more than five days of work because of claimed illness. The doctor sent the form to the company, rather than maintaining it in his confidential files.

The Alaska Rules of Evidence protect against disclosure of "confidential communications made for the purpose of

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[177] 656 F.2d 469 (9th Cir. 1981).

[178] *See id.* at 472.

[179] *Cf. United States v. Blackwood,* 878 F.2d 1200, 1202 (9th Cir. 1989) (finding *Iran* inapplicable where witness with personal knowledge provided extrinsic evidence to establish authenticity).

[180] *Id.; Ballou v. Henri Studios, Inc.,* 656 F.2d 1147, 1155 (5th Cir. 1981) (stating that claims of "alteration, contamination or adulteration" of blood samples that serve as the basis of blood tests to determine intoxication go to the "weight and not the admissibility of the evidence.").

diagnosis or treatment."[181] A doctor's excuse sent to the patient's employer is not shielded by this rule.[182] Even if the form and the testimony relating to it were covered by the federal confidentiality rule, admission of this record was within the court's discretion,[183] and was harmless in any event because of the overwhelming evidence from other sources establishing the matter at issue, that Hazelwood had the alcohol problem the record tended to prove.

VIII. Plaintiffs' cross appeal.

Plaintiffs cross appeal. They argue that the district court erroneously granted summary judgment against the claimants who suffered purely economic injury on account of the oil spill. And they argue that if the punitive damages award were reversed, then certain rulings on evidence and instructions were erroneous and should be corrected for retrial.

A. Economic injury.

The district court granted summary judgment against all claimants who suffered only economic injury on account of the oil spill, unaccompanied by any physical injury to their property or person. It relied on the United States Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint,*[184] a case commonly read to hold that economic recovery is unavailable in admiralty cases absent physical harm, and our decision in *Union Oil Co. v. Oppen,*[185] which recognized a commercial fisherman's exception to the *Robins Dry Dock* rule. Based on the understanding that state law may not conflict with federal maritime law, the district court held that *Robins Dry Dock* preempted Alaska's strict liability statute for hazardous substances. In light of subsequent Supreme Court decisions, we are compelled to reverse the district

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[181] AK R. Evid. 504(b).

[182] AK R. Evid. 504(a)(4).

[183] 42 U.S.C. § 290dd-2(b)(2)(C).

[184] 275 U.S. 303 (1927).

[185] 501 F.2d 558 (9th Cir. 1974).

court's ruling in part.

Whether the dismissed claimants may recover depends on two inquiries: whether state law can control despite *Robins Dry Dock,* and whether Alaska law does indeed allow for recovery. The first question has been recently addressed by the United States Supreme Court. In *American Dredging Co. v. Miller*[186] and *Yamaha Motor Corp. v. Calhoun,*[187] the Supreme Court reaffirmed the three-prong test articulated almost a century ago in *Southern Pacific Co. v. Jensen,*[188] as the proper analysis for determining whether federal admiralty law preempts contrary state law. Interpreting the "saving to suitors clause" of the 1789 Judiciary Act, the Supreme Court held that, notwithstanding federal admiralty law, a state may "adopt such remedies ... as it sees fit" so long as the state remedy does not (1) "contravene[ ] the essential purpose expressed by an act of Congress;" (2) "work[ ] material prejudice to the characteristic features of the general maritime law"; or (3) "interfere[ ] with the proper harmony and uniformity of that law in its international and interstate relations."[189] Whether contrary state law can control despite *Robins* thus depends on whether the denial of recovery for pure economic injury is the "essential purpose" of an act of Congress, a "characteristic feature" of admiralty, or a doctrine whose uniform application is necessary to maintain the "proper harmony" of maritime law.[190] Like the First Circuit, we think it is none of these.[191]

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[186] 510 U.S. 443 (1994).

[187] 516 U.S. 199 (1966).

[188] 244 U.S. 205 (1917).

[189] *American Dredging,* 510 U.S. at 447; *see also Yamaha,* 516 U.S. at 211.

[190] *See American Dredging,* 510 U.S. at 447.

[191] *See Ballard,* 32 F.3d 623. The conclusion that contrary state law is not preempted by *Robins* has also been reached in the context of maritime oil spills by the Alaska Supreme Court and several district courts. *See Kodiak Island Borough v. Exxon,* 991 P.2d 757 (1999); *Complaint of*

The first question is easily disposed of: no act of Congress directly governs our case.[192] The second prong of the *Jensen* test requires preemption where a state remedy "works material prejudice to [a] characteristic featur[e] of the general maritime law." In *American Dredging,* the Court held that the "characteristic feature" language of *Jensen* refers only to a federal rule that either "originated in admiralty" or "has exclusive application there."[193] Where a federal rule "is and has long been a doctrine of general application," a state's refusal to follow that rule does not "work 'material prejudice to [a] characteristic featur[e] of the general maritime law.'"[194]

As the First Circuit has held, the *Robins Dry Dock* rule denying purely economic losses neither "originated in admiralty" nor "had 'exclusive' application in admiralty."[195] Justice Holmes' opinion in *Robins Dry Dock* presents the rule as a truism for which "no authority need be cited," and cites four cases that have applied the rule, only two of which are in admiralty.[196] It is a traditional rule of tort law.[197] Commentators trace the *Robins Dry Dock* rule to a non-admiralty case decided in 1875.[198] And courts, including our own, have repeatedly denied liability for purely economic harm in a variety of land-based contexts. As the Fifth Circuit noted in *M/V Testbank,* "[*Robins Dry Dock*] broke no new ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interfer-

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Nautilus Motor Tanker Co., Ltd., 900 F. Supp. 697 (D.N.J.1995); *Slaven v. BP America, Inc.,* 786 F. Supp. 853 (C.D. Cal. 1992).

[192] *See, e.g., Ballard,* 32 F.3d at 627 (no act of Congress governed 1989 spill); *In re Nautilus,* 900 F. Supp. at 702 (no act of Congress governed 1990 spill).

[193] 510 U.S. at 450.

[194] *Id.*

[195] *Ballard,* 32 F.3d at 627-28.

[196] 275 U.S. at 309.

[197] *Ballard,* 32 F.3d at 628.

[198] *See Id.*

ence with 'contractual rights.'"[199] Thus, a state's decision to depart from *Robins Dry Dock* does not materially prejudice a rule that "originated in" or is "exclusive to" general maritime law, and cannot be preempted on this ground.

State law allowing for recovery of purely economic damage can be preempted, therefore, only if it "interferes with the proper harmony and uniformity" of maritime law.[200] The Supreme Court has adopted a balancing test that weighs state and federal interests on a case-by-case basis.[201]

In undertaking this balancing test, we first look to the state interest in providing remedies for damages caused by oil spills. The Alaska Supreme Court has expressly recognized the state's "strong interest in regulating oil pollution and in providing remedies for damages caused by oil spills."[202] The United States Supreme Court has similarly recognized that regulating oil pollution and providing for recovery of economic damages is within the state's police powers, and is not preempted by federal law.[203] Because it is undisputed that "general maritime law may be changed, modified, or affected by state legislation,"[204] where "the state law is aimed at a matter of great and legitimate state concern, a court must act

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[199] *State of Louisiana v. M/V Testbank,* 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc).

[200] *Jensen,* 244 U.S. at 216.

[201] *Yamaha,* 516 U.S. at 210-15; *Ballard,* 32 F.3d at 628 (citing *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961)); *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442-48 (1960).

[202] *Kodiak,* 991 P.2d at 768 (finding *Robins Dry Dock* does not preempt state law remedies).

[203] *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 328-29 (1973) (describing oil spills as "an insidious form of pollution of vast concern to every coastal city or port and to all estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent"); *see also Huron,* 362 U.S. at 442 (describing state air pollution laws as a classic example of police power allowing states to regulate maritime activities concurrently with the federal government).

[204] *Jensen,* 244 U.S. at 216.

with great caution," before declaring the state remedy "potentially so disruptive as to be unconstitutional."[205]

Accordingly, we must balance a state's "great and legitimate" interest in protecting its citizens from oil spill-related injury against the federal interest in barring recovery for pure economic harm. The federal interest in maintaining a uniform rule of recovery in admiralty is "more subtle but also not without importance."[206] It aims to contain costs potentially imposed on maritime commerce by a regime of liability, or a diversity of regimes, that are not so difficult to administer as to prevent the efficient and predictable resolution of maritime disputes.

Two federal laws establish the absence of a federal policy against awards for purely economic harm, the Oil Pollution Act ("OPA")[207] and the Trans-Alaska Pipeline Authorization Act ("TAPAA").[208] The First Circuit concluded that OPA "almost certainly provides for recovery of purely economic damages in oil spill cases" even where the claimant does not have a proprietary interest in the damaged property or natural resources.[209] The same has been said of TAPAA.[210] Both OPA and TAPAA, moreover, expressly provide that they do not preempt state imposition of additional liability requirements.[211] These statutes offer "compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime com-

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[205] *Ballard,* 32 F.3d at 630.

[206] *Id.* at 629.

[207] Oil Pollution Act of 1990, 33 U.S.C §§ 2701-2718 (1990).

[208] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1656 (1994).

[209] *Ballard,* 32 F.3d at 630-31

[210] *Slaven v. BP America, Inc.,* 786 F. Supp. 853, 857-59 (C.D.Cal.1992) (TAPAA repealed *Robins Dry Dock,* at least in part)

[211] *See* 33 U.S.C. § 2718(a)(1990); 43 U.S.C. § 1653(c)(3) & (9) (1994).

merce."[212]

In light of these considerations, the balance tips in favor of the state: "Alaska's strong interest in protecting its waters and providing remedies for damages resulting from oil spills outweighs the diminished federal interest in achieving interstate harmony through the uniform application of *Robins.*"[213]

Whether the dismissed claimants can recover depends, therefore, on whether economic recovery is indeed available under Alaska law. The Alaska Supreme Court has recently addressed this issue under Alaska's strict liability statute for hazardous substances, Alaska Stat. § 46.03.822.[214]

This expansion of liability to purely economic harm does not establish liability for all the claims plaintiffs advance. As we held in *Benefiel v. Exxon Corp.*[215] the requirement of proximate cause bars remote and speculative claims. There we held that Californians who claimed that their gasoline cost more as a result of the Exxon Valdez oil spill were barred from recovery because of "the remote and derivative damages" they claimed and lack of proximate cause as a matter of law.[216]

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 damages. Summary judgment was appropriately granted against "area businesses," "commercial fishermen outside the closed areas," the aquaculture associa-

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[212] *Ballard,* 32 F.3d at 630-31.

[213] *Kodiak,* 991 P.2d at 769.

[214] *See id.* at 759-65; *Federal Deposit Ins. Corp. v. Laidlaw Transit, Inc.,* 21 P.3d 344 (Alaska 2001).

[215] 959 F.2d 805, 808 (9th Cir. 1992).

[216] *Benefiel,* 959 F.2d at 808 ("[w]hile proximate or legal causation normally presents an issue for the trier of fact to resolve, both California and federal law recognize that where causation cannot reasonably be established under the facts alleged by a plaintiff, the question of proximate cause is one for the courts.").

tion, and persons claiming "stigma" damages. Even without *Robins Dry Dock,* these groups' damages were too remote.

B. Conditional Cross-Appeals.

Plaintiffs argue that if the judgment is reversed in any respect, we should also reverse certain evidentiary and instructions determinations made by the trial court. We decline to do so.

First, plaintiffs say that the trial court erred in excluding some evidence of Hazelwood's drinking, drunkenness, and leaving the bridge during the early 1980's, before he went to a hospital for alcohol treatment. The district court excluded the evidence because much other evidence, closer in time and more relevant, of substantially the same conduct came in. The excluded evidence was of lesser relevance because it was remote in time, was likely to cause confusion, and would waste time as there would be a trial within the trial about whether the highly disputed allegations were true. This was within the district court's discretion.[217]

Plaintiffs also argue that the district court erred by excluding evidence of Hazelwood's two criminal convictions for driving while under the influence of alcohol. The district court excluded them for various reasons, among which were that the risk of unfair prejudice outweighed the relevance, particularly because Exxon did not know about them, because Hazelwood's misconduct with his own car on his own time had limited value in proving what he did on company time with the company's oil tanker, and because the offer of proof suggested use of character to prove conduct.[218] Though plaintiffs make a good argument for admitting the evidence, we cannot say that the district court abused its discretion in keeping it out. Nor, considering the evidence of alcohol abuse that came in, is there any significant possibility that the out-

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[217] Fed. R. Evid. 403; *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 927 (9th Cir. 2000).

[218] Fed. R. Evid. 403; Fed. R. Evid. 404.

come was affected by the exclusion.[219]

The same applies to the other challenged rulings, which excluded evidence that Hazelwood had five to seven drinks on an airplane flight a few days after the oil spill, and limited an expert witness's reliance on the excluded material. The district court's exclusion of evidence relating to whether a punitive damages award of the magnitude of this one was "material" to Exxon's financial condition was within its discretion for the reason the court gave, that "materiality" was a subjective accounting judgment not helpful to the jury.[220] The district court also did not abuse its discretion in refusing to admit evidence of Exxon's insurance coverage.

Likewise plaintiffs' disputes about the formulation of jury instructions go to exercises of discretion, and the district court has broad discretion in the formulation of instructions.[221] It was not abused.

Conclusion

The judgment is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. Each party to bear its own costs.

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[219] *Bernal,* 204 F.3d at 927-28.

[220] *Cf. id.* at 927; *see also* Fed. R. Evid. 403.

[221] *Beachy v. Boise Cascade Corp.,* 191 F.3d 1010, 1013 (9th Cir. 1999), *cert. denied,* 529 U.S. 1021 (2000).

APPENDIX C

United States District Court, D. Alaska.
In re the EXXON VALDEZ
This Order Relates to All Cases
No. A89-0095-CV (HRH).

Jan. 28, 2004.

ORDER No. 364

Second Renewed Motion for Reduction of Punitive Damages Award

HOLLAND, District Judge.

Preface

On December 6, 2002, the court granted Exxon Mobil Corporation's (D-1) and Exxon Shipping Company's (D-2), hereinafter referred to as "Exxon", renewed motion for reduction or remittitur and reduced a jury verdict awarding plaintiffs $5 billion in punitive damages to $4 billion.[1] The court concluded that application of the *BMW* guideposts supported the $5 billion award but, based on plaintiffs' alternative suggestion, reduced the award to $4 billion because the Ninth Circuit in earlier proceedings hereinafter described in detail had mandated that the award be reduced on remand. After final judgment was entered on the $4 billion award,[2] both Exxon and plaintiffs timely appealed.[3]

On April 7, 2003, before any briefing on the appeals in this case, the Supreme Court decided *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct.

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[1] Order No. 358, Clerk's Docket No. 7564. Order No. 358 was published as *In re Exxon Valdez,* 236 F. Supp. 2d 1043 (D. Alaska 2002).

[2] Order No. 359 (granting Motion for Rule 54(b) Determination) (Jan. 27, 2003), Clerk's Docket No. 7589; Judgment, Clerk's Docket No. 7566.

[3] Clerk's Docket Nos. 7605 and 7609A.

1513 (2003).[4] In *State Farm,* the United States Supreme Court revisited the due process issue as to punitive damages in the context of an insurance bad faith case. On August 18, 2003, the Ninth Circuit Court of Appeals vacated the $4 billion punitive damages judgment and remanded the case to this court to reconsider the punitive damages award in light of *State Farm.*[5] Upon remand, this court called for supplemental briefing from the parties to aid in its reconsideration.[6] Exxon submitted its supplemental briefing in the form of a second renewed motion for reduction or remittitur of punitive damages.[7] This motion is opposed by plaintiffs.[8] Oral argument on the second renewed motion for reduction or remittitur of punitive damages was heard on December 3, 2003.

After considering the parties' briefing and hearing oral argument, the court has determined it most practical, for purposes of reevaluating the punitive damages award, to vacate Order No. 358 in its entirety.[9] *State Farm* adds no new, free-standing factor to the constitutional analysis of punitive damages that the court might "tie onto" its previous order. It is the court's view that *State Farm,* while bringing the *BMW* guideposts into sharper focus, does not change the analysis.[10]

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[4] *State Farm* will also be published as 538 U.S. 408, 123 S .Ct. 1513.

[5] *See* Order, Clerk's Docket No. 7737.

[6] Order re Further Proceedings on Punitive Damages Award (Aug. 26, 2003), Clerk's Docket No. 7714.

[7] Clerk's Docket No. 7753.

[8] Clerk's Docket No. 7767.

[9] Vacating Order No. 358 impliedly leaves Exxon's Renewed Motion for Reduction of Punitive Damages Award, Clerk's Docket No. 7487, unresolved. In light of Exxon's Second Renewed Motion for the Reduction of Punitive Damages, the motion at Clerk's Docket No. 7487 is denied as moot.

[10] By so stating, the court does not mean that it has adopted plaintiffs' suggestion that *State Farm* breaks no new ground and is limited to the facts of that case. There is new guidance from the Supreme Court; however, there is still no "bright-line" rule as to what is or is not unconstitutional as regards punitive damages. *State Farm,* 123 S. Ct. at 1524. The three *BMW* guideposts still apply.

In fact, there are aspects of the due process evaluation of punitive damages awards which have not changed at all as a result of *State Farm.* As a consequence, although the court is vacating Order No. 358, where the court perceives no need or necessity of further exposition of the facts or its view of the law, the court will simply replicate what it has previously said in Order No. 358.

Facts

Terrible things have happened in Alaska on Good Friday. On Good Friday, March 27, 1964, the strongest earthquake ever recorded in North America literally relocated the seabed of most of Prince William Sound and the Kenai Peninsula. On Good Friday, March 24, 1989, the oil tanker *Exxon Valdez* was run aground on Bligh Reef in Prince William Sound, Alaska.

On March 24, 1989, Exxon's co-defendant, Joseph Hazelwood, was in command of the *Exxon Valdez.* He was assisted by a third mate and a helmsman. Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and, before departing Valdez, Alaska, on March 23, 1989, he had, more probably than not, consumed sufficient alcohol to incapacitate a non-alcoholic. As the *Exxon Valdez* exited Valdez Arm, Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier. That diversion from the standard shipping lanes took the vessel directly toward Bligh Reef. The captain gave the third mate explicit, accurate orders which, if carried out by the third mate, would have returned the vessel to the shipping lanes without danger of grounding on Bligh Reef. The third mate, who had completed the requirements for a captain's license, was, more probably than not, overworked and excessively tired at the time in question. He neglected to commence a turn of the vessel at the point where, and the time when, he had been directed to do so. At that critical time, Captain Hazelwood had left the bridge to attend to paperwork.

When the third mate realized that he had proceeded too far in the direction of Bligh Reef, he commenced a turn, but it was too late.

Like so many great tragedies, this one occurred when three or more unfortunate acts and/or omissions took place in close proximity to one another, and but for any one of them, the grounding would likely not have occurred. Joe Hazelwood was under the influence of alcohol. Instead of staying on the bridge to verify that his orders were carried out, he tended to paperwork below. The third mate, being overworked and tired, neglected to carry out the orders which he had been given. The grounding might still have been avoided but for several other converging circumstances: the captain had put the vessel on an automated system for increasing its speed prior to completing the maneuver around the ice in the shipping lane; and the third mate, upon realizing his oversight, did not turn the vessel as sharply as he might have.

It has never been established that there was any design, mechanical, or other fault in the *Exxon Valdez.* It responded to its human masters as intended and expected. Thus it is entirely clear why the *Exxon Valdez* grounded on Bligh Reef: the cause was pure and simple human frailty.

Defendant Exxon Shipping owned the *Exxon Valdez.* Exxon employed Captain Hazelwood, and kept him employed knowing that he had an alcohol problem. The captain had supposedly been rehabilitated, but Exxon knew better before March 24, 1989. Hazelwood had sought treatment for alcohol abuse in 1985 but had "fallen off the wagon" by the spring of 1986. Exxon knew that Hazelwood had relapsed and that he was drinking while on board ship. Exxon officials heard multiple reports of Hazelwood's relapse, and Hazelwood was being watched by other Exxon officers. Yet, Exxon continued to allow Hazelwood to command a supertanker carrying a hazardous cargo. Because Exxon did nothing despite its knowledge that Hazelwood was once again drinking, Captain Hazelwood was *the* person in charge of a vessel as long as three football fields and carrying 53 million gallons of crude

oil. Exxon officials knew that it was dangerous to have a captain with an alcohol problem commanding a supertanker. Exxon officials also knew that oil and fisheries could not mix with one another. Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct the operation of the *Exxon Valdez* through Prince William Sound.

Captain Hazelwood came to the bridge immediately after the grounding. He timely reported to the United States Coast Guard:

> *Exxon Valdez* [calling Valdez Traffic Control]. We should be on your radar there. We've fetched up hard aground north of Goose Island off Bligh Reef and evidently leaking some oil and we're gonna be here for a while....[11]

Despite the fact that he was aware of oil boiling up through the seawater on both sides of the vessel, Captain Hazelwood attempted to extract the vessel from the reef.[12] Had he succeeded in backing the vessel off the reef or driving it across the reef, the *Exxon Valdez* would probably have foundered, risking the loss of the entire cargo and the lives of those aboard. However, the vessel was really hard aground. It could wiggle but not be moved off Bligh Reef.

The best available estimate of the crude oil lost from the *Exxon Valdez* into Prince William Sound is about 11 million gallons.[13] In the days following the grounding, about 42 mil-

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[11] Plaintiffs' Exhibit 92A, Excerpts of Record, Vol. II-Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[12] Transcript of Trial Testimony of Joseph J. Hazelwood at 439, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[13] Throughout these proceedings, plaintiff W. Findlay Abbott has contended that far more than 11 million gallons of crude oil were actually spilled from the *Exxon Valdez* into Prince William Sound. The court has repeatedly rejected these contentions for lack of any substantial evidence to support Mr. Abbott's contentions. For example, his *qui tam* action,

lion gallons of crude oil were lightered off the *Exxon Valdez* by other tankers. This process was very dangerous. The lightering process was necessarily taking place in a pool of crude oil. A spark from static electricity or other mechanical or electrical sources might have set fire to the crude oil.

The crude oil lost from the *Exxon Valdez* spread far and wide around Prince William Sound, mostly in a westerly direction. Counter-currents which pass through the sound in a westerly direction (the primary North Pacific currents flow from west to east) took the crude oil past numerous islands, spreading to the coast of the Kenai Peninsula, Cook Inlet, and Kodiak Island. As the oil spread, it disrupted the lives and livelihoods of those in its path, including the 32,677 punitive damages class members. Commercial fisheries throughout this area were totally disrupted, with entire fisheries being closed for the 1989 season. As a result, commercial fishermen not only suffered economic losses but also the emotional distress that comes from having one's means of making a living destroyed. A high percentage of commercial fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three.[14] Subsistence fishing by residents of Prince William Sound and Lower Cook Inlet villages was also disrupted. The disruption to subsistence fishing deeply affected Native Alaskans, for whom subsistence fishing is not merely a way to feed their families but an important part of their culture. Research indicated that Native Alaskans also experienced great emotional

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United States ex rel. Abbott v. Exxon Corp., No. A96-0041-CV, was dismissed by this court and that dismissal was affirmed by the Ninth Circuit Court of Appeals, 182 F.3d 930 (Table) (1999 WL 313320) (9th Cir. 1999). There is no reliable evidence in the record that a larger spill was covered up by Exxon.

[14] J. Steven Picou and Duane A. Gill, "The *Exxon Valdez* Disaster as Localized Environmental Catastrophe: Dissimilarities to Risk Society Theory" in *Risk in the Modern Age: Social Theory, Science and Environmental Decisionmaking,* Maurie J. Cohen, ed. (2000) at 160-62, pertinent part attached as Exhibit 6 to Declaration of David W. Oesting, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

distress following the spill.[15] Shore-based businesses dependent upon the fishing industry were also disrupted as were the resources of cities such as Cordova.

In keeping with its legal obligations, Exxon undertook a massive cleanup effort.[16] Approximately $2.1 billion was ultimately spent in efforts to remove the spilled crude oil from the waters and beaches of Prince William Sound, Lower Cook Inlet, and Kodiak Island. Also in accordance with its legal obligations attendant to spilling crude oil,[17] Exxon undertook a voluntary claims program, ultimately paying out $303 million, principally to fishermen whose livelihood was disrupted for the year 1989 and ensuing years up to 1994.

Proceedings

Litigation over the grounding was soon commenced. The civil suits came first, but developed slowly because of their number and complexity. Both the United States Government and the State of Alaska sued Exxon for environmental damage. That litigation was expeditiously settled by means of consent decrees under which Exxon agreed to pay to the governments, for environmental damage, $900 million over a period of ten years.[18] The decrees contain an "opener" provision, allowing the governments to make additional claims of up to $100 million for environmental damage not known when the settlements were reached.[19]

Captain Hazelwood was prosecuted by the State of Alaska for operating a watercraft while intoxicated, reckless endan-

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[15] *Id.* at 160-61.

[16] *See* 33 U.S.C. § 1321, which imposes a duty upon an owner or operator of a vessel that spills oil to clean up its discharge.

[17] AS 46.03.822.

[18] *United States v. Exxon Corp.*, No. A91-0082-CV (Clerk's Docket No. 46 at 7-8), and *Alaska v. Exxon Corp.*, No. A91-0083-CV (Clerk's Docket No. 26 at 7-8).

[19] *See* Consent Decree and Agreement at 18-19, Clerk's Docket No. 46 in *United States v. Exxon Corp.*, No. A91-0082-CV, and Clerk's Docket No. 26 in *Alaska v. Exxon Corp.*, No. A91-0083-CV.

germent, negligent discharge of oil, and three felony counts of criminal mischief. That litigation became involved in legal complexities which led to multiple appeals. Some nine years after the grounding, a single misdemeanor conviction for negligent discharge of oil was affirmed on appeal.[20]

Exxon was prosecuted by the federal government for various environmental crimes: violating the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); violating the Refuse Act, 33 U.S.C. §§ 407 and 411; violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and violating the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon Corporation pled guilty to one count of violating the Migratory Bird Treaty Act. Exxon Shipping pled guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. They were jointly fined $25 million and were ordered to pay restitution in the amount of $100 million.[21]

The civil cases (involving thousands of plaintiffs) were ultimately (but with a few exceptions) consolidated into this case. Municipal claims and some Native corporation claims were tried in state court.[22]In the consolidated cases, there was

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[20] *State v. Hazelwood,* 946 P.2d 875 (Alaska 1997); *State v. Hazelwood,* 866 P.2d 827 (Alaska 1993); and *Hazelwood v. State,* 962 P.2d 196 (Alaska Ct. App.1998).

[21] *See* Judgments at Clerk's Docket Nos. 235 and 236 in *United States v. Exxon Corp.,* No. A90-0015-CR.

[22] More or less simultaneously with the trial in this case, a state court civil trial involving several Native corporations was conducted. The jury awarded the corporations almost $6 million in damages. *Chenega Corp. v. Exxon Corp.,* 991 P.2d 769, 774 (Alaska 1999). The trial court offset pretrial settlements and payments against the jury award. *Id.* at 775. Because the pretrial payments exceeded the jury award, final judgments were entered by which the corporations "took nothing" from Exxon. *Id.* Recently, a straggling case involving six Alaska communities was tried in state court to a defense verdict. The cities were unsuccessful in their efforts to recover from Exxon for alleged additional expenses incurred by them as a consequence of the oil spill.

never any dispute as to Exxon's liability for compensatory damages. Only the amount of the plaintiffs' economic losses was controverted. As a consequence of procedural orders in this case and the excellent, cooperative approach taken by counsel for all parties, an effective and efficient trial protocol for the plaintiffs' claims was developed. As the time for trial grew near, this court became convinced of the necessity of creating a single, punitive damages claims class. On April 14, 1994, the court granted conditional final approval of a mandatory punitive damages class, consisting 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.[23]

By agreement with the parties, trial as regards Exxon's and Captain Hazelwood's liability for punitive damages was commenced on May 2, 1994. In this Phase I of the trial, the jury found Exxon and Captain Hazelwood to be liable for punitive damages.

Phase II of the trial dealt with compensatory damages for plaintiffs' economic losses. In Phase IIA, the jury returned a verdict in favor of the fishermen in the amount of $287 million. Phase IIB, a separate aspect of the compensatory claims having to do with the Native economic claims, was settled without trial for $22.6 million.

Phase III of the trial focused upon the amount of punitive damages which should be imposed upon the defendants. As a predicate or base for the punitive damages trial, the parties entered into a stipulation regarding impacts from the oil spill which was read to the jury at the beginning of Phase III. [24] The stipulation outlined the actual damages that had been resolved in Phase IIB of the trial and the actual damages that were to be resolved in Phase IV of the trial and in Alaska state

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[23] Order No. 204 (granting conditional final approval and certifying mandatory punitive damages class) at 2, Clerk's Docket No. 4856.

[24] *See* Clerk's Docket No. 5634.

court proceedings. The damage estimates outlined in the stipulation exceeded $350 million. The jury was, of course, also aware that it had awarded $287 million in damages in Phase IIA of the trial. The evidence presented during Phase III focused on Exxon's and Hazelwood's conduct as it related to the oil spill. While evidence of extra-territorial conduct was admitted,[25] it had a nexus to the grounding of the *Exxon Valdez* and the resulting oil spill.

In consultation with counsel, unusually detailed punitive damages instructions were developed for purposes of this case. The jury was instructed that punitive damages are awarded for the purposes of punishment and deterrence,[26] and that the fact that it had found the defendants' conduct reckless did not require it to award punitive damages.[27] The jury was specifically instructed to use reason in setting the amount of punitive damages and that any award of punitive damages should bear a reasonable relationship to the harm caused the members of the plaintiff class by the defendants' misconduct.[28] The jury was instructed that punitive damages are not

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[25] For example, evidence of Hazelwood drinking in parts of the country other than Valdez, Alaska, was admitted.

[26] *See* Jury Instruction No. 22:

> The purposes for which punitive damages are awarded are:
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> (1) to punish a wrongdoer for extraordinary misconduct; and
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> (2) to warn defendants and others and deter them from doing the same.

Clerk's Docket No. 5890.

[27] *See* Jury Instruction No. 20, which in pertinent part, reads: "The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them." Clerk's Docket No. 5890.

[28] *See* Jury Instruction No. 25, which in pertinent part reads:

> the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount....[A]ny punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to

intended to provide compensation for plaintiffs' losses and that they should assume that the plaintiffs had been fully compensated for the damages that they had suffered as a result of the oil spill.[29] Factors that the jury was told it could consider in setting an amount of punitive damages included the reprehensibility of the defendants' conduct,[30] the amount of actual and potential harm suffered by the members of the plaintiff class as a result of the defendants' conduct, and the financial condition of the defendants.[31] As to the reprehensibility factor, the jury was instructed that in determining the reprehensibility of the defendants' conduct it could consider "the nature of the conduct, the duration of the conduct, and

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members of the plaintiff class by a defendant's misconduct.... Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence.

Clerk's Docket No. 5890.

[29] *See* Jury Instruction No. 26, which reads:

An award of punitive damages is not intended to provide compensation for any loss suffered by any plaintiff. In determining whether to make an award of punitive damages you should assume that all plaintiffs have been or will be fully compensated for all damages they may have suffered as a result of the oil spill. You may not make an award of punitive damages for the purpose of compensating any plaintiff.

Clerk's Docket No. 5890.

[30] The jury was instructed, however, that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible...." *See* Jury Instruction No. 30, Clerk's Docket No. 5890.

[31] *See* Jury Instruction No. 27, which reads in pertinent part:

In determining the amount of punitive damages to award, if any, you may consider, among other factors:

(a) the degree of reprehensibility of the defendants' conduct,

(b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and

(c) the financial condition of the defendants.

Clerk's Docket No. 5890.

defendant's awareness that the conduct was occurring."[32] As to the defendants' wealth, the jury was instructed to consider the defendants' financial condition only in terms of what level of award would be necessary to achieve punishment and deterrence.[33]

The jury was instructed that it should not count any damage to natural resources or the environment in general when assessing the harm suffered by members of the plaintiff class.[34] The jury was also instructed that it could consider as mitigating factors the existence of criminal fines or civil awards against the defendants for the same conduct and the extent to which the defendants had taken steps to remedy the consequences of the oil spill[35] and to prevent another oil

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[32] Jury Instruction No. 30, Clerk's Docket No. 5890.

[33] *See* Jury Instruction No. 32, which reads:

> In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a defendant's financial condition affects the level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

Clerk's Docket No. 5890.

[34] *See* Jury Instruction No. 29, which reads in pertinent part: "In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally [.]" Clerk's Docket No. 5890.

[35] *See* Jury Instruction No. 36, which reads in pertinent part:

> In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means,

spill.[36]

The Phase III trial was relatively short, lasting only five days, but the jury deliberated for approximately twenty-two days before returning a verdict. The jury awarded a breath-taking $5 billion in punitive damages against the Exxon defendants, and $5,000 against Captain Hazelwood.

There was to be a Phase IV of the civil litigation. The Phase IV claims embodied all of the compensatory damage claims remaining in federal court and not included in Phase II. As to these claims, a settlement was reached in the amount of $13.4 million.

Exxon moved for a reduction or remittitur of punitive damages.[37] That motion was denied.[38] The court applied the *Hammond* factors to reach its conclusion that the $5 billion punitive damages award was not so grossly excessive as to violate Exxon's due process rights.[39] After lengthy other

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such as loss of standing in the community, public vilification, loss of reputation, and similar matters.

Clerk's Docket No. 5890.

[36] *See* Jury Instruction No. 35, which reads in pertinent part, that "[i]n considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question-in this case, another oil spill." Clerk's Docket No. 5890.

[37] Clerk's Docket No. 5970.

[38] Clerk's Docket No. 6234.

[39] The Supreme Court, in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), indicated that the Hammond factors were useful in assessing the reasonableness of a punitive damages award. The Hammond factors are as follows:

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also

proceedings not relevant now, final judgment was entered including the award of $5 billion in punitive damages.[40]

Appeal and Remands

Exxon appealed as to liability for and the amount of punitive damages. Exxon sought and obtained a stay of execution on the judgment for punitive damages by posting a *supersedeas* bond in the amount of $6,750,000,000.[41] On appeal, Exxon contended first that punitive damages should have been barred as a matter of law. For reasons given, the court of appeals rejected this contention, concluding that:

> the Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights.... [W]hat saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

In re Exxon Valdez, 270 F.3d at 1231.

Exxon's second contention was that the plaintiffs' burden of proof should be to produce clear and convincing evidence of liability for punitive damages. The court of appeals held that this court did not abuse its discretion by employing the preponderance of evidence standard. *Id.* at 1232-33. Similarly, this court was affirmed as regards its instructions to the jury concerning Exxon's vicarious liability for the conduct of its

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sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Haslip*, 499 U.S. at 21-22.

[40] Judgment as to Phases I and III was entered September 16, 1994. Clerk's Docket No. 5891. That judgment was vacated. Clerk's Docket No. 6055. A final judgment was entered September 24, 1996, Clerk's Docket No. 6911, and an amended judgment was entered January 30, 1997, Clerk's Docket No. 6966.

[41] Clerk's Docket No. 6914.

employees. *Id.* at 1235. Exxon did not challenge the substance of the court's instructions as to the determination of punitive damages; for, with prescient skill, counsel for plaintiffs and Exxon had proposed instructions which appropriately informed the jury as to what have become the "guideposts" for fixing punitive damages: the reprehensibility of defendant's conduct, the relationship of punitive damages to actual and potential harm, and comparison to other penalties.

Captain Hazelwood and Exxon both challenged the sufficiency of the evidence to support an award of punitive damages against them. The Ninth Circuit Court concluded that there was substantial evidence to support a jury verdict of liability for punitive damages as to both Captain Hazelwood and Exxon. *Id.* at 1237-38.

Finally, with liability concluded, the court of appeals turned to Exxon's challenge to the amount of the punitive damages award against it. In addition to passing muster under the sufficiency of the evidence test, punitive damages awards must be subjected to a due process analysis which flows from the decision of the United States Supreme Court in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). In *BMW,* the Supreme Court held that a $2 million punitive damages award[42] based upon $4,000 in compensatory damages for pure economic loss was unconstitutional because the defendant lacked fair notice of so severe a punitive award. *Id.* at 574-75. The importance of the *BMW* guideposts in determining the outer constitutional limits of punitive damages was reinforced in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001).

Based upon *BMW,* the Ninth Circuit Court of Appeals in this case reiterated the three guideposts established by the Supreme Court for use in determining whether punitive damages are so grossly excessive as to constitute a violation of due process. The guideposts are:

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[42] The jury awarded Dr. Gore $4 million in punitive damages, which the Alabama Supreme Court reduced to $2 million.

> (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.

In re Exxon Valdez, 270 F.3d at 1240. The court of appeals recognized that this court did not have the benefit of *BMW* and *Cooper Industries* when it decided Exxon's original motion to reduce the punitive damages award and remanded the case "for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*." *Id.* at 1241. However, the court of appeals also provided its analysis of the *BMW* factors to aid the court in its consideration of the constitutional question. *Id.* In the end, the court of appeals unequivocally told this court that "[t]he $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper Industries*" and "[i]t must be reduced." *Id.* at 1246 (citations omitted).

On remand, Exxon filed a renewed motion for reduction or remittitur of the punitive damages award,[43] which plaintiffs opposed.[44] After consideration of the briefing and hearing oral argument on the renewed motion, the court, on December 6, 2002, issued Order No. 358, which granted Exxon's renewed motion and reduced the punitive damages award to $4 billion.[45] In applying the *BMW* guideposts, the court found Exxon's conduct highly reprehensible, a ratio of 9.85-to-1 based on actual and potential harm of over $507 million, and comparable civil and criminal penalties of which Exxon was on notice in excess of $5 billion. The court concluded that application of the *BMW* guideposts supported the $5 billion punitive damages award but reduced the award to $4 billion because the Ninth Circuit had mandated that the award be reduced.

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[43] Clerk's Docket No. 7487.

[44] Clerk's Docket No. 7501.

[45] Clerk's Docket No. 7564.

Judgment on the $4 billion punitive damages award was entered on December 10, 2002.[46] Plaintiffs moved for an order directing entry of a final judgment on Order No. 358 or, in the alternative, an order authorizing an interlocutory appeal.[47] On January 27, 2003, the court granted the plaintiffs' motion.[48] Both Exxon and plaintiffs timely noticed appeals to the Ninth Circuit Court of Appeals. Exxon sought and obtained a stay of execution on the judgment by posting a *supersedeas* bond in the amount of $4,806,000,000.[49]

On April 7, 2003, the Supreme Court decided *State Farm,* 538 U.S. 408, 123 S. Ct. 1513, which addressed the question of whether a $145 million punitive damages award, compared to compensatory damages of $1 million, in an insurance bad faith case was grossly excessive and violated due process. The Court held that the $145 million punitive damages award did not comport with due process and remanded the case to the Utah Supreme Court with the suggestion that, under the circumstances of the case, a punitive damages award at or near the amount of compensatory damages would comport with due process. *Id.* at 1526.

On August 18, 2003, prior to briefing on either appeal, the Ninth Circuit Court of Appeals vacated the $4 billion punitive damages judgment and again remanded the case to this court, this time to reconsider the punitive damages award in light of *State Farm.*[50] In remanding, the court of appeals simply vacated the court's amended judgment which found plaintiffs entitled to $4 billion in punitive damages against Exxon. The court of appeals did not comment on the merits of Order No. 358, neither suggesting nor implying that the court should revise Order No. 358, although the court of appeals plainly

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[46] Clerk's Docket No. 7566.

[47] Clerk's Docket No. 7569.

[48] Order No. 359 (granting Motion for Rule 54(b) Determination) (Jan. 27, 2003), Clerk's Docket No. 7589.

[49] Clerk's Docket No. 7622.

[50] *See* Order, Clerk's Docket No. 7737.

intended that this court reconsider Order No. 358 in light of *State Farm.* In remanding, the court of appeals also did not disturb its earlier holding that the $5 billion punitive damages award was too high to pass constitutional muster.

On remand, this court called for supplemental briefing from the parties to aid in its reconsideration of the punitive damages award in light of *State Farm.*[51] Exxon submitted its supplemental briefing in the form of a second renewed motion for reduction or remittitur of punitive damages.[52] This motion is opposed by plaintiffs.[53] Oral argument on the second renewed motion for reduction or remittitur of punitive damages was heard on December 3, 2003. Having considered the parties' arguments, both written and oral, the court turns, for a third time, to the question of whether the $5 billion punitive damages award against Exxon offends the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Discussion

Legal Background

It has long been understood "that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 453-54 (1993) (quoting *Seaboard Air Line Ry v. Seegers,* 207 U.S. 73, 78 (1907)). It was not, however, until recent years that the Supreme Court considered applying this general principle of constitutional law to punitive damages awards.

In *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 276-77 (1989), the Supreme Court suggested that the Due Process Clause could place substantive limits on punitive damages awards but left the

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[51] Order re Further Proceedings on Punitive Damages Award (Aug. 26, 2003), Clerk's Docket No. 7714.

[52] Clerk's Docket No. 7753.

[53] Clerk's Docket No. 7767.

question of whether it did to another day because the parties had not raised the issue below. *Id.*

That day came two terms later in *Haslip,* 499 U.S. 1. *Haslip* involved the misappropriation of insurance premiums by Pacific Mutual's agent. After their insurance lapsed because of non-payment of premiums, Haslip and others brought a fraud claim against the agent and also sought to hold Pacific Mutual liable on a *respondeat superior* theory. A jury awarded Haslip $200,000 in compensatory damages and $840,000 in punitive damages.[54] *Id.* at 6-7 and n. 2. Pacific Mutual challenged Haslip's punitive damages award arguing that it violated both substantive and procedural due process.

The Supreme Court rejected Pacific Mutual's argument that its substantive due process rights were violated by the imposition of liability based upon the *respondeat superior* doctrine. The Court also determined that the common-law method of determining punitive damages is not "so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.* at 17. However, the Court emphasized that a punitive damages award that was the result of unlimited jury or judicial discretion could violate the Due Process Clause. *Id.* at 18.

The Court in *Haslip* refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable...." *Id.* Rather, the Court stated that punitive damages awards should be evaluated based upon "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury...." *Id.* The Court then concluded that the punitive damages award against Pacific Mutual did not violate the Due Process Clause because: (1) the jury had been adequately instructed and was not given unlimited discretion in setting the amount of punitive damages; (2) the trial court was required to do a post-trial review of the punitive damage award for excessiveness; and (3) the Alabama Supreme Court also conducted a post-verdict

[54] The other three plaintiffs were awarded much smaller amounts of damages ($15,290; $12,400; and $10,288).

review of punitive damages awards, using the *Hammond* factors. *Id.* at 191-22.

The Court observed that Haslip's punitive damages award was more than four times her compensatory damages and much greater than any fine that could have been imposed for insurance fraud under Alabama law but found that the award, although perhaps "close to the line", *id.* at 23, did "not cross the line into the area of constitutional impropriety." *Id.* at 24.

Two terms later, in *TXO,* 509 U.S. 443, the Court again took up the issue of the constitutionality of a punitive damages award, this time a $10 million punitive damages award in a slander of title case that was 526 times the compensatory damages award. The parties urged the Supreme Court to formulate a "test" for evaluating whether a punitive damages award violated due process. The Court refused to do so, instead returning to what it had said in *Haslip:*

> "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus."

Id. at 458 (quoting *Haslip,* 499 U.S. at 18).

In evaluating the reasonableness of the $10 million punitive damages award against TXO, the Court concluded that it was appropriate not only to consider the actual harm that a defendant's conduct caused a plaintiff but also the potential harm that may have resulted from the defendant's conduct. *Id.* at 460. TXO's pattern of behavior could have resulted in damages ranging from $5 million to $8.3 million. *Id.* at 461. Considering the "potential" harm, the Court found that "the dramatic disparity between the actual damages and the punitive award [was not] controlling...." *Id.* at 462.

TXO also challenged the punitive damages award on the grounds that the jury had not been adequately instructed. The Court noted that the jury had been instructed that it could

consider the wealth of TXO "in recognition of the fact that effective deterrence of wrongful conduct 'may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.'" *Id.* at 463 (quoting the punitive damages jury instruction). The jury was also instructed that one of the purposes of punitive damages was to provide additional compensation to the injured parties.

The Court agreed with TXO that reference to TXO's wealth may have increased the risk of the jury being influenced by prejudice against a large non-resident defendant but noted that it had found in *Haslip* that the wealth of the defendant could be considered when assessing punitive damages. The Court also stated that it did not understand the reference in the instructions about "additional compensation" . However, because the issue of inadequate instructions had not been raised below, the Court did not consider what effect these jury instructions might have had on the punitive damages award.

. The Supreme Court next considered the constitutionality of a punitive damages award in *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994). Oberg was severely injured in an accident involving a three-wheeled all-terrain vehicle that was manufactured and sold by Honda. The jury awarded Oberg $735,512.31 in compensatory damages and $5 million in punitive damages. Honda appealed, arguing that the punitive damages award violated due process, in large part, because Oregon courts had no power to reduce a punitive damages award if they found that the amount of the award was grossly excessive. The Court held "that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment."[55] *Id.* at 432.

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[55] On remand, the Oregon Supreme Court, after engaging in a due process analysis, upheld the $5 million punitive damages award. *Oberg v. Honda Motor Co.,* 320 Or. 544, 888 P.2d 8 (1995).

Then came *BMW,* 517 U.S. 559, in which the Court provided lower courts with a more definite means for analyzing the reasonableness of a punitive damages award. In *BMW,* Dr. Gore purchased a new BMW from a Birmingham, Alabama, dealer. Pursuant to a national BMW policy, the dealer did not disclose to Dr. Gore that the car had been repainted because the cost of this "repair" was less than three percent of the car's suggested retail value.

At trial, BMW admitted that its national policy since 1983 was to not disclose repairs to new cars if the repairs cost less than three percent of the car's suggested retail price. Dr. Gore presented evidence that since 1983 BMW had sold 983 "repaired" cars as new, including fourteen in Alabama. Dr. Gore also presented evidence that the value of a repainted car was ten percent less than a car that had not been repainted.

The jury awarded Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages (apparently based on 1000 cars x $4000 in actual damages per car). BMW moved to set aside the punitive damages award, but the trial court denied the motion. On appeal to the Alabama Supreme Court, the punitive damages award was reduced to $2 million.

In reviewing the $2 million punitive damages award, the United States Supreme Court stated that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW,* 517 U.S. at 568. The Court observed that there could be no doubt that Alabama had a legitimate interest in protecting its citizens from deceptive trade practices. *Id.* at 568-69. However, it was conceded that Dr. Gore was endeavoring to achieve national punishment and deterrence. For reasons explained, the Supreme Court held that Alabama's interests, not those of the entire nation, were the proper scope of deterrence and punishment. *Id.* at 573-74.

The Court then announced the three guideposts that lower courts are to use to determine whether a punitive damages award is grossly excessive and applied them to the punitive

damages award against BMW. The Court held that the $2 million punitive damages award against BMW violated due process and remanded the case to the Alabama Supreme Court.[56] *Id.* at 585-86.

After *BMW,* the Supreme Court did not consider a punitive damages/due process case until its 2001 decision in *Cooper Industries,* 532 U.S. 424, in which the issue was "whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award." *Id.* at 426. The Ninth Circuit Court of Appeals had applied an abuse of discretion standard; the Supreme Court reversed, holding that the constitutionality of punitive damages required *de novo* review and remanded the case to the appellate court to apply the appropriate standard. *Id.* at 431. Although the constitutional issue was not before the Court, it nonetheless applied the *BMW* guideposts and found several potential problems with a punitive damages award of $4.5 million versus a compensatory damages award of $50,000 for violations of the Lanham Act based on Cooper Industries passing off its product as Leatherman's.[57]

For the next several years, lower courts grappled with applying the *BMW* guideposts to punitive damages awards with no additional guidance from the Supreme Court. Then, last term, the Court handed down its decision in *State Farm,* 538 U.S. 408. *State Farm* arose out of a serious traffic accident in 1981, in which, one person (Ospital) was killed and one (Slusher) was permanently disabled. The accident occurred when Curtis Campbell was attempting to pass six vans. Early investigation into the accident indicated that Campbell's unsafe pass was the cause of the accident. A wrongful death and tort action was brought against Campbell. Campbell

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[56] On remand, the punitive damages award was reduced to $50,000. *See BMW of North America, Inc. v. Gore,* 701 So.2d 507 (Ala.1997).

[57] On remand, the Ninth Circuit Court of Appeals reduced the punitive damages award to $500,000. *See Leatherman Tool Group, Inc. v. Cooper Industries, Inc.,* 285 F.3d 1146 (9th Cir. 2002).

insisted that he was not at fault and his insurer, State Farm, decided to contest liability and declined offers to settle the claims against Campbell for policy limits ($25,000 per person, $50,000 total).

The case went to trial and ended with a judgment against Campbell for $185,849, which was in excess of the amount offered in settlement. State Farm refused to cover the excess or to assist Campbell in an appeal. Campbell hired his own counsel to appeal and during the appeal reached a settlement with the plaintiffs in the tort case by which they agreed not to seek satisfaction of the judgment against Campbell if Campbell would pursue a bad faith action against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal. State Farm then paid the entire judgment, including the excess. Nonetheless, Campbell and his wife filed suit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.

The trial court granted summary judgment to State Farm but was reversed on appeal. On remand, the case was bifurcated for trial. In the first phase of the trial the jury determined that State Farm's decision to not settle was unreasonable. Phase two of the trial addressed, among other issues, compensatory and punitive damages. During phase two, the Campbells were allowed to introduce evidence of "'a national scheme [by State Farm] to meet corporate fiscal goals by capping payouts on claims company wide.'" *Id.* at 1518 (quoting *Campbell v. State Farm Mutual Auto. Ins. Co.*, 65 P.3d 1134, 1143 (Utah 2001)). This evidence concerned State Farm's business practices for over 20 years in numerous states. Many of the practices had no connection to third-party automobile claims, which was the type of claim underlying the complaint against the Campbells. In addition, some of the out-of-state conduct was legal where it occurred. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million.

On appeal, the Supreme Court of Utah applied the *BMW* guideposts and reinstated the $145 million punitive damages award (but left compensatory damages at $1 million). State Farm successfully petitioned for certiorari.

The United States Supreme Court began its analysis, as it had in *BMW,* with a discussion of how the two aims of punitive damages, deterrence and retribution, fit into the concept that grossly excessive or arbitrary punitive damages awards offend due process. The Court observed that "it is well established that there are procedural and substantive constitutional limitations" on punitive damages awards. *State Farm,* 123 S. Ct. at 1519. The Court further observed that although punitive damages serve the same purpose as criminal penalties, defendants in civil cases are not afforded the same protections as criminal defendants. The Court stated that "[t]his increases our concerns over the imprecise manner in which punitive damages systems are administered." *Id.* at 1520. The Court discussed the need to properly instruct juries concerning punitive damages. *Id.* The Court continued by remarking that "[o]ur concerns are heightened when the decisionmaker is presented ... with evidence that has little bearing as to the amount of punitive damages that should be awarded." *Id.*

The Court then turned its attention to the application of the *BMW* guideposts, observing that "this case is neither close nor difficult." *Id.* at 1521. The Court held that the $145 million punitive damages award violated due process and remanded the case to the Utah Supreme Court, stating:

> An application of the [*BMW*] guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages.

Id. at 1526.

The Question Presented

The question presented by the instant motion is the same

question that was presented in *Haslip, TXO, BMW,* and *State Farm:* does the punitive damages award constitute "grossly excessive or arbitrary punishment [ ] on [Exxon]" in violation of the Due Process Clause of the Fourteenth Amendment? *State Farm,* 123 S. Ct. at 1520 (citing *Cooper Industries,* 532 U.S. at 433, and *BMW,* 517 U.S. at 562). The question is not whether the jury "got it right" as to the necessary and/or appropriate level of punishment and/or deterrence *per se.* Discussions of whether the award sufficiently "got" Exxon's attention or whether the costs of the cleanup of the oil spill were a sufficient deterrence have little place in the constitutional analysis. We engage in a judicial (as opposed to lay judgment) review of the fundamental fairness of the punitive damages award. We consider whether Exxon was fairly on "notice not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty...." *BMW,* 517 U.S. at 574. That analysis is a forward-looking inquiry from Exxon's point of view *prior* to the grounding of the *Exxon Valdez.* The Supreme Court has not said this expressly, but the forward-looking nature of the inquiry is necessarily implicit in the concept of fair notice to Exxon, *i.e.,* what Exxon should reasonably have perceived as the likely consequences of its conduct. It is because of this aspect of the inquiry that we are to look at not only actual harm but also potential harm which a defendant's reckless conduct could foreseeably have caused. *TXO,* 509 U.S. at 460.

The fair notice inquiry requires that the court first look at the quality of Exxon's conduct. Any reasonable person will understand that the more heinous his conduct, the more severe the punishment will be. Next, we look at the harm which a reasonable person would anticipate likely to flow from his conduct. This includes potential harm because a reasonable person analyzing the consequences of his conduct would naturally look to not only what is sure to happen but also to what could possibly happen. Finally, we look at other sanctions that can be imposed because the *maxima* in these regards are the very kind of thing that a reasonable person would think

about if he were evaluating the possible consequences of his conduct.

In sum, the question before us is whether, under the circumstances of this case, an award of $5 billion in punitive damages is grossly excessive and therefore violates due process. To answer that question, the court's inquiry is two-fold: (1) the court must identify the state interests that the $5 billion punitive damages award was designed to serve, and (2) the court must apply the *BMW* guideposts in light of *State Farm.*

Punishable Interests

In *BMW,* the Court instructed that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW,* 517 U.S. at 568. Without saying so expressly, *State Farm* suggests that this is still the first step in the due process evaluation of a punitive damages award. *State Farm,* 123 S. Ct. at 1519-20. In both *BMW* and *State Farm,* the plaintiffs were endeavoring to achieve national punishment and deterrence. In *BMW,* for reasons explained, the Supreme Court held that Alabama's interests, not those of the entire nation, were the proper scope of deterrence and punishment. *BMW,* 517 U.S. at 573-74. In *State Farm,* the Court reiterated that punitive damages are not to be used to punish and deter a defendant for conduct that happened in another jurisdiction, particularly if the conduct is legal in the jurisdiction in which it occurred. *State Farm,* 123 S. Ct. at 1522-23.

Most of the courts considering the constitutionality of punitive damages awards have ignored this first step in the analysis. In *In re Exxon Valdez,* the Ninth Circuit Court did not expressly discuss the scope of interests which plaintiffs seek to vindicate.[58] That it would not have done so probably

[58] Both the Tenth and Eleventh Circuits have expressly stated that *BMW* requires a two-step analysis: (1) define the scope of the legitimate state interests the punitive award is intended to further and (2) apply the three *BMW* guideposts. *Smith v. Ingersoll-Rand Co.,* 214 F.3d 1235,

flows directly from the circumstances of this case. The plaintiffs' claims for punitive damages expressly excluded consideration of harm to the environment. These claims were pursued and vindicated by consent decrees in favor of the State of Alaska and the United States Government in other proceedings. Here, the plaintiffs' focus has always been upon what happened in Prince William Sound, Lower Cook Inlet, and the environs of Kodiak Island. While brought under both state and federal law, the focus of plaintiffs' complaints have always had to do with harm to Alaska fisheries, Alaska businesses, Alaska property (both real and personal), and, to the extent that potential claims have been involved, they too have Alaskan roots. No one has contended that Exxon should be deterred or that it should be punished for conduct not having a direct nexus with the grounding of the *Exxon Valdez* on Bligh Reef in Prince William Sound.

Before moving on, and as a part of the first phase of the constitutional analysis, further comment about the court's instructions on punitive damages may be in order. The Supreme Court's punitive damages jurisprudence has consistently emphasized the role of adequate jury instructions in ensuring punitive damage awards that comport with due process. As discussed above, in *State Farm,* the Supreme Court reiterated its concern about quasi-criminal awards being made without the protections applicable to criminal cases and without adequate instructions that properly limit the jury's discretion. *State Farm,* 123 S. Ct. at 1520.

Here, given the jurisprudential changes which took place between the time this court first evaluated the $5 billion punitive damages award and the Ninth Circuit Court's review of the same, there could have been an absence of appropriate instructions to the jury or inadequate instructions as to how

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1252-53 (10th Cir. 2000); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999). The Ninth Circuit did the same in a case that was decided after *In re Exxon Valdez. See White v. Ford Motor Co.*, 312 F.3d 998, 1013 (9th Cir. 2002).

punitive damages should be determined by the jury.[59] As discussed above, Exxon had its opportunity for input to those instructions, its opportunity to challenge those instructions, and we all have the results of that inquiry before us at the present time. The court's substantive jury instructions as to the determination of punitive damages were unchallenged. Nevertheless, given the nature of the present inquiry, it strikes the court as important to know and be mindful in understanding the second phase of the constitutional analysis (the guideposts) that the trial jury in this case was working with the very same concepts embodied within the *BMW* guideposts as set out above. The jury was instructed on the purpose of punitive damages: punishment and deterrence. The jury was admonished not to be arbitrary: punitive damages must have a rational basis in the record and bear a reasonable relationship to harm done or likely to result from the defendant's conduct. The jury was also instructed on the subjects of reprehensible conduct and consideration of mitigation (as by voluntary payments) and some comparison to other available sanctions.

Without proper instructions, jury verdicts are patently suspect. Here, we know that the trial jury, in making an award of $5 billion for punitive damages, was seeking to vindicate-through punishment and deterrence-the appropriate, Alaska-oriented plaintiff interests, and not other interests such as environmental concerns which had been separately dealt with and which the jury was expressly told not to consider. In short, this is not a situation where the jury awarded $5 billion in punitive damages based upon one script, with this court second-guessing the jury's work using a different script.

Finally, this court was concerned before trial about the risk of multiple punitive damages awards based upon the same incident. Even when punitive damages awards are limited to matters in which there is a proper Alaska interest, they

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[59] Both now and when this case was tried, Ninth Circuit pattern jury instructions on punitive damages are not adequate to meet the concern expressed in *State Farm.*

could be arbitrarily cumulative and in sum grossly excessive. Here, Exxon was exposed to a multiplicity of claims, most but not all of which were pending in this court. But for the creation of a mandatory punitive damages class, Exxon was exposed to the risk of multiple punitive damages awards flowing from the same incident.[60] Where multiple suits for punitive damages have been brought in a single jurisdiction, it strikes this court that there is a very real risk that two punitive damages awards in different courts, but based upon the same incident, could result in a doubling up on deterrence and punishment. How this concern should be managed under *BMW* and *State Farm* is not clear. What is clear is that the risk does not exist in this case. Because of the mandatory punitive damages class, the court can say with confidence that Exxon has not been exposed to grossly excessive deterrence or punishment because of multiple suits for punitive damages based upon the same harm or course of conduct. It follows that the whole of what is constitutionally foreseeable for purposes of due process is fairly put to the *BMW* test of whether $5 billion in punitive damages was or was not grossly excessive.

In consideration of the foregoing, this court concludes that the plaintiffs in making their claims, this court in instructing the jury, and the jury in awarding punitive damages, were all focused upon the appropriate, relevant Alaska interests for which deterrence and punishment through punitive damages is permissible.

Application of BMW Guideposts

Reprehensibility. In *BMW,* the Court stated that "*[p]erhaps* the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW,* 517 U.S. at 575 (emphasis added). In *State Farm,* the Court unequivocally stated that the reprehensibility of the defendant's conduct *is* "'[t]he most

[60] Indeed, claims against Exxon were being tried at virtually the same time in both the United States District Court for the District of Alaska and the Superior Court for the State of Alaska.

important indicium of the reasonableness of a punitive damages award....'" *State Farm,* 123 S. Ct. at 1521 (quoting *BMW,* 517 U.S. at 575). In determining whether a defendant's conduct is reprehensible, the court considers whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

In *BMW,* BMW's conduct was found to be not very reprehensible. Dr. Gore suffered only economic harm; BMW did not show indifference to the health and safety of others; BMW's conduct was not criminal; and although BMW suppressed a material fact, there were no deliberate false statements made. Dr. Gore argued that BMW's conduct was highly reprehensible because it was part of a nationwide pattern of conduct, thereby making BMW a recidivist. *BMW,* 517 U.S. at 577-79. The Court recognized that a recidivist is usually punished more severely than a first offender, but noted that in some states, BMW's conduct would not have violated state disclosure laws and that BMW had a good faith belief that its conduct would not be considered fraudulent.

In *State Farm,* the Court again found the defendant's conduct not very reprehensible, once extra-territorial (non-Utah) factors were set aside. State Farm had altered company records to make Campbell look less culpable, disregarded the overwhelming evidence of liability and almost certainty of an excess judgment at trial, and first assured the Campbells that their personal assets were safe but after judgment told them to put a for-sale sign on their house. The

Campbells, like Dr. Gore, argued that State Farm's conduct was reprehensible based on its nation-wide business practices. The Supreme Court reiterated that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *State Farm,* 123 S. Ct. at 1522. The Court also emphasized that a defendant should not be punished for out-of-state conduct that is unrelated to the harm suffered by the plaintiffs. *Id.* at 1523. In short, the Court concluded that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." *Id.* at 1524.

The reprehensibility of a party's conduct, like truth and beauty, is subjective. One's view of the quality of an actor's conduct is the result of complex value judgments. The evaluation of a victim will vary considerably from that of a person not affected by an incident. Courts employ disinterested, unaffected lay jurors in the first instance to appraise the reprehensibility of a defendant's conduct. Here, the jury heard about what Exxon knew, and what its officers did and what they failed to do. Knowing what Exxon knew and did through its officers, the jury concluded that Exxon's conduct was highly reprehensible.

As part of the constitutional analysis, the court must also determine the reprehensibility of Exxon's conduct, and it does so by applying the factors set forth in *State Farm.* These factors are objective criteria which the court employs to evaluate the jury's subjective appraisal of the quality of a defendant's conduct. With due deference to the jury process, verdicts should not be upset unless the jury result is "grossly excessive" in light of the objective evaluation of a defendant's conduct and therefore, constitutionally impermissible. *BMW,* 517 U.S. at 574; *State Farm,* 123 S. Ct. at 1519-20.

In evaluating the reprehensibility of a defendant's conduct, the court may not consider extra-territorial conduct that has no nexus to the harm suffered by plaintiffs. *State Farm,* 123 S. Ct. at 1523. However, the Supreme Court stated in *State Farm*

that even "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.* at 1522. Here, the court views not only the actual grounding of the *Exxon Valdez* as relevant conduct but also Exxon's conduct in the years prior to the grounding that resulted in Exxon giving the keys to a supertanker to a relapsed alcoholic on the evening of March 23, 1989. Exxon's pre-grounding conduct by and large took place outside Alaska. Exxon could have removed Captain Hazelwood from his command on the *Exxon Valdez* based upon knowledge of his relapse into alcoholism. It chose not to do so with tragic consequences. The nexus between the out-of-state conduct of Exxon and the grounding and harm to plaintiffs is clear and convincing.

The court turns now to the *State Farm* reprehensibility factors.

Type of Harm. In determining reprehensibility, the court considers whether the defendant's conduct caused physical harm or only economic harm to the plaintiffs. In both *BMW* and *State Farm,* the defendants' conduct caused only economic harm. Conduct that results in physical harm is considered more reprehensible than conduct that results in only economic harm. *Swinton v. Potomac Corp.,* 270 F.3d 794, 818 (9th Cir. 2001).

Exxon's conduct did not cause only economic harm. The court of appeals has aptly observed on Exxon's earlier appeal that "The huge oil spill obviously caused harm beyond the 'purely economic'." *In re Exxon Valdez,* 270 F.3d at 1242. The social fabric of Prince William Sound and Lower Cook Inlet was torn apart. "[R]esearch on the community impacts of the *Exxon Valdez* Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and

psychological stress."[61] Communities affected by the spill "reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation related problems."[62] Also, several studies found that a high percentage of affected fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three.[63] The spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet disrupted the lives (and livelihood) of thousands of claimants and their families for years.

The foregoing shows that the harm that the plaintiffs suffered as a result of Exxon's conduct was much more egregious than the pure economic harm suffered by Dr. Gore whose only harm was that his new car was worth slightly less, or the economic risk and attendant emotional distress to which the Campbells were subject for eighteen months. Moreover, Dr. Gore and the Campbells each chose to deal with their defendant. Here, Exxon unilaterally intruded into the lives of the plaintiffs with no transactional foundation.

Reckless disregard to the health and safety of others. Exxon's and Captain Hazelwood's conduct was determined by the jury to have been reckless and its verdict as to liability for punitive damages has already been affirmed. In evaluating the reprehensibility guidepost, the court of appeals observes

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[61] J. Steven Picou, *et al., Community Recovery From the Exxon Valdez Oil Spill: Mitigating Chronic Social Impacts* at 6-7, attached as Exhibit 4 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[62] Duane A. Gill, *Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impact of the Exxon Valdez Oil Spill, in Folk Management in the World's Fisheries* 227 (Dyer & McGoodwin, eds., 1994), pertinent part attached as Exhibit 5 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[63] *See* Plaintiffs' Opposition at 24, n. 20, for a complete list of the relevant studies, Clerk's Docket No. 7501. Pertinent portions of the studies are attached as Exhibits 4 and 6 through 9 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

that the spill "did not kill anyone." *In re Exxon Valdez,* 270 F.3d at 1242-43. That statement is true based upon the record of this case; but we are engaged in a due process inquiry evaluating what Exxon was fairly on notice of prior to the plaintiffs' losses. It is a well-known fact that drunk drivers kill people with alarming frequency.[64] Exxon's decision to leave Captain Hazelwood in command of the *Exxon Valdez* not only showed a reckless disregard for the health and safety of those who lived and worked on the Sound, but also recklessly put the captain himself, his crew, and all of his rescuers in harm's way. After its grounding, the *Exxon Valdez* was sitting in a pool of oil. Rescuers had to enter that pool of oil. Careless cigarette smoking, or an electrical failure on the grounded vessel, or so simple and predictable an occurrence as an electro-static discharge when hoses are being connected or disconnected to a vessel might have ignited the crude oil and incinerated everyone in the vicinity.[65]

Finally, Captain Hazelwood, for whom Exxon is responsible, did not just ground the *Exxon Valdez.* Perhaps because of judgment impaired by alcohol, but in the face of knowledge that the vessel had been holed and was rapidly losing crude oil into Prince William Sound, he endeavored to maneuver the

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[64] In 1988, an estimated 23,626 deaths were caused by alcohol-related motor vehicle crashes. *See Traffic Safety Facts 1999* at 32 *available at* http://www-nrd.nhtsa.dot.gov/pfd/nrd-30/NCSA/TSFAnn/TSF1999/pdf. In 1989, 22,404 alcohol-related fatalities were reported. *Id.*

[65] As an example, Captain William J. Deppe, who took over command of the Exxon Valdez after Captain Hazelwood was relieved of his duty, explained that:

> when we were pumping oil from the top like that, oxygen could come in through the openings ... and we would create an explosive atmosphere between the void space, the deck and the oil. By putting the tools and lines and equipment down there, we could get a spark, and if we had an explosive atmosphere, you could blow up the ship.

Transcript of Trial Testimony of William J. Deppe at 7206, lns. 15-20, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

vessel. The record reflects that this was a dangerous undertaking, one which might have taken a vessel from a point of more or less stability into a posture where a great deal more oil might have been spilled. Indeed, the vessel might have foundered.

Exxon's conduct showed great disregard for the health and safety of others (including Exxon employees) and appreciably aggravates Exxon's conduct.

Financially vulnerable targets. The plaintiffs, plus anyone else who lived and worked on Prince William Sound, were the foreseeable "victims" of Exxon's decision to leave a relapsed alcoholic at the helm of a supertanker carrying a toxic cargo. While the commercial fishermen may not have been financially vulnerable targets, the subsistence fishermen certainly were.[66] Although Exxon's claims program mitigated the impact that its conduct had on financially vulnerable targets, Exxon cannot escape the fact that it knew that it was allowing a relapsed alcoholic to operate a fully-loaded, crude oil tanker in and out of Prince William Sound, a body of water which Exxon knew to be highly valuable for its fishery resources, resources which Exxon knew, or should have known, were relied on by subsistence fishermen.

Repeated actions or an isolated incident. BMW and *State Farm* recognized that a recidivist may be punished more severely than a first-time offender. In the instant case, Exxon's conduct involved repeated actions, not an isolated incident. Granted, Captain Hazelwood only grounded one vessel in Alaska between the spring of 1986 and March of 1989 and

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[66] A compensatory damages class of Alaska Natives was certified in March of 1994. *See* Order Certifying Commercial Fishing Class, Native Class, and Landowner Class (March 14, 1994), Clerk's Docket No. 4653. The Native class included Alaska Native subsistence fishermen who suffered losses because of the oil spill. An exact number of class members is not available. However, 717 Native subsistence fishermen opted out of the Alaska Natives class. *See* Order No. 307 (granting final approval of settlement between Native opt-out settlement class and Exxon) (Jan. 19, 1996), Clerk's Docket No. 6600.

there was only one spill of oil from the *Exxon Valdez* into Prince William Sound. But, as the court noted at the outset of its discussion of the reprehensibility guidepost, the relevant conduct here involves more than just the actual grounding. It involves the conduct that led up to the grounding of the *Exxon Valdez.* March 24, 1989, was not the first time that Exxon had permitted Captain Hazelwood to command a supertanker even though Exxon knew that he had "fallen off the wagon." For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood to sail into and out of Prince William Sound with a full load of crude oil.

Intentional malice, trickery, or deceit, or mere accident. The grounding of the *Exxon Valdez* and the consequential spilling of crude oil was not intentional. Captain Hazelwood's purpose just prior to the grounding was to avoid Bligh Reef, not park on it. The defendants' conduct did not involve trickery or deceit. There was no effort on the part of Exxon to hide or minimize what happened.[67] But the grounding was no mere accident.

It is undisputed that Exxon understood and well knew the risks attendant to transporting crude oil out of Valdez, Alaska, and through Prince William Sound. Moreover, Exxon knew that Captain Hazelwood was an alcoholic, it knew that he had resumed drinking, and it knew that Captain Hazelwood was drinking while on duty. Driving under the influence of alcohol is a crime anywhere in the country and in Alaska.[68] Exxon knew from the spring of 1986 that Captain Hazelwood was

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[67] Hiding a 900-foot vessel capable of carrying more than 53 million gallons of crude oil-even in so large a body of water as Prince William Sound-would not have been possible. More to the point, however, Exxon not only made no effort to hide what happened but, rather, Captain Hazelwood reported the incident to the Coast Guard immediately. *See also supra* note 13 and accompanying text.

[68] AS 28.35.030(a) and (r)(3) as regards operating watercraft.

drinking and driving the crude oil tanker *Exxon Valdez* and did nothing about it until after the *Exxon Valdez* was grounded.

The court of appeals observed in this regard that Exxon's knowledge "goes more to justify punitive damages than to justify punitive damages at so high a level." *In re Exxon Valdez,* 270 F.3d at 1242. Certainly Exxon's knowledge that Captain Hazelwood was drinking and driving the *Exxon Valdez* is an important, perhaps the most important, reason why the jury found and the court of appeals affirmed Exxon's liability for punitive damages. But, Exxon's knowledge is also a fundamental component of fair notice. Fair notice is the foundation of due process under the Fourteenth Amendment. Respectfully, the extent of Exxon's knowledge should also be a consideration in the characterization of the quality of Exxon's conduct.

Here we are concerned about due process and what Exxon should reasonably have anticipated as punishment for wrongful conduct. There is a direct nexus between what Exxon should reasonably have expected as punishment and the extent of its knowledge of Captain Hazelwood's situation. It is one thing to knowingly employ a sober recovering alcoholic. It is quite another-a far more serious matter-to have knowingly and intentionally allowed Captain Hazelwood to continue as master of the *Exxon Valdez* despite his relapse. Some Exxon representatives contended that Captain Hazelwood was the most watched person in the fleet, and he may have been. Exxon officials nevertheless ignored the information that was at their disposal, leaving Captain Hazelwood to operate a huge tank vessel through Prince William Sound, a body of water known for its valuable fishing resources. This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound. Rather, this is an employer deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil. In the view of this court, the decision by Exxon to leave Captain

Hazelwood in command of the *Exxon Valdez* is *the* critical factor in evaluating the quality of Exxon's conduct and therefore the amount of punitive damages.

Exxon willfully[69] allowed Captain Hazelwood to continue to operate a supertanker filled with crude oil despite Exxon's knowledge that he was drinking again. It was this intentional decision by Exxon that led to the plaintiffs being harmed. Willfulness-ignoring reason-is a principal component of malice. [70] Exxon's management of Captain Hazelwood amounted to intentional malice toward the plaintiffs.

Conclusion as to Reprehensibility. Punitive damages "'should reflect the enormity of [the defendant's] offense....'" *In re Exxon Valdez,* 270 F.3d at 1241 (quoting *BMW,* 517 U.S. at 575). Exxon's conduct did not simply cause economic harm to the plaintiffs. Exxon's decision to leave Captain Hazelwood in command of the *Exxon Valdez* demonstrated reckless disregard for a broad range of legitimate Alaska concerns: the livelihood, health, and safety of the residents of Prince William Sound, the crew of the *Exxon Valdez,* and others. Exxon's conduct targeted some financially vulnerable individuals, namely subsistence fishermen. Plaintiffs' harm was not the result of an isolated incident but was the result of Exxon's repeated decisions, over a period of approximately three years, to allow Captain Hazelwood to remain in command despite Exxon's knowledge that he was drinking and driving again. Exxon's bad conduct as to Captain Hazelwood and his operation of the *Exxon Valdez* was intentionally malicious.

Comparing Exxon's conduct with what happened in *BMW*

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[69] Willful is defined as: "governed by will without yielding to reason or without regard to reason" or "done deliberately." *Webster's Third New International Dictionary* 2617 (1981).

[70] Malice is defined as: "intention or desire to harm another usu [ally] seriously through doing something unlawful or otherwise unjustified," "*willfulness in commission of a wrong,*" or "evil intention." *Id.* at 1367 (emphasis supplied).

and *State Farm,* Exxon's conduct was many degrees of magnitude more egregious. For approximately three years, Exxon management, with knowledge that Captain Hazelwood had fallen off the wagon, willfully permitted him to operate a fully-loaded, crude oil tanker in and out of Prince William Sound-a body of water which Exxon knew to be highly valuable for its fisheries resources. Exxon's argument that its conduct in permitting a relapsed alcoholic to operate an oil tanker should be characterized as less reprehensible than what State Farm did to the Campbells suggests that Exxon, even today, has not come to grips with the opprobrium which society rightly attaches to drunk driving. While there are surely other situations that would be more reprehensible-such as knowingly allowing a relapsed alcoholic to operate a 747 aircraft loaded with passengers-this case is in an entirely different galaxy than selling repainted cars as new, passing off a product as that of a competitor's, or refusing for eighteen months to pay an excess judgment of $185, 849. Based on the foregoing, the court finds Exxon's conduct highly reprehensible.

Ratio. The ratio guidepost requires the court to compare "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award[.]" *State Farm,* 123 S. Ct. at 1520. The harm side of the ratio is made up of two components: actual harm to the victim and the harm that was likely to occur. *BMW,* 517 U.S. at 581. The trial jury in this case was expressly instructed to consider the magnitude of "actual" and "likely" harm.[71] Under this guidepost, the court may also consider whether the compensatory damages award contained a punitive component, whether the economic injuries were minor, and whether the plaintiffs suffered physical harm or trauma. *State Farm,* 123 S. Ct. at 1524-25.

The Supreme Court has repeatedly declined "to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 1524. However, the Court has also repeatedly

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[71] Jury Instruction No. 27, Clerk's Docket No. 5890.

noted that "traditional" multipliers for wrongful conduct have been in the range of double, treble, or quadruple damages and that a ratio of more than 4-to-1 might be "close to the line of constitutional impropriety." *Id.* (citing *Haslip,* 499 U.S. at 23-24). "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (quoting *BMW,* 517 U.S. at 5821589). "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW,* 517 U.S. at 582. But, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm,* 123 S. Ct. at 1524. "The precise award in any case, of course, must be based upon facts and circumstances of the defendant's conduct and the harm to plaintiff." *Id.*

In *BMW,* the actual and potential harm to Dr. Gore was limited to $4,000. Thus, the Court stated that the 500-to-1 ratio between punitive damages and the harm suffered by Dr. Gore "must surely 'raise a suspicious judicial eyebrow.'" *BMW,* 517 U.S. at 583 (quoting *TXO,* 509 U.S. at 481 (O'Connor, J., dissenting)). In *State Farm,* the Court began its application of the ratio guidepost with the presumption that a triple-digit ratio would not comport with due process, but plainly, the appropriate ratio is still "somewhat indeterminate." *In re Exxon Valdez,* 270 F.3d at 1243.

Not only is the ratio somewhat indeterminate, but "potential harm" is often not subject to precise calculation. *TXO,* 509 U.S. at 460. In *TXO,* the United States Supreme Court observed that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not de-

terred." *Id.* (emphasis in original). While neither *BMW* or *State Farm* involved potential harm, both cases acknowledged that potential harm is part of the ratio analysis. Clearly this court is not restricted to the jury's compensatory award in evaluating the ratio guidepost. Moreover, in another case flowing from the grounding of the *Exxon Valdez* (*Sea Hawk Seafoods, Inc. v. Exxon Corp.,* 246 F.3d 676 (Table) (2000 WL 1860726) (9th Cir. 2000)), the Ninth Circuit Court held that Western Alaska Fisheries, Inc., a seafood processor that did not file an independent lawsuit against Exxon, could nevertheless share in the class action punitive damages award on the same basis as other, eligible, seafood processors. The court of appeals stated that "[u]nder federal law, including federal maritime law, punitive damages are available to any person or entity that suffered actual injury arising from a defendant's violation of a federally protected right, independent of whether legal injury is established at trial." *Id.* at *2. If this be true, then it may also follow that claimants who were dismissed from this case and were not awarded any compensatory damages could also share in the punitive damages award if they suffered some actual injury that involved a federally protected right. In addition, there are plaintiffs whose claims, dismissed by this court, have been reinstated by the court of appeals and have not yet been settled. *See In re Exxon Valdez,* 270 F.3d at 1253.[72] These claimants have "potential" for adding to the harm side of the ratio.

As to actual harm-the compensatory damages associated with the grounding of the *Exxon Valdez*-the parties differ sharply. Exxon first contends that the actual harm number for purposes of ratio calculation can be no higher than $20.3 million, which is the amount of the two compensatory judgments ultimately entered against Exxon. Exxon contends that all other payments it made were pre-judgment payments or

[72] Specifically, the claims of tender boat operators and crews, cannery workers, and 34 seafood processors were reinstated. Some of these reinstated claims have been settled; some are still pending.

settlements, which the court of appeals has said do not count for purposes of calculating actual harm.[73] If pre-judgment payments or settlements do not reduce actual harm, Exxon contends that the actual harm number is $383 million.[74] The plaintiffs contend that the actual harm component of total compensatory damages is $513.1 million.[75] This number is based on actual judgments and recoveries obtained by distinct categories of plaintiffs from Exxon and the TAPL Fund.[76]

The court finds that the best indicators of actual, compensatory damages in this case are the following items:

(1) $287,000,000 Phase II jury verdict[77]

(2) $9,515,000 paid by Exxon to Native corporation owned seafood processing operations[78]

(3) $113,500,000 paid to other commercial fish processors[79]

(4) $6,000,000 paid to the Seattle Seven fish proces-

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[73] Exxon also argues that most of its pre-judgment payments could not reasonably be treated as compensation for actual harm caused by the oil spill because Exxon's prompt payment of claims protected the plaintiffs from economic loss that might have otherwise occurred. Whether Exxon's pre-judgment payments represent "actual" harm or harm that might otherwise have occurred is ultimately irrelevant since the court must consider both harms for purposes of calculating a ratio. *BMW,* 517 U.S. at 581.

[74] Exxon's Second Renewed Motion for Reduction or Remittitur of Punitive Damages Award at 24, Clerk's Docket No. 7753.

[75] Plaintiffs' Memorandum in Opposition to Exxon's Second Renewed Motion for Reduction or Remittitur of Punitive Damages Award at 21, Clerk's Docket No 7767.

[76] *See* chart summarizing judgments and recoveries at page 39 of Plaintiffs' Opposition, Clerk's Docket No. 7501.

[77] The precise amount the jury awarded was $286, 787, 739.22. *See* Minutes from the United States District Court (Aug. 11, 1994), Clerk's Docket No. 5716.

[78] Amended Stipulation Regarding Impacts for Phase III at 5, Part III, ¶ 5, Clerk's Docket No. 5634.

[79] *Id.* at ¶ 6.

sors[80]

(5) $4,000,000 paid to fish processors by TAPL Fund[81]

(6) $20,000,000 paid by Exxon to members of the Native class[82]

(7) $2,600,000 paid by Exxon to Native class members who opted out[83]

(8) $17,790,510 net paid to Native corporations by TAPL Fund (after reimbursement by corporations to the Fund; Native corporations reimbursed the Fund $7.4 million)[84]

(9) $3,254,576 paid by Exxon to Native corporations[85]

(10) $152,275 Tatitlek state court jury verdict[86]

(11) $592,500 in other settlements to Native corporations[87]

(12) $8,521,667 paid by Exxon to municipalities and

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[80] 1996 Settlement Agreement at 4, Part II, ¶ A, Exhibit 16 to Oesting Declaration which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[81] *See* Exhibit C to Declaration of John F. Daum, which is appended to Defendants' Reply, Clerk's Docket No. 7535.

[82] Amended Stipulation Regarding Impacts for Phase III at 2, Part I, ¶ 1, Clerk's Docket No. 5634.

[83] *See* Order No. 307 (Jan. 19, 1996), Clerk's Docket No. 6600.

[84] *See* Daum Declaration at 3, ¶ 6, which is appended to Notice of Filing Original Declaration, Clerk's Docket No. 7540, and Exhibit C to his declaration, which is attached to Defendants' Reply, Clerk's Docket No. 7535. *See also,* Oesting Declaration at 7, ¶ 13, and 10, ¶ 15, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[85] *See* Memorandum from W. Monte Taylor at 53 (Mar. 20, 1992), attached as Exhibit 19 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[86] Oesting Declaration at 9, ¶ 14, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[87] *See* Exhibits 21 and 22 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

villages[88]

(13) $974,000 in additional settlements to municipalities and villages[89]

(14) $724,000 state jury verdict for Kodiak Island Borough[90]

(15) $1,340,178 paid by TAPL Fund to municipalities and villages[91]

(16) $1,500,000 received by municipalities and villages as part of the State of Alaska's recovery against Alyeska[92]

(17) $13,400,000 Phase IV settlement[93]

(18) $4,071,694 paid by TAPL Fund to cannery workers, tenders, and seafood brokers[94]

(19) $11,964,793 paid by Exxon to cannery workers, tenders, and seafood brokers[95]

(20) $388,596 paid by Exxon to area businesses[96]

(21) $219,305 paid by TAPL Fund to area businesses[97]

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[88] *See* Taylor Memorandum at 53, attached as Exhibit 19 to Oesting Declaration, and Exhibit 24 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[89] *See* Exhibits 25, 26, and 27 attached to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[90] *See* Exhibit 28 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[91] *See* Oesting Declaration at 8, ¶ 13, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501. This number should probably be slightly lower as it likely includes interest.

[92] *See id.* at 11, ¶ 16.

[93] *See id.* at 12, ¶ 17.

[94] *See id.* at 13, ¶ 18. This number probably includes interest and so should be slightly lower.

[95] *See id.*

[96] *See* Exhibit 30 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

(22) $821,000 paid by Exxon to reinstated seafood processors[98]

(23) $3,067,646 paid by Exxon to reinstated cannery workers[99]

(24) $1,750,000 paid by Exxon to reinstated tender-boat operators and crew.[100]

These figures represent a total actual harm of $513,147,740.

Laying aside briefly the question of whether it is possible to place a number on the likely or potential harm flowing from the grounding of the *Exxon Valdez,* this court turns now to what it has found to be the most troubling aspect of the decision of the court of appeals in *In re Exxon Valdez.* Without citation of authority, and without explanation that has a nexus to the due process fair notice issue which underlies the question of whether or not punitive damages are grossly excessive, the court of appeals observed with respect to the ratio analysis that:

> The amount that a defendant voluntarily pays before judgment should generally not be used as part of the numerator, because that would deter settlements prior to judgment.

In re Exxon Valdez, 270 F.3d at 1244.[101]

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[97] Oesting Declaration at 13, ¶ 19, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[98] Exxon's Second Renewed Motion for Reduction or Remittitur of Punitive Damages Award at 23 n. 27, Clerk's Docket No. 7753.

[99] *Id.*

[100] *Id.*

[101] Following the suggestion that the court should generally discount compensatory damages by the amount of voluntary payments or settlements, the court of appeals goes on (as a part of its discussion of the ratio) to speak of cleanup expenses, observing that they "should be considered as part of the deterrent already imposed." *In re Exxon Valdez,* 270 F.3d at 1244. But cleanup costs have to do with environmental damage, and the jury was precluded from considering that harm in making its award of punitive damages. In this case, environmental harm and deterrence of it

The briefing of the parties and the court's independent research suggest that authority on the issue under consideration is virtually nonexistent, and what sparse authority there is reaches a contrary conclusion. In *Kelley v. Michaels,* 59 F.3d 1050 (10th Cir. 1995), the court dealt with an actual damage award of $292,750 and a punitive damages award of $500,000. However, the net actual damages recovered by the plaintiff were only $2,750 because of an offset of $290,000 which was the result of a partial settlement of the plaintiff's claim. The Tenth Circuit employed the $292,750 compensatory award in calculating the ratio of harm to punitive damages. *Id.* at 1055. A similar result is to be found in *United Phosphorus, Ltd. v. Midland Fumigant, Inc.,* 205 F.3d 1219 (10th Cir. 2000), where the district court reduced a compensatory award made by a jury but did not reduce the punitive award. There, also, the Tenth Circuit rejected the argument that because the district court reduced the compensatory award to prevent a double recovery to the plaintiff, the punitive award should also be reduced. *Id.* at 1231 n. 6. Thus, in determining harm for *the second *BMW* guidepost (the ratio), the Tenth Circuit added back into the compensatory award those damages that had been subtracted out because of a double recovery. *Id.* at 1231.

As already noted, the court of appeals' reason for suggesting the subtraction of voluntary payments was because to do otherwise would deter settlements prior to judgment. This court does not understand how or why encouraging settlements should be a part of the due process analysis of a punitive damages award made in a case which went to trial. Moreover, this court believes that a contrary view is more logical. If a defendant knows that it will get credit in the computation of punitive damages for a partial settlement, voluntarily made before trial, it may be encouraged to go to trial; whereas, as a general proposition the specter of a large

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should stand apart from other harms and the punishment and deterrence of them.

punitive damages award is a very powerful factor in encouraging settlements of entire cases. Reducing the risk of going to trial on punitive damages by discounting them for voluntary payments does not encourage settlements; it encourages trials.

In this case, if the general rule announced by the circuit-that the harm factor should be reduced by voluntary payments-is held to be the law, then that general rule should not apply in this case. This position is not taken because of this court's view of how reducing harm for purposes of punitive damages evaluation might impact the settlement process, but because of the specific punitive damages instructions given the jury in this case.

Generally, punitive damages instructions are very open-ended as regards how juries should come up with a punitive damages number if liability for such damages is determined. For example, the Ninth Circuit Model Civil Jury Instruction for punitive damages provides as to the amount of punitive damages only that:

> If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.[102]

In instructing the jury in this case, and as set out fully in marginal notes above, the court, with much assistance from the parties, went far beyond the norm in endeavoring to give the jury guidance on how to determine punitive damages. In those instructions, the jury was specifically admonished to take account of mitigating factors. It was instructed that it

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[102] Ninth Circuit Model Civil Jury Instruction No. 7.5.

could "consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures."[103]

In arguing this case to the jury, the plaintiffs sought punitive damages of more than $5 billion and less than $20 billion.[104] The jury plainly did not buy plaintiffs' top-dollar analysis of how punitive damages should be calculated in this case. The court presumes that the jurors followed and faithfully applied, to the best of their ability, the court's instructions. *See Leatherman,* 285 F.3d at 1150 ("we must presume the jury understood and followed the instructions"). Presumably the jury already considered whether and to what extent punitive damages should be mitigated based on voluntary payments by Exxon before judgment. Reducing actual harm for purposes of ratio analysis by the amount of voluntary payments unfairly skews the ratio in Exxon's favor, and in effect gives Exxon double credit for voluntary payments by reducing both punitive damages which were based on mitigation instructions and actual harm for purposes of the punitive damages/harm ratio analysis. In this case, the court concludes that it should not discount actual harm by voluntary payments made by Exxon.

Thus, the court finds that the actual harm Exxon's conduct caused plaintiffs was $513,147,740. The punitive damages award was $5 billion, which leads to a ratio of 9.74-to-1. This ratio, of course, does not include any consideration of potential harm, a consideration that is still appropriate after *State Farm.*

In this case, there was purely non-economic harm that cannot be quantified; there was harm which likely occurred but has not yet been valued; and there was potential harm-all flowing from the grounding of the *Exxon Valdez.*

Firstly, there are some 32,677 punitive damages claim-

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[103] Jury Instruction No. 36, Clerk's Docket No. 5890.

[104] *See* Transcript of Proceedings, Trial by Jury-70th Day, at 7587, lns. 23-25 (Aug. 29, 1994), Clerk's Docket No. 5778.

ants.[105] These claimants did not get deceived about the quality of the paint on a new car. As discussed in detail above, the most direct and palpable effect of Exxon's recklessness was upon the livelihood of Prince William Sound, Cook Inlet, and Kodiak area fishermen. However, the spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet also disrupted the lives of thousands of claimants and their families. The trauma was real although not physical. That harm cannot be quantified.

Secondly, there are plaintiffs whose claims have been reinstated in *In re Exxon Valdez* and whose claims are not yet determined. Putting a number on these claims would be speculative, even though the harm is very likely to have occurred.

Thirdly, and in the area of potential harm, there is no way of calculating how much additional oil might have spilled into Prince William Sound and spread elsewhere had Captain Hazelwood's efforts to back the *Exxon Valdez* off Bligh Reef succeeded. Here, the risk of more extensive economic and non-economic losses to the plaintiffs is immense and incalculable. If more oil would have been spilled, it is very likely that the oil would have spread further so as to affect more fisheries and more fishermen than the thousands who are plaintiffs in this case. Had the entire cargo spilled, the risk to the *Exxon Valdez* crew and its rescuers would have also been enhanced. Exxon insists that *State Farm* precludes any consideration of potential harm to anyone besides the plaintiffs.

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[105] *See* Plaintiffs' Response to Court's Requests at Oral Argument at 4, Clerk's Docket No. 7553. This number includes claimants whose claims are based on recreational uses or commercial fishing activities in unoiled commercial fisheries. These claimants may be entitled to punitive damages under the Ninth Circuit's holding in Sea Hawk Foods, 246 F.3d 676 (Table) (2000 WL 1860726). But see Exxon's Memorandum with Respect to Plaintiffs' Response to Court's Questions, Clerk's Docket No. 7561.

Here, the court discusses potential harm, so use of the number of claimants potentially entitled to receive punitive damages seems most appropriate.

While it is the court's view that consideration of the risks to rescuers and crew does not run afoul of *State Farm* or other constitutional concepts, even if this potential harm is excluded, the additional harm to the plaintiffs had the entire cargo spilled would have been immense. For Exxon to suggest that spilling the entire tanker load of crude oil into Prince William Sound involved no more risk or no more potential loss to anyone than spilling a fifth of its cargo is ludicrous. It is true that having once closed fishing for a full season, the season cannot be closed again, but that says nothing about whether additional fisheries or fishing seasons could have also been lost.

Because there is no way to quantify the non-economic, potential, and yet-to-be-litigated economic harms discussed above, the appropriate approach is to accommodate the unknowns by allowing a higher ratio to pass constitutional muster. This is in keeping with Supreme Court precedent. In *BMW,* the Court observed that "[a] higher ratio may ... be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW,* 517 U.S. at 582.

Besides unquantified harm, there are other factors that support a higher ratio in this case. In *State Farm,* the Court observed that a higher ratio may be appropriate when the defendant's conduct is highly reprehensible and the economic damages recovered by the plaintiffs are small. *State Farm,* 123 S. Ct. at 1524. Exxon insists that the economic damages in this case were "substantial" and thus a 1-to-1 ratio is all that is appropriate. In *State Farm,* the Court found the $1 million in compensatory damages awarded to the Campbells "substantial" and suggested that a lower ratio, in the realm of 1-to-1, would be appropriate in that case. In *State Farm,* there were two plaintiffs. Assuming that each plaintiff was entitled to an equal share of the damages, each plaintiff received $500,000 in compensatory damages, a substantial number under any circumstances. Here, there are 32,677 claimants. Using the $513,147,740 as the measure of damages and as-

suming that each plaintiff was entitled to an equal share (which the court is aware is not the case), the plaintiffs' average share of the total recovery is $15,704. That is a far cry from the half-million dollars each plaintiff in *State Farm* received. The court is unpersuaded that the damages in this case were "substantial" . Rather, this is a case in which the economic damages recovered by the average plaintiff was relatively small.

In *State Farm,* the Court indicated that where compensatory damages already contain a punitive component, a lower ratio may be appropriate. In *State Farm,* the compensatory damages awarded to the Campbells contained such a punitive component. *State Farm,* 123 S. Ct. at 1525. The same is not true here. The compensatory damages that the plaintiffs received were solely for economic losses and had no punitive component. Unlike the Campbells, who pursued an intentional infliction of emotional distress claim against State Farm, the plaintiffs here never pursued such claims against Exxon. Therefore, unlike the Campbells who were compensated for the emotional distress that State Farm caused, the plaintiffs here have never been compensated for the emotional distress (the disruption of their lives discussed earlier) that resulted from oil spill which was caused by Exxon's reckless behavior. Because the plaintiffs' compensatory damages did not already contain a punitive component, a higher, single-digit ratio is appropriate in this case.

The court of appeals suggests that the cleanup costs and the like paid by Exxon would go a long way toward effecting appropriate deterrence. *In re Exxon Valdez,* 270 F.3d at 1244. As discussed above, this court is of the view that we are far past the question of whether the cleanup costs incurred by Exxon was sufficient deterrence in and of itself. That was the dealt with in the environmental litigation as discussed above. However, the issue of over-deterrence is relevant to the constitutional analysis because over-deterrence may mean that a defendant did not have fair notice that its actions could subject it to the level of punishment and deterrence imposed.

Apparently taking a cue from Justice Breyer's concurrence in *BMW,*[106] the court of appeals discusses how entrepreneurs do their planning, suggesting that they are deterred by the prospect of cleanup costs and the like. The appeals court concludes by observing, "[a]s bad as the oil spill is, fuel for the United States at moderate expense has great social value and that value as well as the value of avoiding horrendous oil spills can be reconciled by ratio analysis." *Id.*

While the court of appeals' economic analysis makes sense in the abstract or academic world, its analysis reflects what well-informed, rational entrepreneurs would do. In the real world, Exxon and its officials and managers do not work this way. If they did, they would remove the Captain Hazelwoods from the bridge because leaving them there is what creates a risk of horrendous cleanup costs and other expenses. Thus, what it theoretically takes to deter a rational business person (cleanup costs, etc.), and what it takes to deter corporate officials given to reckless conduct are very different. Here, we are dealing with reckless corporate officials.

The following considerations cause this court to believe that a higher, single-digit ratio presents no identified risk of over-deterrence. Firstly, a huge number of claimants suffered harm that was not purely economic. The harm struck at their lifestyle, causing trauma but no proven physical injuries. The health and safety of the residents of the Sound, people working on the Sound, the *Exxon Valdez* crew, and their rescuers were put at risk.

Secondly, the court is aware of no evidence in the record of this case suggesting that Exxon is able to pass its cleanup and other costs associated with the *Exxon Valdez* spill on to the public. Thus there is no showing that the deterrent effect of Exxon's costs (or the punitive sanctions) threatened the

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[106] *BMW,* 517 U.S. at 593 (Breyer, J., concurring).

socially valuable availability of moderately priced fuel.[107]

Thirdly, the discussion thus far has said nothing about the financial circumstances of the defendants. In *State Farm,* the Court stated that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm,* 123 S. Ct. at 1525. However, the Court also observed that it was neither unlawful nor inappropriate to consider the defendant's wealth. *Id.* Punitive damages are intended to punish and deter; they are not intended to be an economic death sentence. Here, after judgment was entered on the punitive damages award, Exxon's treasurer advised the court that "the full payment of the Judgment would not have a material impact on the corporation or its credit quality."[108] In fact, Exxon was able to protect itself from the risk of the plaintiffs executing on the $5 billion judgment by posting an irrevocable, syndicated standby letter of credit for over $6 billion.[109] There is absolutely no chance of a $5 billion punitive damages award amounting to an economic death sentence for Exxon. This is at least some evidence of the absence of over-deterrence. In any event, this is *not* a case where Exxon's size and wealth has been used by the plaintiffs as a surrogate for the "'failure of other factors, such as "reprehensibility."'" *State Farm,* 123 S. Ct. at 1525 (quoting *BMW,* 517 U.S. at 591 (Breyer, J., concurring)).

The foregoing discussion of deterrence says nothing about the coequal goal of punitive damages: punishment. The deterrence aspect of punitive damages is intended to be essentially forward-looking. The goal is to modify the future conduct of Exxon and others similarly situated. The punishment

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[107] As already observed, cleanup costs have to do with environmental damage; and in this case, environmental damages have been excluded from the punitive damages determination and this court's ratio analysis.

[108] Declaration of Edgar A. Robinson at 16, ¶ 30, pertinent portion attached as Exhibit 33 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[109] *See* Clerk's Docket No. 6914.

aspect of punitive damages awards is backward-looking. The law imposes sanctions for reckless conduct of the past. The concepts are therefore quite different and foster different societal goals.

The harms visited upon the plaintiffs and punitive damages class members (both actual and potential harm) are, for reasons discussed above, not entirely economic, and Exxon's conduct was highly reprehensible. Thus, the applicable ratio of punitive damages to harm must be such as to accommodate not just the deterrence of reckless conduct in the future, but also punishment for the recklessness which gave rise to the harm.

"Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution [.]" *State Farm,* 123 S. Ct. at 1524. The court concludes that the dual purposes of punitive damages and the circumstances of this case justify a 9.74-to-1 punitive damages to actual harm ratio. The reprehensibility of Exxon's conduct, the low per-plaintiff average economic damages recovered, the actual and potential unquantified harm, and the lack of a punitive component in the compensatory damages all point to a higher ratio in this case. Considering all of the foregoing, the court is persuaded that a punitive damages award of $5 billion was "both reasonable and proportionate to the amount of harm to the plaintiff[s] and to the general damages recovered." *Id.* That award was not grossly excessive in comparison to the actual and potential harm occasioned by the grounding of the *Exxon Valdez.*

Comparable Penalties. In *BMW,* the Court announced that "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW,* 517 U.S. at 583. Although indicating that both civil and criminal penalties were appropriate for comparison, the *BMW* Court only looked to the comparable civil penalty, which was $10,000. The Court observed that the $2 million punitive damages award was "substantially greater" than the statutory

fine of $10,000. *BMW,* 517 U.S. at 584.

In *State Farm,* the Court dropped any reference to criminal penalties, stating that "[t]he third guidepost in [*BMW*] is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *State Farm,* 123 S. Ct. at 1526 (quoting *BMW,* 517 U.S. at 575). The *State Farm* Court acknowledged that in past cases it had looked to comparable criminal penalties that might be imposed. The Court then observed that

> [t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility.

Id. The Court emphasized that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id.* The Court then only looked at the comparable civil penalty to which State Farm could have been subject, which again was $10,000. The Court observed that the civil fine was "dwarfed by the $145 million punitive damages award." *Id.*

Thus, after *State Farm,* there has been some discussion as to whether comparable criminal penalties are still appropriate for consideration under the third guidepost. This court's role is to make a due process inquiry. The potential size of criminal sanctions not only tells us that Alaska (and Federal) authorities view oil spills as very serious, but the criminal (and civil) sanctions available are a useful double-check of what Exxon reasonably would have understood was the outside limit of punishment that it could incur by reckless conduct. The latter is the focus of the constitutional inquiry.

In criminal proceedings brought against them by the federal government, the Exxon defendants were charged with five separate counts. Count I charged a violation of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); Count II, a

violation of the Refuse Act, 33 U.S.C. §§ 407 and 411; Count III, a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); Count IV, a violation of the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and Count V, a violation of the Dangerous Cargo Act, 46 U.S.C. § 3718(b).[110] Exxon Corporation pled guilty to Count III, and Exxon Shipping pled guilty to Counts I, II, and III, and both were fined.[111] That said, the point to be made here is that Exxon has admitted criminal responsibility for its conduct. It is plainly, therefore, not unreasonable to evaluate the constitutionality of a civil award of punitive damages in the light of what Exxon could have reasonably been on notice of had it considered the civil and criminal sanctions which could flow from the conduct in question. The actual criminal penalty imposed is not the proper criteria for the constitutional inquiry in which we are engaged. Our focus is the outer limit of potential sanctions that Exxon was charged with knowing prior to the grounding of the *Exxon Valdez.*

For each of the five criminal offenses brought against it, the Exxon defendants might have been fined "twice the gross [pecuniary] loss" occasioned by the oil spill. 18 U.S.C. § 3571(d). Laying aside harm likely caused by the oil spill which has not been quantified, and laying aside harm that might potentially have been occasioned by the spill had

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[110] *See United States v. Exxon Corp.,* No. A90-0015-CR.

[111] Pursuant to a joint plea agreement, Exxon was fined a net amount of $25 million and ordered to pay restitution in the amount of $100 million. *See* Judgments at Clerk's Docket Nos. 235 and 236 in Case No. A90-0015-CR. The net amount of the fine was affected by at least three considerations: (1) the plea agreement effected a settlement which avoided a difficult and expensive trial, (2) at the time of the disposition of the criminal case, this court did not have the benefit of the more robust development of actual damages which took place later in the civil proceedings, and (3) there were practical reasons why the court eschewed a larger fine in favor of a substantial restitution obligation. The court deemed it far preferable for Exxon to be sanctioned by means of a restitution obligation which would be employed for restoration of the environment than by a larger fine which would not be so employed.

Captain Hazelwood succeeded in backing the *Exxon Valdez* off Bligh Reef, the court has found the actual pecuniary loss for purposes of the constitutional analysis to be $513.1 million. That amount doubled, as provided by the statute, and multiplied by five offenses equals $5.1 billion.[112] Because Exxon is on notice of the provisions of the criminal laws of the United States, in particular 18 U.S.C. § 3571(d), it was, for constitutional due process purposes, on notice that criminal sanctions for spilling even a modest portion of the cargo of the *Exxon Valdez* could lead to truly horrendous criminal penalties. Perhaps more important because we are concerned about notice of what *could be,* Exxon is fairly chargeable with knowledge that reckless conduct on its part could result in the spill of the entire cargo of a tank vessel such as the *Exxon Valdez.* While the court is not prepared to say that spilling the entire cargo of the *Exxon Valdez* would cause additional damage in direct proportion to that actually observed, spilling five times as much oil as was spilled would surely result in a significant increase in Exxon's exposure for criminal and civil penalties. Surely Exxon knew that billions of dollars were at stake if it were to criminally spill a tanker-load of oil in Prince William Sound. Plainly those fines could exceed the jury's punitive damages award in this civil case.

Subsection 3551 of Title 18, United States Code, also provides for imprisonment.[113] While it is not possible to imprison a corporate defendant in a criminal case, provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the constitutional analysis, justifies a punitive damages award

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[112] Exxon suggests that voluntary pre-judgment payments should be deducted when calculating a potential fine, just as those payments should be deducted when calculating the ratio under the second *BMW* factor. In this case, a reduction would be no more appropriate here than it was for purposes of calculating the ratio.

[113] Exxon personnel with the authority and responsibility for placing a relapsed alcoholic in control of a large tank vessel might be imprisoned for up to one year. 33 U.S.C. §§ 407 and 411.

"'much in excess of the fine that could be imposed[.]'" *BMW,* 517 U.S. at 583 (quoting *Haslip,* 499 U.S. at 23).

The Ninth Circuit Court of Appeals observed that "[c]eilings on civil liability are also instructive." *In re Exxon Valdez,* 270 F.3d at 1245. The court of appeals discussed the $100 million "cap" on liability for discharging oil from a vessel as provided by the Trans-Alaska Pipeline Act. 43 U.S.C. § 1653(c)(1) & (3). This limit upon liability is not in any sense a sanction, nor is it a limit on civil liability. It is, rather, an upper limit of *strict* liability for harms caused by non-negligent spilling of oil. Here, we deal with Exxon's reckless conduct and focus upon sanctions as to which the statutory limit of strict liability for non-negligent conduct is not instructive.

In *BMW,* the Court suggests that a more appropriate consideration is exposure to civil penalties for wrongful conduct. *BMW,* 517 U.S. at 584. Both state and federal law make provision for the imposition of civil penalties for spilling crude oil into Prince William Sound. Alaska Statutes, Section 46.03.758, imposes civil penalties ranging from $1 per gallon to $10 per gallon, depending on where the oil is spilled. The plaintiffs estimate that state civil penalties for spilling 11 million gallons of oil in Prince William Sound would amount to $63.8 million, or an average of $5.80 per gallon.[114] Federal civil penalties of $270,000 could also have been imposed for the spill. *See* 16 U.S.C. §§ 668(b), 1858(a); 33 U.S.C. §§ 1232(a)(1), 1319(g), 1514(b)(3), 1908(b); 43 U.S.C. § 1350(b); and 46 U.S.C. § 3718(a)(1). Again, the foregoing pre-supposes the actual spill, whereas Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties approaching five times the civil penalty which would attend the actual spill. Such a civil penalty could be in excess of $255

[114] Plaintiffs' Opposition at 70, Clerk's Docket No. 7501. Exxon could have received an offset equal to the amount of oil it removed from the environment as part of cleanup efforts. *See* AS 46.03.758(f).

million.

The court is well satisfied that Exxon was fairly on notice that its officers could face imprisonment and the company could face in excess of $5 billion in criminal and civil penalties for recklessly spilling crude oil into Prince William Sound.

New Developments

Since the Supreme Court's decisions in *BMW* and *State Farm,* both state and federal lower courts, when faced with the constitutionality of a punitive damages award, dutifully cite the three *BMW* guideposts and apply them, with varying results. In general, a review of post-*BMW* and post-*State Farm* cases offers little guidance to the court in its evaluation of the punitive damages award in this case. However, because this court is bound by the precedent of the Ninth Circuit Court of Appeals, the court has found *Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020 (9th Cir. 2003), the one published case in which the court of appeals has considered the constitutionality of a punitive damages award after *State Farm,* helpful to its analysis.

Zhang was an employment discrimination case in which one plaintiff was awarded $360,000 in compensatory damages and $2.6 million in punitive damages on his Section 1981 claim. *Id.* at 1027. The court of appeals applied the *BMW* guideposts as clarified by *State Farm* to determine whether the punitive damages award was grossly excessive.

As for reprehensibility, the court of appeals found a "substantial gulf" between the reprehensibility of the defendants' intentional racial and ethnic discrimination and the conduct at issue in *BMW, Cooper Industries,* and *State Farm. Zhang* at 1043. Similarly here, this court finds a vast gulf between the reprehensibility of Exxon's conduct in willfully allowing a relapsed alcoholic to continue to command a supertanker filled with toxic cargo and the conduct at issue in *BMW, Cooper Industries,* and *State Farm.*

As for the ratio guidepost, the court of appeals found a

7-to-1 ratio constitutionally acceptable, in large part because it was a single-digit ratio. The court of appeals observed that it was "aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." *Zhang,* 339 F.3d at 1044. Here, this court finds a single-digit ratio constitutionally acceptable-not grossly excessive.

Lastly, as to the comparable sanctions guidepost, the court of appeals noted that there was no comparable civil penalty but that Congress has imposed a $300,000 cap on punitive damages for Title VII discrimination claims. *Id.* at 1045. Although recognizing that $300,000 is less than the $2.6 million in punitive damages imposed, the court of appeals noted that it was not as great a discrepancy as there was in *BMW* and *State Farm. Id.* The court of appeals also stated that simply because one *BMW* factor raises constitutional concerns does not mean that the punitive damages award is constitutionally excessive. Here too, if we were to only look at comparable civil penalties, there could be constitutional concern. *Id.* But here, as in *Zhang,* the defendant (Exxon) engaged in highly reprehensible conduct. The latter is "'[t]he most important indicium of the reasonableness of a punitive damages award.'" *State Farm,* 123 S. Ct. at 1521 (quoting *BMW,* 517 U.S. at 575).

Conclusion

The Supreme Court instructed that punitive damages awards must be subjected to an "exacting" review to "ensure[ ] that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's caprice.'"" *State Farm,* 123 S. Ct. at 1520-21 (quoting *Cooper Industries,* 532 U.S. at 436) (quoting *BMW,* 517 U.S. at 587 (Breyer, J., concurring)). This court has engaged in an exacting review of the $5 billion punitive damages award not once or twice, but three times, with a more penetrating inquiry each time. This court again concludes that a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice-its right to due

process. This conclusion is based on the court's findings that:

> (1) Exxon's conduct was highly reprehensible;
>
> (2) the ratio of punitive damages to actual harm inflicted on the plaintiffs is a permissible one, 9.74-to-1; and
>
> (3) the comparable criminal and civil penalties could have exceeded $5 billion.

However, the court of appeals did not just remand this case for application of *BMW, Cooper Industries,* and *State Farm.* It instructed this court to reduce the punitive damages award, and the court must do that. Determining the amount of an award that will be constitutionally acceptable "'is not an enviable task.'" *Leatherman,* 285 F.3d at 1152 (quoting *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.,* 181 F.3d 446, 468 (3d Cir. 1999)). As the Third Circuit Court of Appeals explained:

> We have searched vainly in the case law for a formula that would regularize this role, but have not found one.... [T]he Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount.

Inter Medical Supplies, 181 F.3d at 468. This observation remains as true today after *State Farm* as it was before *State Farm.*

Because the court's independent evaluation of the *BMW* guideposts as applied to the facts of this case have led it to the conclusion that the $5 billion award was not grossly excessive, the court does not perceive any principled means by which it can reduce that award. In their memorandum in opposition to the first renewed motion for reduction or remittitur of punitive damages, plaintiffs suggested that "a punitive damage[s] award of at least $4 billion satisfies the requirements of due process consistent with *BMW v. Gore,* 517 U.S. 559 (1996)."[115] In light of *State Farm,* which tells us that sin-

[115] Plaintiffs' Opposition at 80, Clerk's Docket No. 7501.

gle-digit multipliers pass constitutional muster for highly reprehensible conduct, which is what we have here, and in light of *Zhang,* in which the Ninth Circuit Court of Appeals approved a 7-to-1 ratio for conduct that was also highly reprehensible, the court reduces the punitive damages award to $4.5 billion as the means of resolving the conflict between its conclusion and the directions of the court of appeals.

Exxon's motion for reduction or remittitur of the punitive damages award is granted. The sum of $500 million of the $5 billion jury award is remitted, and therefore the punitive damages award in this case is reduced to $4.5 billion.[116] The clerk of court shall enter an amended partial judgment accordingly.[117]

All plaintiffs' lead counsel's motion for a Rule 54(b) determination[118] as to the punitive damages judgment is reinstated as is Exxon's opposition to the motion.[119] The court again concludes that there is no just reason to delay entry of a final judgment in this case. The court's judgment as to the $4.5 billion punitive damages award is deemed final for purposes of Rule 54(b), Federal Rules of Civil Procedure. In the alternative, the court concludes that an interlocutory appeal under 28 U.S.C. § 1292(b) is appropriate.

All plaintiffs' lead counsel's motion for a Rule 54(b) finality determination or, in the alternative, an interlocutory

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[116] If Exxon accepts this result by paying the punitive damages award plus accrued interest, this case should of course end at that point. However, if Exxon chooses to take a further appeal for the purpose of seeking a more generous reduction of the jury's punitive damages award, then the court again urges the plaintiffs to cross-appeal. If left to apply *BMW* and *State Farm* without the requirement that it effect some reduction of the $5 billion punitive damages award, this court would have, as set out above, denied Exxon any relief whatever on its third motion for reduction or remittitur of punitive damages.

[117] . Interest on the reduced award of punitive damages shall accrue from September 24, 1996, in accordance with 28 U.S.C. § 1961.

[118] Clerk's Docket No. 7569.

[119] Clerk's Docket No. 7577.

appeal, is granted.

APPENDIX D

United States District Court,
for the D. Alaska.

In re: The EXXON VALDEZ,	No. A89-0095-CV (HRH)

This Order Relates to All Cases.

Dec. 9, 2002.

Commercial and subsistence fishermen, landowners and others brought environmental tort suits against owner of oil tanker that ran aground and caused oil spill. Following trial resulting in award of compensatory and punitive damages and remand of earlier appeal, 239 F.3d 985, the District Court resolved post-trial motions. Owner appealed, and various plaintiffs cross-appealed. The Court of Appeals, 270 F.3d 1215, affirmed in part, vacated in part, and remanded. On remand, owner moved for reduction or remittitur of punitive damages award. The District Court, Holland, J., held that: (1) $5 billion punitive damages award did not violate due process, but (2) reduction of award to $4 billion was required to comply with Court of Appeals' mandate.

Motion granted.

ORDER No. 358

HOLLAND, District Judge.

Renewed Motion for Reduction of Punitive Damages Award

Defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2), hereinafter referred to as "Exxon", have filed a renewed motion for reduction or remittitur of the punitive damages award entered against them.[1] The motion is opposed by the plaintiffs.[2] Exxon has replied.[3] Various affidavits in support of and in opposition to the motion as well as

[1] Clerk's Docket No. 7487.

[2] Clerk's Docket No. 7501.

[3] Clerk's Docket No. 7535.

the underlying record have been considered by the court, and oral argument has been requested and heard.

Facts

Terrible things have happened in Alaska on Good Friday. On Good Friday, March 27, 1964, the strongest earthquake ever recorded in North America literally relocated the seabed of most of Prince William Sound and the Kenai Peninsula. On Good Friday, March 24, 1989, the oil tanker Exxon Valdez was run aground on Bligh Reef in Prince William Sound, Alaska.

On March 24, 1989, Exxon's co-defendant, Joseph Hazelwood, was in command of the Exxon Valdez. He was assisted by a third mate and a helmsman. Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and, before departing Valdez, Alaska, on March 23, 1989, he had, more probably than not, consumed sufficient alcohol to incapacitate a nonalcoholic. As the Exxon Valdez exited Valdez Arm, Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier. That diversion from the standard shipping lanes took the vessel directly toward Bligh Reef. The captain gave the third mate explicit, accurate orders which, if carried out by the third mate, would have returned the vessel to the shipping lanes without danger of grounding on Bligh Reef. The third mate, who had completed the requirements for a captain's license, was, more probably than not, overworked and excessively tired at the time in question. He neglected to commence a turn of the vessel at the point where, and the time when, he had been directed to do so. At that critical time, Captain Hazelwood had left the bridge to attend to paperwork. When the third mate realized that he had proceeded too far in the direction of Bligh Reef, he commenced a turn, but it was too late.

Like so many great tragedies, this one occurred when three or more unfortunate acts and/or omissions took place in

close proximity to one another, and but for any one of them, the grounding would likely not have occurred. Joe Hazelwood was under the influence of alcohol. Instead of staying on the bridge to verify that his orders were carried out, he tended to paperwork below. The third mate, being overworked and tired, neglected to carry out the orders which he had been given. The grounding might still have been avoided but for several other converging circumstances: the captain had put the vessel on an automated system for increasing its speed prior to completing the maneuver around the ice in the shipping lane; and the third mate, upon realizing his oversight, did not turn the vessel as sharply as he might have.

It has never been established that there was any design, mechanical, or other fault in the Exxon Valdez. It responded to its human masters as intended and expected. Thus it is entirely clear why the Exxon Valdez grounded on Bligh Reef: the cause was pure and simple human frailty.

Defendant Exxon Shipping owned the Exxon Valdez. Exxon employed Captain Hazelwood, and kept him employed knowing that he had an alcohol problem. The captain had supposedly been rehabilitated, but Exxon knew better before March 24, 1989. Hazelwood was being watched by other Exxon officers. They knew that he had "fallen off the wagon." Nothing was done about it. As a consequence, Captain Hazelwood was the person in charge of a vessel as long as three football fields and carrying 53 million gallons of crude oil. Exxon officials well knew that oil and fisheries could not mix with one another. Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct the operation of the Exxon Valdez through Prince William Sound.

Captain Hazelwood came to the bridge immediately after the grounding. He timely reported to the United States Coast Guard:

"Exxon Valdez [calling Valdez Traffic Control]. We

> should be on your radar there. We've fetched up hard aground north of Goose Island off Bligh Reef and evidently leaking some oil and we're gonna be here for a while...."[4]

Despite the fact that he was aware of oil boiling up through the seawater on both sides of the vessel, Captain Hazelwood attempted to extract the vessel from the reef.[5] Had he succeeded in backing the vessel off the reef or driving it across the reef, the Exxon Valdez would probably have foundered, risking the loss of the entire cargo and the lives of those aboard. However, the vessel was really hard aground. It could wiggle but not be moved off Bligh Reef.

The best available estimate of the crude oil lost from the Exxon Valdez into Prince William Sound is about 11 million gallons. In the days following the grounding, about 42 million gallons of crude oil were lightered off the Exxon Valdez by other tankers. This process was very dangerous. The lightering process was necessarily taking place in a pool of crude oil. A spark from static electricity or other mechanical or electrical sources might have set fire to the crude oil.

The crude oil lost from the Exxon Valdez spread far and wide around Prince William Sound, mostly in a westerly direction. Counter-currents which pass through the sound in a westerly direction (the primary North Pacific currents flow from west to east) took the crude oil past numerous islands, spreading to the coast of the Kenai Peninsula, Cook Inlet, and Kodiak Island. Commercial fisheries throughout this area were totally disrupted. Lands and vessels were heavily oiled. Subsistence fishing by residents of Prince William Sound and Lower Cook Inlet villages was disrupted, as were recreational activities throughout the area. Shore-based businesses de-

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[4] Plaintiffs' Exhibit 92A, Excerpts of Record, Vol. II-Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[5] Transcript of Trial Testimony of Joseph J. Hazelwood at 439, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

pendent upon the fishing industry were disrupted. The resources of cities such as Cordova were substantially disrupted.

In keeping with its legal obligations, Exxon undertook a massive cleanup effort.[6] Approximately $2.1 billion was ultimately spent in efforts to remove the spilled crude oil from the waters and beaches of Prince William Sound, Lower Cook Inlet, and Kodiak Island. Also in accordance with its legal obligations attendant to spilling crude oil,[7] Exxon undertook a voluntary claims program, ultimately paying out $303 million, principally to fishermen whose livelihood was disrupted for the year 1989 and ensuing years up to 1994.

Proceedings

Litigation over the grounding was soon commenced. The civil suits came first, but developed slowly because of their number and complexity. Both the United States Government and the State of Alaska sued Exxon for environmental damage. That litigation was expeditiously settled by means of consent decrees under which Exxon agreed to pay to the governments, for environmental damage, $900 million over a period of ten years.[8] The decrees contain an "opener" provision, allowing the governments to make additional claims of up to $100 million for environmental damage not known when the settlements were reached.[9]

Captain Hazelwood was prosecuted by the State of Alaska for operating a watercraft while intoxicated, reckless endangerment, negligent discharge of oil, and three felony counts of

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[6] *See* 33 U.S.C. § 1321, which imposes a duty upon an owner or operator of a vessel that spills oil to clean up its discharge.

[7] AS 46.03.822.

[8] *United States v. Exxon Corp.*, No. A91-0082-CV (Clerk's Docket No. 46 at 7-8), and *Alaska v. Exxon Corp.*, No. A91-0083-CV (Clerk's Docket No. 26 at 7-8).

[9] *See* Consent Decree and Agreement at 18-19, Clerk's Docket No. 46 in *United States v. Exxon Corp.*, No. A91-0082-CV, and Clerk's Docket No. 26 in *Alaska v. Exxon Corp.*, No. A91-0083-CV.

criminal mischief. That litigation became involved in legal complexities which led to multiple appeals. Some nine years after the grounding, a single misdemeanor conviction was affirmed on appeal.[10]

Exxon was prosecuted by the federal government for various environmental crimes: violating the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); violating the Refuse Act, 33 U.S.C. §§ 407 and 411; violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and violating the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon Corporation pled guilty to one count of violating the Migratory Bird Treaty Act. Exxon Shipping pled guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. They were jointly fined $25 million and were ordered to pay restitution in the amount of $100 million.[11]

The civil cases were ultimately (but with a few exceptions) consolidated into this case. Municipal claims and some Native corporation claims were tried in state court.[12] In the consolidated cases, there never was any dispute as to Exxon's liability for compensatory damages. Only the amount of the

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[10] *State v. Hazelwood,* 946 P.2d 875 (Alaska 1997); *State v. Hazelwood,* 866 P.2d 827 (Alaska 1993); and *Hazelwood v. State,* 962 P.2d 196 (Alaska App. 1998).

[11] *See* Judgments at Clerk's Docket Nos. 235 and 236 in *United States v. Exxon Corp.,* No. 90-0015-CR.

[12] More or less simultaneously with the trial in this case, a state court civil trial involving several Native corporations was conducted. The jury awarded the corporations almost $6 million in damages. *Chenega Corp. v. Exxon Corp.,* 991 P.2d 769, 774 (Alaska 1999). The trial court offset pretrial settlements and payments against the jury award. *Id.* at 775. Because the pretrial payments exceeded the jury award, final judgments were entered by which the corporations "took nothing" from Exxon. *Id.* Very recently, a straggling case involving six Alaska communities was tried in state court to a defense verdict. The cities were unsuccessful in their efforts to recover from Exxon for alleged additional expenses incurred by them as a consequence of the oil spill.

plaintiffs' losses was controverted. As a consequence of procedural orders in this case and the excellent, cooperative approach taken by counsel for all parties, an effective and efficient trial protocol for the plaintiffs' collective damage claims was developed. As the time for trial grew near, this court became convinced of the necessity of creating a single, punitive damages claims class.

By agreement with the parties, trial as regards Exxon's and Captain Hazelwood's liability for punitive damages was commenced on May 2, 1994. In this Phase I of the trial, the jury found Exxon and Captain Hazelwood to be liable for punitive damages.

Phase II of the trial dealt with compensatory damages. In Phase IIA, the jury returned a verdict in favor of fishermen in the amount of $287 million. Phase IIB, a separate aspect of the compensatory claims having to do with Native claims, was settled without trial for $22.6 million.

Phase III of the trial focused upon the amount of punitive damages which should be imposed upon the defendants. As a predicate or base for the punitive damages trial, the parties entered into a stipulation regarding impacts from the oil spill which was read to the jury at the beginning of Phase III.[13] The stipulation outlined the actual damages that had been resolved in Phase IIB of the trial and the actual damages that were to be resolved in Phase IV of the trial and in Alaska state court proceedings. The damage estimates outlined in the stipulation exceeded $350 million. The jury was, of course, also aware that it had awarded $287 million in damages in Phase IIA of the trial.

In consultation with counsel, unusually detailed punitive damages instructions were developed for purposes of this case. The jury was instructed that punitive damages are awarded for the purposes of punishment and deterrence,[14] and the fact that

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[13] *See* Clerk's Docket No. 5634.

[14] *See* Jury Instruction No. 22:

The purposes for which punitive damages are awarded are:

it had found the defendants' conduct reckless did not require it to award punitive damages.[15] The jury was specifically instructed to use reason in setting the amount of punitive damages and that any award of punitive damages should bear a reasonable relationship to the harm caused the members of the plaintiff class by the defendants' misconduct.[16] Factors that the jury was told it could consider in setting an amount of punitive damages included the reprehensibility of the defendants' conduct,[17] the amount of actual and potential harm suffered by the members of the plaintiff class as a result of the defendants' conduct, and the financial condition of the defendants.[18] However, the jury was instructed that it should not

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(1) to punish a wrongdoer for extraordinary misconduct; and

(2) to warn defendants and others and deter them from doing the same.

Clerk's Docket No. 5890.

[15] *See* Jury Instruction No. 20, which in pertinent part, reads: "The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them." Clerk's Docket No. 5890.

[16] *See* Jury Instruction No. 25, which in pertinent part reads:

> the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount.... [A]ny punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to members of the plaintiff class by a defendant's misconduct.... Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence.

Clerk's Docket No. 5890.

[17] The jury was instructed, however, that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible...." *See* Jury Instruction No. 30, Clerk's Docket No. 5890.

[18] *See* Jury Instruction No. 27, which reads in pertinent part:

> In determining the amount of punitive damages to award, if any, you may consider, among other factors:

count any damage to natural resources or the environment in general when assessing the harm suffered by members of the plaintiff class.[19] The jury was also instructed that it could consider as mitigating factors the existence of criminal fines or civil awards against the defendants for the same conduct and the extent to which the defendants had taken steps to remedy the consequences of the oil spill[20] and to prevent another oil spill.[21]

The Phase III trial was relatively short, lasting only five days, but the jury deliberated for approximately twenty-two days before returning a verdict. The jury awarded a breath-taking $5 billion in punitive damages against the

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> (a) the degree of reprehensibility of the defendants' conduct,
>
> (b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and
>
> (c) the financial condition of the defendants.

Clerk's Docket No. 5890.

[19] *See* Jury Instruction No. 29, which reads in pertinent part: "In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally [.]" Clerk's Docket No. 5890.

[20] *See* Jury Instruction No. 36, which reads in pertinent part:

> In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters.

Clerk's Docket No. 5890.

[21] *See* Jury Instruction No. 35, which reads in pertinent part, that "[i]n considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question-in this case, another oil spill." Clerk's Docket No. 5890.

Exxon defendants, and $5,000.00 against Captain Hazelwood.

There was to be a Phase IV of the civil litigation. The Phase IV claims embodied all of the compensatory damage claims remaining in federal court and not included in Phase II. As to these claims, a settlement was reached in the amount of $13.4 million.

Exxon moved for a reduction or remittitur of punitive damages.[22] That motion was denied.[23]

Appeal and Remand

Once a final judgment was entered,[24] Exxon appealed. Exxon sought and obtained a stay of execution on the judgment by posting a supersedeas bond in the amount of $6,750,000,000.00.[25] On appeal, Exxon contended first that punitive damages ought to have been barred as a matter of law. For reasons given, the court of appeals rejected this contention, concluding that:

> The Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights.... [W]hat saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment.

In re Exxon Valdez, 270 F.3d 1215, 1231 (9th Cir. 2001).

Exxon's second contention was that the plaintiffs' burden of proof should be to produce clear and convincing evidence of liability for punitive damages. The court of appeals held

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[22] Clerk's Docket No. 5970.

[23] Clerk's Docket No. 6234.

[24] Judgment as to Phases I and III was entered September 16, 1994. Clerk's Docket No. 5891. That judgment was vacated. Clerk's Docket No. 6055. A final judgment was entered September 24, 1996, Clerk's Docket No. 6911, and an amended judgment was entered January 30, 1997, Clerk's Docket No. 6966.

[25] Clerk's Docket No. 6914.

that this court did not abuse its discretion by employing the preponderance of the evidence standard. *Id.* at 1232-33. Similarly, this court was affirmed as regards its instructions to the jury concerning Exxon's vicarious liability for the conduct of its employees. *Id.* at 1235. Exxon did not challenge the substance of the court's instructions as to the determination of punitive damages; for, with prescient skill, counsel for plaintiffs and Exxon had proposed instructions which appropriately informed the jury as to what have become the "guideposts" for fixing punitive damages: the reprehensibility of defendant's conduct, the relationship of punitive damages to actual and potential harm, and comparison to other penalties.

Captain Hazelwood and Exxon both challenged the sufficiency of the evidence to support an award of punitive damages against them. The Ninth Circuit Court concluded that there was substantial evidence to support a jury verdict of liability for punitive damages as to both Captain Hazelwood and Exxon. *Id.* at 1237-38.

Finally, with liability concluded, the court of appeals turned to Exxon's challenge of the $5 billion punitive damages award against it. In addition to passing muster under the sufficiency of the evidence test, punitive damages awards must now be subjected to a due process analysis which flows from the decision of the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, the Supreme Court held that a $2 million punitive damages award[26] based upon $4,000 in compensatory damages for pure economic loss was unconstitutional because the defendant lacked fair notice of so severe a punitive award. *Id.* at 574-75. The importance of the *BMW* factors in determining the outer constitutional limits of punitive damages was reinforced in *Cooper Industries, Inc. v. Leatherman Tool Group,*

[26] The jury awarded Dr. Gore $4 million in punitive damages, which the Alabama Supreme Court reduced to $2 million.

Inc., 532 U.S. 424 (2001).[27]

Based upon *BMW*, the Ninth Circuit Court of Appeals in this case reiterated the three guideposts established by the Supreme Court for use in determining whether punitive damages are so grossly excessive as to constitute a violation of due process. The guideposts are:

> (1) the reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties in comparable cases.

In re Exxon Valdez, 270 F.3d at 1240.

The court of appeals recognized that this court did not have the benefit of *BMW* and *Cooper Industries* when it decided Exxon's original motion to reduce the punitive damages award and in this case remanded "for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*." *Id.* at 1241. However, the court of appeals also provided its analysis of the *BMW* factors "to aid" the court in its consideration of the constitutional question. *Id.* In the end, the court of appeals unequivocally told this court that the "$5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper Industries*" and "[i]t must be reduced." *Id.* at 1246 (citations omitted).

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[27] The issue in *Cooper Industries* was "whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award." *Cooper Industries*, 532 U.S. at 426. The Ninth Circuit had applied an abuse of discretion standard; the Supreme Court held that the constitutionality of punitive damages required *de novo* review and remanded the case to the appellate court to apply the appropriate standard. Although the constitutional issue was not before the Court, it nonetheless applied the *BMW* factors and found several potential problems with a punitive damages award of $4.5 million versus a compensatory damages award of $50,000. On remand, the Ninth Circuit Court of Appeals reduced the punitive damages award to $500,000. *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002).

Discussion

Since the Supreme Court's decision in *BMW*, the Supreme Court and various courts of appeal have considered and applied the *BMW* factors. The only significant Supreme Court case was *Cooper Industries*, discussed above.[28] Courts of appeal faithfully cite the three *BMW* factors and then apply them, with varying results. The courts of appeal have shown some consistency on the reprehensibility factor, perhaps because the Court provided some guidance in *BMW* as to how to apply this factor. The courts of appeals have also fairly consistently looked to legislative determinations to ascertain comparable sanctions for the third *BMW* factor, although some circuits have remarked on the difficulty of comparing a violation of common law tort duties with statutory penalties. *See, e.g., Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3d Cir. 1999), and *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996). As for the second *BMW* factor, a review of post-*BMW* cases reveals that courts are willing to find a wide variety of ratios constitutionally acceptable. The Ninth Circuit has found a 28-to-1 ratio acceptable. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 818-19 (9th Cir. 2001). The Eleventh Circuit found a 100-to-1 ratio acceptable. *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir. 1999). By the same token, in many cases involving large compensatory damages awards, the ratios found to be permissible are much smaller. *See, e.g., United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232-33 (10th Cir. 2000) ($58.5 million in punitive damages compared to $67 million in compensatory damages, a ratio of .87-to-1); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1350 (Fed.Cir. 2001) ($50 million in punitive damages compared to $15 million in compensatory damages,

[28] In the seven other post-*BMW* Supreme Court cases, the Court remanded to a lower court for reconsideration of the punitive damages award in light of the *BMW* decision.

a ratio of 3.33-to-1). In the end, a review of the post-*BMW* cases provides little guidance to this court as it considers the constitutionality of the $5 billion punitive damages awarded in the instant case in light of the *BMW* guideposts. *In re Exxon Valdez*, 270 F.3d at 1241.

Application of *BMW*-Punishable Interests

Little mention is made in current punitive damages jurisprudence about Section II of *BMW*[29] wherein the United States Supreme Court discusses how deterrence and punishment fit into the constitutional concept that grossly excessive awards of punitive damages offend due process requirements. *BMW*, 517 U.S. at 568-574. In *BMW*, the Court found it was first necessary to identify "the scope of Alabama's legitimate interests in punishing *BMW* and deterring it from future misconduct." *Id.* at 568. In *BMW*, it was conceded that Dr. Gore was endeavoring to achieve national punishment and deterrence. For reasons explained, the Supreme Court held that Alabama's interests, not those of the entire nation, were the proper scope of deterrence and punishment.

Most of the courts considering the constitutionality of punitive damages awards have ignored this first step in the analysis.[30] In *In re Exxon Valdez*, the Ninth Circuit Court did not expressly delineate between the first and second aspects of *BMW*. That it would not have done so probably flows directly from the circumstances of this case. The plaintiffs' claims for punitive damages expressly excluded consideration of harm to the environment. These claims were pursued and vindicated by consent decrees in favor of the State of Alaska and the United States Government. Here, the plaintiffs' focus has always been upon what happened in Prince William Sound,

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[29] *But see White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), which was published as this order was being finalized.

[30] Both the Tenth and Eleventh Circuits have expressly stated that *BMW* requires a two-step analysis, with the three "guideposts" falling into the second step. *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1252-53 (10th Cir. 2000); *Johansen*, 170 F.3d at 1333.

Lower Cook Inlet, and the environs of Kodiak Island. While brought under both state and federal law, the focus of plaintiffs' complaints have always had to do with Alaska fisheries, Alaska businesses, Alaska property (both real and personal), and, to the extent that potential claims have been involved, they too have Alaskan roots. No one has contended that Exxon should be deterred from any particular conduct somewhere outside of Alaska, nor that it should be punished for conduct not having a direct nexus with the grounding of the Exxon Valdez on Bligh Reef in Prince William Sound.

In consideration of the foregoing, this court concludes that the plaintiffs in making their claims, this court in instructing the jury, and the jury in awarding punitive damages, were all focused upon the appropriate, relevant interests for which deterrence and punishment through punitive damages is permissible. This conclusion, of course, does not address the question: How much is enough? This court, like the court of appeals, will take up that subject in the course of evaluating the *BMW* guideposts.

Before moving on, and as a part of the first phase of the *BMW* analysis, further comment about the court's instructions on punitive damages may be in order. In *BMW*, the Supreme Court was concerned that punitive damages were determined with reference to an inappropriate set of interests. It is equally important that punitive damages be determined in the first instance with reference to appropriate factors. Here, given the jurisprudential changes which took place between the time this court first evaluated the $5 billion punitive damages award and the Ninth Circuit Court's review of the same, there could have been an absence of appropriate instructions to the jury or unintended misdirection as to how punitive damages should be determined by the jury. As discussed above, Exxon had its opportunity for input to those instructions, its opportunity to challenge those instructions, and we all have the results of that inquiry before us at the present time. The court's substantive jury instructions as to the determination of punitive damages were unchallenged. Nevertheless, given the

nature of the present inquiry, it strikes the court as important to know and be mindful in understanding the second phase of the *BMW* analysis (the guideposts) that the trial jury in this case was, by and large, working with the very same concepts embodied within the *BMW* guideposts as set out above. The jury was instructed on the purpose of punitive damages: punishment and deterrence. The jury was admonished not to be arbitrary: punitive damages must have a rational basis in the record and bear a reasonable relationship to harm done or likely to result from the defendant's conduct. The jury also was instructed on the subjects of reprehensible conduct and consideration of mitigation (as by voluntary payments) and some comparison to other available sanctions.

Without proper instructions, jury verdicts are patently suspect. Here, we know that the trial jury, in making an award of $5 billion for punitive damages, was seeking to vindicate-through punishment and deterrence-the appropriate plaintiff interests, and not other interests such as environmental concerns which had been separately dealt with and which the jury was expressly told not to consider. In short, this is not a situation where the jury awarded $5 billion in punitive damages based upon one script, with this court second-guessing their work using a different script.

There is yet another consideration which, in the view of this court, should precede analysis of the *BMW* factors, for it too goes to the kind of question posed in the first aspect of *BMW*. In *BMW*, the United States Supreme Court was concerned that Dr. Gore was endeavoring to impose his view of things upon the nation, not just Alabama. *BMW* might have been sued and punitive damages sought in other jurisdictions. Here, Exxon was exposed to a multiplicity of claims, most but not all of which were pending in this court. But for the creation of a mandatory punitive damages class, Exxon was exposed to the risk of multiple punitive damages awards flowing

from the same incident.[31] Where multiple suits for punitive damages have been brought, it strikes this court that there is a very real risk that two punitive damages awards in different courts, but based upon the same incident, would involve a considerable risk of doubling up on deterrence and punishment. How this concern is to be managed under *BMW* is not clear. What is clear is that the risk does not exist in this case. Because of the mandatory punitive damages class, the court can say with complete confidence that Exxon has not been exposed to excessive deterrence or punishment because of multiple suits for punitive damages. It follows that the whole of what is constitutionally foreseeable for purposes of due process is fairly put to the *BMW* test of whether $5 billion in punitive damages was or was not grossly excessive.

Application of *BMW*-Factors

Reprehensibility. The court considers first the quality of defendants' conduct which led the trial jury to find liability for punitive damages.

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *In re Exxon Valdez*, 270 F.3d at 1241 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

This factor is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award...." *BMW*, 517 U.S. at 575. In the end, the punitive damages award must "not be 'grossly out of proportion to the severity of the offense.'" *Id.* at 576 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). The trial jury was expressly instructed to consider "the degree of reprehensibility of the defendants' conduct."[32]

The reprehensibility of a party's conduct, like truth and

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[31] Indeed, claims against Exxon were being tried at virtually the same time in both the United States District Court for the District of Alaska and the Superior Court for the State of Alaska.

[32] Jury Instruction No. 27, Clerk's Docket No. 5890.

beauty, is subjective. One's view of the quality of an actor's conduct is the result of complex value judgments. The evaluation of a victim will vary considerably from that of a person not affected by an incident. Courts employ disinterested, unaffected lay jurors in the first instance to appraise the reprehensibility of a defendant's conduct. Here, the jury heard about what Exxon knew, and what its officers did and what they failed to do. Knowing what Exxon knew and did through its officers, the jury concluded that Exxon's conduct was highly reprehensible.

In a case decided less than a month before this case, the Ninth Circuit Court of Appeals observed that the Supreme Court had outlined what has been termed the "hierarchy of reprehensibility":

> Acts and threats of violence [are] at the top, "followed by acts taken in reckless disregard for others' health and safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence."

Swinton, 270 F.3d at 818 (quoting *Florez v. Delbovo*, 939 F. Supp. 1341, 1348-49 (N.D. Ill. 1996) (citing *BMW*, 517 U.S. at 575-76)). These are objective criteria which the court employs to evaluate the jury's subjective appraisal of the quality of a defendant's conduct. With due deference to the jury process, verdicts should not be upset unless the jury result is grossly excessive in light of the objective evaluation of a defendant's conduct.

Some aspects of the quality of Exxon and Captain Hazelwood's conduct vis-a-vis the plaintiffs are pretty straightforward. The defendants' conduct was (a) criminal, but (b) non-violent. As set out above, the Exxon defendants pled guilty to violations of three federal environmental statutes. Captain Hazelwood was ultimately convicted of the state crime of negligent discharge of oil. Non-violent crimes are patently less serious than crimes of violence. The grounding of the Exxon Valdez and the consequential spilling of crude oil was not intentional. Captain Hazelwood's purpose just

prior to the grounding was to avoid Bligh Reef, not park on it. The defendants' conduct did not involve trickery or deceit. There was no effort on the part of Exxon to hide what happened.[33]

It is undisputed that Exxon understood and well knew the risks attendant to transporting crude oil out of Valdez, Alaska, and through Prince William Sound. Moreover-and these additional facts make Exxon's conduct very reprehensible-Exxon knew that Captain Hazelwood was an alcoholic, it knew that he had resumed drinking, and it knew that Captain Hazelwood was drinking while on duty. Driving under the influence of alcohol is a crime anywhere in the country. Exxon knew that Captain Hazelwood was drinking and driving the crude oil tanker Exxon Valdez and did nothing about it.

The court of appeals observed in this regard that Exxon's knowledge "goes more to justify punitive damages than to justify punitive damages at so high a level." *In re Exxon Valdez*, 270 F.3d at 1242. Certainly Exxon's knowledge that Captain Hazelwood was drinking and driving the Exxon Valdez is an important, perhaps the most important, reason why the jury found and the court of appeals affirmed Exxon's liability for punitive damages. But, as the last-quoted obser-

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[33] Hiding a 900-foot vessel capable of carrying more than 53 million gallons of crude oil-even in so large a body of water as Prince William Sound-would not have been possible. More to the point, however, Exxon not only made no effort to hide what happened but, rather, Captain Hazelwood reported the incident to the Coast Guard immediately.

Throughout these proceedings, plaintiff W. Findlay Abbott has contended that far more than 11 million gallons of crude oil were actually spilled from the *Exxon Valdez* into Prince William Sound. The court has repeatedly rejected these contentions for lack of any substantial evidence to support Mr. Abbott's contentions. For example, his *qui tam* action, *United States ex rel. Abbott v. Exxon Corp.*, No. 96-00041-CV, was dismissed by this court and that dismissal was affirmed by the Ninth Circuit Court of Appeals, 182 F.3d 930 (Table) (1999 WL 313320) (9th Cir. 1999). There is no reliable evidence in the record that a larger spill was covered up by Exxon.

vation of the circuit court implies, the extent of Exxon's knowledge may also be a consideration in the characterization of the quality of Exxon's conduct.

Here we are concerned about due process and what Exxon should reasonably have anticipated as punishment for wrongful conduct. There is a direct nexus between what Exxon should reasonably have expected as punishment and the extent of its knowledge of Captain Hazelwood's situation. It is one thing to knowingly employ a recovering alcoholic. It is quite another-a far more serious matter-to have knowingly and intentionally allowed Captain Hazelwood to continue as the master of the Exxon Valdez despite his relapse. Some Exxon representatives contended that Captain Hazelwood was the most watched person in the fleet, and he may have been. Exxon officials nevertheless ignored the information that was at their disposal, leaving Captain Hazelwood to operate a huge tank vessel through Prince William Sound, a body of water known for its valuable fishing and recreational resources. This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound. Rather, this is an employer deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil. In the view of this court, the decision to leave Captain Hazelwood in command of the Exxon Valdez was highly reprehensible.

Exxon's and Captain Hazelwood's conduct was determined by the jury to have been reckless. In evaluating the reprehensibility guidepost, the court of appeals observes that the spill "did not kill anyone." *In re Exxon Valdez*, 270 F.3d at 1242-43. That statement is true based upon the record of this case. What it does not say, however, is that Exxon's decision to leave Captain Hazelwood in command of the Exxon Valdez recklessly put the captain himself, his crew, and all of his rescuers in harm's way. After its grounding, the Exxon Valdez was sitting in a pool of oil. Rescuers had to enter that pool of oil. Careless smoking of tobacco or an electrical or elec-

tro-static spark might have ignited the crude oil and incinerated everyone in the vicinity.[34]

Finally, Captain Hazelwood, for whom Exxon is responsible, did not just ground the Exxon Valdez. Perhaps because of judgment impaired by alcohol, but in the face of knowledge that the vessel had been holed and was rapidly losing crude oil into Prince William Sound, he endeavored to maneuver the vessel. The record reflects that this was a dangerous undertaking, one which might have taken a vessel from a point of more or less stability into a posture where a great deal more oil might have been spilled. Indeed, the vessel might have foundered. Exxon's claims program certainly mitigated the reprehensibility of its conduct. But in the view of this court, what might have happened as the result of a careless cigarette or an electrical failure on the grounded vessel or so simple an occurrence as an electro-static discharge when hoses are being connected or disconnected to a vessel appreciably aggravates Exxon's conduct.

Punitive damages "'should reflect the enormity of [the defendant's] offense....'" *In re Exxon Valdez*, 270 F.3d at 1241 (quoting *BMW*, 517 U.S. at 575). On the *BMW* hierarchy of reprehensibility, Exxon's conduct, while not reaching the top, falls just short. Its conduct was criminal. Exxon's decision to leave Captain Hazelwood in command of the Exxon Valdez demonstrated reckless disregard for the livelihood,

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[34] As an example, Captain William J. Deppe, who took over command of the *Exxon Valdez* after Captain Hazelwood was relieved of his duty, explained that:

> when we were pumping oil from the top like that, oxygen could come in through the openings ... and we would create an explosive atmosphere between the void space, the deck and the oil. By putting the tools and lines and equipment down there, we could get a spark, and if we had an explosive atmosphere, you could blow up the ship.

Transcript of Trial Testimony of William J. Deppe at 7206, Ins. 15-20, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

health, and safety of the residents of Prince William Sound, the crew of the Exxon Valdez, and others. Exxon's conduct was highly reprehensible.

Ratio. The second indicium of an unreasonable or excessive punitive damages award is its ratio to the harm inflicted on the plaintiff. *BMW*, 517 U.S. at 580. There must be a reasonable relationship between exemplary damages and compensatory damages. *Id.* The compensatory side of the ratio is made up of two components: actual harm to the victim and the harm that was likely to occur. *Id.* at 581. The trial jury was expressly instructed to consider the magnitude of "actual" and "likely" harm.[35]

There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *BMW*, 517 U.S. at 583. In *Haslip*, 499 U.S. at 23, the Supreme Court found a 4-to-1 ratio "close to the line." In *TXO*, a 10-to-1 ratio was upheld. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993). In *BMW*, the Court stated that "[w]hen the ratio is a breathtaking 500 to 1 ... the award must surely 'raise a suspicious judicial eyebrow.'" *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481). Although it noted in this case that a 4-to-1 ratio has been found to be close to the line, the Ninth Circuit Court of Appeals has upheld far greater ratios in other cases. *See, e.g., Swinton*, 270 F.3d at 818-19 (28-to-1 ratio), and *Leatherman*, 285 F.3d at 1152 (10-to-1 ratio). Plainly, the ratio is "somewhat indeterminate." *In re Exxon Valdez*, 270 F.3d at 1243.

Not only is the ratio somewhat indeterminate, but also harm likely to occur and "potential harm" are often not subject to precise calculation. *TXO*, 509 U.S. at 460. In *TXO*, the United States Supreme Court observed that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm

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[35] Jury Instruction No. 27, Clerk's Docket No. 5890.

to other victims that might have resulted if similar future behavior were not deterred." *Id.* (emphasis in original). Clearly this court is not restricted to the jury's compensatory award in evaluating the ratio guidepost. Moreover, in another case flowing from the grounding of the Exxon Valdez (*Sea Hawk Seafoods, Inc. v. Exxon Corp.*, 246 F.3d 676 (Table) (2000 WL 1860726) (9th Cir. 2000)), the Ninth Circuit Court held that Western Alaska Fisheries, Inc., a seafood processor that did not file an independent lawsuit against Exxon, could nevertheless share in the class action punitive damages award on the same basis as other, eligible, seafood processors. The court of appeals stated that "[u]nder federal law, including federal maritime law, punitive damages are available to any person or entity that suffered actual injury arising from a defendant's violation of a federally protected right, independent of whether legal injury is established at trial." *Id.* 2000 WL 1860726, at *2. If this be true, then it also follows that claimants who were dismissed from this case and were not awarded any compensatory damages could also share in the punitive damages award if they suffered some actual injury that involved a "federally protected right."[36] In addition, there are plaintiffs' claims, dismissed by this court, which have been reinstated by the court of appeals. *See In re Exxon Valdez*, 270 F.3d at 1253.[37] All of these claimants certainly have "potential" for adding to the harm side of the ratio.

As to actual harm-the compensatory damages associated with the grounding of the Exxon Valdez-the parties differ sharply. Exxon contends that the actual harm number for purposes of ratio calculation can be no higher than $20.3 million, which is the amount of the two compensatory judgments against Exxon. Exxon contends that all other payments it made were pre-judgment payments or settlements, which

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[36] The court of appeals has not made it clear what federally protected right entitled Western Alaska Fisheries to participate in the punitive damages award.

[37] Specifically, the claims of tender boat operators and crews, cannery workers, and 34 seafood processors were reinstated.

the court of appeals has said do not count for purposes of calculating actual harm.[38] If pre-judgment payments or settlements do not reduce actual harm, Exxon contends that the actual harm number is $369.4 million.[39] This number represents $354 million in payments by Exxon and $15,436,371 paid to the plaintiffs by the Trans-Alaska Pipeline Liability Fund (TAPL Fund).[40]

The plaintiffs contend that the actual harm component of total compensatory damages is $517.2 million. This number is based on actual judgments and recoveries obtained by eight distinct categories of plaintiffs from Exxon and the TAPL Fund.[41]

The court finds that the best indicators of actual, compensatory damages in this case are the following items:

(1) $287,000,000 Phase II jury verdict[42]

(2) $9,515,000 paid by Exxon to Native corporation owned seafood processing operations[43]

(3) $113,500,000 paid to other commercial fish processors[44]

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[38] Exxon also argues that most of its pre-judgment payments could not reasonably be treated as compensation for actual harm caused by the oil spill because Exxon's prompt payment of claims protected the plaintiffs from economic loss that might have otherwise occurred. Whether Exxon's pre-judgment payments represent "actual" harm or harm that might otherwise have occurred is ultimately irrelevant since the court must consider both harms for purposes of calculating a ratio. *BMW,* 517 U.S. at 581.

[39] Declaration of John F. Daum at 4, ¶ 8, attached to Notice of Filing Original Declaration, Clerk's Docket No. 7540.

[40] *Id.* at 2, ¶ 5, and 3-4, ¶ 7[a].

[41] *See* chart summarizing judgments and recoveries at page 39 of Plaintiffs' Opposition, Clerk's Docket No. 7501.

[42] The precise amount the jury awarded was $286,787,739.22. *See* Minutes from the United States District Court (Aug. 11, 1994), Clerk's Docket No. 5716.

[43] Amended Stipulation Regarding Impacts for Phase III at 5, Part III, ¶ 5, Clerk's Docket No. 5634.

[44] *Id.* at ¶ 6.

(4) $6,000,000 paid to the Seattle Seven fish processors[45]

(5) $4,000,000 paid to fish processors by TAPL Fund[46]

(6) $20,000,000 paid by Exxon to members of the Native class[47]

(7) $2,600,000 paid by Exxon to Native class members who opted out[48]

(8) $17,790,510 net paid to Native corporations by TAPL Fund (after reimbursement by corporations to the Fund; Native corporations reimbursed the Fund $7.4 million)[49]

(9) $3,254,576 paid by Exxon to Native corporations[50]

(10) $152,275 Tatitlek state court jury verdict[51]

(11) $592,500 in other settlements to Native corporations[52]

(12) $8,521,667 paid by Exxon to municipalities and

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[45] 1996 Settlement Agreement at 4, Part II, ¶ A, Exhibit 16 to Oesting Declaration which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[46] *See* Exhibit C to Daum Declaration, which is appended to Defendants' Reply, Clerk's Docket No. 7535.

[47] Amended Stipulation Regarding Impacts for Phase III at 2, Part I, ¶ 1, Clerk's Docket No. 5634.

[48] *See* Order No. 307 (Jan. 19, 1996), Clerk's Docket No. 6600.

[49] *See* Daum Declaration at 3, ¶ 6, which is appended to Notice of Filing Original Declaration, Clerk's Docket No. 7540, and Exhibit C to his declaration, which is attached to Defendants' Reply, Clerk's Docket No. 7535. *See also,* Oesting Declaration at 7, ¶ 13, and 10, ¶ 15, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[50] *See* Memorandum from W. Monte Taylor at 53 (Mar. 20, 1992), attached as Exhibit 19 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[51] Oesting Declaration at 9, ¶ 14, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[52] *See* Exhibits 21 and 22 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

villages[53]

(13) $974,000 in additional settlements to municipalities and villages[54]

(14) $724,000 state jury verdict for Kodiak Island Borough[55]

(15) $1,340,178 paid BY TAPL Fund to municipalities and villages[56]

(16) $1,500,000 received by municipalities and villages as part of the State of Alaska's recovery against Alyeska[57]

(17) $13,400,000 Phase IV settlement[58]

(18) $4,071,694 paid by TAPL Fund to cannery workers, tenders, and seafood brokers[59]

(19) $11,964,793 paid by Exxon to cannery workers, tenders, and seafood brokers[60]

(20) $388,596 paid by Exxon to area businesses[61]

(21) $219,305 paid by TAPL Fund to area busi-

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[53] *See* Taylor Memorandum at 53, attached as Exhibit 19 to Oesting Declaration, and Exhibit 24 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[54] *See* Exhibits 25, 26, and 27 attached to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[55] *See* Exhibit 28 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[56] *See* Oesting Declaration at 8, ¶ 13, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501. This number should probably be slightly lower as it likely includes interest.

[57] *See id.* at 11, ¶ 16.

[58] *See id.* at 12, ¶ 17.

[59] *See id.* at 13, ¶ 18. This number probably includes interest and so should be slightly lower.

[60] *See id.*

[61] *See* Exhibit 30 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

nesses.[62]

These figures represent a total actual harm of $507,509,094.

Laying aside briefly the question of whether it is possible to place a number on the likely or potential harm flowing from the grounding of the Exxon Valdez, this court turns now to what it has found to be the most troubling aspect of the decision of the court of appeals in *In re Exxon Valdez*. Without citation of authority, and without explanation that has a nexus to the due process-fair notice issue which underlies the question of whether or not punitive damages are grossly excessive, the court of appeals observes with respect to the ratio analysis that:

> The amount that a defendant voluntarily pays before judgment should generally not be used as a part of the numerator, because that would deter settlements prior to judgment. *In re Exxon Valdez*, 270 F.3d at 1244.[63]

The briefing of the parties and the court's independent research suggest that authority in support of the foregoing proposition is nonexistent, and what sparse authority does exist reaches a contrary conclusion. In *Kelley v. Michaels*, 59 F.3d 1050 (10th Cir. 1995), the court dealt with an actual damage award of $292,750.00 and a punitive damages award of $500,000.00. However, the net actual damages recovered by the plaintiff were only $2,750.00 because of an offset of

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[62] Oesting Declaration at 13, ¶ 19, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[63] Following the suggestion that the court should generally discount compensatory damages by the amount of voluntary payments or settlements, the court of appeals goes on (as a part of its discussion of the ratio) to speak of cleanup expenses, observing that they "should be considered as part of the deterrent already imposed." *In re Exxon Valdez,* 270 F.3d at 1244. But cleanup costs have to do with environmental damage, and the jury was precluded from considering that harm in making its award of punitive damages. In this case, environmental harm and deterrence of it should stand apart from other harms and the punishment and deterrence of them.

$290,000.00 which was the result of a partial settlement of the plaintiff's claim. The Tenth Circuit employed the $292,750.00 compensatory award in calculating the ratio of harm to punitive damages. *Id.* at 1055. A similar result is to be found in *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219 (10th Cir. 2000), where the district court reduced a compensatory award made by a jury but did not reduce the punitive award. There, also, the Tenth Circuit rejected the argument that because the district court reduced the compensatory award to prevent a double recovery to the plaintiff, the punitive award should also be reduced. *Id.* at 1231 n.6. Thus, in determining harm for the second *BMW* factor (the ratio), the Tenth Circuit added back into the compensatory award those damages that had been subtracted out because of a double recovery. *Id.* at 1231.

As already noted, the court of appeals' reason for suggesting the subtraction of voluntary payments was because to do otherwise would, in the view of the appellate court, deter settlements prior to judgment. This court does not understand how or why encouraging settlements should be a part of the due process analysis of a punitive damages award made in a case which went to trial. Moreover, this court believes that a contrary argument is more logical. If a defendant knows that it will get credit for a partial settlement, voluntarily made before trial, it may be encouraged to go to trial; whereas, as a general proposition the specter of a large punitive damages award is a very powerful factor in encouraging settlements of entire cases. Reducing the risk of going to trial on punitive damages by discounting them for voluntary payments does not encourage settlements, it encourages trials.

In this case, the general rule adopted by the circuit should not apply. A reduction of the harm factor based upon voluntary payments is not appropriate. This position is not taken because of this court's view of how discounting harm for voluntary payments might impact the settlement process, but because of the specific punitive damages instructions given the jury in this case.

Generally, punitive damages instructions are very open-ended as regards how juries should come up with a punitive damages number if liability for such damages is determined. For example, the Ninth Circuit Model Civil Jury Instruction for punitive damages provides as to the amount of punitive damages only that:

> If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.[64]

In instructing the jury in this case, and as set out fully in marginal notes above, the parties went far beyond the norm in endeavoring to give the jury guidance on how to determine punitive damages. In those instructions, the jury was specifically admonished to take account of mitigating factors. It was instructed that it could "consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures."[65]

In arguing this case to the jury, the plaintiffs sought punitive damages of more than $5 billion and less than $20 billion.[66] The jury plainly did not buy plaintiffs' top-dollar analysis of how punitive damages should be calculated in this case. The court presumes that the jury followed and faithfully applied, to the best of their ability, the court's instructions. *See Leatherman,* 285 F.3d at 1150 ("we must presume the jury

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[64] Ninth Circuit Model Civil Jury Instruction No. 7.5.

[65] Jury Instruction No. 36, Clerk's Docket No. 5890.

[66] *See* Transcript of Proceedings, Trial by Jury-70th Day, at 7587, lns. 23-25 (Aug. 29, 1994), Clerk's Docket No. 5778. Plaintiffs' counsel reiterated twice that the number should be more than $5 billion but something less than $20 billion.

understood and followed the instructions"). Presumably the jury already considered whether and to what extent punitive damages should be mitigated based on voluntary payments by Exxon before judgment. Reducing actual harm for purposes of ratio analysis by the amount of voluntary payments unfairly skews the ratio in Exxon's favor, and in effect gives Exxon double credit for voluntary payments by reducing both punitive damages and actual harm for purposes of the punitive damages/harm ratio analysis. In this case, the court concludes that it should not discount actual harm by voluntary payments made by Exxon.

The court turns now to its analysis of harms that have not been or cannot be quantified. In this case, there was harm that was purely non-economic; there was harm which likely occurred but has not yet been valued; and there was potential harm-all flowing from the grounding of the Exxon Valdez.

Firstly, there are some 32,677 punitive damages claimants.[67] These claimants did not get deceived about the quality of the paint on a new car. The most direct and palpable effect of Exxon's recklessness was upon the livelihood of Prince William Sound, Cook Inlet, and Kodiak area fishermen. In this regard, the court of appeals observed that:

> Although the huge oil spill obviously caused harm beyond the "purely economic," the punitive damages award was expressly limited by the instructions to exclude environmental harm....

In re Exxon Valdez, 270 F.3d at 1242. Laying aside that en-

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[67] See Plaintiffs' Response to Court's Requests at Oral Argument at 4, Clerk's Docket No. 7553. This number includes claimants whose claims are based on recreational uses or commercial fishing activities in unoiled commercial fisheries. These claimants may be entitled to punitive damages under the Ninth Circuit's holding in *Sea Hawk Seafoods*, 246 F.3d 676 (Table) (2000 WL 1860726). But see Exxon's Memorandum with Respect to Plaintiffs' Response to Court's Questions, Clerk's Docket No. 7561. Here, the court discusses likely or potential harm, so use of the number of claimants potentially entitled to receive punitive damages seems most appropriate.

vironmental damage, the effects of the spilling of 11 million gallons of crude oil into Prince William Sound, as the court of appeals observed, were not purely economic. The social fabric of Prince William Sound and Lower Cook Inlet was torn apart. "[R]esearch on the community impacts of the Exxon Valdez Oil Spill clearly delineate a chronic pattern of economic loss, social conflict, cultural disruption and psychological stress."[68] Communities affected by the spill "reported increased incidences of alcohol and drug abuse, domestic violence, mental health problems, and occupation related problems."[69] Also, several studies found that a high percentage of affected fishermen suffered from severe depression, post-traumatic stress disorder, generalized anxiety disorder or a combination of all three.[70] The spilling of 11 million gallons of crude oil into Prince William Sound and Lower Cook Inlet disrupted the lives and livelihood of thousands of claimants and their families. That harm cannot be quantified.

Secondly, there are plaintiffs whose claims have been reinstated in *In re Exxon Valdez*. Their damages have not yet been determined. Plaintiffs estimate damages to these plaintiffs to be between $77 million and $125 million.[71] Putting a number on these claims would be speculative, even though the harm is very likely to have occurred.

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[68] J. Steven Picou, *et al., Community Recovery From the Exxon Valdez Oil Spill: Mitigating Chronic Social Impacts* at 6-7, attached as Exhibit 4 to Declaration of David W. Oesting, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[69] Duane A. Gill, *Environmental Disaster and Fishery Co-Management in a Natural Resource Community: Impact of the Exxon Valdez Oil Spill, in Folk Management in the World's Fisheries* 227 (Dyer & McGoodwin, eds., 1994), pertinent part attached as Exhibit 5 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[70] *See* Plaintiffs' Opposition at 24, n. 20, for a complete list of the relevant studies, Clerk's Docket No. 7501. Pertinent portions of the studies are attached as Exhibits 4 and 6 through 9 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[71] Plaintiffs' Opposition at 40, Clerk's Docket No. 7501.

Thirdly, and in the area of potential harm, there is no way of calculating how much additional oil might have spilled into Prince William Sound and spread elsewhere had Captain Hazelwood's efforts to back the Exxon Valdez off Bligh Reef succeeded. Here, the risk of more extensive losses to the plaintiffs and the enhanced risks to the Exxon Valdez crew and its rescuers is immense and incalculable.[72] Moreover, the court views Exxon as having been fairly on notice that a serious accident in Prince William Sound could lead to the total loss of the vessel and its entire cargo of crude oil.

Because there is no way to quantify the non-economic, likely or potential harms discussed above, the appropriate approach is to proceed with the ratio calculation, but to accommodate the unknowns by allowing a higher ratio to pass muster.[73] This is in keeping with Supreme Court precedent. In *BMW*, the Court observed that "[a] higher ratio may... be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine." *BMW*, 517 U.S. at 582. If, as the court presently finds, the quantifiable harm in this case is $507.5 million, then the $5 billion punitive damages award in this case gives a 9.85-to-1 ratio. This result does not exceed the 10-to-1 ratio which was upheld by the United States Supreme Court in *TXO*, 509 U.S. 443.[74] Even if this case is viewed as one involving primarily economic harm, a ratio under 10-to-1 is in line with the general rule set forth by the Tenth Circuit in Continental Trend Resources, 101 F.3d at 639, which is cited affirmatively by the Ninth Circuit in *Neibel v. Trans World*

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[72] There are, of course, no such plaintiffs in this case. However, we here discuss potential harm (*see TXO,* 509 U.S. at 460, 113 S.Ct. 2711) in a context where, because of a mandatory punitive damages class, all harm and all punitive damages possibly recoverable from the defendants are at issue.

[73] For this reason, the court rejects Exxon's suggestion that a 2-to-1 ratio would be appropriate for this case.

[74] In *TXO,* the ratio, without considering potential damages, was 526-to-1.

Assur. Co., 108 F.3d 1123, 1132 (9th Cir. 1997) ("'From [*BMW*] we surmise that in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio.'"). This case involves far more than the quantified economic injuries, so a punitive-damages-to-dollars ratio of under 10-to-1 was appropriate under extant Ninth Circuit Court authority.

"Ratio analysis as required by *BMW* helps avoid overdeterrence." *In re Exxon Valdez*, 270 F.3d at 1244. The court of appeals suggests that cleanup costs paid by Exxon, its casualty losses with respect to the Exxon Valdez and its cargo, the fine and restitution payments made by Exxon, and its settlement with various parties (approximately $3.4 billion) would go a long way toward effecting appropriate deterrence. *Id.* Apparently taking a cue from Justice Breyer's concurrence in *BMW*,[75] the court of appeals discusses how entrepreneurs do their planning, suggesting that they are deterred by the prospect of cleanup costs and the like. The appeals court concludes by observing, "[a]s bad as the oil spill is, fuel for the United States at moderate expense has great social value and that value as well as the value of avoiding horrendous oil spills can be reconciled by ratio analysis." *Id.*

The court of appeals' economic analysis makes sense in the abstract or academic world. That analysis reflects what well-informed, rational entrepreneurs would do. In the real world, Exxon and its officials and others like them quite likely do not work this way. If they did, they would remove the Captain Hazelwoods from the bridge because leaving them there is what creates a risk of horrendous cleanup costs and other expenses. Thus, what it theoretically takes to deter a rational business person (cleanup costs, etc.), and what it takes to deter corporate officials given to reckless conduct are very different. Here, we are dealing with reckless corporate officials.

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[75] *BMW*, 517 U.S. at 593, 116 S.Ct. 1589 (Breyer, J., concurring).

The following considerations cause this court to believe that a higher ratio-one at about 10-to-1-presents no identified risk of over-deterrence. Firstly, a huge number of potential claimants suffered harm that was not purely economic. The harm struck at their livelihood. The health and safety of the Exxon Valdez crew and their rescuers were put at risk.

Secondly, the court is aware of no evidence in the record of this case suggesting that Exxon is able to pass its cleanup and other costs associated with the Exxon Valdez spill on to the public. Thus there is no showing that the deterrent effect of Exxon's costs (or the punitive sanctions) threatened the socially valuable availability of moderately priced fuel.[76]

Thirdly, it fairly requires a higher level of deterrence to capture and hold the attention of those given to reckless conduct than can be accomplished by the economic impact of bad business decisions.

Fourthly, the discussion thus far has said nothing about the financial circumstances of the defendants. Captain Hazelwood's financial circumstances are de minimus. He lost his job with Exxon as a consequence of the grounding of the Exxon Valdez. He is likely unemployable in his chosen profession except at the margins. He surely will never be the master of a large cargo vessel again because of the interrelated circumstances of his alcoholism and the wide publicity which attended the grounding of the Exxon Valdez.

Exxon on the other hand, at the time of the trial in 1994, was one of the five largest industrial corporations in the world.[77] For the years 1989-1993, its annual average revenue was $111.6 billion, its annual average net income was $4.83

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[76] As already observed, cleanup costs have to do with environmental damage; and in this case, environmental damages have been excluded from the punitive damages determination and this court's ratio analysis.

[77] Transcript of Trial Testimony of Jack Clarke (director and senior vice president of Exxon Corp.) at 7179, lns. 2-7, Excerpts of Record, Vol. I-Trial Transcript, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

billion, and its average annual net cash flow from operations was $10.1 billion.[78] After judgment was entered on the punitive damages award, Exxon's treasurer advised the court that "the full payment of the Judgment would not have a material impact on the corporation or its credit quality."[79] In fact, Exxon was able to protect itself from the risk of the plaintiffs executing on the $5 billion judgment by posting an irrevocable, syndicated standby letter of credit for over $6 billion.[80]

As the name implies, punitive damages are intended to punish and deter; they are not intended to be an economic death sentence. Over-deterrence in the form of punitive damages is inconsistent with the concept of reform as opposed to cessation of conduct. The contrast between the economic circumstances of Captain Hazelwood and Exxon are instructive in the foregoing regard. What is sufficient to effect just but not excessive deterrence of Captain Hazelwood, and what is sufficient to effect just and not excessive deterrence of the Exxon defendants are vastly different. Indeed, the loss of his employment with Exxon and the notoriety of the grounding of the Exxon Valdez almost surely effect the appropriate deterrence; and the $5,000.00 punitive damages award, given Captain Hazelwood's financial circumstances and one other factor, is sufficient punishment. That other factor is Captain Hazelwood's alcoholism. Alcoholism has long been recognized to be an illness. We do not normally punish people because of their illnesses; however, as to drunk drivers, disablement and some punishment is socially necessary because of the great damage inflicted upon society by drunk drivers. Given the circumstances of this situation, Captain Hazelwood has been effectively disabled from operating tank vessels, and

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[78] *See* Exhibit PX6302A, Excerpts of Record, Vol. II-Trial Exhibits, attached to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[79] Declaration of Edgar A. Robinson at 16, ¶ 30, pertinent portion attached as Exhibit 33 to Oesting Declaration, which is appended to Plaintiffs' Opposition, Clerk's Docket No. 7501.

[80] *See* Clerk's Docket No. 6914.

a modest fine on top of that is adequate punishment, given his financial circumstances.

Exxon, on the other hand, is an economic powerhouse. Its profits, as discussed above, go into the billions of dollars each year. Its callous inattention to Captain Hazelwood's relapse and its reckless failure to remove him from command of the Exxon Valdez, knowing that he had relapsed into drinking, calls for major deterrence. There is absolutely no chance of a $5 billion punitive damages award amounting to an economic death sentence for Exxon. There is a good prospect that punitive damages in that amount will capture Exxon's attention for a long time. Since it is expected that Exxon and others will be transporting crude oil out of Valdez Arm and across Prince William Sound for many years into the future, a major message of deterrence was perceived necessary by the trial jury in this case and merits a punitive damages to total harm ratio at the high end of what is constitutionally permissible.

The foregoing discussion of deterrence says nothing about the coequal goal of punitive damages: punishment. The deterrence aspect of punitive damages is intended to be essentially forward-looking. The goal is to modify the future conduct of Exxon and others similarly situated. The punishment aspect of punitive damages awards is backward-looking. The law imposes sanctions for reckless conduct of the past. The concepts are therefore quite different and foster different societal goals.

The harms visited upon the plaintiffs and punitive damages class members (both actual, likely to have occurred, and potential harm) are, for reasons discussed above, not entirely economic (as was the case in *BMW*) and are highly reprehensible. Thus, the applicable ratio of punitive damages to harm must be such as to accommodate not just the deterrence of reckless conduct in the future, but also punishment for the recklessness which gave rise to the harm.

The court concludes that the dual purposes of punitive damages (punishment and deterrence) and the circumstances

of this case justify a 10-to-1 punitive damages to harm ratio. Considering all of the foregoing, the court is not persuaded that a punitive damages award of $5 billion amounts to excessive deterrence or excessive punishment of Exxon.

Comparable Penalties. The court turns now to the third *BMW* factor which involves comparing the punitive damages award to the criminal and civil penalties that "could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. In *BMW*, the statutory sanctions which might have been imposed upon the defendant were much lower than the punitive damages award. In discussing this factor, the court of appeals observed that "[c]riminal fines are particularly informative because punitive damages are quasi-criminal." *In re Exxon Valdez*, 270 F.3d at 1245 (citing *Cooper Industries*, 532 U.S. at 432).

In criminal proceedings brought against them by the federal government, the Exxon defendants were charged with five separate counts. Count I charged a violation of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); Count II, a violation of the Refuse Act, 33 U.S.C. §§ 407 and 411; Count III, a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); Count IV, a violation of the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and Count V, a violation of the Dangerous Cargo Act, 46 U.S.C. § 3718(b).[81] Exxon Corporation pled guilty to Count III, and Exxon Shipping pled guilty to Counts I, II, and III. Pursuant to a joint plea agreement, Exxon was fined a net amount of $25 million and ordered to pay restitution in the amount of $100 million.[82] The net amount of the fine was affected by at least three considerations: (1) the plea agreement effected a settlement which avoided a difficult and expensive trial, (2) at the time of the disposition of the criminal case, this court did not have the benefit of the more robust development of actual damages

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[81] *See United States v. Exxon Corp.*, No. A90-0015-CR.

[82] *See* Judgments at Clerk's Docket Nos. 235 and 236 in Case No. A90-0015-CR.

which took place later in the civil proceedings, and (3) there were practical reasons why the court eschewed a larger fine in favor of a substantial restitution obligation. The court deemed it far preferable for Exxon to be sanctioned by means of a restitution obligation which would be employed for restoration of the environment than by a larger fine which would not be so employed. All of this said, the actual criminal penalty is not the proper criteria under *BMW*. We are engaged in a constitutional inquiry, the focus of which is the outer limits of potential sanctions that Exxon was charged with knowing prior to the grounding of the Exxon Valdez.

For each of the five criminal offenses brought against it, the Exxon defendants might have been fined "twice the gross [pecuniary] loss" occasioned by the oil spill. 18 U.S.C. § 3571(d). Laying aside harm likely caused by the oil spill which has not been quantified, and laying aside harm that might potentially have been occasioned by the spill had Captain Hazelwood succeeded in backing the Exxon Valdez off Bligh Reef, the court has found the actual pecuniary loss for purposes of *BMW* to be $507.5 million. That amount doubled, as provided by the statute, and multiplied by five offenses equals $5.1 billion.[83] Because Exxon is on notice of the provi-sions of the criminal laws of the United States, in particular 18 U.S.C. § 3571(d), it was, for constitutional due process pur-poses, on notice that criminal sanctions for spilling even a modest portion of the cargo of the Exxon Valdez could lead to truly horrendous criminal penalties. Perhaps more important because we are concerned about notice of what could be, Exxon is fairly chargeable with knowledge that reckless conduct on its part could result in the spill of the entire cargo of a tank vessel such as the Exxon Valdez. While the court is not prepared to say that spilling the

[83] Exxon suggests that voluntary pre-judgment payments should be deducted when calculating a potential fine, just as those payments should be deducted when calculating the ratio under the second *BMW* factor. In this case, a reduction would be no more appropriate here than it was for purposes of calculating the ratio.

entire cargo of the Exxon Valdez would cause additional damage in direct proportion to that actually observed, spilling five times as much oil as was spilled would surely result in a significant increase in pecuniary losses. Surely Exxon knew that billions of dollars were at stake if it were to criminally spill a tanker-load of oil in Prince William Sound. Plainly those fines could exceed the jury's punitive damages award in this civil case.

Subsection 3551 of Title 18, United States Code, also provides for imprisonment.[84] While it is not possible to imprison a corporate defendant in a criminal case, provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the *BMW* analysis, justifies a punitive damages award "'much in excess of the fine that could be imposed.'" *BMW*, 517 U.S. at 583 (quoting *Haslip*, 499 U.S. at 23).

The Ninth Circuit Court of Appeals observed that "[c]eilings on civil liability are also instructive." *In re Exxon Valdez*, 270 F.3d at 1245. The court of appeals discussed the $100 million "cap" on liability for discharging oil from a vessel as provided by the Trans-Alaska Pipeline Act. 43 U.S.C. § 1653(c)(1) & (3). This limit upon liability is not in any sense a sanction, nor is it a limit on civil liability. It is, rather, an upper limit of strict liability for harms caused by non-negligent spilling of oil. Here, we deal with Exxon's reckless conduct and focus upon sanctions as to which the statutory limit of strict liability for non-negligent conduct is not instructive. In *BMW*, the Court suggests that a more appropriate consideration is exposure to civil penalties for wrongful conduct. *BMW*, 517 U.S. at 584.

Both state and federal law make provision for the imposition of civil penalties for spilling crude oil into Prince William Sound. Alaska Statutes, Section 46.03.758, imposes civil

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[84] Exxon personnel with the authority and responsibility for placing a relapsed alcoholic in control of a large tank vessel might be imprisoned for up to one year. 33 U.S.C. §§ 407 and 411.

penalties ranging from $1.00 per gallon to $10.00 per gallon, depending on where the oil is spilled. The plaintiffs estimate that state civil penalties for spilling 11 million gallons of oil in Prince William Sound would amount to $63.8 million, or an average of $5.80 per gallon.[85] Federal civil penalties of $270,000.00 could also have been imposed for the spill. See 16 U.S.C. §§ 668(b), 1858(a); 33 U.S.C. §§ 1232(a)(1), 1319(g), 1514(b)(3), 1908(b); 43 U.S.C. § 1350(b); and 46 U.S.C. § 3718(a)(1). Again, the foregoing presupposes the actual spill, whereas Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties approaching five times the civil penalty which would attend the actual spill. Such a civil penalty could be in excess of $255 million.

In consideration of the foregoing, the court is well satisfied that Exxon was quite fairly on notice that its officers could face imprisonment and the company could face in excess of $5 billion in criminal and civil penalties for recklessly spilling crude oil into Prince William Sound.

Summary

In its Order No. 267,[86] this court rejected Exxon's original motion for reduction or remittitur of the jury's $5 billion punitive damages award. The Supreme Court decision in *BMW* and Cooper Industries, as discussed in *In re Exxon Valdez*, necessitated reexamination of that determination. Based upon that reexamination and, it should be said, much more robust presentations from the parties with respect to the renewed motion for reduction or remittitur as to punitive damages, this court again concludes that a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of fair notice-its right to due process. This conclusion is based on the court's findings that:

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[85] Plaintiffs' Opposition at 70, Clerk's Docket No. 7501. Exxon could have received an offset equal to the amount of oil it removed from the environment as part of cleanup efforts. *See* AS 46.03.758(f).

[86] Clerk's Docket No. 6234.

> (1) Exxon's conduct was highly reprehensible;
>
> (2) the ratio of punitive damages to harm inflicted on the plaintiffs is a permissible one, 9.85-to-1; and
>
> (3) the comparable criminal and civil penalties could have exceeded $5 billion.

However, the court of appeals did not just remand this case for application of *BMW* and Cooper Industries. It instructed this court to reduce the punitive damages award, and the court must do that. Determining the amount of an award that will be constitutionally acceptable "'is not an enviable task.'" *Leatherman*, 285 F.3d at 1152 (quoting *Inter Medical Supplies*, 181 F.3d at 468). As the Third Circuit Court of Appeals explained:

> "We have searched vainly in the case law for a formula that would regularize this role, but have not found one....[T]he Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount."

Inter Medical Supplies, 181 F.3d at 468.

Because the court's independent evaluation of the *BMW* factors as applied to the facts of this case have led it to the conclusion that the $5 billion award was not grossly excessive, the court does not perceive any principled means by which it can reduce that award. Plaintiffs' memorandum in opposition to the renewed motion for reduction or remittitur of punitive damages concludes with the following:

> "For the reasons stated above, the Court should deny Exxon's motion and determine that a punitive damage[s] award of at least $4 billion satisfies the requirements of due process consistent with *BMW v. Gore*, 517 U.S. 559 (1996)."[87]

Since the $5 billion award must be reduced, the court adopts the plaintiffs' position as the means of resolving the conflict between its judgment and the directions of the court

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[87] Plaintiffs' Opposition at 80, Clerk's Docket No. 7501.

of appeals.

Conclusion

Exxon's motion for reduction or remittitur of the punitive damages award is granted. The sum of $1 billion of the $5 billion jury award is remitted, and therefore the punitive damages award in this case is reduced to $4 billion.[88] The clerk of court shall enter judgment accordingly.[89]

[88] If Exxon accepts this result by paying the punitive damages award plus accrued interest, this case should of course end at that point. However, if Exxon chooses to take a further appeal for the purpose of seeking a more generous reduction of the jury's punitive damages award, then the court urges the plaintiffs to cross-appeal, for, if left to apply *BMW* without the requirement that it effect some reduction of the $5 billion punitive damages award, this court would have, as set out above, denied Exxon any relief whatever on its second motion for reduction or remittitur of punitive damages.

[89] Interest on the reduced award of punitive damages shall accrue from September 24, 1996, in accordance with 28 U.S.C. § 1961.

APPENDIX E

United States District Court, D. Alaska.
In re the EXXON VALDEZ.
v.
This Order Relates to All Cases.
No. A89-0095-CV (HRH).

Jan. 27, 1995.

Lloyd Benton Miller, Anchorage, AK.
Douglas Serdahely, Anchorage, AK.
David Ruskin, Anchorage, AK.

ORDER NO. 267
HOLLAND, District Judge.

EXXON'S MOTION FOR JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIMS (PHASE III); AND EXXON'S MOTION FOR A NEW TRIAL ON PLAINTIFFS' PUNITIVE DAMAGES CLAIMS (WEIGHT OF THE EVIDENCE)

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure on plaintiffs' punitive damages claims (Phase III issues).[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3]

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[1] Clerk's Docket No. 5970. Pursuant to the 1991 amendments to the Federal Rules of Civil Procedure, both a motion for a directed verdict and a motion for judgment notwithstanding the verdict are now designated as motions for judgment as a matter of law. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 at 242 (1995). *See* Fed. R. Civ. P. 50 advisory notes, 1991 amendment.

[2] Clerk's Docket No. 6043. Plaintiff Tom Lakosh (P-108) filed an opposition to Exxon's motion and requested a hearing. Clerk's Docket No. 6017. The request for hearing is denied as unnecessary.

[3] Clerk's Docket No. 6099.

Exxon also filed a motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs oppose the motion[5] and Exxon has replied.[6] Oral argument on both motions is deemed unnecessary and is denied.

I. Review of punitive damages awards

A "[j]ury has considerable discretion to award punitive damages, and its award, if supportable, will not be lightly disturbed." *Hopkins v. Dow Corning Corp.,* 33 F.3d 1116, 1126 (9th Cir. 1994), *cert. denied,* 63 U.S.L.W. 3423 (U.S. Jan. 9, 1995) (No. 94-861) (quoting *Kennedy v. Los Angeles Police Dept.,* 901 F.2d 702, 707 n.3 (9th Cir. 1989)). Although the jury has "considerable discretion" in awarding punitive damages, that discretion is subject to "definite and meaningful constraint[s]" imposed by the Due Process Clause. *Hopkins,* 33 F.3d at 1127. *See Morgan v. Woessner,* 997 F.2d 1244, 1255 (9th Cir. 1993), *cert. dismissed,* 114 S. Ct. 671 (1994) (punitive damage awards in federal court are subject to the scrutiny of the Due Process Clause).

"As the first stage of scrutiny, a trial court should instruct the jury on the proper role of punitive damages." *Morgan,* 997 F.2d at 1256. The purpose of punitive damages is not to compensate plaintiffs but "to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 21 (1991). *See Morgan,* 997 F.2d at 1256 ("instructions should be fashioned to describe the proper purpose of punitive damages so that the jury understands that punitive damages are not to compensate the plaintiff, but to punish and deter the defendant and others from such conduct in the future.") (citing *Haslip,* 499 U.S. at 16).

In the case at bar, the court instructed the jury on the purposes of punitive damages in Phase III Jury Instruction Nos. 22, 23, 24 and 25. In Instruction No. 26, the court instructed the jury that punitive damages were not designed to

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[4] Clerk's Docket No. 5948.

[5] Clerk's Docket No. 6043.

[6] Clerk's Docket No. 6094.

provide compensatory relief. Instruction No. 27 focused on the reprehensibility of Exxon's conduct, the magnitude of the harm, Exxon's financial condition, and mitigating factors. Instruction Nos. 28 through 38 amplified the foregoing instructions. The instructions given in this case were more explicit than those which the Ninth Circuit considered "adequate" in *Morgan. Morgan,* 997 F.2d at 1256-57. The court concludes that the Phase III instructions satisfy the "first stage of scrutiny." *Id.* at 1256.

"As the second stage of scrutiny, a trial court should review the punitive award and record its reasons for upholding or altering it." *Id.* at 1257. At this level, the trial court can look to the *Hammond* factors or other general elements of reasonableness. The *Hammond* factors, announced in *Haslip,* are as follows:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss; (d) the "financial position" of the defendant (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 21-22.

The district court must also compare the amount of punitive damages assessed to a "figure derived from the facts of the case at hand." *Morgan,* 997 F.2d at 1257. To ascertain this figure, "the court should look to awards in similar cases and to

its own experiences." *Id.*

Although *Morgan* suggested that district courts should "look to awards in similar cases", *Id.,* the Supreme court places little value on such comparisons. *TXO Prod. Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1993), recognized that punitive damages are the product of numerous intangible factors, requiring the jury to "make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Id.* at 2720. In discussing the value of such comparisons, *TXO* stated:

> As an analytical approach to assessing a particular award, however, we are skeptical. Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.

Id. Similar concerns were expressed by Justice Kennedy in his concurring opinion in *Haslip:* Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.

> These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity can not be equated with constitutional infirmity.

Haslip, 499 U.S. at 41 (Kennedy, J., concurring). *See E.E.O.C. v. Farmer Bros. Co.,* 31 F.3d 891, 904 (9th Cir. 1994) ("the amount of punitive damages required to deter and punish the defendant necessarily is dependent on the circumstances of each case...."). Based on the above case law, it is apparent that *Morgan*'s suggestion that the court "look to awards in similar cases" is of limited utility.[7]

TXO provided further guidance "on the issue of excessiveness of punitive damage awards." *Hopkins* 33 F.3d at 1127. The district court is not limited to comparing the punitive award to the actual damages, but may consider the magnitude of the harm that potentially could have occurred. *TXO* declined to develop a bright line test to determine a constitutional award, but held that a "'general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.'" *TXO,* 113 S. Ct. at 2720 (quoting *Haslip,* 499 U.S. at 18). "While proportionality to actual damages sustained is relevant in the analysis, it is only one of several factors to be considered." *Hopkins,* 33 F.3d at 1127 (citation omitted).

II. Standard for judgment as a matter of law

According to Rule 50:

> [(a)(1)] If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue

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[7] Indeed, it would undercut the jury system for the court to base its review, in part, on what other juries have decided. It is meaningless to compare "numbers" from other cases because juries hear unique facts and are given dissimilar instructions. Neither the Supreme Court nor the Ninth Circuit has ever provided a uniform formula from which juries might determine a punitive award. Without such uniformity, it is impossible to make meaningful comparisons from among the myriad of punitive cases.

> against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (b) Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.

Fed. R. Civ. P. 50(a) and (b). Pursuant to Rule 50, Exxon argues that there is insufficient evidence to support the jury's Phase III verdict that Exxon is liable for $5 billion in punitive damages.

> Judgment as a matter of law:
>
> [I]s proper when the evidence permits only one reasonable conclusion as to the verdict. The jury's verdict must be supported by substantial evidence in order to stand. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. [[[Judgment as a mater of law] is improper if reasonable minds could differ over the verdict.

Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987) (citations omitted); *See George v. City of Long Beach,* 973 F.2d 706, 709 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 1269 (1993) ("[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence") (citations omitted); *Glover v. BIC Corp.,* 6 F.3d 1318, 1330 n.5 (9th Cir. 1993) (the court must consider all evidence and not just evidence favoring the non-moving party). In *Lytle v. Household Mfg., Inc.,* 494 U.S. 545 (1990), the Supreme Court stated:

> [I]n considering a motion for [judgment as a matter of law], the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'

Id. at 554-555 (citations omitted). *See Moore v. Local Union 569 of the Int'l Bhd. of Elec. Workers,* 989 F.2d 1534, 1537 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1066 (1994) (a motion for judgment as a matter of law "is proper when the evidence permits only one reasonable conclusion as to the verdict.") (citations omitted); *Dean v. Trans World Airlines, Inc.,* 924 F.2d 805, 810 (9th Cir. 1991) (a motion for judgment as a matter of law "is appropriate only when the evidence, viewed in the light most favorable to the nonmoving party, could not reasonably support the verdict.") (citations omitted); *See also Vaughn v. Ricketts,* 950 F.2d 1464, 1468 (9th Cir. 1991); *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir. 1973).

To grant Exxon's motion would deprive plaintiffs of the jury's determination of the facts; thus, such motions are "granted cautiously and sparingly." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 at 252 (1995). The court "must view the evidence most favorably to [plaintiffs] and give [plaintiffs] the benefit of all reasonable inferences that may be drawn from the evidence." *Id.* at 256-259. If the court finds evidence sufficient to support the jury's verdict, then Exxon's motion must be denied. *Id.* at 253-254. As noted, the court will not weigh the evidence, make credibility determinations, or substitute its judgment for that of the jury's. *Id.* at 255-256.

When a court is reviewing punitive damages, the court must uphold the award "whenever possible and all presumptions are in favor of the judgment." *Bouman v. Block,* 940 F.2d 1211, 1234 (9th Cir.), *cert. denied,* 112 S. Ct. 640 (1991). *See Blanton v. Mobil Oil Corp.,* 721 F.2d 1207, 1216 (9th Cir.

1983), *cert. denied,* 471 U.S. 1007 (1985) (a damage award cannot stand if it "could only have been based on speculation or guesswork.") (citations omitted).

III. Phase III punitive damages award

In Phase I of the trial, the jury determined that Exxon acted recklessly and that such reckless conduct caused the *Exxon Valdez* to run aground.[8] In Phase III, at issue here, the jury determined that Exxon was liable for $5 billion in punitive damages.[9] Exxon seeks judgment as a matter of law under Rule 50 on plaintiffs' punitive damages claims on the ground that the jury's award of $5 billion is grossly excessive. Exxon requests that the award be set aside or drastically reduced.

Exxon devotes the bulk of its briefs to comparing the punitive award in this case to those of other cases. Despite *Morgan's* suggestion that the court look to awards in similar cases, the court can glean little of value from the many cases cited by Exxon. As *TXO* and *Haslip* recognized, no two punitive damages cases are truly identical and meaningful comparisons are difficult to make. The *Exxon Valdez* case in particular, is quite dissimilar from other punitive damage cases. The 11,000,000 gallon oil spill was the largest oil spill and greatest environmental disaster in American history. The spill disrupted the livelihoods of tens of thousands of people. This case simply does not compare to the numerous cases referenced by Exxon.

Exxon argues that the sole factor for the court to consider is whether the award is larger than that which is necessary to punish and deter, and argues that the *Hammond* factors are irrelevant except to the extent that they relate to what is necessary for punishment and deterrence. Exxon oversimplifies the court's task. The task for the court is to determine, based

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[8] The jury also determined that Captain Hazelwood acted negligently and recklessly and that his conduct caused the grounding of the Exxon Valdez.

[9] The jury also determined that Captain Hazelwood was liable for $5 thousand in punitive damages.

on a review of the evidence in the light most favorable to the plaintiffs, whether the award is so grossly excessive as to violate due process. Of course, if the court determines that the award is grossly excessive, it follows that the award will exceed that which is necessary to punish and deter. Regardless, the Supreme Court has stated that the *Hammond* considerations "are relevant to a determination of whether a punitive damages award is excessive...." *Hopkins* 33 F.3d at 1127 (citing *Haslip,* 499 U.S. at 21-22). Additionally, "[t]he [[[*Hammond*] standards provide a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Haslip,* 499 U.S. at 22. The court will be guided by the *Hammond* factors and "general concerns of reasonableness", *Haslip,* 499 U.S. at 18, in reviewing the punitive award.

(a) The Hammond factors

1. Exxon's conduct[10]

The evidence presented at trial established the Exxon was aware that transporting crude oil through Prince William Sound could result in an oil spill with catastrophic consequences. The evidence also established that Captain Hazelwood suffered from an alcohol abuse problem and could relapse after treatment. The jury heard evidence that Hazelwood drank numerous times after treatment and that he was alcohol impaired at the time of the grounding. From the evidence, the jury could have found that Exxon, with knowledge of the risks, placed a relapsed alcoholic in charge of a supertanker. The jury also heard evidence that Exxon was aware that Hazelwood had relapsed but that Exxon failed adequately to monitor Hazelwood or to insure that his drinking would not interfere with his performance. The jury heard evidence that Exxon's work schedules led to crew fatigue and that Third Mate Cousins, whom Captain Hazelwood left in charge of the

[10] The facts are well known to the court and have been reviewed numerous times during the court's review of Exxon's post trial motions. The facts need not be repeated in great detail here.

Exxon Valdez, was fatigued the night of the grounding.

Although disputed, the evidence, when viewed in the light most favorable to the plaintiffs, was sufficient for the jury to conclude that Exxon was aware that a disastrous spill could occur and that Exxon's reckless actions increased those risks.

The evidence established that with relatively small expense, when compared to the enormous risk, Exxon could have insured that its supertanker crews were rested and not captained by relapsed alcohol abusers.[11]

2. The harm caused by the oil spill

Broken down into dollar amounts, the spill caused the following harm: (1) Phase IIA verdict-- $287,000,000. Exxon argues that the total recovery will be no more than $120,000,000 after $167,000,000, paid as part of Exxon's claims program, is deducted. Nonetheless, the harm to commercial fishermen was $287,000,000; (2) Phase IIB settlement-- $20,000,000; (3) State court verdict-- $9,700,000; and (4) Damages to Phase IV plaintiffs-- $70,000,000 to $200,000,000.[12] Exxon argues the $98,000,000 paid by Alyeska in settlement should be deducted, given the maritime rule of proportionate fault. If the Alyeska settlement is deducted, the total harm could range from $288.7 million to $418.7 million.

In addition to considering the harm that did occur, the court may also consider "the magnitude of the harm likely to

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[11] Exxon argues that its failure to remove alcohol abusing tanker captains from their positions was motivated by concern for employee rights, and not costs. Exxon's argument does not change the fact that, at a small cost when compared to the risk, Exxon could have insured that its supertankers were not captained by alcohol abusers.

[12] Plaintiffs add $123 million representing payments to processors. The court has held that processors may not recover under *Robins Dry Dock.* Those damages were not a legal result of the spill and were not considered by the jury. Plaintiffs also include another $50,000,000 to $140,000,000 as damages of commercial fishermen in state court for permits and vessels. Exxon argues that the claim is barred by *Robins Dry Dock* and should not be considered.

result from the defendants' conduct" . Phase III Jury Instruction No. 27; *Haslip,* 499 U.S. at 21; *Morgan,* 997 F.2d at 1257 n.15. *See Hopkins,* 33 F.3d at 1127 (citing *TXO* 113 S. Ct. at 2720) ("a court is not limited to considering the proportionality of the punitive award to actual damages sustained, but may also consider the magnitude of the harm that potentially could have occurred...."). The evidence established that the *Exxon Valdez* spilled 11,000,000 gallons of crude oil, approximately one-fifth of its cargo. Had the remaining 45,000,000 gallons of oil spilled, the disaster and harm would have been many times greater.[13]

No mathematical formula exists for comparing the relationship between the punitive award and actual and potential harm. *Boyle v. Lorimar Prod. Inc.,* 13 F.3d 1357, 1361 (9th Cir. 1994). *See TXO,* 113 S. Ct. at 2732 (O'Connor, J., dissenting) (noting the Court's "inability to discern a mathematical formula" in assessing punitive awards). At a minimum, the court must insure that the punitive award is "not grossly out of proportion to the severity of the offense and [has] some understandable relationship to compensatory damages." *Boyle,* 13 F.3d at 1359 (quoting *Haslip,* 499 U.S. at 22). Ultimately, "[t]he question is whether the difference between the two figures is so wide that the punitive damages have been divorced from the societal goals of retribution and deterrence." *Boyle,* 13 F.3d at 1361.

The *Exxon Valdez* jury had to "make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." *Hopkins* 33 F.3d at 1127

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[13] The potential for a greater disaster certainly existed. It is undisputed that Hazelwood began to maneuver the ship after it was aground, either to dislodge it from the reef or to firmly settle it aground. Regardless, the maneuvering could have resulted in the ship breaking apart, capsizing, or exploding. *See* deposition of Exxon Captain William Deppe at Tr. 7220-21. The Supreme Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused...." *TXO,* 113 S. Ct. at 2721-22.

(quoting *TXO,* 113 S. Ct. at 2720). Considering the potential that harm of a much greater magnitude could easily have occurred, the $5 billion punitive verdict was not disproportionate to the harm.

In addition to considering the magnitude of the harm and potential harm, the jury may have considered that Exxon is one of the largest and wealthiest corporations in the world and that only a large award could effectively punish and deter. (Exxon's financial condition is discussed below). As stated in *Boyle,* "while the difference between the punitive and compensatory damages was significant ... defendant was so wealthy a smaller award would have had little deterrent or retributive effect." *Boyle,* 13 F.3d at 1361 (citing *Neal v. Farmers Ins. Exchange,* 21 Cal. 3d 910 (1978)). The "harm" evidence, when viewed in the light most favorable to plaintiffs, supports the verdict.

Given the extent of the disaster that did occur, and the very real potential for the disaster to have been four times greater, Exxon can not show, under the standards for granting judgment as a matter of law, that the only reasonable conclusion as to the verdict is that punitive damages should not have been awarded or should be drastically reduced.

3. Exxon's financial condition

Phase III Jury Instruction No. 27 instructed the jury that in determining the amount to punitive damages to award, it could consider Exxon's financial condition. Instruction No. 27 follows the *Hammond* requirements. *See Morgan,* 997 F.2d at 1257 n.14. Instruction No. 27 was amplified by Instruction No. 32 which stated:

> In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a defendant's financial condition affects the

level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

Phase III Jury Instruction No. 32, Clerk's Docket No. 5890.

Jury Instruction No. 33 provided:

In considering a defendant's financial condition, you may not consider the defendant's gross wealth, that is, the value of its assets without subtracting any debts or obligations that the defendant may owe, but only the defendant's net worth, that is, the difference between the defendant's assets and the defendant's liabilities. Similarly, if you consider a defendant's income in assessing its financial condition, you may not consider a defendant's gross income (that is, the total amount of money received by the defendant) but only the difference between gross income and all expenses that must be paid out of that income.

Phase III Jury Instruction No. 33, Clerk's Docket No. 5890.

Finally, Instruction No. 34 provided:

In considering a defendant's net worth or net income, you may consider what portion of the defendant's net worth or net income is most relevant to a defendant's activities that were implicated in the defendant's wrongful conduct. You may also decide that all of a defendant's net worth and net income is relevant to determining the appropriate amount of punitive damages, if any, necessary to punish a defendant and deter a defendant and others.

Phase III Jury Instruction No. 34, Clerk's Docket No. 5890.

Exxon argues that the punitive award may not be justified on the basis of its wealth because the award must be based on conduct not wealth. The award was not based exclusively on wealth, however, because wealth was just one of many factors the jury was permitted,

but not required, to consider in Instruction No. 27.[14] Furthermore, *TXO, Haslip, Hopkins,* and *Morgan* all stated that consideration of a defendant's wealth was appropriate. *See TXO,* 113 S. Ct. at 2722 n.28 ("factors such as [net worth] are typically considered in assessing punitive damages.") (citing *Haslip,* 499 U.S. at 22).

Exxon argues that the size of a punitive award must, at a minimum, be based on more than a defendant's net worth. The jury, however, was permitted to consider all of the relevant *Hammond* factors in Instruction No. 27, and possibly, although doubtfully, did not consider wealth at all. Exxon argues that its wealth was virtually the exclusive focus of plaintiffs' Phase III case. Exxon is correct, but the point bears little weight. Plaintiffs' Phase III case took less than 12 hours, while Phases I and IIA, which focused on conduct and harm, lasted several days.[15]

There is simply no basis for a conclusion that the jury concentrated exclusively on wealth in determining the puni-

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[14] Instruction No. 27 stated in pertinent part:

In determining the amount of punitive damages to award, if any, you may consider, among other factors:

(a) the degree of reprehensibility of the defendants' conduct,

(b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and

(c) the financial condition of the defendants.

You may also consider, as mitigating factors:

(a) the existence of prior criminal sanctions or civil awards against the defendants for the same conduct, and

(b) the extent to which a defendant has taken steps to remedy the consequences of his or its conduct or prevent repetition of that conduct.

Phase III Jury Instruction No. 27, Clerk's Docket No. 5890.

[15] Each trial day lasted approximately five and one-half hours, taking two fifteen-minute breaks into account. Phase III opened on August 22, 1994, at 8:00 a.m. and plaintiffs rested at 8:48 a.m. on August 24, 1994.

tive award. The jury was instructed that it might consider wealth, and if it did consider wealth, those considerations were to be made within strict parameters. As noted in *Boyle,* consideration of the wealth of a corporation is appropriate where smaller punitive awards could have "little deterrent or retributive effect." *Boyle,* 13 F.3d at 1361 (citations omitted).[16]

When compared to the entire trial, evidence regarding wealth was a rather small percentage of the total presentation of evidence. Exxon has not shown that the award was a function of wealth, as opposed to a function of all of the *Hammond* factors.[17] At most, Exxon has shown that wealth, in all probability, was one of the factors considered. That alone does not violate due process.[18]

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[16] Exxon's enormous wealth cannot lightly be discounted. The evidence included Exxon's 1990 Annual Report which stated: Over time, Exxon's consistently strong earnings performance has enabled the company to achieve and maintain a position of extraordinary financial strength and flexibility. For example, over the past ten years, Exxon's internal cash generation from operations amounted to more than $100 billion.

Plaintiffs' opposition at 117 (quoting 1990 Annual Report at 202-03, Tr. 7135-36), Clerk's Docket No. 6043. Jack Clarke, Senior Vice-President of Exxon Corporation, testified that the spill did not have any adverse effects on Exxon's operations and that Exxon's substantial costs in responding to the spill did not effect Exxon's AAA rating. Tr. at 7175-76.

[17] Exxon devotes much of its briefing on the wealth issue to comparisons of this case with other punitive damages cases. As the court previously noted, "'punitive damages are the products of numerous, and sometimes intangible factors; a jury imposing punitive damages must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it.'" *Hopkins,* 33 F.3d at 1127 (quoting *TXO,* 113 S. Ct at 2720). Certainly, the *Exxon Valdez* litigation, which concerns America's largest oil spill recklessly caused by one of the world's largest corporations involves a "'host of facts and circumstances unique to the particular case.'" *Id.* The *Exxon Valdez* litigation simply does not compare to other punitive damage cases.

[18] As stated in *Boyle,* "[t]he 'key question' is whether the 'damages "exceed[] the level necessary to ... deter.'" A comparison of the award to

4. Punitive damages impact on Exxon shareholders

Though not specifically a *Hammond* factor, it is appropriate to discuss Exxon shareholders in relation to Exxon's financial condition. The jury was given an instruction regarding the impact of punitive damages on shareholders:

In determining whether an award of punitive damages should be made, and if so in what amount, you may consider whether, and if so to what extent, an award of punitive damages against the corporate Exxon defendants might be borne by the Exxon shareholders. Consideration of who may bear the ultimate financial impact of punitive damages is but one of many factors you may consider in fixing the amount of punitive damages.

Phase III Jury Instruction No. 38, Clerk's Docket No. 5890.

Exxon argues that the Supreme Court and the Ninth Circuit have recognized that the quantification of punitive damages should take into account the "impact on innocent third parties." *Haslip* 499 U.S. at 20 (citation omitted); *Morgan,* 997 F.2d at 1256 n.10. Instruction No. 38 adequately instructed the jury to consider such innocent third parties.

The court previously considered the impact on shareholders in Order No. 196. The court stated:

> [S]hareholders who invest in Exxon bear the risk that Exxon will spill oil, and if they do not wish to bear that risk, they may invest elsewhere. Concern over a shareholder's investment is no reason to avoid punitive damages when they are warranted.

Order No. 196 at 4, Clerk's Docket No. 4755. The jury heard evidence from both parties regarding the impact of a punitive award on shareholders. Instruction No. 38 and the presentation of applicable evidence satisfied Exxon's due process concerns regarding innocent third parties.

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gross revenues does not answer this question because it does not indicate ability to pay." *Boyle,* 13 F.3d at 1361 (citation omitted).

5. The costs of litigation

The costs of litigation were only briefly discussed. Specifics costs were not presented to the court or the jury. Plaintiffs assure the court that, in the five years since the 1989 spill, they "have had to endure ... great expense to bring this matter to a jury." Plaintiffs' opposition at 127, Clerk's Docket No. 6043. No doubt Exxon's expenses have been equally great. Exxon has not argued that the costs of litigation rendered the verdict grossly excessive and the court does not so find.

6. Imposition of criminal sanctions

Instruction No. 36 permitted the jury to consider, as a mitigating factor, "whether a defendant has paid other criminal fines or civil penalties." Phase III Jury Instruction No. 36, Clerk's Docket No. 5890. The evidence established that Exxon paid a $25 million criminal fine plus $100 million in restitution to the state and federal governments imposed as part of the criminal sentence. The award was one of the largest criminal fines ever paid in the history of the United States. Exxon argues that the criminal payment is evidence that Exxon has been sufficiently punished. The evidence was presented to the jury, and the jury, which considered all of the evidence, including evidence of harm and conduct, determined that a $125 million criminal payment was not a sufficient punitive award against Exxon. The existence of the criminal payment, in light of the other evidence, does not establish that the only reasonable conclusion is that the verdict should be set aside or reduced. The criminal payment may have been one of the greatest on record, but so was the oil spill. Additionally, the criminal payment was made before the harm to plaintiffs was quantified; therefore, the criminal payment does not reflect the true extent of the harm. The jury had the opportunity to consider the evidence of Exxon's criminal payments and due process on that issue was satisfied.

7. Civil awards against Exxon

In addition to the criminal and compensatory payments, Exxon has made various other payments. Exxon will pay,

over ten years, $900 million in settlement of government claims for natural resources damages and punitive damages (with the possibility of $100 million reopener). Exxon has paid $2.1 billion in cleanup expenditures through 1992, and $304 million in settlement of private damage claims paid through the Exxon claims program.[19] In Instruction No. 36, the jury was instructed that it could "consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures.... These are factors which you may consider in mitigation of any award of punitive damages that you might otherwise find proper." Phase III Jury Instruction No. 36.

Nearly $3 billion of the payments referenced above, were for natural resources harm.[20] The payments were not made to compensate victims, but, quite simply, to clean up Exxon's mess.[21] Exxon's settlement with the governments and its decision to fund the cleanup are laudable. Exxon's voluntary payment of damages to some fishermen was both laudable and extraordinary given that litigation was sure to follow irrespective of the voluntary payments. But that does not mean that Exxon should go unpunished for reckless conduct in causing the spill and the damages it caused for commercial fishermen and native Alaskans. Exxon has not shown that the jury did not consider the evidence in mitigation. The jury was presented with the evidence and properly instructed that it could consider it in mitigation. Accordingly, Exxon's due

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[19] Exxon also argues that it paid $46 million in casualty losses for the vessel and cargo. The cost Exxon paid for wrecking its own ship should not be considered in mitigation.

[20] The jury was specifically instructed not to "consider any damage to natural resources or to the environment generally; you may not base an award of punitive damages on such harms." Phase III Jury Instruction No. 29, Clerk's Docket No. 5890.

[21] Exxon cleaned up the mess, but that did not erase the harm to the commercial interests of fishermen or to the livelihoods of native Alaskans. Additionally, the jury had an opportunity to view Prince William Sound to assess Exxon's cleanup measures.

process rights were protected.

IV. The amount required to punish and deter

"[T]he amount of punitive damages required to deter and punish the defendant necessarily is dependent on the circumstances of each case...." *Farmer Bros.,* 31 F.3d at 904. This basic principle is fundamental when reviewing a punitive damages award. Exxon argues that "plaintiffs have not shown that this award is anywhere within the range of previous awards." Exxon's reply at 30. Plaintiffs need not make such a showing. Rather, the court must find, based on the unique circumstances of this case, considered in light of *TXO, Haslip, Hopkins,* and *Morgan,* that the award is not grossly excessive in punishing and deterring Exxon.

Exxon argues that it was punished sufficiently by paying a large criminal fine. As noted, the jury considered the fine, and the fine was paid before the extent of the harm was learned. Furthermore, the fine was paid before the court established, on Exxon's motion, a mandatory punitive damages class. Thus, the punitive award is the total award for Exxon's reckless conduct which effected tens of thousands of people. Exxon is not exposed to any further punitive damage awards. The jury was instructed that it could

> [C]onsider harms to all persons who suffered actual damages as a legal result of the spill. All such claims have been consolidated into this single proceeding for purposes of determining whether punitive damages should be awarded against the defendants and, if so, the amount of such damages. This includes claims of persons who are suing for their actual damages in the state courts. Because of this consolidation of claims, there will be no other claims for punitive damages in any other court.

Phase III Jury Instruction No. 28, Clerk's Docket No. 5890.

The criminal penalty did not have the all-inclusive nature of the mandatory punitive damages class and did not comprehend the enormity of the harm or number of people ad-

versely effected by the spill. The jury was entitled to consider both the criminal penalty and the mandatory punitive damages class, and there was substantial evidence for the jury to decide that the criminal penalty alone did not sufficiently punish Exxon.[22]

Exxon also argues that the verdict cannot serve any deterrence purposes because Exxon has behaved properly since the spill, learned its lesson, and modified its behavior to prevent future spills. Exxon argues that it paid $2.1 billion in cleanup costs, and $304 million in private damage claims through its claims program. Exxon provides the following examples of how it has modified its behavior:

> (1) Exxon revised its alcohol policies to specify that employees who have been treated for alcohol dependency may not be assigned to safety-sensitive positions;
>
> (2) Exxon implemented improved monitoring practices, random testing for alcohol or substance abuse, and anonymous reporting procedures;
>
> (3) Exxon adopted a prohibition of alcohol use by vessel officers while on a tour of duty;
>
> (4) Exxon assigned additional mates in port to assist with loading and lightering operations and an extra third mate aboard vessels;
>
> (5) Exxon strengthened requirements regarding mandatory rest periods and work hours;

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[22] Exxon also argues that it has been punished sufficiently by virtue of the "opprobrium heaped on Exxon and its employees from every quarter of the country." Exxon's motion at 2, Clerk's Docket No. 5970. The jury was entitled to consider, as a mitigating factor, "the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters." Phase III Jury Instruction No. 36, Clerk's Docket No. 5890. The jury's return of a large punitive award does not mean that they did not consider opprobrium heaped upon Exxon. The jury may have considered that opprobrium alone was insufficient punishment in relation to the conduct and harm.

> (6) Exxon adopted new navigation policies specifying daylight only departures in icy conditions, limitations on deviations from traffic lanes, and increased use of tug escorts;
>
> (7) Exxon implemented use of an advanced satellite navigation tool;
>
> (8) Exxon strengthened policy requiring masters to remain on the bridge while in Prince William Sound;
>
> (9) Exxon instituted an enhanced safety training program; and
>
> (10) Exxon established a Safety, Environmental and Regulatory Department and improved spill response capabilities.

See Exxon's motion at 25-28, Clerk's Docket No. 5970.

Exxon argues that other oil companies, such as ARCO, have adopted measures similar to the ones listed above. For these reasons, Exxon argues that it and other companies have been deterred sufficiently and have "gotten the message." Exxon's motion at 28, Clerk's Docket No. 5970. Consequently, Exxon argues that the punitive verdict will not result in any change in Exxon policy or procedure that has already been implemented.

The jury received specific instructions regarding Exxon's policy changes. Instruction No. 35 stated:

> Evidence of changes in policies, practices, and procedures by the Exxon defendants has been put before you so that you can consider this issue. The fact that changes have been made after an event does not tend to show that such changes should have been made before the event, or that the policies, practices, or procedures in place before the event were negligent or otherwise improper. Accordingly, if you find that changes were made that have reduced the likelihood of an oil spill in the future, you may consider the making of such changes as a factor tending to mitigate any punitive damages award that you might otherwise find proper.

Phase III Jury Instruction No. 35, Clerk's Docket No. 5890.

Exxon presented all of the "policy change" evidence to the jury. A $5 billion verdict does not mean that the evidence was not considered. It may have been that the jury would have reached a higher punitive award had they not considered the evidence. It is also possible that, from the testimony of Exxon executives, the jury could have inferred a lack of remorse. Regardless, when all of the evidence is considered in the light most favorable to the plaintiffs, the jury could reasonably have reached a conclusion that a very large punitive award was necessary for purposes of punishment and further deterrence despite the evidence concerning Exxon's changes in policy and procedure.

V. Summary

A judgment as a matter of law is improper, unless the evidence, viewed in the light most favorable to plaintiffs, permits only one reasonable conclusion contrary to the verdict. Exxon has not established that only one reasonable conclusion is possible. At best, Exxon has established that reasonable minds could reach two inconsistent conclusions from the evidence. The court has considered the verdict in light of the *Hammond* factors and the concerns raised by *TXO* and *Haslip* in evaluating the award, and finds that it was neither grossly excessive nor a violation of due process. The jury made a "qualitative assessment based on a host of facts and circumstances unique to the particular case before it", *TXO,* 113 S. Ct. at 2720, and their verdict should not be overturned simply because of its record size. The jury received conservative and comprehensive instructions on the purpose of punitive damages and the manner in which they were to be assessed. The comprehensive instructions insured that jury was not left to whim, conjecture, or speculation. Furthermore, the jury was instructed not to base its verdict on "dislike for, bias, prejudice, or sympathy toward any party", thus directing the jury not to base its verdict on passion or prejudice, and the court finds that the verdict was not a function of passion or prejudice. *See* Phase III Jury Instruction No. 25. The jury deliber-

ated 13 days as to Phase III. Judging from contacts which the court and counsel had with jurors during those deliberations, the jury reached its verdict only after much difficult analysis of the evidence. The jury did not vote precipitously. The deliberations became emotional at times; but the 11 men and women chosen by counsel resolved their differences. This verdict and the amount awarded were not the result of passion or prejudice against Exxon. For these reasons, Exxon's motion for judgment as a matter of law on plaintiffs' punitive damage claims (Phase III) is denied.

VI. Motion for a new trial

Exxon moved for a new trial in the event that the court denied its motion for judgment as a matter of law. Pursuant to Rule 59 of the Federal Rules of Civil Procedure:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States....

Fed. R. Civ. P. 59(a).

Exxon's motion for a new trial on plaintiffs' punitive damages claims applies to Phases I and III and is based on the weight of the evidence.

> [A] stringent standard applies when the motion is based on insufficiency of the evidence. A motion for a new trial may be granted on this ground only if the verdict is against the "great weight" of the evidence or "it is quite clear that the jury has reached a seriously erroneous result."

Venegas v. Wagner, 831 F.2d 1514, 1519 (9th Cir. 1987) (citations omitted). In considering a motion for a new trial, the district court may weigh the evidence and assess the credibility of witnesses. The court need not view the evidence in the light most favorable to plaintiffs. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.,* 880 F.2d 176 (9th Cir. 1989), *cert. denied,* 493 U.S. 1058 (1990).

> [I]n most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter.... If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Landes Constr. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987) (citations omitted).[23]

The court has reviewed the evidence on numerous occasions during the *Exxon Valdez* litigation. The Phase I verdict that Exxon was reckless and the Phase III verdict that Exxon is liable for $5 billion in punitive damages are not against the great weight of the evidence. The court might have reached different conclusions in both phases, but from the "entire evidence" the court is not "left with the definite and firm conviction that a mistake has been committed...." *Id.* The jury's verdict is defensible under the evidence, and the court must restrain itself from substituting its own conclusions for that of the jury. The court respects the "collective wisdom of the jury" and accepts its findings. *Id.* at 1371 (citation omitted). Exxon's motion for a new trial is denied.

VII. Conclusion

In summary, Exxon's motion for judgment as a matter of law on plaintiffs' punitive damages claims (Phase III issues) is denied and Exxon's motion for a new trial (weight of the evidence) is denied.

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[23] *Landes Constr.* further stated that:

> Doubts about the correctness of the verdict are not sufficient grounds for a new trial: the trial court must have a firm conviction that the jury has made a mistake.... Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id. 833 F.2d at 1372 (citations omitted).

APPENDIX F

United States District Court, D. Alaska.
In re the EXXON VALDEZ.
This Order Relates to All Cases.
A89-0095-CV (HRH).

Jan. 27, 1995.

ORDER NO. 265

EXXON'S MOTION FOR JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIMS (PHASE I ISSUES)

HOLLAND, Chief Judge.

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, for judgment as a matter of law[1] on plaintiffs' punitive damages claims (Phase I issues).[2] Plaintiffs oppose the motion[3] and Exxon has replied.[4] Oral argument has not been requested and is deemed unnecessary.

According to Rule 50(b):

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later de-

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[1] Pursuant to the 1991 amendments to the Federal Rules of Civil Procedure, both a motion for a directed verdict and a motion for judgment notwithstanding the verdict are now designated as motions for judgment as a matter of law. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 (1995) (footnote omitted). *See* Fed. R. Civ. P. 50 advisory notes, 1991 amendment.

[2] Clerk's Docket No. 5969.

[3] Clerk's Docket No. 6043.

[4] Clerk's Docket No. 6098.

> termination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.[5]

Fed. R. Civ. P. 50(b).

Exxon argues that plaintiffs' punitive damages award can not be justified because substantial evidence was not presented that would allow a reasonable jury to find that Exxon's conduct was reckless. Exxon argues that its conduct was not the legal cause of the grounding of the *Exxon Valdez* because:

> The evidence was legally insufficient to allow a finding that Exxon was liable for punitive damages on the basis of conduct of Captain Hazelwood; and
>
> The evidence was legally insufficient to allow a finding that Exxon was liable for punitive damages on any other basis.

Exxon brief in support of motion at 3.

I. Standard for judgment as a matter of law

> Judgment as a matter of law:
>
> [I]s proper when the evidence permits only one reasonable conclusion as to the verdict. The jury's verdict must be supported by substantial evidence in order to stand. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. [Judgment as a mater of law] is improper if reasonable minds could differ over the verdict.

Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir.1987) (citations omitted); *See George v. City of Long Beach,* 973 F.2d 706, 709 (9th Cir.1992), *cert. denied,* 113 S.Ct. 1269 (1993) ("[s]ubstantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions

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[5] Exxon moved for judgment in each phase of the trial and at the close of all the evidence; and the parties have stipulated that the motion may be filed prior to the entry of judgment.

from the evidence") (citations omitted); *Glover v. BIC Corp.*, 6 F.3d 1318, 1330 n. 5 (9th Cir.1993) (the court must consider all evidence and not just evidence favoring the nonmoving party). In *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), the Supreme Court stated:

> [I]n considering a motion for [judgment as a matter of law], the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'

Id. at 554-55 (citations omitted). *See Moore v. Local Union 569 of the Int'l Bhd. of Elec. Workers,* 989 F.2d 1534, 1537 (9th Cir.1993), *cert. denied,* 114 S.Ct. 1066 (1994) (a motion for judgment as a matter of law "is proper when the evidence permits only one reasonable conclusion as to the verdict.") (citations omitted); *Dean v. Trans World Airlines, Inc.,* 924 F.2d 805, 810 (9th Cir.1991) (a motion for judgment as a matter of law "is appropriate only when the evidence, viewed in the light most favorable to the nonmoving party, could not reasonably support the verdict.") (citations omitted). *See also Vaughn v. Ricketts,* 950 F.2d 1464, 1468 (9th Cir.1991); *Cockrum v. Whitney,* 479 F.2d 84, 85 (9th Cir.1973).

To grant Exxon's motion would deprive plaintiffs of the jury's determination of the facts; thus, such motions are "granted cautiously and sparingly." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 at 252 (1995). The court "must view the evidence most favorably to [plaintiffs] and give [plaintiffs] the benefit of all reasonable inferences that may be drawn from the evidence." *Id.* at 256-59. If the court finds evidence sufficient to support the jury's verdict, then Exxon's motion must be denied. *Id.* at 253-54. As noted, the court will not weigh the evidence, make credibility determinations, or substitute its judgment for that of the jury's. *Id.* at 255-56.

II. Conduct which permits an award of punitive damages

Phase I Jury Instruction No. 28 stated:

> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively aware must in fact have eventuated. Third, a defendant must have disregarded the risk in determining how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Phase I Jury Instruction No. 28, Clerk's Docket No. 5309.

Exxon argues that Instruction No. 28 provides the framework for analyzing whether a reasonable jury could find that Exxon's conduct was reckless.[6] Exxon argues that neither the conduct of Captain Hazelwood nor Exxon meets the above standard for recklessness.

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[6] In a footnote, Exxon argues that the jury should have been instructed that reckless conduct must be proved by clear and convincing evidence as opposed to a preponderance of the evidence. The court rejected this argument in Order No. 264.

II. The conduct of Captain Hazelwood[7]

Exxon argues that Captain Hazelwood's decision to leave the bridge at 11:52 p.m. on the night of the grounding was the only act committed by Hazelwood which could be the legal cause of the accident.[8] The jury heard evidence that Hazelwood, upon electing to leave the bridge, gave Gregory Cousins certain navigation instructions. Both Hazelwood and Cousins were confident that Cousins could maneuver the ship. If Cousins had followed the instructions, the grounding would not have occurred. Exxon argues that Hazelwood's leaving the bridge was not a reckless act for three distinct reasons:

> [1] Under the objective conditions present, no grave danger or risk of harm existed.
>
> [2] Nothing about Hazelwood's leaving the bridge, although admittedly negligent, involved a "gross deviation from appropriate standards of conduct."
>
> [3] There is no evidence that Captain Hazelwood, or anyone else, was subjectively conscious of a grave risk of harm.

Exxon's brief in support of motion at 14.

The court has reviewed all of the evidence on this issue in the light most favorable to the plaintiffs. The evidence does not mandate only one conclusion; that Hazelwood was not reckless. Rather, the evidence, when taken as a whole, provides a sufficient probative basis upon which a reasonable jury could find that Hazelwood was reckless in leaving the

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[7] The briefing on this motion exceeds 150 pages, not including exhibits. The bulk of the briefing is devoted to the evidence presented at trial. It would serve no purpose for the court to repeat all of the evidence here. The court has previously considered the majority of the evidence during pretrial motion practice and, of course, heard all of the evidence during trial. Having reviewed the evidence a third time in consideration of the instant motion, the court will discuss the evidence only when warranted.

[8] Exxon argues that under the "strict complicity" rule, Captain Hazelwood's conduct may not be attributed to Exxon. The court has considered and rejected this argument in Order No. 264.

bridge.

Evidence was submitted which showed that it was the Master's duty to be on the bridge during the Prince William Sound transit. When Hazelwood left the bridge of his supertanker which was carrying over one million barrels of crude oil, she was on a course headed directly at Bligh Reef, some five miles distant. There was evidence that Hazelwood gave Cousins instructions to turn when he was abeam of Busby Island light. Although the critical turn was to be made in only two minutes, Hazelwood left the bridge, and the turn was made several minutes late. Evidence was presented that Hazelwood should have checked with Cousins or returned to the bridge when the turn was not made after two minutes. Hazelwood remained in his stateroom even after Cousins belatedly called to say that the turn was commenced.

The jury could reasonably have found that it was reckless for Hazelwood to leave the bridge of a supertanker headed directly at a known reef only minutes away.

Given that the turn was made several minutes late, and that supertankers respond slowly to the helm, the jury could reasonably have found that Hazelwood was reckless for having remained off the bridge upon learning that the vessel had belatedly begun the turn, particularly when Hazelwood recognized that Bligh Reef was a "very nasty spot". Plaintiffs' opposition at 97 n. 111 (citation omitted). Even though the vessel was headed into a known danger, Hazelwood remained in his stateroom until the grounding was reported.

Although Cousins had been on the bridge during previous voyages through Prince William Sound, he did not, as Hazelwood was aware, have a pilotage endorsement for Prince William Sound. The evidence showed that Cousins had never before been left alone in Prince William Sound heading toward a known reef.

Finally, quite apart from the foregoing, and arguably most important of all, the jury could have found that it was reckless for Hazelwood to have assumed command of the *Exxon*

Valdez on the night in question based upon alcohol consumption in close temporal proximity to his departure from the Valdez, Alaska Tanker Terminal. (*See* discussion on alcohol at part IV below).

The evidence does not permit only one reasonable conclusion as to the verdict. Plaintiffs have the benefit of all reasonable inferences, and a consideration of all of the evidence in the light most favorable to plaintiffs establishes only that reasonable minds might draw two inconsistent conclusions from the evidence. There was sufficient probative evidence for the jury to conclude that Hazelwood was reckless for leaving the bridge the night of the grounding. Accordingly, judgment as a matter of law cannot be entered on the issue of Hazelwood's leaving the bridge.

III. Deck officer fatigue

Substantial evidence existed such that reasonable minds might differ on whether Exxon was reckless regarding deck officer fatigue. The jury heard evidence that Exxon management had received reports of excessive levels of fatigue but ignored the reports. The jury also heard conflicting evidence on whether Cousins was fatigued on the night of the grounding. It is undisputed that Cousins had only 4 1/2 hours off during the twelve hour period before sailing. Moreover, from 8:00 a.m. until the time of the grounding, Cousins worked a total of 11 1/2 hours. On the other hand, Cousins and others testified that fatigue was not a factor in the grounding.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions [and] all justifiable inferences are to be drawn in [plaintiffs'] favor." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990) (citations omitted). Substantial evidence was presented so that a reasonable jury could conclude that Cousins was fatigued at the time of the grounding and that Exxon was aware that its vessels embarked with fatigued crews but recklessly ignored the attendant risks. Exxon has shown that reasonable minds might draw inconsistent con-

clusions based upon the evidence, but that is insufficient to grant Exxon's motion on the fatigue issue.[9]

IV. Captain Hazelwood and alcohol

The evidence regarding Hazelwood's alcohol consumption raises several different issues. The court will not discuss each issue separately, but will, in general terms, discuss them all.

Evidence regarding both Hazelwood's alcohol consumption and Exxon's awareness of and reactions to Hazelwood's alcohol consumption have been before the court on numerous occasions. The evidence has been thoroughly reviewed by the court once again and the facts need not be repeated in this order. The court will, however, highlight the more pertinent facts which establish that, at the very most, reasonable minds could reach inconsistent conclusions over whether Exxon was reckless concerning Hazelwood's drinking and whether Hazelwood's alcohol consumption on the night of the grounding made his conduct reckless.

Substantial evidence existed to show that Hazelwood was treated for alcohol abuse,[10] that he was assigned to command a supertanker upon his release from treatment, that he relapsed, and that Exxon was aware of the relapse. There was evidence presented to the jury that after Hazelwood was released from treatment at South Oaks, he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at

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[9] The parties debate whether Exxon was in compliance with 46 U.S.C. § 8104 (the six hour rule). Although Exxon did not keep records of its officers' time, officers were instructed to comply with § 8104. The Coast Guard did not charge Exxon with failure to comply with § 8104. Sufficient evidence did exist, however, such that reasonable minds could reach inconsistent conclusions on whether Exxon was reckless regarding compliance with § 8104.

[10] Substantial evidence existed for the jury to find that Hazelwood was an alcoholic. Hazelwood entered an alcohol rehabilitation program and participated in Alcoholics Anonymous. Hazelwood's wife attended Al-Anon.

various ports, and aboard Exxon tankers.

There was evidence that Exxon failed to evaluate Hazelwood before returning him to duty and did not consider whether he should be given a shoreside assignment. Exxon never discussed with Hazelwood whether he was attending AA (Alcoholics Anonymous) meetings, nor was he ever asked about his drinking or told to refrain from drinking. The jury also heard conflicting evidence regarding whether Exxon relied on the Rehabilitation Act 29 U.S.C. § 794, in placing Hazelwood in command of a supertanker because he was a recovered alcohol abuser.

The jury heard evidence that, subsequent to his return to sea duty, Hazelwood drank with Exxon officers and that Exxon management received reports of Hazelwood's relapse. The jury heard conflicting evidence on whether Hazelwood was closely monitored regarding his alcohol consumption. Exxon did not document any monitoring activities and neither Hazelwood nor his peers were aware that Hazelwood was being monitored. The jury heard conflicting evidence regarding whether Exxon had a monitoring program and, if one existed, the quality of the monitoring program.

The jury's finding that Exxon was reckless regarding the alcohol issues is supported by substantial evidence. Although Exxon presented contrary evidence, it only established that reasonable minds could reach different conclusions. Exxon's evidence does not establish that the only reasonable conclusion was that Exxon was not reckless.

It was not disputed that Hazelwood consumed alcohol on March 23, 1989. The amount he drank is unclear, but it was the jury's responsibility to judge the credibility of witnesses who saw Hazelwood drink. The jury heard evidence that Hazelwood's blood alcohol level was .061 at 10:50 a.m. on March 24, 1989, and .241 at the time of the grounding. Exxon challenged the validity of the blood tests regarding breaks in the chain of custody and threats to the integrity of the specimens. The jury also heard evidence that the specimens were

not compromised despite evidence of mishandling. Here again, the evidence might result in inconsistent conclusions, but that does not warrant granting judgment as a matter of law.

Substantial evidence existed for the jury to find that Hazelwood's judgment was impaired by alcohol on the night of the grounding. Based upon the evidence, the jury was entitled to find that Hazelwood, and therefore Exxon, acted recklessly in causing the grounding.

The court cannot ignore the heavy burden which Exxon must meet to warrant granting a motion for judgment as a matter of law. As the court has noted, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions ... [and] ... all justifiable inferences are to be drawn in [plaintiffs'] favor.'" *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 554-55 (1990) (citations omitted). Upon consideration of the above standard, Exxon has not established that the only possible conclusion is that neither Exxon nor Hazelwood acted recklessly. At the very most, Exxon has only shown that reasonable minds could reach inconsistent conclusions. When reasonable minds could differ over the verdict, then judgment as a matter of law is improper. *Venegas v. Wagner,* 831 F.2d 1514, 1517 (9th Cir. 1987). The jury's verdict in Phase I was supported by substantial evidence and Exxon's motion for judgment as a matter of law (Phase I issues) is denied.

APPENDIX G

United States District Court, D. Alaska.
In re the Exxon Valdez.
This Order Relates to All Cases.
No. A89-0095-CV (HRH).

Jan. 27, 1995.

ORDER NO. 264

Exxon's and Hazelwood's Motions for a New Trial on Plaintiffs' Punitive Damages Claims (Jury Instructions)

Exxon Corporation (D-1), Exxon Shipping Company (D-2) (collectively Exxon), and Joseph Hazelwood (D-7) have filed motions for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure, on the punitive damages issues tried in Phases I and III.[1] Plaintiffs oppose the motions[2] and Exxon has replied.[3] Oral argument has not been requested and is deemed unnecessary.

Exxon argues that a new trial is warranted because the court committed errors in its Phase I and Phase III jury instructions.[4] "[E]rroneous jury instructions, as well as the failure to give adequate instructions are ... bases for a new trial." *Murphy v. City of Long Beach,* 914 F.2d 183, 187 (9th Cir. 1990) (citations omitted). "An error in instructing the jury in a civil case requires reversal unless the error is more

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[1] Clerk's Docket No. 5946. Exxon's motion and reply brief were adopted by Hazelwood at Clerk's Docket Nos. 5957 and 6120 (§§ IV and V only).

[2] Clerk's Docket No. 6043.

[3] Clerk's Docket No. 6125.

[4] In Phase I of the trial, the jury found that Exxon and Captain Hazelwood acted recklessly in the grounding of the *Exxon Valdez.* In Phase III, the jury determined the amount of punitive damages to be paid by Exxon and Hazelwood for their reckless acts.

probably than not harmless." *Caballero v. City of Concord,* 956 F.2d 204, 206 (9th Cir. 1992) (citing *Coursen v. A.H. Robins Co., Inc.,* 764 F.2d 1329, 1337 (9th Cir. 1985)).

> In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.

Caballero, 956 F.2d at 207.

Exxon argues that the court's charge to the jury was prejudicially erroneous in that:

> (1) The jury should not have been charged that it could not consider, on the issue of whether Exxon was reckless, the existence of corporate policies violated by Captain Hazelwood. Phase I Jury Instruction No. 36. As a practical matter, the effect of the Court's charge on this point was to direct a verdict against Exxon on the issue of recklessness.
>
> (2) The jury should not have been charged that a corporation can be liable for the reckless acts of shipboard employees if those employees are acting in a managerial capacity; instead the jury should have been told that vicarious liability is permissible only if there is compliance with the strict complicity doctrine of maritime law. Phase I Jury Instruction No. 33.
>
> (3) The jury should not have been charged in Phases I and III that a preponderance of the evidence was the evidentiary standard for the award of punitive damages, but should have been charged that it was required to make its findings by clear and convincing evidence.
>
> (4) The jury should not have been charged that reckless conduct is sufficient to allow an award of punitive damages, but should have been charged that punitive damages may be awarded only on the basis of conduct which is the moral equivalent of actual malice.

Exxon's motion at 2-3.

I. *Phase I Jury Instruction No. 36*

Exxon argues that the principal error involves Phase I Jury Instruction No. 36, in which the court instructed the jury that if it found that Hazelwood was a "managerial agent", then Hazelwood's conduct was attributable to Exxon regardless of whether that conduct was contrary to corporate policies and instructions. According to Exxon, the instruction had the effect of directing a verdict against Exxon if the jury found Hazelwood reckless. Exxon argues that the jury was forbidden to consider the fact that Hazelwood's leaving the bridge at 11:52 p.m. on the night of the grounding was in direct violation of Exxon policies and instructions, was not for the benefit of Exxon, and was not within the scope of Hazelwood's employment.[5]

Phase I Jury Instruction No. 36 read as follows:

> Since plaintiffs in this case seek punitive damages against corporations, you must consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations.
>
> Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the

[5] Plaintiffs argued in their opposition to Exxon's motion to strike plaintiffs' inadmissible and non-record evidence that Exxon never argued to the jury that Hazelwood was not acting within the scope of his employment on the night of the grounding. Clerk's Docket No. 6118. Accordingly, plaintiffs suggest that the issue should not be considered. *See* Order No. 260, Clerk's Docket No. 6150. The court finds that issues regarding scope of employment were in evidence at trial and should be considered herein.

> policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.
>
> *However, if the employee was a managerial agent, then as stated in Instruction No. 33[6], the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.*

Phase I Jury Instruction No. 36, Clerk's Docket No. 5309 (emphasis added).

Exxon argues that the jury considered the last paragraph of Instruction No. 36 in conjunction with Instruction No. 34, which read:

> An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

Phase I Jury Instruction No. 34, Clerk's Docket No. 5309. Exxon argues that Instruction Nos. 34 and 36 instructed the jury that Exxon was responsible for Hazelwood's actions even if those actions were outside the course and scope of Hazelwood's employment. Exxon argues that the final paragraph of Instruction No. 36 was contrary to law and prejudicial to Exxon. According to Exxon: A correctly instructed jury

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[6] Phase I Instruction No. 33 stated:

> The Exxon defendants, as corporations, may act only through natural persons, and especially through their officers and employees. A corporation is not responsible for the reckless acts of all of its employees. A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

Phase I Jury Instruction No. 33, Clerk's Docket No. 5309.

would have been told that it could consider company policies on the issue of whether Hazelwood's conduct should be imputed to Exxon. If it found Hazelwood's reckless conduct contrary to corporate policies adequately established and enforced, the jury should have been told, it could not attribute Hazelwood's conduct to Exxon -- or at the very least, it was not *required* to do so.

Exxon's memorandum in support of motion at 5 (citing *United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979); *United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied,* 490 U.S. 1125 (1973); *United States v. Basic Constr. Co.,* 711 F.2d 570, 573 (4th Cir. 1983), *cert. denied,* 464 U.S. 956 (1983). Essentially, Exxon argues that the jury should have been instructed that Hazelwood's conduct could not be attributed to Exxon unless Hazelwood acted within the scope of his employment.

Exxon argues that on the night of the grounding, Hazelwood left the bridge in direct violation of company policy.[7] Having violated Exxon policy, Exxon argues that Hazelwood's action in leaving the bridge was outside the scope of his employment. Thus, Exxon argues that Hazelwood's conduct cannot be attributed to Exxon.

In support of its argument, Exxon cites, *In re American Biomaterials Corp.,* 954 F.2d 919, 924 (3d Cir. 1992), which

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[7] According to Exxon's Navigation and Bridge Organization Manual, "[t]he Master must be on the bridge when 'passing in the vicinity of shoals, rocks or other hazards which represent any threat to safe navigation' and when entering or leaving port." Exxon's memorandum in support of motion at 7-8 (citation omitted). Exxon required that one copy of the manual be kept in the Master's library and another on the bridge. Officers were required to acknowledge by signature that they had read and understood the manual. *Id.* Other than arguing that the manual was kept on board ship and apparently read by the officers, Exxon has not discussed how it enforced the manual's requirements. *See United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979) ("[m]erely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment.") (citation omitted).

stated that, "[i]n every jurisdiction ... for punitive damages to be imposed vicariously on the employer, the employee must be acting within the scope of the employment." *Id.* (citations omitted). The key Ninth Circuit case to speak to the issue is *Protectus Alpha Navigation v. Northern Pac. Grain Co.,* 767 F.2d 1379 (9th Cir. 1985). *Protectus,* an admiralty and punitive damages case, states:

> 'A majority of courts ... have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification' .... This is in accord with the 'general rule of agency law, [under which] principals are liable when their agents act with apparent authority and commit torts....'

Id. at 1386 (citations omitted).

Protectus adopted *Restatement (Second) of Torts* § 909 which states:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) *the agent was employed in a managerial capacity and was acting in the scope of employment,* or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (1977). *See Protectus,* 767 F.2d at 1386 (emphasis added).

For the jury to have found Exxon liable for Hazelwood's acts, under subsection (c) above, the jury would have found that Hazelwood acted in a managerial capacity and that the act of leaving the bridge was within the scope of employment.

Exxon argues, however, that "the principal error involving Instruction 36 [is that it] erroneously forbade the jury to consider, on the issue of Exxon's vicarious liability for Captain Hazelwood, whether his allegedly reckless acts violated specific company policies ...." Exxon reply at 1.[8]

Although Exxon argues that the principal issue is the jury's inability to consider whether Hazelwood's reckless acts violated Exxon policy, the more salient issue is whether the final paragraph of Instruction No. 36 is a correct statement of law. As previously noted, the final paragraph of Instruction No. 36 stated:

> However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.

Phase I Instruction No. 36, Clerk's Docket No. 5309. Instruction No. 33, referenced above, stated that, "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Phase I Jury Instruction No. 33, Clerk's Docket No. 5309.

It cannot be disputed that Instruction Nos. 36 and 33 are to be read together. The concept from the two instructions is that when a managerial agent acts within the scope of his employment, those actions are attributable to the employer. It might have been better had the instructions defined "scope of employment", but neither party requested such an instruction.

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[8] Exxon does not dispute that Hazelwood was a managerial employee. Instruction No. 34 stated:

> An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

Phase I Jury Instruction No. 34, Clerk's Docket No. 5309. *See* Exxon's reply at 5 n.4 (Exxon "does not attack" Instruction No. 34).

Regardless, Instruction Nos. 36 and 33, when taken together, correctly state the law.

The *Restatement* permits punitive damages where the employee, acting in a managerial capacity, performs a reckless act within the scope of his employment. In the case at bar, it cannot be disputed seriously that the captain of a supertanker acts in a managerial capacity. As stated in *Protectus,* "[w]e agree that a corporation can act only through its agents and employees, and that no reasonable distinction can be made between the guilt of the employee in a managerial capacity acting within the scope of his employment and the guilt of the corporation." *Protectus,* 767 F.2d at 1386 (citations omitted). Instruction Nos. 33 and 36 fall within the *Protectus* and *Restatement* standards. Given that Instruction No. 36 correctly states the law, Exxon's "principal error" -- whether the jury was forbidden to consider whether Hazelwood's acts violated Exxon policy -- loses significance.

Exxon also argues that the jury was entitled to consider Exxon's policies because the policies are the most relevant indicia of "scope of employment" . The first paragraph of Instruction No. 36 told the jury to do exactly what Exxon argues it was precluded from doing-- consider Exxon's policies. Instruction No. 36 paragraph one stated in pertinent part, "you must consider whether the actions of employees were in violation of direct ... policies of the defendant corporation." Phase I Jury Instruction No. 36, Clerk's Docket No. 5309. Despite the clear language of the first paragraph of Instruction No. 36, Exxon argues that the final paragraph of Instruction No. 36 negated the first paragraph. According to Exxon, the final paragraph of Instruction No. 36 negated the first paragraph by instructing the jury that if it found Hazelwood to be a managerial agent, then it must attribute those acts to Exxon, whether or not they were contrary to company policy.

The court disagrees with Exxon's argument that the final paragraph of Instruction No. 36 negated the first paragraph. The final paragraph of Instruction No. 36 directed the jury to consider Instruction No. 33. Instruction No. 33 instructed the

jury that the reckless acts of a managerial officer done in the scope of employment were attributed to the employer. The first paragraph of Instruction No. 36 then instructed the jury to consider whether the employee's actions violated company policies. The instructions, when read together, do not negate paragraph one of Instruction No. 36.[9] Rather, the instructions are mutually supporting in reiterating that the jury should consider whether the employee acted within the scope of employment and whether those actions violated company policy.[10]

Exxon's argument assumes that Hazelwood's scope of employment was strictly circumscribed by company policy to the effect that Hazelwood should have been on the bridge when the grounding occurred. Yet a managerial employee's scope of employment is not circumscribed by company policy to the extent Exxon suggests and a managerial employee, particularly a supertanker master, can interpret policy and engage in policy-making decisions as part of the scope of employment. Accordingly, the final paragraph of Instruction No. 36 correctly stated the law and did not negate the first paragraph of the same instruction.[11]

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[9] The second paragraph of Phase I Jury Instruction No. 36 stated: Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.

[10] Another reason why the final paragraph of Instruction No. 36 does not negate the first paragraph is that the jury could have found that a particular company policy was non-existent or not enforced.

[11] It is also the case that the jury may have found that Exxon's liability for punitive damages arose from circumstances other than Hazelwood's managerial capacity. Plaintiffs contended at trial that other officials of Exxon were reckless in their supervision of Hazelwood.

Exxon next argues that the jury was entitled to attribute Hazelwood's leaving the bridge to Exxon only if leaving the bridge was within the scope of Hazelwood's employment. Exxon's argument does not accurately reflect the law. "An act, although forbidden, or done in a forbidden manner, may be within the scope of employment." *Restatement (Second) of Agency* § 230 (1958). Thus, even if Hazelwood's leaving the bridge was a violation of company policy, that does not mean that his action was outside the scope of employment.

Exxon further argues that an action is within the scope of employment only if the employee's actions are authorized or are motivated by an intent to benefit the corporation. *United States v. Cincotta,* 689 F.2d 238, 241-242 (1st Cir), *cert. denied,* 459 U.S. 991 (1982). *See United States v. Halpin,* 145 F.R.D. 447, 449 (N.D. Ohio 1992) (citations omitted) ("it is essential that the illegal conduct be related to and done within the course of employment and have some connection with the furtherance of the business of the corporation.").

The *Restatement* defines scope of employment as follows:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master;
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 228 (1958).[12] *See Re-*

[12] Section 229 provides:

statement (Second) of Agency § 229 cmt. a ("the scope of employment includes ... acts which, as between the master and servant, the servant is not privileged to do.").

Hazelwood was commander of a modern supertanker, whose position required certain flexibility. Captain Bolton, an expert on the duties of a master, testified about a master's responsibilities.

> [O]nce a ship is at sea [the master] has no umbilical cord of support. He is the sole decision maker and he lives with the responsibility that he's got to discharge, under adverse and varied conditions, calling upon those levels of expertise at moments and when he's least expecting it.

Plaintiffs' opposition at 40 n.44 (quoting Bolton Tr. at

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(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place, and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

Restatement (Second) of Agency § 229 (1958).

3853-3854).

Exxon argued at trial that Hazelwood left the bridge to work on weather charts. He had received a report of a storm moving eastward in the Gulf of Alaska which would cross the intended southbound course of the *Exxon Valdez.* Prior to leaving the bridge, he left specific, correct navigation instructions with his third mate. Given Hazelwood's multi-faceted responsibilities, it cannot be contended that leaving the bridge under those circumstances violated company policy or was outside the scope of employment. On the other hand, even if leaving the bridge could be considered a violation of company policy, Hazelwood's action, as master of a supertanker, was "related to and done within the course of employment and [had] some connection with the furtherance of the business of the corporation." *United States v. Halpin,* 145 F.R.D. 447, 449 (N.D. Ohio 1992) (citations omitted).[13]

Instruction No. 36, when read in conjunction with Instruction No. 33, provided a correct statement of the law. One can violate company policy yet act within the scope of employment. *See Restatement (Second) of Torts* § 909 cmt. b ("although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity ... does an outrageous act" punitive damages are warranted). The jury was not forbidden to consider whether Hazelwood's actions violated Exxon policies. In fact, as previously discussed, paragraph 1 of Instruction No. 36 instructed the jury to "consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations." Phase I Jury Instruction No. 36.

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[13] According to the Navigation and Bridge Organization Manual, the Master was entitled to leave the bridge to rest during times when certain conditions, such as weather, rocks, or traffic, presented a potential threat to the vessel. "In such circumstances, the Master should consider delegating navigational conning responsibilities to the Senior Officer to allow sufficient time for adequate rest." Manual, DX-3450 at 6. If the Master could leave the bridge for a prolonged period to rest, certainly he could leave the bridge for a short period to consult navigation and weather charts.

Paragraph 1, combined with the final paragraph of Instruction No. 36, which instructed the jury to make a scope of employment inquiry pursuant to Instruction No. 33, adequately stated the law.[14] It is doubtful that Hazelwood violated company policy, but even if he did, there was ample evidence for the jury to find that Hazelwood was a managerial agent who, upon leaving the bridge, acted within the scope of his employment.[15]

II. *Phase I Jury Instruction No. 33*

Exxon argues that Instruction No. 33 erroneously attributed to corporations the reckless conduct of sea-based employees acting in a managerial capacity. Instruction No. 33 instructed the jury that "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Phase I Jury Instruction No. 33. Exxon argues that the maritime "strict complicity" rule should have been ap-

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[14] *See Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 879 P.2d 772, 778 (N.M. 1994), which states:

> If we were to adopt the position that misconduct by managing agents who actually control daily operations is not sufficient to trigger corporate punitive damages, large corporations that routinely delegate managerial authority to shape corporate policy by making important corporate decisions could unfairly escape liability for punitive damages by virtue of their size.... When a corporate agent with managerial capacity acts on behalf of the corporation, pursuant to the theoretical underpinnings of the Restatement rule of managerial capacity, his acts are the acts of the corporation; the corporation has participated.

[15] Plaintiffs also argue that Exxon admitted that Hazelwood acted within the scope of employment because Exxon, in a stipulation, admitted that Hazelwood was negligent in leaving the bridge and that Exxon was responsible for Hazelwood's negligence. The stipulation is silent on the scope of employment issue and bears no relevance to Exxon's motion. Additionally, plaintiffs argue that Exxon did not specifically state its reasons for objecting to Instruction No. 36, thus waiving any objection under Federal Rule of Civil Procedure 51. The transcripts reveal that Exxon adequately objected to Instruction No. 36. *See* Exxon's reply at 25 n.18 (quoting 23 Tr. 4085:12 - 4086:8).

plied.

The "strict complicity" rule holds principals liable for punitive damages only if it authorizes or ratifies wanton actions of the agent. *Matter of P & E Boat Rentals, Inc.,* 872 F.2d 642, 650 (5th Cir. 1989). *See The Amiable Nancy,* 16 U.S. (3 Wheat) 546 (1818). In *U.S. Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970), the court, sitting in admiralty, held:

> We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before of after the accident. Punitive damages may also be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him.

Fuhrman, at 1148 (citations omitted).

P & E Boat Rentals recognized that "[t]he only other circuit court sitting in admiralty which has ruled on this question is the Ninth Circuit in *Protectus Alpha Navigation Co. v. N. Pacific Grain Growers,* 767 F.2d 1379 (9th Cir. 1985)." *P & E Boat Rentals,* 872 F.2d at 652. In *Protectus,* a dock foreman cast off the lines securing a burning vessel to the dock. A fireman left aboard was killed and the vessel destroyed.

> The Ninth Circuit, relying primarily on the Restatement of Torts § 909, held that the defendant dock owner was properly cast for punitive damages because his foreman was a managerial employee acting in the course of his employment.

P & E Boat Rentals, 872 F.2d at 652. This court, bound by *Protectus,* followed the *Restatement* and *Protectus* in Instruction No. 33, rather than the "strict complicity" rule.

Exxon argues that *Protectus* is not controlling authority in this case because the actions of sea-based employees were not before the Ninth Circuit. Exxon also argues that *Protectus* did

not evaluate any of the "strict complicity" cases in reaching its decision. Exxon argues that the court cannot extend the land-based principles of *Protectus* to sea-based employees because such an extension would be inconsistent with other Ninth Circuit authority.

The only significant Ninth Circuit case upon which Exxon relies is *Bergen v. F/V St. Patrick,* 816 F.2d 1345 (9th Cir. 1987). On orders of the captain, the crew of the St. Patrick abandoned the ship in heavy seas and most were lost. The district court found the vessel owners liable for punitive damages for failing to provide a licensed master and mate for the vessel. The Ninth Circuit reversed the district court, holding that the vessel owners' negligent failure to comply with licensing requirements could not, without additional findings, be considered willful conduct justifying punitive damages. *Id.* at 1349-50.

Bergen does not undermine *Protectus. Bergen* neither mentions nor discusses "strict complicity" and none of the key "strict complicity" cases are cited. *Protectus* followed the *Restatement* instead of "strict complicity", and *Protectus* is binding on this court.

Exxon next argues that the court should not follow *Protectus* because its reasoning is questionable and unpersuasive. Exxon argues that *Protectus* imposed punitive damages not to punish and deter, but to encourage employers to choose its management personnel wisely. *Protectus,* 767 F.2d at 1386. *Protectus* did not base the punitive award on the reason suggested by Exxon. *Protectus* did state that one purpose of the *Restatement* § 909 was to place upon employers the burden of choosing management personnel wisely. *Id.* Nonetheless, *Protectus* recognized that "[p]unitive damages serve the purpose 'of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.'" *Id.* at 1385 (citations omitted). *Protectus* imposed punitive damages for the same reasons the *Exxon Valdez* jury did; to punish and deter.

The "strict complicity" rule does not apply in the Ninth Circuit, and *Protectus* is binding authority, whether land-based or sea-based employees are involved, for the proposition that "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Phase I Jury Instruction No. 33. Accordingly, Instruction No. 33 was not erroneous.[16]

III. *The evidentiary standard for awarding punitive damages*

Exxon argues that the jury was improperly instructed in Phases I and III that the evidentiary standard for awarding punitive damages in maritime cases is a "preponderance of the evidence", as opposed to a standard requiring "clear and convincing evidence". The court previously considered this issue in Order No. 171.[17] In Order No. 171, the court recognized, as do the parties in the instant briefing, that no federal court has held that the clear and convincing standard of proof for punitive damages should apply in a maritime case. This court further noted:

> [T]he Ninth circuit pattern jury instructions and Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions* (Civil) (1987), use the preponderance of the evidence standard for punitive damages. In the maritime context, the *Federal Jury Practice and Instructions* specifically refer to the preponderance of the evidence standard for punitive damages.

Order No. 171 at 3-4. The court then held:

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[16] Plaintiffs argue that Phase III Instruction No. 30 cured any possible error in Phase I Instruction Nos. 36 and 33. Phase III Instruction No. 30 stated, among other things, that the jury could consider "whether the wrongful conduct and the participation of the employees in such conduct was in conformity with corporate policies." Phase III Jury Instruction No. 30. Phase III instructions, however, did not permit the jury to revisit its Phase I liability determinations. Phase III Jury Instruction No. 20. Phase III Instruction No. 30 did not "cure" any alleged Phase I "errors".

[17] Clerk's Docket No. 4405.

> [T]here is no persuasive authority for the court to create and adopt a new rule for maritime cases. No federal court has held that the clear and convincing standard should be used in maritime punitive damage cases. This court finds that, in the maritime setting, punitive damages shall be considered under the preponderance of the evidence standard.

Id. at 4.

Based on a recent Supreme Court case, *Honda Motor Co., Ltd. v. Oberg,* 114 S. Ct. 2331 (1994), Exxon asks the court to reconsider the evidentiary standard for punitive damages in maritime cases. *Honda Motor Co.* is a non-maritime personal injury case in which the Supreme Court held that the state of Oregon violated due process by prohibiting review of the size of a punitive damages award. The law violated due process because judicial review of a punitive award is a safeguard against excessive awards.

Honda Motor Co. did not hold that the clear and convincing evidentiary standard for punitive damages should be used in either maritime or non-maritime cases. Rather, the significance of *Honda Motor Co.,* and other recent Supreme Court cases which have considered punitive damages, is that procedural safeguards must be employed to ensure that punitive damage awards will comport with due process. *See TXO Prod. Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Corp. v. Haslip,* 499 U.S. 1 (1991). In *TXO,* the court affirmed use of jury instructions which followed the preponderance of the evidence standard because due process protections were in place. *TXO,* 113 S. Ct. at 2723. *Haslip,* also approved a preponderance standard. *Haslip* stated:

> There is much to be said in favor of a State's requiring, as many do ... a standard of "clear and convincing evidence" ... We are not persuaded, however, that the Due Process clause requires that much. We feel that the lesser standard ... "reasonably satisfied from the

> evidence" - when buttressed ... by ... procedural and substantive protection[s] ... is constitutionally sufficient.

Haslip, 499 U.S. at 23 n.11.

Throughout the course of the *Exxon Valdez* pre-trial motion practice and trial, this court has followed the holdings of *TXO, Haslip,* and more recently *Honda Motor Co.,* to guarantee that plaintiffs' claim for punitive damages would comport with due process. The court has also granted the majority of Exxon's motions to exclude evidence. The court, on Exxon's motion, created a mandatory punitive damages class for *Exxon Valdez* claims for punitive damages to prevent separate state and federal court punitive damage awards which might escape collective judicial review. In the case at bar, the preponderance of the evidence standard has been buttressed by procedural and substantive protections and is, therefore, constitutionally sufficient to satisfy the due process clause.

The parties debate the significance of *Alegria Enterprises v. Immel's Marine and John Dykstra,* No. 90-8127, 1992 WL 97913, (E.D. Pa. May 5, 1992), in which the court, sitting in admiralty, considered a claim against a salvage company that allegedly damaged a yacht during salvage operations. Exxon argues that *Alegria* is a case for compensatory but not punitive damages. Plaintiffs, of course, argue that *Alegria* applied the preponderance of the evidence standard in a punitive damages case. The *Alegria* court stated as follows:

> Finally, plaintiff seeks punitive damages. Obviously, since I have concluded that plaintiff has not proved negligence and certainly has not proved gross negligence or wilful or wanton misconduct, punitive damages cannot be awarded.

Id. at * 14, 1992 U.S. Dist. Lexis 6469 at *38. The court later held, in language typically associated with punitive damages, that:

> Plaintiff failed to prove by a preponderance of the

> evidence that the defendants ... were ... grossly or wilfully negligent or acted carelessly, wantonly, or maliciously in conducting and carrying out the salvage of *Alegria.*

Id. at *15, 1992 U.S. Dist. Lexis 6469 at *42. *Alegria* considered punitive damages under the preponderance of the evidence standard, and *Alegria* reached the definitive conclusion that "[p]laintiff is not entitled to recover punitive damages...." *Id.* at *15, 1992 U.S. Dist. Lexis 6469 at *43.

Alegria is the only case to consider the appropriate evidentiary standard in maritime punitive damage cases. Yet the significance of *Alegria* is secondary to the Supreme Court's concern that all punitive damage cases, maritime or otherwise, comport with due process. The clear and convincing standard may be necessary when due process protections are not employed. In the case at bar, however, the court is satisfied that Exxon's due process rights were protected; therefore, the preponderance of the evidence standard was appropriate.[18]

IV. *Conduct which warrants punitive damages*

Exxon argues that the court improperly instructed the jury that it could award punitive damages for conduct which manifests "reckless disregard for the rights of others" . Exxon's motion at 40 (quoting Phase I Jury Instruction No. 27).[19] The court defined reckless conduct as follows:

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[18] Exxon argues that of the 45 states that allow punitive damages, 28 follow the clear and convincing evidence standard. Exxon recognizes, however, that *Haslip* does not require that the clear and convincing evidence standard be followed in punitive cases. Exxon argues that, "[t]he issue here ... is not whether a clear and convincing evidence requirement is required by due process, but whether the Court should adopt such a requirement as a matter of substantive federal maritime law." Exxon's reply at 35. This court elects to follow *Haslip's* finding that the clear and convincing evidence standard is not required. Exxon's due process concerns were protected, and this court again declines to be the first admiralty court to adopt the clear and convincing standard for maritime punitive damages cases.

[19] Phase I Jury Instruction No. 27 stated:

> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively conscious must in fact have eventuated. Third, a defendant must have disregarded the risk in determining how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Phase I Jury Instruction No. 28.

Exxon argues that the jury should have been instructed that punitive damages may be awarded only for conduct which is malicious, or conduct which is consciously done in such deliberate disregard of serious danger as to be the moral equivalent of actual malice. Exxon argues that the court failed

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> The burden is on the plaintiffs to establish, by a preponderance of the evidence in the case, the essential elements of their claims for punitive damages. In this case, the essential elements are:
>
> First, that a defendant's conduct before the grounding of the *Exxon Valdez* manifested reckless or callous disregard for the rights of others; and
>
> Second, that such conduct by a defendant was a legal cause of the grounding of the *Exxon Valdez.*

Exxon also argues that Phase I Jury Instruction No. 40, which refers to reckless conduct, is erroneous.

to instruct the jury that punitive damages require despicable conduct, aggravation, outrage, evil motive, fraud or oppression and that negligence or carelessness, no matter how gross or aggravated, do not suffice.

Exxon argues that "[p]unitive damages should be awarded in maritime cases *only* for conduct which is malicious, or conduct which is consciously done in such deliberate disregard of serious danger as to be the moral equivalent of actual malice." Exxon's memorandum in support of motion at 45. Exxon's concerns were reflected in Instruction No. 28, quoted above, which defined reckless behavior. Instruction No. 28 told the jury that a defendant must be "subjectively conscious of a particular grave danger" and that the defendant "disregarded the risk in determining how to act."[20]

The language used in Instruction No. 28 is similar to that used in *Protectus Alpha Navigation v. Northern Pac. Grain Growers, Inc.*, 767 F.2d 1379 (1985). *Protectus* stated that punitive damages:

> [M]ay be imposed for that conduct which manifests 'reckless or callous disregard' for the rights of others, *Smith v. Wade,* 461 U.S. 30, 51 (1983), or for conduct which shows 'gross negligence or actual malice or

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[20] In a footnote to Exxon's motion, Exxon argues, without support, that Instruction No. 28 does not cure the prejudice in Instruction No. 27 because "as long as the term 'reckless' is used, there is a great danger that the jury will base an award on conduct that constitutes aggravated negligence as opposed to wilful or malicious conduct or its functional equivalent." Exxon's memorandum in support of motion at 40 n.39. Instruction No. 28 carefully defined recklessness and distinguished between recklessness and negligence. It is always possible for a jury to misconstrue or misunderstand any instruction, but Exxon does not argue that Instruction No. 28 was incomprehensible. In fact, Exxon states that "the Court gave a careful definition of the conduct which qualifies as 'reckless or callous disregard for the rights of others.'" Exxon's memorandum in support of motion at 40 n.39. Instruction No. 28 was clear and understandable. Use of the term "reckless" when carefully defined, would not pose a "great danger" that the jury would base it decision on aggravated negligence as opposed to recklessness.

> criminal indifference.' *In re Marine Sulphur Queen,* 460 F.2d [89], 105 [(2d Cir.), *cert. denied,* 409 U.S. 982 (1972)].

Protectus, 767 F.2d at 1385.

Although *Protectus* stated that punitive damages could be imposed upon a finding of "actual malice", *Protectus* also stated that punitive damages could be imposed for reckless and callous conduct. In *Protectus,* the Ninth Circuit found that the conduct of a dock foreman "clearly manifested a 'reckless or callous disregard' for the rights of Protectus Alpha sufficient for the imposition of punitive damages." *Id.*[21] Having followed *Protectus,* Instruction No. 28 was not erroneous.

Exxon argues that, "[t]he jury should have been instructed that punitive damages can only be awarded for conduct which is malicious, or which is consciously done in such deliberate disregard of serious danger as to be the moral equivalent of actual malice". Exxon's reply at 39 (emphasis omitted). Exxon subsequently argued that:

> Defendants do not contend that punitive damages can be awarded only upon a showing of "actual malice" or specific intent to cause harm; they recognize that conscious and deliberate disregard of serious danger can supply the requisite state of mind.... [D]efendants' objection is that the term "recklessness," no matter how carefully defined, too easily slips into a colloquial shorthand for what is merely aggravated negligence.

Exxon's reply at 40. As noted above at note 16, Exxon offers no support for the proposition that a strict and careful definition of recklessness will somehow become "colloquial shorthand" for aggravated negligence. The court gave the jury a detailed, four-part definition of "reckless" and carefully distinguished between "reckless" and "negligence" . The

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[21] *Protectus* followed *Smith v. Wade,* 461 U.S. 30 (1983), which held that in a § 1983 action, punitive damages could be awarded when the defendants conduct "involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56.

language of Instruction No. 28 followed *Protectus* so that punitive damages could not be imposed unless the jury found that Exxon's conduct "clearly manifested a 'reckless or callous disregard' for the rights of [plaintiffs]." *Protectus,* 767 F.2d at 1385.[22]

V. *Conclusion*

For the above stated reasons, Exxon's and Hazelwood's motions for a new trial on plaintiffs' punitive damages claims (jury instructions) are denied.

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[22] Exxon argues that the court should follow the trend in state court cases to allow punitive damages only where there is "conscious or deliberate disregard" or "willful and conscious disregard" of the rights of others. Exxon's memorandum in support of motion at 43-44 (citations omitted). The language of the state cases is similar to both *Protectus* and Instruction No. 28.

Exxon also argues that in maritime cases, punitive damages involve intentional, deliberate misconduct. None of Exxon's supporting cases are from this century. Regardless, Instruction No. 28 referred to a "conscious choice of action ... with knowledge of serious danger to others...." Phase I Jury Instruction No. 28. The language in Instruction No. 28 differs little in substance from language requiring "deliberate misconduct".

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	No. A89-0095-CV (HRH) (Consolidated)

ORDER NO. 196

MOTION IN LIMINE TO EXCLUDE EVIDENCE OF OR COMMENT UPON EXXON DEFENDANTS' TOTAL WEALTH, NET WORTH, EARNINGS, CASH FLOW OR OTHER INDICIA OF FINANCIAL CONDITION

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have filed a motion in limine to exclude evidence of, or comment upon, their total wealth, net worth, earnings, cash flow or other indicia of financial condition[1]. Plaintiffs oppose the motion,[2] and Exxon has replied.[3] Exxon's request for oral argument is deemed unnecessary and is denied.[4]

Exxon recognizes that common law traditionally regards wealth as a permissible consideration in setting a punitive I damage award. Clerk's Docket No. 4186 at 4. See TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711, 2722 n.28 (1993) ("Under well-settled law . . . factors such as [net worth] are typically considered in assessing punitive damage.");[5] Newport v. Fact Concerts, Inc., 453 U.S. 247, 270

[1] Clerk's Docket No. 4186.

[2] Clerk's Docket No. 4360.

[3] Clerk's Docket No. 4441.

[4] Clerk's Docket No. 4452.

[5] TXO recognized that emphasis on the wealth of a wrongdoer in a jury instruction increased the risk that the award may have been influenced by prejudice against large corporations. Nonetheless, the Supreme Court stated that a defendant's financial position could be taken into account

(1981) ("evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded"). Exxon asserts that it "is not arguing that a maritime court cannot admit evidence of wealth in an appropriate case." Clerk's Docket No. 4441 at 2. Additionally, Exxon recognizes the notion "that wealth should be admitted because the amount required for deterrence must be proportional to the means of the offender." Id. at 4, and notes the ample "support for that rationale in land-based case law . . . ." Id. Nonetheless, Exxon argues that under the circumstances of the case at bar, this court, applying maritime law, should disregard the common law, "blaz[e] the trail," Clerk's Docket No. 4186 at 12, and preclude evidence of Exxon's wealth as irrelevant under Rule 402 of the Federal Rules of Evidence.

Admiralty law does not specifically address whether a defendant's wealth should be considered when assessing punitive damages. When maritime law is silent, courts typically look to land-based law for guidance. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 (9th Cir. 1992).

As Exxon concedes, land-based law permits a jury to consider a defendant's wealth when assessing punitive damages. Exxon's arguments that the court should ignore land-based law and fashion a new rule for admiralty are not persuasive. Exxon argues that punishing Exxon will, in reality, punish innocent shareholders and other blameless parties. See, Zazu v. Designs v. L'Oreal. S.A., 979 F.2d 499, 508-09 (7th Cir. 1992).[6] That argument, however, addresses more the

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when assessing punitive damages. 113 S.Ct. at 2723. See also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (financial position is one factor which may be considered in assessing punitive damages) .

[6] Zazu noted that a defendant's wealth is a factor when "'[a]n amount sufficient to punish or to deter one individual may be trivial to another.'" 979 F.2d at 508. (citations omitted). Zazu stated in dicta, however, that corporations are not wealthy in the sense that persons are because investors own the net worth of the business. Thus, according to Zazu, investors of average wealth pay the punitive awards because their shares decrease in

propriety of punitive damages than a jury's consideration of corporate wealth. The propriety of punitive damages as a legal remedy is not the point of Exxon's motion. Furthermore, shareholders who invest in Exxon bear the risk that Exxon will spill oil, and if they do not wish to bear that risk, they may invest elsewhere. Concern over a shareholder's investment is no reason to avoid punitive damages when they are warranted.

Exxon argues that a consideration of corporate wealth could mean that Exxon would be punished to a greater extent than a small, less successful company when each committed the same harm. Exxon also argues that it is illogical to assume that a successful corporation values money less than a less successful corporation and that it takes a larger award to deter the successful corporation. Again, these arguments are more suited to the propriety of punitive damages or argument to the jury. Regardless, the arguments are specious. A dollar amount which would seriously impact a small company might not even merit a footnote in an annual report of one of the largest corporations in the world.

Exxon argues that to consider wealth perversely assumes that "having a large net worth [is] the wrong to be deterred." Zazu Designs, 979 F.2d at 508. Exxon's argument mixes the issues. If all companies, no matter how large or small, were assessed the same punishment for the same misconduct, the largest companies could afford to continue to misbehave. That is why common law permits consideration of corporate wealth.

Exxon's arguments that the court should ignore well-settled law are not persuasive, and the court finds that evidence of Exxon's wealth, net worth, earnings, cash flow

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value. Consequently, Zazu stated that "[s]eeing the corporation as wealthy is an illusion . . . ." Id. To suggest that a corporation which earns multi-billion dollar profits annually is not "wealthy" is also an illusion. Regardless, the Supreme Court has specifically found that it is permissible for a jury to consider the wealth of a corporation when assessing punitive damages. TXO Prod. Corp v. Alliance Resources Corp., 113 S.Ct. 2711, 2723 (1993).

and other indicia of financial condition may be considered by the jury as relevant evidence under Rule 402 in the punitive damages phase of this case.

Exxon also argues that the evidence, even if relevant, should be excluded under Rule 403 as unfairly prejudicial. Evidence is excluded when it could "arouse irrational fears and prejudices." United States v. Hitt, 981 F.2d 422, 424 (9th Cir. 1992). The comments to Rule 403 suggest that evidence should be excluded for risk of unfair prejudice if it could "suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed R. Evid. 403 (comment). Given that a jury's consideration of a wrongdoer's wealth is well established in the common law, there is no reason to suggest that such a consideration could lead to unfair prejudice or a decision based on emotions. The court finds that it would not be unfairly prejudicial to Exxon for the jury to consider its corporate wealth.

For the above stated reasons, Exxon's motion in limine to exclude evidence of, or comment upon, its total wealth, net worth, earnings, cash flow or other indicia of financial condition is denied.

DATED at Anchorage, Alaska, this 31 day of March, 1994.

s/
United States District Judge

IMMEDIATE NOTIFICATION
IS REQUESTED

APPENDIX I

United States Court of Appeals
For The Ninth Circuit.

In re: The EXXON VALDEZ, Grant Baker; Sea Hawk Seafoods, Inc.; Cook Inlet Processors, Inc.; Sagaya Corp.; William Mcmurren; Patrick L. Mcmurren; William W. King; George C. Norris; Hunter Cranz; Richard Feenstra; Wilderness Sailing Safaris; Seafood Sales, Inc.; Rapid Systems Pacific Ltd.; Nautilus Marine Enterprises, Inc.; William Findlay Abbott, Jr., *Plaintiffs-Appellees*, *v.* Exxon Mobile Corp; Exxon Shipping Co., *Defendants-Appellants*.	No. 04-35183 D.C. No. CV-89-00095-HRH ORDER AMENDING OPINION AND DISSENTS TO ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted
January 27, 2006-San Francisco, California
Filed December 22, 2006
Amended May 23, 2007

Before Mary M. Schroeder, Chief Judge,
James R. Browning and Andrew J. Kleinfeld, Circuit Judges.

Order;
Dissent to Order by Judge Kozinski;
Dissent to Order by Judge Bea;
Per Curiam Opinion;
Dissent by Judge Browning

COUNSEL

Walter Dellinger, O'Melveny & Myers, LLP, Washington, DC, and John F. Daum, O'Melveny & Myers LLP, Los Angeles, CA, for the defendants-appellants, cross-appellees.

Brian B. O'Neill, Faegre & Benson, Minneapolis, MN, and David C. Tarshes, Davis, Wright, Tremaine, LLP, Anchorage, AK, for the plaintiffs-appellees, cross-appellants.

ORDER

IT IS ORDERED THAT:

The opinion in *In re Exxon Valdez,* 472 F.3d 600 (9th Cir. 2006) is amended as follows: On page 621, delete the first full paragraph commencing with "There is also a limit on the law of the case doctrine ..." and concluding with "... may not generally be used as part of the calculation of harm."[*]

With that amendment, the panel has voted to otherwise deny the petition for panel rehearing.

The petition for panel rehearing is DENIED.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. 35.[1]

The petition for rehearing en banc is DENIED.

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[1] Judges Wardlaw, Tallman, and Ikuta were recused in this matter and took no part in the voting.

[*The deleted paragraph read as follows:

There is also a limit on the law of the case doctrine. One exception to this doctrine exists for an intervening change of law. *See United States v. Bad Marriage,* 439 F.3d 534, 538 (9th Cir. 2006). In this case, there is such a change. Subsequent to our decision in *Punitive Damages Opinion I,* the Supreme Court decided *State Farm.* In that case, the fact that State Farm "paid the excess verdict before the complaint was filed," *State Farm*,538 U.S. at 426, 123 S.Ct. 1513, was a mitigating factor reducing the ratio. The Supreme Court did not use it to reduce the amount of total harm. The Court in *State Farm* itself took into account, in its consideration of whether the ratio was proper, the substantiality and completeness of the compensatory award, the essentially economic nature of the harm, the likelihood that the punitive award duplicated the compensatory, and the defendant's prompt settlement of compensatory damages. *Id.* All these mitigating factors were used to assess whether the ratio itself was likely to comply with due process. *State Farm* did not use such mitigating factors to reduce the harm. *State Farm* makes untenable the idea that a defendant's voluntary, pre-judgment payment of compensatory damages may not generally be used as part of the calculation of harm. *Punitive Damages Opinion I,* 270 F.3d at 1244.]

KOZINSKI, Circuit Judge, dissenting from the order denying the petition for rehearing en banc.

For two centuries, maritime law has protected ship owners from liability for punitive damages based solely on the fault of captain and crew. *See* Thomas J. Schoenbaum, Admiralty & Maritime Law § 5-17 (2005) ("[A]dmiralty cases deny punitive damages in cases of imputed fault."). The Supreme Court first erected this bulwark in *The Amiable Nancy,* 16 U.S. 546, 558-59 (1818), explaining that a ship owner can't be subject to "exemplary damages" for the actions of its agent if the owner is "innocent of the demerit of this transaction, having

neither directed it, nor countenanced it, nor participated in it in the slightest degree."

Dutifully following *The Amiable Nancy,* we held in *Pacific Packing & Navigation Co. v. Fielding,* 136 F. 577, 580 (9th Cir. 1905), that punitive damages are unavailable against a ship owner for the reckless conduct of the captain. We abruptly changed course in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.,* 767 F.2d 1379 (9th Cir. 1985), and held that, under maritime law, punitive damages are available against an owner for the actions of his agent who "was employed in a managerial capacity and was acting in the scope of employment." *Id.* at 1386 (quoting Restatement (Second) of Torts § 909).[1]

The conflict between *Protectus Alpha* and *Pacific Packing* washed ashore in *In re the Exxon Valdez* (*Valdez I*), 270 F.3d 1215 (9th Cir. 2001).[2] Following *Protectus Alpha,* and consigning *The Amiable Nancy* and *Pacific Packing* to the dustbin of history, the district court instructed the jury that Exxon was responsible for the reckless acts of the captain if he was "employed in a managerial capacity while acting in the scope of [his] employment." *See Valdez I,* 270 F.3d at 1233 (internal quotations omitted). Once the jury found that the

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[1] While taking no account of *The Amiable Nancy, Protectus Alpha* pointed to state cases imposing vicarious punitive liability based upon "the reality of modern corporate America," 767 F.2d at 1386, but nothing has changed in the relationship between ship owner and captain that would justify importing this innovation into maritime law, *see* Schoenbaum, Admiralty & Maritime Law § 5-17 ("[S]tate tort law reforms do not affect admiralty punitive damage awards."). The captain has always borne the responsibility for safeguarding his crew and third parties, and this hasn't changed in modern times. *See, e.g., Boudoin v. J. Ray McDermott & Co.,* 281 F.2d 81, 84-85 (5th Cir. 1960); *Northern Queen Inc. v. Kinnear,* 298 F.3d 1090, 1096 (9th Cir. 2002).

[2] While this conflict didn't come to the full court's attention until Exxon's petition for rehearing after *In re the Exxon Valdez* (*Valdez II*), 472 F.3d 600 (9th Cir. 2006) (per curiam), we can consider en banc any issue in *Valdez I* under *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.,* 341 F.3d 987, 995-96 & n. 13 (9th Cir. 2003) (en banc).

captain acted recklessly, it was also required to find that Exxon acted recklessly. On appeal, the panel recognized that *Protectus Alpha* conflicts with *Pacific Packing;* at that point, it was duty-bound to call this case en banc. *See United States v. Hardesty,* 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam). Instead, it scuttled the en banc process and held that *Protectus Alpha's* imposition of punitive damages based on vicarious liability is now the maritime rule in our circuit. *See Valdez I,* 270 F.3d at 1235-36.[3]

This decision puts us at loggerheads with every other circuit that has considered this issue. In *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970), the Sixth Circuit followed *The Amiable Nancy* and *Pacific Packing* in holding that a ship owner cannot be held liable for punitive damages "unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident ... [or] the acts complained of were those of an unfit master and the owner was reckless in employing him." *Id.* at 1148. The Fifth Circuit followed the same course in *In re P & E Boat Rentals, Inc.,* 872 F.2d 642 (5th Cir. 1989). In rejecting *Protectus Alpha,* it observed that admiralty courts, going back to *The Amiable Nancy,* have held that punitive damages are unavailable based on vicarious liability. *See id.* at 652. Finally, in *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 705 (1st Cir. 1995), the First Circuit, while taking a somewhat broader view of what con-

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[3] In overruling *Pacific Packing,* the panel relied exclusively on *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). *See Valdez I,* 270 F.3d at 1235-36. The panel badly missed the mark. *The Amiable Nancy* and *Pacific Packing* held that punitive damages, based on vicarious liability, are not available under maritime law. By contrast, *Haslip* was a constitutional decision, holding that state law could, consistent with due process, impose punitive damages based on vicarious liability. No one disputes that maritime law *could* constitutionally impose punitive damages under such circumstances. The question is whether it does. For two centuries, every court (except ours in *Protectus Alpha*) has held it doesn't, and nothing the Supreme Court said in *Haslip* could possibly have changed that.

stitutes a ship owner's fault, endorsed the principle that "some level of culpability" on the part of the ship owner is required before punitive damages may be imposed under maritime law.

The panel's decision is also contrary to the modern drift of maritime law, which has reaffirmed its historical reluctance to impose hedonic and punitive damages at all. *See Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1508 n. 11 (5th Cir. 1995) (en banc). In *Miles v. Apex Marine Corp.,* 498 U.S. 19, 31-33 (1990), a unanimous Supreme Court held that the family of a seaman couldn't recover nonpecuniary damages in a wrongful death action brought under general maritime law. Courts have read *Miles* as barring nonpecuniary damages, including punitive damages, for wrongful death, personal injury and other related actions brought on behalf of seamen, *see Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 150205 & n. 14 (9th Cir. 1995); *Guevara,* 59 F.3d at 1503, 150607, 1512, and some have interpreted *Miles* as applying to non-seamen, *see Wahlstrom v. Kawasaki Heavy Indus., Ltd.,* 4 F.3d 1084, 1092 (2d Cir. 1993). While these cases involve the intersection of federal statutes with maritime common law, they confirm the Supreme Court's observation in *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 270 (1972), that the "long experience [of] the law of the sea ... is concerned with ... limitation of liability." It makes no sense to hold that families of those who are killed and maimed at sea can't get punitive awards, or even damages for pain and suffering or loss of consortium, and yet *reverse* centuries of maritime law to make it easier for businessmen to recover billions in punitive damages for harm to their commercial interests.

The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction-a staggeringly huge area-to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves against our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen-ships sink, collide and run aground-often because of se-

rious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the under standing that they won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong, *The Amiable Nancy,* 16 U.S. at 559; the panel opinion has thrown this protection overboard.

This case demonstrates the pernicious impact of departing from the traditional protections of maritime law. The plaintiffs here suffered no physical injuries-their only claim was that the oil spill harmed their commercial fishing interests. *See Valdez I,* 270 F.3d at 1221. After the accident, Exxon acted as a model corporation-it spent over $2 billion to remove oil from the water and adjacent shore and $900 million to restore damaged natural resources. *Id.* at 1223. Furthermore, before the jury ever entered a verdict, Exxon compensated the plaintiffs for most of their damages. *See Valdez II,* 472 F.3d at 611-12. Yet the jury, perhaps subscribing to the maxim that a rising tide lifts all boats, took advantage of the vicarious liability instruction to award billions in punitive damages as a windfall to their fellow Alaskans.

As Exxon learned, a company can voluntarily compensate harmed parties, take every step imaginable to undo the tragic mess its agents created, and still be subject to the largest punitive award ever upheld by a federal court-all because it had the misfortune of hiring a captain who committed a reckless act. Moreover, the effects of this opinion are not limited to shippers and docks based in the Ninth Circuit: The shipping business knows no circuit, or even national, boundaries. Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

Because my colleagues don't seem to share my concern that we have undermined the uniformity of maritime law and

contravened long-settled Supreme Court precedent, as well as the unanimous view of our sister circuits, I dissent.

BEA, Circuit Judge, dissenting from the order denying the petition for rehearing en banc.

I agree with Judge Kozinski that punitive damages should not have been awarded in this case. However, even if punitive damages were appropriate, I note that the ratio of punitive damages to compensatory damages is excessive. The Supreme Court has instructed that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America v. Gore,* 517 U.S. 559, 575 (1996). As the panel itself noted, the reprehensibility of Exxon's conduct here is "at most, a mid range." *In re the Exxon Valdez* (*Valdez II*), 472 F.3d 600, 618 (9th Cir. 2006) (per curiam). Importantly, the panel correctly concluded that "Exxon's conduct caused no actual physical harm to people," although it did cause "more than mere economic harm to them, because the economic effects of its misconduct produced severe emotional harm as well." *Id.* at 614.

Of course, the plaintiffs in *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003), had economic and emotional harm also. In that case, the Campbells brought a claim against State Farm for bad faith failure to settle within policy limits, fraud, and intentional infliction of emotional distress. The emotional distress the Campbells suffered was not limited to that caused by their business losses, as the Exxon Valdez plaintiffs suffered. The Campbells were faced with a large potential judgment beyond insurance limits coverage-which the insurance company gaily told them would probably cost them their house. As in *Valdez II,* State Farm liquidated all economic damage by paying the third-party judgment *before* the Campbells filed their complaint. Nonetheless, the court awarded $1 million in compensatory damages and $25 million in punitive damages. The Supreme

Court reversed the judgment and held that a 25 to 1 ratio of punitive to compensatory damages was constitutionally invalid as excessive. Instead, even considering the economic and emotional harm, in remanding, the Supreme Court stated "a punitive damages award at or near the amount of compensatory damages" would be appropriate. *Id.* at 425.

Although the Supreme Court has declined to set a bright-line ratio for punitive damages awards, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Moreover, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps *only equal to compensatory damages,* can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). The Supreme Court characterized the Campbells's $1 million compensatory damages award as "substantial." *Id.* at 426. Surely, then, the $513 million in compensatory damages here is also "substantial" damages. Hence, the 5:1 ratio adopted by the majority seems to violate the limits implied by the Court for a case where the reprehensibility of the conduct of the defendant does not include infliction of physical injury, nor an assessment for environmental damage. Accordingly, I respectfully dissent from denial of rehearing en banc.

APPENDIX J

STATUTORY PROVISIONS INVOLVED

RELEVANT CRIMINAL AND CIVIL PENALTIES UNDER THE CLEAN WATER ACT

Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c), 1319(d), 1321(b) and 1321(f), as they read on March 24, 1989:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

. . .

§ 1319. Enforcment

. . .

(c) Criminal penalties

(1) Negligent violations

Any person who-

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . .

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who-

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328 or 1345 of this title . . .

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

. . .

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

. . .

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title . . . and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

. . .

§ 1321

. . .

(b) Congressional declaration of policy against discharges of oil or hazardous substances; . . . ; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]).

. . .

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

. . .

(6) . . .

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the

owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

. . .

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

. . .

(4) The costs of removal of oil or hazardous substance for which the owner or operator of a vessel or on shore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a

result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

18 U.S.C. § 3571(d)

(d) Alternative fine based on gain or loss. — If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined nor more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

APPENDIX K

JURY INSTRUCTIONS ON VICARIOUS LIABILITY FOR PUNITIVE DAMAGES

JURY INSTRUCTION NO. 33

The Exxon defendants, as corporations, may act only through natural persons, and especially through their officers and employees. A corporation is not responsible for the reckless acts of all of its employees. A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

JURY INSTRUCTION NO. 34

An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

JURY INSTRUCTION NO. 36

Since plaintiffs in this case seek punitive damages against corporations, you must consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations.

Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the policies or directions, then an employee's acts contrary to such policies or instructions are not

attributable to the employer, and you should find that the employer's conduct was not reckless.

However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ,	No. A89-0095-CV (HRH) (Consolidated)

SPECIAL VERDICT
FOR PHASE I OF TRIAL

Interrogatory No. 1: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was negligent, as that term has been defined in the instructions, and that his negligence was a legal cause of the grounding of the Exxon Valdez on March 24, 1989.

Yes: ✓ No: _____

Interrogatory No. 2: Do you unanimously find from a preponderance of the evidence that defendant Hazelwood was reckless, as that term has been defined in the instructions, and that his recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: ✓ No: _____

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that the Exxon defendants were reckless, as that term has been defined in the instructions, and that their recklessness was a legal cause of the grounding of the Exxon Valdez?

Yes: ✓ No: _____

If you have completed all of the answers to the questions required of you by this verdict, please have your presiding juror sign the verdict and date it and return it to the court.

DONE at Anchorage, Alaska, this 13th day of June 1994.

/s
Presiding Juror