No. 07-219

IN THE
SUPREME COURT OF THE UNITED STATES

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO RESPONDENTS' SUBMISSION WITH RESPECT TO RULE 42.1

Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively, "Exxon") agree with plaintiffs that whether to award interest, on top of the $507.5 million punitive damages award that the Court has allowed, should be decided by this Court, and should be decided now. Pls. Rule 42.1 Submission ¶ 9. Indeed, it necessarily will be decided now: under Rule 42.1, unless this Court's judgment addresses the issue of interest explicitly, no interest is allowed. To forestall further litigation over the operation of Rule 42.1, however, Exxon further agrees that this Court should exercise its authority under the Rule to address the interest question expressly.

But Exxon does not agree that there is any sound basis to award plaintiffs what they seek – approximately $488 million over and above the $507.5 million that this Court determined was the legally proper amount to punish and deter. As will

be shown, plaintiffs do not currently have any legal entitlement to interest, and there is no good reason for this Court to grant them the interest under Rule 42.1.

1. Rule 42.1 provides in relevant part: "If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest." The judgment here was modified with instructions that a judgment for money be entered below, so the Rule is directly applicable by its terms. The issue is whether interest should be awarded from the date of the original district court judgment (September 24, 1996) as plaintiffs seek, or whether it should be awarded only from some later date, such as the date of this Court's judgment fixing the legally proper amount of punitive damages.

Rule 42.1 is exactly parallel to Rule 37(b) of the Federal Rules of Appellate Procedure. *See* Gressman et al., Supreme Court Practice §15.9, at 825 n.40 (2007); Moore's Federal Practice § 542.02 (1997). Indeed, it was added to this Court's rules in 1980, in imitation of Appellate Rule 37(b), which had been included in the original Federal Rules of Appellate Procedure promulgated in 1968. Both rules provide that when a judgment under review is reversed or modified, it is up to the reviewing court to determine the consequences of its ruling for the question of whether interest on the reduced judgment should be paid, and if so from what date. *Id.* Even before the enactment of these rules, the default rule was clear: if a reviewing court fails to provide directions in its judgment or mandate for the payment of interest, no interest is allowable. *Briggs v. Pa. R.R. Co.,* 334 U.S. 304

(1948); *see* Fed. R. App. P. Rule 37(b), 1967 Adv. Comm. Note; Wright, Miller & Cooper, Fed. Prac. & Proc. § 3983, at 635 (3d ed. 1999). The purpose of the rules is to remind reviewing courts to make provision for interest if they wish to allow it. *See* Fed. R. App. P. 37, 1967 Adv. Comm. Note. What interest to allow, and from what date, is left to the broad discretion of the reviewing court based on the equities of the case and the totality of the circumstances. *See Tronzo v. Biomet, Inc.*, 318 F.3d 1378, 1381 (Fed. Cir. 2003); *Smith v. Nat'l R.R. Passenger Corp.*, 856 F.2d 467, 473 (2d Cir. 1988); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986) (en banc).

2. Plaintiffs do not urge any affirmative reason this Court should exercise its authority under Rule 42.1 to include in its judgment interest running back to the original district court judgment. Instead plaintiffs contend that Rule 42.1 is not applicable at all, and that the district court's award of interest is what matters here. According to plaintiffs, Rule 42.1 – and, necessarily, its cognate Appellate Rule 37(b) – applies only when a reviewing court reverses a judgment for a defendant and awards money to the plaintiff. Pls. Rule 42.1 Submission ¶ 7. That construction squarely contradicts the plain language of the Rule, which applies to *all* appellate modifications, not just those that reverse judgments for defendants. So far as Exxon is aware, no court has ever suggested such a construction of either Rule 42.1 or Appellate Rule 37(b), and the latter rule is regularly applied when, as here, a judgment for plaintiff is modified or reduced. *E.g., Loughman v. Consol-Pa. Coal Co.*, 6 F.3d 88 (3d Cir. 1993); *Cordero v. Jesus-Mendez*, 922 F.2d 11 (1st Cir.

1990). It is thus not the district court's interest award that matters, but the interest award, if any, made by the reviewing court that has modified the underlying judgment and ordered a new judgment entered.

3. The Ninth Circuit's judgment in this case ordered that the punitive damages award be reduced to $2.5 billion, but did not award interest on the punitive damages judgment as so reduced. Pet. App. 42a. (Nor did the Ninth Circuit award interest in its opinion on the first appeal. Pet. App. 117a.) As the case came to this Court, then, there was no interest included in the judgment as modified.[1] The question now is whether this Court should exercise its own authority under Rule 42.1 and grant plaintiffs interest on the $507.5 million in punitive damages they will be awarded pursuant to this Court's directions. Plaintiffs have not offered any affirmative reason this Court should also direct an award of $488 million in interest, and, as explained below, Exxon submits there is no persuasive reason for the Court to do so.

a. In this Court's only modern decision, other than *Briggs,* on the subject of post-judgment interest, the Court held that "[t]he purpose of post-judgment interest is to compensate the successful plaintiff for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser*

[1] As explained in the text, because Appellate Rule 37(b) governs interest on any judgment modified on appeal, the district court's interest award was irrelevant. Plaintiffs nevertheless err in asserting that Exxon did not challenge the district court's interest award before the Ninth Circuit. Pls. Rule 42.1 Submission ¶ 1. In fact, Exxon argued on appeal that the interest contributed to making the underlying punitive damages award unconstitutionally excessive. Joint Opening Brief of Appellants Exxon Corporation and Exxon Shipping Company, No. 97-35191 (9th Cir., filed June 26, 1997), at 85.

Aluminum & Chem. Co. v. Bonjorno, 494 U.S. 827, 835-36 (1990). Other courts have similarly emphasized that the principal purpose of post-judgment interest is to provide compensation to a "wronged plaintiff." *Affiliated Capital*, 793 F.2d at 712; *Smith*, 856 F.2d at 473. But here there is no kind of "loss" within the meaning of *Bonjorno*, and there is no plaintiff "wronged" by lack of compensation. On the contrary, all plaintiffs here were fully compensated years ago; no plaintiff has any type of personal or property right to be paid punitive damages; such damages are imposed purely in the public interest for the purposes of punishment and deterrence. *Exxon Shipping Co. v. Baker,* 554 U.S. __, ___ (2008), slip op. 19 & n.9 (June 25, 2008); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *In re Paris Air Crash,* 622 F.2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.). And those purposes are necessarily forward-looking. The Court has held that $507.5 million is the legally-correct amount necessary to deter Exxon and others from future oil spills; the deterrent for future spills will thus be the same whether post-judgment interest is paid or not. Future spillers in Exxon's position will know that their punishment will be in an amount up to the extent of damage they cause.

b. Similarly, there was no "ascertainment" within the meaning of *Bonjorno* of the amount of "damages" – that is, the amount legally required to punish and deter – until first the Ninth Circuit and later this Court determined the appropriate amount. It is thus consistent with *Bonjorno* to decline to award interest on the modified punitive damages judgment. In an ordinary case of compensatory damages, the jury decides the amount to award, and its determination of the

amount of damages is a "fact" which under the Seventh Amendment may not be set aside easily. It is thus reasonable to consider the jury determination an "ascertainment" of the amount of damages. But under *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the amount of *punitive* damages is not a "fact" found by the jury, but is a question of law that ultimately must be resolved by an appellate court. *Id.* at 436-37. Plaintiffs' submission cites three cases where Courts of Appeals have exercised their "broad equitable discretion" to award interest on reduced punitive damages awards from the date of the original judgment. Pls. Rule 42.1 Submission ¶ 8. But the cases prove only that under Rule 42.1 and Rule 37(b) appellate courts have the discretion to come to varying results depending on the particular facts of a given case. And in any event because the cases plaintiffs cite pre-date *Cooper Industries*, those courts did not confront the implications of that decision and thus may well have treated the jury's determination of the amount of punitive damages as a form of "fact"-finding, and therefore an "ascertainment" of damages.

c. There is also no reason to penalize Exxon by awarding another $488 million in damages when the substantial delay here was not in any sense Exxon's fault, but was caused by plaintiffs' insistence on urging the district court to disregard the plain command of the Ninth Circuit (and of this Court's cases) that the punitive award had to be reduced. After the first appeal, the Ninth Circuit instructed plaintiffs and the district court that the award "must be reduced." Pet. App. 104a. Plaintiffs told the district court that the Ninth Circuit was wrong, and

urged the district court to "explain that to the Court of Appeals." 9th Cir. Rec. Excs. 501:20-22. The district court duly wrote an opinion explaining that it could not see "any principled means by which it can reduce [the] award." Pet. App. 222a. A second appeal was thus required. The Ninth Circuit again vacated the award, this time for the district court to consider this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). Pet. App. 119a. Once again, plaintiffs urged on the district court that the award was not grossly excessive or unconstitutional; and once again the district court duly found there was no principled way it could reduce the award. Pet. App. 179a. So a third appeal was required, and proceedings dragged out from November 7, 2001, when the Ninth Circuit decided the first appeal, to May 23, 2007, when it did the job the district court had shirked at plaintiffs' insistence, and finally finished with the third appeal. Absent plaintiffs' inciting the district court to ignore the Ninth Circuit's rulings, this case might have concluded years ago.[2]

d. Finally, courts consider, in determining whether to exercise their discretion to award interest, whether the plaintiff seeking interest has won, despite the reduction in the judgment, some kind of a victory that is "clear-cut." *Affiliated Capital,* 793 F.2d at 711-12. Plaintiffs won nothing like a "clear-cut" victory here. Plaintiffs saw their outlier punitive damages award vacated and then twice

[2] Indeed, of the total of more than ten years that passed from the entry of an amended judgment (January 27, 1997) to the Ninth Circuit's denial of rehearing (May 23, 2007), less than two years was devoted to briefing, the only part of the process conceivably subject to influence by Exxon. *See* Brief in Opposition to Conditional Cross-Petition for a Writ of Certiorari, No. 07-276, at 9 n.5.

substantially reduced. Moreover, the Court divided equally on the vicarious punishment issue, which the Ninth Circuit itself described as a "close" question. Pet. App. 85a. A ruling favorable to Exxon on the vicarious punishment issue, of course, would have completely eliminated the punitive damages award. Although plaintiffs were ultimately able to establish that $507.5 million in punitive damages was legally proper, it was far from the kind of victory that could be described as "clear-cut." This case simply is not comparable to cases where courts award interest from the date of the original judgment because, although the judgment is reduced, it is substantially affirmed and upheld.

CONCLUSION

For the reasons stated, the Court should include in the judgment interest only from the date of this Court's judgment fixing the legal size of the punitive damages award. In the alternative, the Court could say nothing about interest in the judgment, which would make plain under *Briggs* and Rule 42.1 that interest cannot run back to the date of the original district court judgment.

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