No. 07-219

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

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

RESPONDENTS' SUBMISSION WITH RESPECT TO RULE 42.1

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RESPONDENTS' SUBMISSION WITH RESPECT TO RULE 42.1

Respondents respectfully request that this Court make clear in its judgment that this Court's Rule 42.1 – a rule concerning interest on certain judgments for money – does not apply to this case or, in the alternative, that respondents are entitled to interest on the punitive damages award according to the terms previously established in the district court. In support of this request, respondents offer the following information:

1. In the judgment that is the subject of this appeal, the district court reduced the jury's $5 billion punitive damages award to $4.5 billion and ordered that the respondents were entitled to interest on the new judgment running from the date of the original judgment, September 24, 1996. Pet. App. 180a n.117; *see also* Pet. App. 223a n.89. The applicable interest rate under 28 U.S.C. § 1961(a) is 5.9%. *See* THOMSON-WEST, FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 1038 (2008 ed.) (table following 28 U.S.C. § 1961). Exxon did not contest the determination of the relevant date or interest rate in the district court, nor did it appeal the district court's determination that respondents are entitled to interest on the punitive judgment from the date of the original judgment.

2. On Exxon's appeal from the district court's judgment as to the amount of the punitive damages award, the Ninth Circuit held that the punitive award should be reduced to $2.5 billion. The Ninth Circuit stayed

its mandate pending proceedings in this Court. The mandate remains stayed.

3. Exxon sought certiorari in this Court raising various issues regarding the permissibility and size of the punitive award. As in the Ninth Circuit, Exxon did not raise the matter of interest on the judgment. This Court granted certiorari limited to three of Exxon's questions presented.

4. On June 25, 2008, this Court issued its opinion. The opinion holds that respondents are entitled to recover punitive damages but that the amount must be further reduced. The opinion concludes: "[W]e take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. *See In re Exxon Valdez,* 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive damages judgment award accordingly." Slip op. 42. This Court's opinion does not mention the subject of interest.

5. This Court's Rule 42.1 provides: "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. . . . Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law."

6. In light of the form of this Court's opinion and the existence of Rule 42.1, respondents are concerned that if this Court's judgment (the equivalent of its "mandate" in a case arising from a federal court of appeals) does not mention interest, then Exxon may argue on remand that this Court's opinion and judgment deprive respondents of their right to interest on the new punitive judgment that will be entered, despite the district court's prior and unappealed ruling on this issue. Respondents accordingly sought assurance from Exxon that, in the event of silence from this Court regarding the matter of interest, it would not make such an argument regarding interest. Exxon refused to give respondents such an assurance.

7. Respondents believe that Rule 42.1 does not apply because the district court opinion already established respondents' entitlement to interest on the judgment; Exxon did not challenge that determination on appeal; and this Court's opinion does not upset that determination. *See De la Rama v. De la Rama,* 241 U.S. 154, 159 (1916); *The Republic of Columbia*, 195 U.S. 604 (1904). This situation thus falls outside of the purview of the Rule, which, as far as respondents can tell, addresses a situation in which this Court directs that plaintiffs be awarded money to which they had not previously established a legal entitlement. *See, e.g., Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304 (1948). Accordingly, respondents respectfully suggest that this Court simply note in its judgment that Rule 42.1 does not apply.

8. If this Court concludes that Rule 42.1 does apply, then respondents respectfully request that this Court note in its judgment that respondents are entitled to interest on the punitive award according to the terms established in the district court. This result would accord not only with the law of the case but with the routine practice when federal courts rule that awards of punitive damages must be reduced. *See, e.g., Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1339-40 (11th Cir. 1999); *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 49, 55 (2d Cir. 1998); *Dunn v. HOVIC*, 13 F.3d 58, 60-62 (3d Cir. 1993).

9. In closing, respondents emphasize the importance of this Court taking some action with respect to its judgment. This case has now been pending for nineteen and one-half years, including almost fourteen years since the jury returned its verdict. This Court's opinion dictates a clear outcome to this litigation, and respondents believe it is plain that they are entitled to interest on the punitive award on the terms previously determined by the district court. Yet if past is prologue, there is a real risk that Exxon would exploit any lack of clarity concerning interest to prolong this litigation still further. Specifically, Exxon could take any silence from this Court on the matter as license to commence a new round of argument on remand that respondents have no right to interest on the punitive award. Such an argument would place the Ninth Circuit in the awkward position of interpreting and applying one of this Court's rules, which could trigger a

further request for review by this Court. Respondents respectfully ask this Court to preclude any unnecessary further controversy by clarifying the matter in its judgment.

CONCLUSION

For the foregoing reasons, this Court should note in its judgment in this case that Rule 42.1 does not apply or, in the alternative, that respondents are entitled to interest on the punitive award according to the terms established in the district court.

July 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 8th day of July, 2008, I caused to be served a true and correct copy of RESPONDENTS' SUBMISSION WITH RESPECT TO RULE 42.1 by the method indicated below and addressed as follows:

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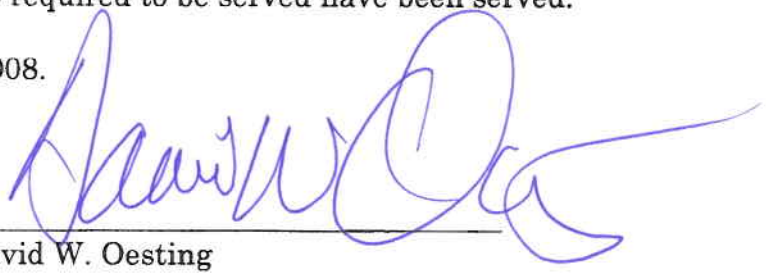
I further certify that all parties required to be served have been served.

DATED this 8th day of July, 2008.



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