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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
The EXXON VALDEZ) Case No. 3:89-cv-00095-HRH
_____) (Consolidated)
_____)
THIS DOCUMENT RELATES TO)
ALL CASES)
_____)

ALL PLAINTIFFS' RESPONSE TO MOTION OF SEA HAWK
SEAFOODS TO VACATE PLAN OF ALLOCATION

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INTRODUCTION

Sea Hawk Seafoods, Inc. (“Sea Hawk”) seeks to escape from agreements that it entered into and from plans that it supported and that this Court approved years ago. Sea Hawk is bound by those agreements and plans. The Supreme Court’s decision in this case does nothing to alter that fact.

Through three sets of agreements and orders, the plaintiff class members and their counsel developed a coordinated plan for sharing the work and sharing the recoveries from this litigation in an all-for-one-and-one-for-all manner. These were:

1. The Joint Prosecution Agreements entered into in 1994 and 1995. Sea Hawk signed these agreements;
2. The Plan of Allocation and Amended Plan of Allocation adopted by this Court in 1996 and 2002, respectively. Sea Hawk did not object to the original Plan. It filed a brief supporting the Amended Plan; and
3. The Processor Plan of Distribution and Amended Processor Plan of Distribution, adopted by this Court in 1999 and 2002, respectively. Sea Hawk did not object to the original Plan. It filed a brief supporting the Amended Plan, with a limited objection, which this Court upheld.

In addition to these Agreements and Plans, Sea Hawk entered into a fourth binding agreement, an agreement with All Plaintiffs in November 2004. That agreement confirmed Sea Hawk’s share in the Amended Processor Distribution Plan.

Although Sea Hawk styles its current motion as an attack on the Plan of Allocation, the arguments it makes and the relief it seeks necessarily constitute an attack on all four sets of Agreements and Plans. Sea Hawk’s attack must be rejected because (1) it is barred by Sea Hawk’s agreement to the Agreements and endorsement of the

1 Plans (Argument § I) and (2) it is based on a false premise, that the Supreme Court’s
2 decision in this case somehow altered the plaintiffs’ ability to share their recoveries with
3 each other (Argument § II). This brief addresses those flaws in Sea Hawk’s argument
4 and responds to questions raised by the Court’s Order of October 20 (Argument § III).

5 **FACTUAL BACKGROUND**

6 **1. Sea Hawk Signs The Joint Prosecution Agreements.**

7 During the summer of 1994, an agreement was “entered into among counsel
8 representing all or virtually all plaintiffs whose claims have been asserted” in this action,
9 both in this Court and in Alaska Superior Court. Joint Prosecution, Settlement and
10 Damages Allocation Agreement (Declaration of Paul Rugani, Ex. 2) at 1. That first Joint
11 Prosecution Agreement provided that:

12 All recoveries from defendants by any plaintiff or
13 group of plaintiffs, whether by settlement or trial, will be
14 shared among all plaintiffs (whether their claims survive or
15 are dismissed and are subject to appeal at the time of
16 payment) in accordance with the allocation matrix attached
17 hereto as Attachment 1

18 *Id.* at 1. The allocation matrix assigned 2.1% of total recoveries to seafood processors.

19 *Id.* Attachment 1.¹

20 In April 1995 the parties entered into a revised Joint Prosecution Agreement, with
21 terms similar to the 1994 Agreement. Rugani Decl. Ex. 3. The 1995 Agreement
22 assigned seafood processors a share of 2.33%. It further provided that Plaintiffs’
23

24 ¹ An earlier version of the allocation matrix was the basis for the plan for distribution of
25 the Alyeska settlement, approved by this Court in 1993. *See* Order Approving Plaintiffs’
Plan for Distribution of the Alyeska Settlement (Clerk’s Dkt. 4017); Plaintiffs’
Supplemental Plan for Distribution of the Alyeska Settlement (Clerk’s Dkt. 3991);
Plaintiffs’ Plan for Distribution of the Alyeska Settlement and Memorandum in Support
(Clerk’s Dkt. 3941); January 12, 1996 Affidavit of David W. Oesting ¶ 42 (Clerk’s
Dkt. 6592).

1 Executive Committee and Allocation Committee could revise shares, provided that the
2 revised shares did not fall below certain “floor” percentages, including 2.1% for
3 processors.

4 Three of Sea Hawk’s counsel signed the Joint Prosecution Agreement: Kenneth
5 L. Adams on July 15, 1994, A. William Saupe on July 15, 1994 and John C. Young on
6 August 8, 1994. The same three counsel for Sea Hawk signed the revised Joint
7 Prosecution Agreement in 1995: John C. Young on April 17, 1995, A. William Saupe on
8 April 24, 1995 and Kenneth L. Adams on April 25, 1995. Sea Hawk has acknowledged
9 that it is one of “the signatories of the Joint Prosecution Agreement.” Partial Objection of
10 Sea Hawk Seafoods, Inc. at 2 (Clerk’s Dkt. 7412) (Declaration of David W. Oesting
11 Ex. 1).

12 **2. The Court Adopts the Plan of Allocation; Sea Hawk Does Not**
13 **Object.**

14 In 1996, plaintiffs formulated and moved for approval of a Plan of Allocation.
15 Rugani Decl. Ex. 1. The Plan carried forward the sharing agreement and allocation
16 matrix that had been set forth in the Joint Prosecution Agreements.

17 The Plan of Allocation explained the methodology adopted for the allocation of
18 recoveries:

19 By the spring of 1994, the Executive Committee concluded
20 that the fairest, most equitable way to allocate recoveries,
21 both punitive and compensatory damages, was in proportion
22 to plaintiffs' damages, as fairly estimated by plaintiffs
23 themselves rather than by jury verdicts. The Executive
24 Committee also concluded that it was fair to include claims
25 by plaintiffs who had in fact suffered loss as a result of the
spill, but whose claims were dismissed for lack of legal
causation. These dismissed plaintiffs had rights of appeal,
and many had made large contributions to the prosecution of
the litigation. However, their damages would be discounted
in a manner commensurate to their relative litigation risk.

1 Alternate mechanisms for allocation of punitive damage
2 recoveries were considered and rejected as less fair. For
3 example, *per capita* distribution among all plaintiffs would
4 not fairly reflect the weight of the harm caused by the spill,
5 given its huge geographic reach and the widely disparate
6 types of losses. Allocation on the basis of jury verdicts would
7 create unmanageable competition among plaintiff groups to
8 try their cases first, and to commit disproportionate resources
9 and trial time to specific claims. It also would force
10 individual plaintiff groups (like a single fishery or Native
11 community) to bear the entire risk of adverse trial results in
12 their particular cases.

13 Plan of Allocation at 1-2. Consistent with the 1995 allocation matrix, the Plan provided
14 that 2.1% of recoveries would be allocated to processors. *Id.* Table 4.

15 The Court granted preliminary approval of the Plan of Allocation (Clerk’s Dkt.
16 6603) and directed that class members be given notice and an opportunity to comment on
17 the Plan. Sea Hawk received notice (Oesting Decl. Exs. 2, 3, and 4) and did not object.

18 The Court’s Order 317 (Rugani Decl. Ex. 5) (Clerk’s Dkt. 6806) approved the
19 Plan of Allocation, with certain modifications. In connection with the dispute concerning
20 the group of processors known as the Seattle Seven, Exxon, together with those seven
21 processors, moved for reconsideration of Order 317. Once again, Sea Hawk did not
22 object to the Plan. Order 327 (Clerk’s Dkt. 6895), denied the motion of Exxon and the
23 Seattle Seven. Sea Hawk did not appeal the Plan of Allocation as adopted by Order 327.

24 **3. The Court Adopts the Processor Distribution Plan; Sea Hawk
25 Does Not Object.**

 In 1997, plaintiffs submitted 51 proposed Plans of Distribution for 51 categories of
plaintiffs, including a plan for seafood processors. Oesting Decl. Exs. 5, 6, and 7. Each
of the distribution plans was predicated on the core division made in the previously
approved Plan of Allocation. In 1999, the Court entered Order 348 (Clerk’s Dkt. 7319),
granting final approval to the Processor Distribution Plan. Because Sea Hawk had
assigned its punitive damage claim for 1989 to Exxon, *see* Oesting Decl. Ex. 8, the Plan

1 (over the objection of Exxon, but not Sea Hawk) excluded participation by Sea Hawk and
2 Exxon to the extent of Sea Hawk’s 1989 damages, but included Sea Hawk for subsequent
3 years. Exxon, but not Sea Hawk, appealed Order 348 to the Ninth Circuit.

4 **4. The Ninth Circuit Upholds the Assignments to Exxon.**

5 Exxon successfully appealed Order 327’s adoption of the Plan of Allocation and
6 Order 348’s adoption of the Processor Plan of Distribution. *See In re the Exxon Valdez*
7 (*Icicle Seafoods, Inc. v. Baker*), 229 F.3d 790 (9th Cir. 2000) (Plan of Allocation); *In re*
8 *the Exxon Valdez (Baker v. Exxon Corp.)*, 239 F.3d 985 (9th Cir. 2001) (Processor Plan
9 of Distribution). In these two opinions, the Ninth Circuit held that it was permissible for
10 class members to assign portions of their claims and recoveries to Exxon. The court
11 upheld the assignments notwithstanding the fact that the effect of the agreements “is that
12 the actual amount of damages the plaintiff receives will deviate from the amount awarded
13 by the jury” 229 F.3d at 797. The Court specifically upheld Sea Hawk’s
14 assignment of a portion of its claim to Exxon. 239 F.3d at 988.² Accordingly, the Court
15 remanded for modification of the Plan of Allocation and the Processor Plan of
16 Distribution. 239 F.3d at 988-89; 229 F.3d at 800-01.

17 **5. The Court Adopts Amended Allocation and Processor**
18 **Distribution Plans; Sea Hawk Supports the New Plans.**

19 In June and July 2001, plaintiffs moved for orders amending the Plan of
20 Allocation and the Processor Plan of Distribution to comply with the Ninth Circuit’s
21 decisions. (Clerk’s Dkt. 7366, 7372) (Oesting Decl. Exs. 9, 10). The Amended
22 Processor Plan of Distribution granted Sea Hawk 13.9101% of processor distributions. It

23 _____
24 ² The Ninth Circuit held that there was no material difference between partial
25 assignments of claims, as affected by Sea Hawk, and partial assignments of recoveries, as
affected by the Seattle Seven. 239 F.3d at 988.

1 did so based on a valuation of Sea Hawk's damages at \$11,287,973. September 19, 2001
2 Declaration of Charles L. Miller, Jr. (Oesting Decl. Ex.11) This amount was significantly
3 higher than the \$4,846,908 that Sea Hawk had actually recovered. *See* Amended Final
4 Judgment of Claims of Sea Hawk Seafoods, Inc. (Clerk's Dkt. 8676) (Oesting Decl. Ex.
5 12) at 3. The \$11.2 million valuation for Sea Hawk was consistent with the methodology
6 used throughout the Plan of Allocation and Plans of Distribution, i.e., to value claims
7 according to claimants' own assessments of harm rather than verdicts, settlements and
8 other recoveries.

9 Sea Hawk filed a brief supporting adoption of the Amended Plan of Allocation
10 and Amended Processor Distribution Plan, with one limited objection. Sea Hawk
11 objected only to the fact that the Processor Distribution Plan provided that 95.44% of Sea
12 Hawk's share would be distributed to Exxon as a result of Sea Hawk's agreement to
13 assign its 1989-related share of punitive damages to Exxon. Sea Hawk argued that only
14 23.92% of its share should go to Exxon.

15 Sea Hawk's brief began:

16 Lead Counsel's motion for approval of an Amended Plan of
17 Distribution of Allocations to the Processor Category and of a
18 related Stipulation with Exxon Mobil Corporation and Exxon
19 Shipping Corporation (collectively "Exxon") [i.e., to Amend
20 the Plan of Allocation] is a laudable effort to bring to prompt
21 closure the distribution issues that were affected by the Court
22 of Appeals' partial reversals of Order No. 348 on appeals by
23 Exxon and by Western Alaska Fisheries, Inc. Sea Hawk
24 Seafoods, Inc. ("Sea Hawk") *supports that motion with one*
25 *exception*, which the motion and the Stipulation submitted
with it expressly anticipate. . . .

Lead Counsel, Sea Hawk and apparently Exxon are in agreement that the Amended Plan of Distribution correctly allocates to Sea Hawk .2921 percent of the net judgment amount [i.e., 2.1% assigned to processors under the Plan of Allocation multiplied by Sea Hawk's 13.9101% of the processors' share under the Distribution Plan] *assigned to the*

1 *signatories of the Joint Prosecution Agreement (of which*
2 *Sea Hawk is one); there is also apparently no dispute as to*
3 *how that net judgment will be calculated.* As the attached
4 Declaration of Charles L. Miller, Jr. explains in more detail,
5 the Sea Hawk percentage, like that of other signatories, has
6 been determined by (1) calculating Sea Hawk's proportional
share of included processors' aggregate losses for the period
1989 through 1995, and then (2) applying the resulting
percentage (13.9101 percent) to the percentage of the net
recovery allocated to all signatory processors, as a group,
under the Plan of Allocation as previously approved by the
Court, without objection by Exxon, in Order No. 317.

7 Partial Objection of Sea Hawk Seafoods, Inc. at 1-3 (emphasis added; footnotes omitted)
8 (Oesting Decl. Ex. 1).

9 On February 12, 2002, the Court entered Order 351, approving the Amended Plan
10 of Allocation (Clerk's Dkt. 7441) (Rugani Decl. Ex. 8) and Order 352, approving the
11 Amended Processor Distribution Plan (Clerk's Dkt. 7443) (Oesting Decl. Ex. 13). The
12 Distribution Plan assigned to Sea Hawk the 13.9101% that plaintiffs proposed and that
13 Sea Hawk supported. The Court upheld Sea Hawk's limited objection that Exxon was
14 entitled to 23.92%, rather than 95.44%, of Sea Hawk's share.

15 One week after the issuance of Orders 351 and 352, the Court entered judgment,
16 pursuant to Rule 54(b), with respect to Order 351 (Clerk's Dkt. 7446). Sea Hawk did not
17 appeal from Order 351, from Order 352, or from the February 19, 2002 judgment.

18 **6. Sea Hawk Enters Into the 2004 Agreement With All Plaintiffs.**

19 In 2002, during the course of negotiations between Sea Hawk and Exxon to
20 resolve Sea Hawk's post-1989 compensatory damage claims, Sea Hawk expressed to
21 plaintiffs' Lead Counsel David Oesting Sea Hawk's dissatisfaction with the share that
22 Sea Hawk was to receive under the Amended Processor Plan of Distribution.
23 Negotiations between Sea Hawk and Exxon, and between Sea Hawk and All Plaintiffs,
24 continued over the course of the next two years. Oesting Decl. ¶ 15 and Ex. 14.

1 Ultimately, in the fall of 2004, Exxon and Sea Hawk settled Sea Hawk's
2 remaining compensatory damage claims and All Plaintiffs and Sea Hawk resolved Sea
3 Hawk's grumblings concerning the Allocation and Distribution Plans. Plaintiffs and Sea
4 Hawk agreed that Exxon would pay the proceeds of the new settlement agreement with
5 Sea Hawk directly to Sea Hawk and that Sea Hawk would retain that money rather than
6 include it in the collective recoveries. In exchange, the punitive damages to be allocated
7 to Sea Hawk pursuant to its 13.9101% share of the Amended Processor Distribution Plan
8 would be set off in favor of All Plaintiffs on a dollar-for-dollar basis, up to the amount of
9 the compensatory damage settlement funds being paid directly to Sea Hawk. Sea Hawk
10 and All Plaintiffs concluded this agreement on November 24, 2004. Rugani Decl. Ex. 7.

11 **7. Sea Hawk Attempts to Escape From the Amended Plan of**
12 **Allocation and the Amended Processor Distribution Plan.**

13 In April 2008, thirteen years after it signed on to the revised Joint Prosecution
14 Agreement, six years after adoption of the Amended Plan of Allocation and the Amended
15 Processor Distribution Plan, and nearly three and one-half years after execution of the
16 November 2004 agreement, Sea Hawk again complained to Lead Counsel about its share
17 under the Plans. During several communications over the course of the next six months,
18 Lead Counsel repeatedly informed counsel for Sea Hawk that Sea Hawk was bound by
19 the Joint Prosecution Agreement, the Amended Plan of Allocation, the Amended
20 Processor Distribution Plan and the November 2004 agreement. (Oesting Decl. ¶ 16 and
21 Exs. 15A, 15B, and 15C). Sea Hawk then filed the pending motion.

22 **ARGUMENT**

23 **I. A DEAL IS A DEAL**

24 Sea Hawk:

- 25 (1) Agreed to the Joint Prosecution Agreements in both 1994 and 1995;

1 (2) Did not object to the Plan of Allocation, affirmatively supported the
2 Amended Plan of Allocation, did not appeal from the orders adopting the Plans and did
3 not appeal from the judgment entered on the Amended Plan of Allocation;

4 (3) Did not object to the original Processor Plan of Distribution,
5 affirmatively supported the Amended Processor Distribution Plan (with the exception of
6 a limited objection that was sustained) and did not appeal from the Amended Processor
7 Distribution Plan; and

8 (4) Entered into an agreement in November 2004 through which it
9 continued to agree to accept a share of punitive damages under the Amended Plan of
10 Allocation and Amended Processor Distribution Plan.

11 It is far too late for Sea Hawk to seek to throw out the Allocation and Processor
12 Distribution Plans and to back out of its agreement to the sharing arrangement established
13 by those Plans and the Joint Prosecution Agreements. The legal doctrines that confirm
14 that Sea Hawk is barred from this attempt to renege on the plans are almost too numerous
15 to mention, but include:

16 (1) Waiver, with respect to Sea Hawk’s failure to object to or appeal
17 from the Amended Plans. *See*, 7B Charles Alan Wright et al., *Federal Practice and*
18 *Procedure* § 1797.4 (3d ed. 2008) (class member’s objection must be unambiguous and
19 clear; failure to object in district court precludes objection on appeal); *Taylor v. Freeland*
20 *& Kronz*, 503 U.S. 638, 644 (1992) (“Deadlines may lead to unwelcome results, but they
21 prompt parties to act and they produce finality.”); *In re Cement & Concrete Antitrust*
22 *Litig.*, 817 F.2d 1435, 1442 (9th Cir. 1987) (“Because the validity of the stipulation [to
23 allow certain parties to share in allocation of class settlement proceeds] was questioned
24
25

1 neither in the district court nor on appeal, the parties are bound by it.”), *rev’d in part on*
2 *other grounds*, 490 U.S. 93 (1989);

3 (2) Judicial estoppel, in light of Sea Hawk’s affirmative support of the
4 Amended Plans and its success with respect to its limited objection to the Amended
5 Processor Distribution Plan. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001);
6 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001);

7 (3) Federal Rule of Civil Procedure 60(b), in light of the February 19,
8 2002 entry of judgment on the Amended Plan of Allocation. *See Ackermann v. United*
9 *States*, 340 U.S. 193, 198 (1950) (successful appeal by co-defendant did not justify relief
10 from judgment under Rule 60(b); “Petitioner cannot be relieved of such a choice because
11 hindsight seems to indicate to him that his decision not to appeal was probably wrong,
12 considering the outcome of the [co-defendant’s] case.”);

13 (4) Equitable estoppel, in light of the fact that other class members
14 relied on the Allocation Plan and Distribution Plans. *See Adams v. Johns-Manville*
15 *Corp.*, 876 F.2d 702, 704-07 (9th Cir. 1989) (where defendant’s actions manifested
16 acceptance of settlement agreement, it was estopped to deny same); *Baugh Constr. Co. v.*
17 *Mission Ins. Co.*, 836 F.2d 1164, 1167, 1174 (9th Cir. 1988) (party’s failure to object to
18 assignment of one of plaintiff’s claims during settlement negotiations estopped it from
19 objecting after settlement agreement executed); *Presidential Life Ins. Co. v. Milken*, 946
20 F. Supp. 267, 278-79 (S.D.N.Y. 1996) (“A party to a settlement may be estopped from
21 objecting thereto once another party to the settlement has relied, to its detriment, on the
22 first party’s failure to object to the settlement terms.”) (*citing Adams*, 876 F.2d at
23 706-07); Oesting Decl. ¶ 19³;

24 ³ Among other things, the Court will recall that the approval of the Phase IV Settlement
25 and of the Plan of Allocation were each conditioned on approval of the other, because

1 (5) Law of the case, in light of the Court’s adoption of the Plans, the fact
2 that distributions have been made pursuant thereto, and the fact that the Ninth Circuit has
3 upheld the principle that parties may assign claims and recoveries in this action. *See,*
4 *e.g., In re the Exxon Valdez*, 239 F.3d at 988; *In re the Exxon Valdez*, 229 F.3d at 796-98;
5 *Quilling v. Trade Partners, Inc.*, 2007 WL 107669 at *2 (W.D. Mich. Jan. 9, 2007); and

6 (6) Breach of contract, in light of Sea Hawk’s attempted breach of the
7 Joint Prosecution Agreements and the 2004 Agreement.⁴

8 A deal is a deal. Sea Hawk is bound by the deal that plaintiffs made to share their
9 efforts and recoveries in the manner set forth in the Joint Prosecution Agreements, the
10 Amended Plan of Allocation and the Amended Processor Distribution Plan. It is also
11 bound by the specific agreement that it entered into with All Plaintiffs in 2004.⁵

12 _____
13 “the Phase IV plaintiffs have traded off the risk and delay inherent in the Phase IV trial
14 for a guaranteed participation in recoveries” obtained by other plaintiffs that are to be
15 shared through the Plan of Allocation. Memorandum in Support of Preliminary Approval
16 of Plan of Allocation (Oesting Decl. Ex. 16) at 2.

17 ⁴ Specific performance of these agreements is necessary in light of the havoc that
18 throwing out the Plan of Allocation and Processor Distribution Plan, as advocated by Sea
19 Hawk, would have. *Village of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982);
20 *Export Worldwide, Ltd. v. Knight*, 2007 WL 628746 at *10 (W.D. Tex. Feb. 27, 2007).

21 ⁵ In a footnote, Sea Hawk suggests that it might be entitled to withdraw from the 1995
22 Joint Prosecution Agreement because its share allegedly has dropped below the 2.1%
23 “floor” allocation to processors. Sea Hawk Motion at 4 n.6. This argument is flawed for
24 two reasons. First, the operative documents with regard to the shares to be distributed are
25 now the Amended Plan of Allocation and the Amended Processor Distribution Plan. Sea
Hawk filed a brief supporting the percentage share it is to receive under those Plans.
Partial Objection of Sea Hawk Seafoods, Inc. at 2 (Oesting Decl. Ex. 1). Second, the
alleged reduction in the processors’ share was contemplated by plaintiffs, but never
implemented. Oesting Decl. ¶ 20. When Sea Hawk said that “the Amended Plan of
Distribution correctly allocates to Sea Hawk .2921 percent of the net judgment amount,”
Partial Objection at 2, it calculated that figure by multiplying the 2.1% assigned to
processors under the Plan of Allocation by Sea Hawk’s 13.9101% of the processors’

1 **II. THE PLAINTIFFS ARE ENTITLED TO SHARE RECOVERIES; THE**
2 **SUPREME COURT’S DECISION DID NOT HOLD OTHERWISE.**

3 Sea Hawk contends that the United States Supreme Court’s decision in this case
4 requires that the Joint Prosecution Agreements, the Amended Plan of Allocation and the
5 Amended Processor Distribution Plan must be jettisoned and that, contrary to those
6 Agreements and Plans, punitive damages must be distributed to each class member in an
7 amount equal to that class member’s actual compensatory recoveries. In fact, plaintiffs
8 were free to share their claims and recoveries; the Plans that incorporated their sharing
9 arrangement were and remain fair, reasonable and adequate; and the Supreme Court’s
10 decision did nothing to invalidate the sharing arrangement incorporated in the Plans.

11 **A. Plaintiffs Are Entitled to Assign Their Claims and Recoveries.**

12 With limited exceptions not applicable here, parties are entitled to assign causes of
13 action and recoveries therefrom. *See generally Pony v. Los Angeles County*, 433 F.3d
14 1138, 1144 (9th Cir. 2006) (“Generally, a party may freely assign the proceeds of his
15 judgment or the value of his recovery. This is true under federal, California, and
16 common law.”); 6A C.J.S. *Assignments* § 43 (“A right of action is generally
17 assignable.”). *Accord Venegas v. Mitchell*, 495 U.S. 82, 88 (1990); *In re the Exxon*
18 *Valdez (Baker v. Exxon Corp.)*, 239 F.3d 985 (9th Cir. 2001); *In re the Exxon Valdez*
19 *(Icicle Seafoods, Inc. v. Baker)*, 229 F.3d 790 (9th Cir. 2000); *Chenega Corp. v. Exxon*
20 *Corp.*, 991 P.2d 769, 785-86 (Alaska 1999).⁶ When multiple parties have claims against
21 share.

22 ⁶ Sea Hawk is in no position to contend that such assignments may not be made in this
23 case. In addition to the assignments effected by the Joint Prosecution Agreements, the
24 Plan of Allocation and the Distribution Plans, Sea Hawk made two additional
25 assignments itself. It assigned its rights to punitive damages with respect to 1989 to
 Exxon, which assignment the Ninth Circuit upheld. *See* 239 F.3d at 988. Also, in March
 1995, when Sea Hawk was sold to a new owner, the new owner “and Sea Hawk assigned
 to [each of the two former owners] 37.5% of the net proceeds to be received by Sea

PLAINTIFFS’ RESPONSE TO SEA HAWK

SEAFOODS’ MOTION – 12

In re: the Exxon Valdez; Case No. 3:89-cv-095-HRH

DWT 11924569v2 0027510-000015

1 a common defendant or group of defendants, it is reasonable for them to combine their
2 efforts, resources and recoveries through such assignments, either to each other or to a
3 common entity that will advance all of their claims. *See, e.g., State Farm Mut. Auto. Ins.*
4 *Co. v. Campbell*, 538 U.S. 408, 413-14 (2003); *Klamath-Lake Pharmaceutical Ass’n v.*
5 *Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1282-83 (9th Cir. 1983); *Pacific Coast*
6 *Agricultural Export Ass’n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208-09 (9th Cir.
7 1976); *LaSala v. Bordier Et Cie*, 519 F.3d 121, 127, n.1 (3d Cir. 2008) (“Assigning both
8 sets of claims . . . to the Trust made logistical sense, as it rendered one entity responsible
9 for prosecuting and distributing to the Purchasers the proceeds of all of the claims”);
10 *Wallsten v. International Bank of Commerce of Laredo*, 770 F. Supp. 1164, 1166-67
11 (S.D. Tex. 1991); *Old Republic Ins. Co. v. Ross*, 180 P.3d 427, 431 (Colo. 2008);
12 *Chenega Corp.*, 991 P.2d at 785-86.

13 The Joint Prosecution Agreements, Plans of Allocation and Plans of Distribution
14 in this case effected such an arrangement. Plaintiffs’ Memorandum in support of
15 preliminary approval of the Plan of Allocation explained:

16 The Joint Prosecution Agreement is, of course, a binding
17 contractual agreement among its signatories. The parties to
18 that agreement gave up their right to keep for themselves
19 whatever damages would be recovered on their own claims.
20 In return, they received ample consideration in the form of the
21 payments which will be forthcoming to each signatory and
22 class member under the Plan of Allocation.

20 Plaintiffs’ Memorandum in Support of . . . Motion for Preliminary Approval of Plan of
21 Allocation (Clerk’s Dkt. 6592) (Oesting Decl. Ex. 16) at 12-13.

23 _____
24 Hawk by way of any settlement or judgment on its claims against Exxon.” *Cesarini, et*
25 *al. v. Bertosen, et al.*, No. 3AN-07-1127CI (Alaska Superior Court November 1, 2007)
Complaint ¶¶ 7, 8 (Oesting Decl. Ex. 17).

1 **B. The Allocation Plan and Distribution Plans Were and Are Fair,
2 Reasonable and Adequate.**

3 This Court has, on multiple occasions, determined that the Plans of Allocation and
4 Plans of Distribution are fair, reasonable and adequate. *E.g.*, Orders 317, 327, 348, 351,
5 352. The most significant benefit of the Plans was the fact that they facilitated tens of
6 thousands of class members, represented by dozens of law firms, in mounting a united
7 and coordinated effort against Exxon. Order 317 summarized the benefits of the mutual
8 effort made possible by the Plans and the Joint Prosecution Agreements:

9 Benefits of the Plan of Allocation.

10 Plaintiffs argue that the Plan of Allocation is preferable to
11 each plaintiff pursuing his own self-interest in seeking a share
12 of the compensatory and punitive damages. Plaintiffs argue
13 that such a scenario would result in extraordinary complexity,
14 duration and "internecine strife." Memorandum in support of
15 motion for final approval of plan of allocation at 17.

16 Plaintiffs argue that they pursued their goal of maximizing
17 total recoveries by subordinating the interests of individual
18 plaintiffs to the collective interests of all. Using this strategy,
19 plaintiffs argue that they were able to present their strongest
20 case at trial for the benefit of all plaintiffs.

21 Plaintiffs argue that they have devoted thousands of hours to
22 the formulation, negotiation, marketing, and consummation of
23 the Plan of Allocation. Plaintiffs also argue that the Plan of
24 Allocation covers virtually every affected party in the Exxon
25 Valdez litigation and that the Plan is almost entirely
 consensual.

 The court finds that the Plan of Allocation was carefully
 formulated and beneficial to all plaintiffs. There is no way
 that more than a few of all plaintiffs could have assembled the
 expert counsel and expert witnesses which the Joint
 Prosecution Agreement made available to all plaintiffs. No
 individual plaintiff, nor even groups of plaintiffs, could have
 afforded to finance the massive discovery and trial
 preparations which the Joint Prosecution Agreement made
 possible. The court has no doubt that the plaintiffs' trial plan
 (concurred in by Exxon) for establishing gross losses, rather
 than individual or artificial group losses, enhanced the
 plaintiffs' recovery opportunities. This simplification of the
 damage trial process obviated the need for scores of separate

1 trials and obviated the possibility of hundreds or even
2 thousands of separate damages trials or masters hearings.
3 The court finds that the benefits of the Plan of Allocation
4 favor approval.

5 Order 317 at 11-12 (footnote omitted).

6 This coordinated effort would not have been possible, of course, without the
7 agreement by all of the plaintiffs to pool and share the recoveries resulting from their
8 efforts. As the Plan of Allocation noted, “it was essential to uncouple the allocation of
9 plaintiffs’ recoveries from the fortunes of individual plaintiffs at trial. This was the only
10 way to ensure a unified effort by the myriad plaintiffs toward their common goal of
11 maximizing total recoveries.” Plan of Allocation at 1. Indeed, “[t]he most significant
12 foundation component of the trial plan adopted by the Court was the agreement of each
13 Plaintiff to forego his or her right to an individual damage determination and to accept
14 the aggregate determination of damages The essential corollary of proceeding with
15 such aggregate determination of damages was a basis for the division and distribution of
16 the resulting aggregate awards.” Memorandum in Support of Motion for Final Approval
17 of Plan of Allocation at 11. (Clerk’s Dkt. 6687) *See also* Plaintiffs’ Memorandum in
18 Support of Preliminary Approval of Plan of Allocation at 10 (agreement to “pool all
19 recoveries in the consolidated litigation and share those recoveries on a fair and
20 reasonable basis was a crucial part of the process”).

21 Importantly, this sharing arrangement also facilitated distribution of a portion of
22 the recoveries to plaintiffs who may not have had viable causes of action under the
23 narrow constraints of applicable law, but who nonetheless were harmed by the Exxon
24 Valdez oil spill. Plan of Allocation at 1-2. These plaintiffs suffered real injury, for
25 which they might not otherwise have received compensation. Many of these parties and
their counsel “made large contributions to the prosecution of the litigation.” *Id.* at 2.

1 Accordingly, it was clear to plaintiffs “that the fairest, most equitable way to
2 allocate recoveries, both punitive and compensatory damages, was in proportion to
3 plaintiffs’ damages, as fairly estimated by plaintiffs themselves rather than by jury
4 verdicts.” *Id.* at 1-2. Consistent with this method, Sea Hawk’s own .2921% share, which
5 it once acknowledged “the Amended Plan of Distribution correctly allocates to Sea
6 Hawk,” Partial Objection of Sea Hawk Seafoods, Inc. at 2, was based on plaintiffs’
7 valuation of Sea Hawk’s damages at \$11.3 million, rather than the \$4.8 million that Sea
8 Hawk actually recovered. *See* September 19, 2001 Miller Decl. (Oesting Decl. Ex. 11);
9 Amended Final Judgment of Claims of Sea Hawk Seafoods, Inc. at 3 (Oesting Decl. Ex.
10 12).

11 This Court recognized that the sharing arrangement adopted through the Joint
12 Prosecution Agreements, the Plan of Allocation and the Plans of Distribution is fair,
13 adequate and reasonable. Orders 351, 352. It further recognized that the distribution
14 method adopted by the Plans is fair, adequate and reasonable even though it does not
15 divide the pool of recoveries obtained by the plaintiffs’ joint effort on the basis of
16 individual verdicts. In approving the Plan of Allocation, the Court held that “there is no
17 requirement that damages must be allocated on a pro rata basis. Rather, allocation of
18 damages must be based on considerations of what is fair, adequate and reasonable.”
19 Order 317 at 36 (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982)).
20 Similarly, the Ninth Circuit upheld the assignments made by the Seattle Seven to Exxon
21 even though the result would be “that the actual amount of damages the plaintiff receives
22 will deviate from the amount awarded by the jury” 229 F.3d at 797. *See also In re*
23 *Chicken Antitrust Litig.*, 669 F.2d at 240; *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171,
24 174 (7th Cir. 1982) (allocation is “a traditional equitable function,” applying “a mode of
25

1 judgment based on broad ethical principles rather than narrow rules”); *Silberblatt v.*
2 *Morgan Stanley*, 524 F. Supp. 2d 425, 430 (S.D.N.Y. 2007) (“Exactitude is not required
3 in allocating consideration to the class, provided that the overall result is fair, reasonable
4 and adequate.”); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 695 (D. Colo. 2006) (“An
5 allocation formula need only have a reasonable, rational basis, particularly if
6 recommended by ‘experienced and competent’ class counsel.”); *In re Relafen Antitrust*
7 *Litig.*, 231 F.R.D. 52, 74-75 (D. Mass. 2005) (rejecting objection of sub-class receiving
8 one-third of settlement amount that it should receive more because it suffered 58% of the
9 damages).

10 In sum, sharing of claims and recoveries between plaintiffs is not only permitted
11 but has been specifically approved by this Court as a fair, reasonable and adequate means
12 of dividing recoveries and of ensuring the coordinated and efficient prosecution of
13 plaintiffs’ claims in this case. Sea Hawk’s belated objection to this arrangement ignores
14 these benefits and the law supporting them.

15 **C. The Supreme Court’s Decision Did Not Alter the Fairness,**
16 **Reasonableness and Adequacy of the Allocation and Distribution**
17 **Plans.**

18 The Supreme Court’s decision in this case did nothing to alter the law permitting
19 assignment of claims and recoveries, the validity of the assignments in this case, or the
20 fairness, reasonableness and adequacy of the Allocation and Distribution Plans. The
21 Court simply held “that a 1:1 ratio [between punitive damages and compensatory
22 damages], which is above the median award, is a fair upper limit in such maritime cases.”
23 *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008). The reduced judgment that
24 will be entered on remand will comply with that holding. Plaintiffs will recover punitive
25 damages in a 1:1 ratio to compensatory harm. This Court’s belief “that the ruling of the

1 United States Supreme Court did not impact the Plan of Allocation” is entirely correct.
2 Order (Oct. 20, 2008) at 1. The Supreme Court *did not* say anything about the Joint
3 Prosecution Agreements, the Plan of Allocation or the Plans of Distribution. The
4 Supreme Court *did not* hold that the plaintiffs were prohibited from sharing their efforts
5 and recoveries. Pursuant to the law permitting assignments of claims and recoveries, the
6 plaintiffs were free to cooperate and share the fruits of their cooperation, and they did so
7 in the Joint Prosecution Agreements and Allocation and Distribution Plans.

8 In any event, the fairness, reasonableness and adequacy of a Plan of Allocation are
9 evaluated as of the time that it is entered into. Subsequent changes in the law do not
10 render unfair an allocation plan or settlement agreement that was fair and reasonable at
11 the time it was entered into. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.*,
12 350 F.3d 360, 364 (3d Cir. 2003) (subsequently-decided Supreme Court decision that
13 “rais[ed] the question whether this settlement would have been approved under current
14 class action doctrine” did not alter propriety of settlement approval); *Armstrong v. Board*
15 *of School Directors*, 616 F.2d 305, 322 (7th Cir. 1980) (“[A] class action settlement is to
16 be evaluated according to the state of the law as of the time it was presented to the district
17 court for approval.”); *Dawson v. Pastrick*, 600 F.2d 70, 76 (7th Cir. 1979) (“To allow
18 post-approval changes or clarifications in the law to upset a settlement would be contrary
19 to the established policy of encouraging settlements and frequently would allow a party
20 to back out of a bargained-for position after agreement had been reached.”); *In re Master*
21 *Key Antitrust Litig.*, 76 F.R.D. 460, 463-65 (D. Conn. 1977) (refusing to reopen class
22 settlement following Supreme Court decision changing the governing law; “If a party
23 makes a conscious and informed choice of litigation strategy, he cannot seek
24 extraordinary relief merely because his assessment of the consequences was incorrect.”);
25

1 *Shepherd Park Citizens Ass’n v. General Cinema Beverages, Inc.*, 584 A.2d 20, 24 (D.C.
2 1990) (“It would be a positive disincentive to settlements if litigants knew an accord were
3 vulnerable to ordinary changes in the law occurring after the agreement”). *See also*
4 *United States v. Bank of New York*, 14 F.3d 756, 759-60 (2d Cir. 1994) (“[A] change in
5 the law occurring after a settlement for a sum of money is not a basis for vacating the
6 settlement pursuant to Rule 60(b).”).

7 This Court has previously recognized that it is fair to hold parties to the
8 agreements set forth in the Joint Prosecution Agreements and Allocation and Distribution
9 Plans, notwithstanding subsequent events. After the Ninth Circuit upheld the
10 assignments made by Sea Hawk and others to Exxon, this Court rejected the argument
11 that the Ninth Circuit’s decisions permitted parties to withdraw from the Phase IV
12 Settlement:

13 The court remains convinced that the original Plan of
14 Allocation was fair, adequate, and reasonable based upon the
15 then existent legal posture of the case. Everyone, including
16 the court and the objectors, made decisions about Phase IV
17 and the original Plan of Allocation based upon their best
18 judgment as to the seafood processors’ claims. That legal
19 posture was altered by the appellate rulings, and the Amended
20 Plan accomplishes a fair, adequate and reasonable revision of
21 the original Plan so as to fold into the Plan the holding of the
22 court of appeals. The objectors have not shown that the
23 Amended Plan of Allocation is unfair, inadequate, or
24 unreasonable in light of the present legal posture of the
25 seafood processors, and they may not avoid the consequences
of earlier agreements about the case simply because the court
is required to admit the seafood processors into the Plan of
Allocation for punitive damages.

Order 351 at 7.

Sea Hawk’s own actions demonstrate that its argument that the Supreme Court
decision permits it to escape the terms of the Plans, the Joint Prosecution Agreements and
its own 2004 agreement is simply an after-acquired excuse for an effort that started long

1 ago. Sea Hawk first sought to get out of the Plans in 2002, long before the Supreme
2 Court's decision. It renewed that effort in the spring of 2008, again before the Supreme
3 Court's decision. Even in discussions after the Supreme Court's decision, Sea Hawk did
4 not rely on that decision in its efforts to evade the deal that it had made. Oesting Decl.
5 ¶ 16.⁷ Not until September 2008, after Lead Counsel had rebuffed other meritless
6 arguments by Sea Hawk, did Sea Hawk first contend that the Supreme Court's decision
7 somehow supported its efforts to avoid the Agreements and Plans that it had entered into
8 and supported.

9 **III. PLAINTIFFS' RESPONSE TO THE COURT'S QUESTIONS OF**
10 **OCTOBER 20.**

11 The Court's October 20 Order (Clerk's Dkt. 8869) asked the parties about "the
12 economic impact of Sea Hawk's motion if Sea Hawk were to prevail," including whether
13 it is feasible for "the Fund Administrator to reserve sufficient funds to accommodate Sea
14 Hawk's motion and, at the same time, effect a substantial distribution to All Plaintiffs"
15 and what "incremental costs . . . may be incurred by the Fund Administrator as a
16 consequence of Sea Hawk's motion." Order (Oct. 20, 2008) at 2.

17 It is not feasible to reserve funds to accommodate Sea Hawk's motion and, at the
18 same time, make a distribution to All Plaintiffs. Were it possible to view Sea Hawk's
19 own claim in isolation, the difference between (1) the share of the approximately \$383
20 million to be distributed that Sea Hawk claims it is entitled to and (2) the share that All
21 Plaintiffs believe Sea Hawk is entitled to is approximately \$7,636,000. It must be

22 ⁷ Nor did Sea Hawk argue, following this Court's issuance of Order 364, that that order
23 mandated that each plaintiff receive punitive damages of nine times its actual
24 compensatory recovery or, following the Ninth Circuit's decision reviewing Order 364,
25 that that decision mandated that each plaintiff receive punitive damages of five times its
actual compensatory recovery.

1 remembered, however, that the relief Sea Hawk seeks is not merely to increase its own
2 share. Rather, Sea Hawk is asking the Court to “vacate the current Plan of Allocation” in
3 order to pay every class member “at a ratio of 1:1 with the class members’ individual
4 compensatory recovery.” Sea Hawk Motion at 2, 22. *See also id.* at 3 (asking court “to
5 insure that no one receives more (and therefore no one receives less) than the 1:1 ratio”).
6 This would, of course, necessarily require invalidating almost all of the 51 Distribution
7 Plans as well because, like the Plan of Allocation, they too are a function of compromise
8 and settlement between the class members, not strict adherence to the formula that Sea
9 Hawk advocates.

10 Thus, it is impossible to reserve funds to accommodate Sea Hawk’s motion and
11 still make a substantial distribution to All Plaintiffs, because Sea Hawk’s motion seeks to
12 invalidate the basis for distributions to every class member. Sea Hawk’s motion, if
13 granted, would result in “each plaintiff pursuing his own self-interest,” resulting in
14 proceedings of “extraordinary complexity, duration and ‘internecine strife,’” Order 317 at
15 11, that the Plan of Allocation and Distribution Plans were designed to avoid.⁸ The great
16 bulk of the 30,000 class members would have to attempt to establish their own
17 compensatory damages and each class member would have an incentive to attack every
18 other class member’s damage submission.⁹

19 ⁸ As Plaintiffs observed in their support of the original Plan of Allocation: “It takes no
20 imagination to visualize the complexity, duration, and unseemliness of the internecine
21 strife which could erupt among Plaintiffs pursuing their own self-interests in seeking a
22 distributive share of the aggregated damages recovery awarded to a Mandatory Punitive
23 Damages Class under Fed. R. Civ. P. 23(b)(1)(B).” *See* Memorandum in Support of
24 Plaintiffs’ Motion for Final Approval of the Plan of Allocation at 17, 18. Sea Hawk’s
25 Motion opens the curtain on that scene.

⁹ To illustrate, some of the Distribution Plans estimated the lost catches of fishermen in
oiled fisheries based on an *average* of their catches for the years before and after 1989.

1 Plaintiffs devoted several years, many person hours, many dollars and an
2 extraordinary amount of goodwill and cooperation to avoid precisely these battles when
3 they developed the Allocation and Distribution Plans. Oesting Decl. ¶ 21 and Exs. 18 -
4 23. Plaintiffs estimate that, were Sea Hawk's motion to require the elimination of those
5 Plans granted, the incremental cost of redetermining distributions based on Sea Hawk's
6 proposed approach would run in the tens of millions of dollars and would take more than
7 two years, not counting the years that would inevitably be spent on challenges to the new
8 Plans in this Court and on appeal. *Id.* ¶ 21.

9 As the Court is aware, All Plaintiffs are making every effort to distribute
10 plaintiffs' recoveries, for which the plaintiffs have waited for nearly 20 years, in the near
11 future.¹⁰ A decision on Sea Hawk's motion on or before November 15 would permit
12 such distributions to be made. In contrast, reserving funds to accommodate the
13 consideration of Sea Hawk's unmeritorious motion at a later date would require the
14 reservation of all funds and permit the distribution of none. All Plaintiffs respectfully
15 submit that the Court should deny Sea Hawk's motion on or before November 15 and
16 permit distributions to be made to the class members.

17
18 _____
19 Other Distribution Plans used each fisherman's *best year* from the years before and after
20 1989. While both methods are reasonable, nearly every class member would have an
21 incentive, based on their own circumstances, to advocate for one of those methods over
22 the other, long after the compromises in the Distribution Plans have been made.

23 ¹⁰ Toward that end, Plaintiffs' Lead Counsel and the EQSF Administrator are preparing a
24 motion to be filed early next week seeking the distribution of approximately \$140 million
25 to claimants in the ten oiled salmon fisheries, to Native Alaskans and to participants in
the Prince William Sound Fund, so that a significant amount of the money recently made
available can be distributed before the end of this year. Lead Counsel and the EQSF
Administrator anticipate that the balance will be the subject of motions to distribute early
in 2009.

1 should deny Sea Hawk's motion on or before November 15, 2008, so that All Plaintiffs
2 may proceed to distribute money to the class members.

3 Plaintiffs reserve the right to seek attorneys' fees with respect to Sea Hawk's
4 motion pursuant to 28 U.S.C. § 1927. Such sanctions are appropriate where, as here, a
5 party brings proceedings for the purpose of attempting to coerce a greater recovery than it
6 is entitled to receive under the law and the facts. *See, e.g., In re NASDAQ Market-*
7 *Makers Antitrust Litig.*, 187 F.R.D. 124, 131 (S.D.N.Y. 1999); *Kramer v. Tribe*, 156
8 F.R.D. 96, 101, 110-11 (D.N.J. 1994); *Ullmann v. Olwine, Connelly, Chase, O'Donnell*
9 *& Weyher*, 123 F.R.D. 559, 562-64 (S.D. Ohio 1987); *Sam & Mary Housing Corp. v.*
10 *New York State*, 632 F. Supp. 1448, 1453 (S.D.N.Y. 1986).

11
12 Respectfully submitted this 24th day of October, 2008.

13
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