

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**

**JOINT APPENDIX VOLUME ONE
[Pages 1 - 690]**

| | |
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*Petition for Writ of Certiorari Filed August 20, 2007
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APPENDIX A

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

Docket No. 89-095

2/8/1991 Fld ORDER NO. 38 re: Alyeska's mot for judg on the pleadings. cc: D. Serdahely, L. Miller, D. Ruskin, 9CCA.

* * *

12/23/1992 Fld ORDER No. 121, in A89-095, A91-102, A91-103, A91-137, re D3, D9, D11, D12, D14, D19, D20 & D21, D1, D2 & D10 mots for SJ agnst P144 in A89-095, P533 in A91-102, P726 & P734 in A91-103, and P1211 in A91-137: moving defts' mot for SJ agnst P-144 in A89-095 GRANTED except for TAPAA clm agnst D-2; moving defts' mot for SJ agnst P533 in A91-102, P726 in A91-103 & P734 in A91-103 is MOOT; moving defts' mot for SJ agnst P1211 in A91-137 GRANTED except for clm under AS46.03.822 agnst D2; crt expressly does not address question of punitive damages & does not dsms or strike punitive damages request; D2 may file mot for SJ as to pltfs' strict liability clms upon verification from fund that D2 has pd

its \$14 million; crt declines to grant certification under rule 54(b) FRCP but crt will entertain an application for interlocutory appeal certification under 28USC1292(b). cc L. Miller, D. Serdahely, D. Ruskin.

* * *

1/14/1993 Fld ORDER NO. 125, in A91-567 & 568, re dkt#2619 pltfs mot for leave to file cys of charts used at O/A is GRANTED; pltfs implied mot under Rule 60(b) and implied action in equity is DENIED; A91-082CV & A91-083CV are severed from A89-095CV & are again closed; defts mot for SJ is GRANTED, P273, P1602 & P1603s' claims & complaint in A91-567CV are DISMISSED w/prej; P139, P143, P299, P300 & P301 are allowed 30 days to amend complaint in A91-568; to the extent that sport fishermen (P139, P143, P299, P300 & P301) do not allege uniquely private claims, the claims are DISMISSED; appeal of 12-17-91 Discovery Master Ord is DENIED as moot; appeal of 1-31-92 Discovery Master Ord is DENIED as moot; Alyeska's mot for partial reconsideration(dkt #2884) is GRANTED and court orders Environmental Groups to return the two allegedly stolen docs to Alyeska immediately; any pty involved in this ord who seeks review, interlocutory or otherwise, of this ord shall do so w/i

14 days; COC to enter jmt of dsmsl in A91-567. cc: L. Miller, D. Ruskin, D. Serdahely, Cert cy: A91-082CV, A91-083CV, A91-567CV.

- 1/14/1993 Fld JMT, in A91-567, dismissing P273, 1602 & 1603 claims and complaint w/prej. cc: L. Miller, D. Ruskin, D. Serdahely, Cert cy: O&J #4854, A91-567CV.
- 1/15/1993 Fld ORDER NO. 126 re P-80's (Kodiak) claims in A91-568CV are REMANDED; P-80's claims in A89-239CV are DISMISSED. cc: L. Miller, D. Ruskin, D. Serdahely, Cert cy: AK Sup Ct, A89-239CV.
- 1/15/1993 Fld LIAISON CNSL FOR PLTFs, in all cases, opp to appeal of "John Doe" re DM-114 Discovery Master Ord. (FILED UNDER SEAL)
- 1/15/1993 Fld P3378 in A92-192, mot for reconsideration of ord dsmsg pltf P3378(Urie) w/att aff of M. Muckle in support.
- 1/19/1993 Fld AMENDED ORDER NO. 125, re crt orders Environmental Groups to return the two allegedly stolen docs to the party from whom they were stolen immediately. (**this line was only change from previous Ord No. 125 fld at dkt #3218**) cc: L. Miller, D. Ruskin, D. Serdahely, A91-082CV, A91-083CV, A91-567CV.

* * *

- 4/8/1993 Fld. ORDER NO. 139, in A89-095 and A91-137, re D2 mot for SJ in A89-095 and P1211 is GRANTED; D7 & D18 mot for SJ in A91-137 agnst P1121 is GRANTED; D7 & D18 mot for SJ in A89-095 agnst P144 is GRANTED; defts mot for Rule 54(b) jmt is GRANTED; P144's claims in A89-095 are DISMISSED; P1211 claims in A91-137 are DISMISSED: clerk shall enter FJ dismissing complaints of P144 & P1211; defts mot to lift stay and mot for ext of time to file reply are DENIED as moot. cc: L. Miller, D. Serdahely, D. Ruskin
* * *
- 4/15/1993 Fld D1,2,10, in all cases, mot for leave to fle mot for part SJ re punitive damages
- 4/15/1993 Fld D1,2,10,3,9,11,12,14,19,20,21, in all cases, mot for leave to fle mot for part SJ on claims for punitive damages based on TAPAA displacement of general maritime law.
* * *
- 4/21/1993 Fld D1,2,10,3,9,11,12,14,19,20 & 21, in all cases, mot for part SJ on claims for punitive damages based on TAPAA displacement of general maritime law w/att memo in support.
* * *
- 6/2/1993 Fld D3,9,11,12,14,19,20,21, in all cases, supp reply in support of mot for

SJ on punitive damages based upon TAPAA displacement of general maritime law.

* * *

7/8/1993 Fld ORDER NO. 146, in A91-568, re defts mots to dsms (dkt#3384,3385& 3386) are GRANTED; amended complaint (dkt#3284) DISMISSED w/prej; clk to enter FJ agnst P139,143,299,300 & 301 pursuant to Rule 54(b). cc: L. Miller, D. Ruskin, D. Serdahely

* * *

10/21/1993 Fld ORDER NO. 158 re defts mots for part SJ on punitive damages based upon TAPAA displacement of general maritime law (dkt#s 3462 and 3488) are DENIED. cc: L. Miller, D. Serdahely, D. Ruskin.

10/21/1993 Fld ORDER NO. 159, in all cases, re defts mots for part SJ on punitive damages based upon res judicata (dkt#s 3461, 3463 and 3489) are DENIED. cc: L. Miller, D. Serdahely, D. Ruskin

* * *

3/23/1994 Fld ORDER NO. 187 re D1, 2 mot for SJ on clms of commercial fishermen based on price diminishment(dkt#4024) is GRANTED wlrrespect to commercial fishermen whose fisheries were neither closed or contaminated and

4706

DENIED w/respect to commercial fishermen whose fisheries were contaminated and either closed or partially closed cc: L. Miller, D. Serdahely, D. Ruskin

3/23/1994 Fld ORDER NO. 188 re D1,2 mot for
4707 SJ on clms of commercial fishermen based on diminished value of limited entry permits & fishing vessels(dkt#4137) is GRANTED

/cc: L. Miller, D. Serdahely, D. Ruskin

3/23/1994 Fld ORDER NO. 189 re D1,2 mot for
4708 SJ on clms by area businesses 6 municipalities on Robins Dry Dock grounds(dkt#4040) is moot and denied as to municipal pltfs du, to remand of those cases to state crt; mot for SJ is DENIED to the extent explain in this ord regarding the clms of Cook Inlet Aquaculture Assoc.(P4172), Kodiak Regional Aquaculture Assoc.(P1851) and Prince William Sound Aquaculture Corp.(PI with these exceptions D1.2 mot for SJ or part SJ regarding the remaining pltfs a listed in Tables A,B and C attached to 01.2 rply memo(dktB4407) is GRANTED; pltf mots to lift stay at dkt Us 4641 and 4665 are DENIED. cc: L. Miller, D. Serdahel D. Ruskin

3/23/1994 Fld ORDER NO. 190 re D1,2 mot for
SJ on native class clms for non-economic injury (dkt#4053) is GRANTED. cc: L. Miller, D.

Serdahely, D. Ruskin

* * *

4/7/1994 Fld D1,2 & CO-LEAD CNSL FOR
PLTFS, in all cases, third amended
revised trial plan.

* * *

6/13/1994 Fld jury special verdict for Phase I
trial.

* * *

7/26/1994 Fld. LIASON CNSL FOR PLTFS, in
all cases, amended stip w/ defts re
impacts for Phase III

7/27/1994 Fld ORDER, in all cases, GRANTING
amended stip re impacts from Phase
III. cc: L. Miller, D. Serdahely, D.
Ruskin

* * *

8/11/1994 Jury Special Verdict for Phase II-A
Trial.

8/11/1994 Jury Special Verdict for Phase III
Trial.

* * *

2/7/1995 D1,2, in all cases, motion for certain
discovery (FILED UNDER SEAL).

* * *

6/14/1995 HRH Order No. 290 re D1,2 motion
for certain discovery (dkt#6251);
sealed filings with respect to this
motion or results of evidentiary
hearing shall now be unsealed &

returned to public file; transcripts of 6-13 and 6-14, 1995, evidentiary hearing may be filed in public file when presented by the court reporter. cc: L. Miller, D. Serdahely, D. Ruskin (THE FOLLOWING DOCUMENTS ARE UNSEALED PURSUANT TO THIS ORDER: memo in support of dkt#6246, memo in support of dkt#6247, dkt#s 6251, 6252, 6260, 6270, 6288, 6289, 6325, 6330, 6331, 6334, 6347, 6350, 6355, 6356, 6358, 6359, 6360, 6361, 6362, 6363, 6381, 6383, 6391 and 6392)

* * *

9/18/1996 HRH Extended Summary Judgment, in all cases, re judgment entered in favor of D1,2,7 and against all plaintiffs listed in Attachments A through J of the judgment; claims of plaintiffs in Attachments A through J are dismissed w/prejudice pursuant to previously entered orders of this court as stated in judgment; terminating in light of this order: motion for entry of orders implementing Phase IV settlement (6838-1). cc: L. Miller, D. Serdahely, D. Ruskin, O&J #9928 (judgment w/o atts) (ATTACHMENTS IN SEPARATE FOLDER NEXT TO FILE VOLUME)

* * *

9/24/1996 HRH Final Judgment, in all cases, re members of subclasses listed in Exh A and direct action plaintiffs listed in Exh B are awarded compensatory damages against D1,D2 & D7 in the amount of \$19,590,257.00 with pre-judgment interest in the amount of \$37,981,673.18; the mandatory punitive damages class is awarded punitive damages against D7 in the amount of \$5000.00 and against D1 & D2 in the amount of \$5,000,000,000.00; awards shall bear interest from and after date of entry of judgment in accordance with 28 USC 1961; plaintiffs shall recover their costs of this action with the exception of costs attributable to Phase IV; all claims of all parties not otherwise adjudicated in paragraphs 1,2,3,4 and 5 of judgment are dismissed. cc: L. Miller, D. Serdahely, D. Ruskin, O&J #9932, cert cy: all open member cases in consolidated action. (REDISTRIBUTED 1-21-97 WITH AMENDMENTS AS TO PREJUDGMENT INTEREST AND EXHIBIT B PER ORDER NO. 332 FLD 1-17-97 AT DKT #6960) (PER MO AT DKT #6965 AMENDED JUDGMENT ENTERED 1-30-97 AT DKT #6966)

* * *

1/17/1997 HRH Order No. 332, in all cases, granting in part and denying in part D1,2 motion to alter or amend judgment (6922-1); judgment shall be amended to incorporate revised Exhibit B lodged with Exxon's reply brief; judgment shall be amended to award prejudgment interest in the amount of \$37,971,043.91; motion to amend judgment is denied as it relates to punitive damages and costs; mandatory punitive damages class as a whole prevailed on the punitive damages issue. cc: L. Miller, D. Serdahely, D. Ruskin (AMENDED JUDGMENT ENTERED 1-30-97 AT DKT #6966 PER MO AT DKT #6965)

* * *

1/30/1997 HRH Amended Final Judgment, in all cases, re members of subclasses listed in Exh A and direct action plaintiffs listed in Exh B are awarded compensatory damages against D1,2 & 7 in the amount of \$19,590,257.00 with pre-judgment interest awarded in the amount of \$37,971,043.91; the mandatory punitive damages class is awarded punitive damages against D7 in the amount of \$5,000.00 and against D1 & D2 in the amount of \$5,000,000,000.00; awards shall bear interest from and after 9-24-96 in accordance with 28 USC 1961; plaintiffs shall recover their costs of this action with the exception of costs

attributable to Phase IV; all claims of all parties not otherwise adjudicated in paragraphs 1,2,3,4 and 5 of judgment are dismissed; costs are taxed in favor of plaintiffs and against defendants in the amount of \$415,354.66. cc: L. Miller, D. Serdahely, D. Ruskin, O&J #9997

* * *

2/12/1997 D-1 and D-2, in all cases, appeal to 9CCA of (6911-1) filed 09/24/96, (6966-1) filed 01/30/97. cc:cns1, Judge, 9CCA w/CADS 97-35191

* * *

9/23/1997 PLTFS' LIAISON COUNSEL motion to lift stay, w/atch memo (to allow filing of motion - atch'd).

* * *

6/12/2002 DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award w/att memo & notice of fax declaration of Robert T. Deacon

6/17/2002 Original declaration of Robert T. Deacon re: DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award (7487-1)

6/17/2002 Cy declaration of Richard T. Harvin re: DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award

(7487-1)

* * *

7/17/2002 PLFS' LEAD/LIAISON CNSLS' opposition to DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award (7487-1), w/excerpts of record vol 1 & vol 2, and declaration of David Oesting (w/exhs) (oversized documents in accordian folders by file - video/audio tapes returned, no order).

* * *

9/13/2002 DEF 1-2 Notice of filing original declaration of John F. Daum in support of D1 & D2's reply re: DEFS' LEAD/LIAISON CNSL'S motion (renewed) for reduction or remittitur of punitive damages award (7487-1).

* * *

10/15/2002 HRH Court Minutes [ECR: Elisa Singleton] o/a on renewed mot for reduction (#7487); under advisement; Mr O'Neill to notify crt re number of defs involved by 10/16/02

* * *

12/6/2002 Vacated per Order #364 at dkt 7835) HRH Order order #358 granting motion (renewed) for reduction or remittitur of punitive damages award (7487-1); punitive damages award reduced to \$4 billion. cc: cns1

* * *

1/27/2003 HRH Order granting motion to file sur-reply memo re mot for entry of jmt (7586-1); court's judgment of 12/10/02 at 7566 is deemed final for purposes of Rule 54(b); granting mot for R54(b) finality determination or, in alternative, an interlocutory appeal (7569-1). cc: cns1

* * *

2/24/2003 DEF 1-2 appeal to 9CCA of (7589-1) filed 01/27/03. cc:cns1, Judge, 9CCA

* * *

9/30/2003 D1 & D2 LEAD CNSLS' motion (2d renewed) for reduction or remittitur of punitive damages award w/att memo

* * *

10/31/2003 ZZZ 1-2 opposition to D1 & D2 LEAD CNSLS' motion (2d renewed) for reduction or remittitur of punitive damages award (7753-1) w/att memo.

* * *

1/28/2004 HRH ORDER #364 that this court concludes that a \$5 billion punitive damages 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 as stated. The court of appeals did not just remand this case for application of BMW, Cooper

Industries, and State Farm. It means resolving the conflict between its conclusion and the direction 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 reduced to \$4.5 billion. The clerk shall enter an amended partial judgment accordingly. All plfs' lead counsel's mot for Rule 54(b) determination as to the punitive damages judgment is reinstated as is Exxon's opposition to the mot. The court concludes there is no just reason to delay entry of final judgment. The court's judgment as to the \$4.5 billion punitive damages award is deemed final for purposes of Rule 54(b) FRCP. In the alternative the court concludes that the interlocutory appeal under 28 U.S.C. 1292(b) is appropriate. All plfs' lead counsel's mot for Rule 54(b) finality determination or, in the alternative, an interlocutory appeal, is granted. Court granted mot (2d renewed) for reduction or remittitur of punitive damages award (7753-1). Order #358 at docket 7835 is vacated. Exxon's second renewed mot for reduction of punitive damages at dkt 7487 is denied as moot. cc: cnsl Signed by Judge H. Russel Holland on 01/28/04. (SMF) (Entered: 01/26/2006)

1/28/2004 HRH Amended Partial Judgment that punitive damages are awarded for the plfs and against the defs Exxon Mobile Corp (D-1) and Exxon Shipping Co (D-2), jointly and severally, in the amount of \$4.5 billion. Interest on the reduced award of punitive damages shall accrue from 9/24/06, in accordance with 28:1961. cc: cnsl, O& J 11463, redistributed 2/12/04 w/corsts taxed. Signed by Judge H. Russel Holland on 1/28/04. (SMF) (Entered: 01/26/2006)

* * *

2/26/2004 NOTICE OF APPEAL as to [7835] Order by EXXON Corporation, EXXON Shipping Company. (SMF) (Entered: 01/26/2006)

APPENDIX B

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

**UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

Docket No. 97-35191

3/3/1997 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. (Refer to MOATT to set briefing schedules) [97-35190, 97-35191, 97-35192, 97-35193] (mhf) [97-35190 97-35191 97-35192 97-35193]

* * *

4/1/1997 Filed aplts' motion to advance appeal for disposition with motion for stay and to vacate briefing schedule; [97-35191] served on 3/31/97 to (MOATT). [3201210] [97-35191] (jr) [97-35191]

4/11/1997 Filed order MOATT (SL) Aples' unopposed oral request for an ext of time to file an opposition to aplts' 4/1/97 motion for stay is GRANTED. Aples' opposition is due 4/30/97. The briefing schedule in appeal no. 96-36098 is STAYED pending disposition of the motion for stay. The briefing schedule in appeal no. 97-35191 shall be set by separate order. [96-36098, 97-35191] (hh) [96-36098 97-35191]

4/16/1997 Filed order MOATT (SL) On 4/7/97, a case management conference was con-

ducted by motions atty Stephen Liacouras. Defts were represented by John F. Daum. Plntfs were represented by David W. Oesting, Brian B. O'Neill, and David C. Tarshes. The parties agreed to the following matters: If aplts have not already done so, within 14 days of the date of this order they shall designate the transcripts for their appeal in the dc. The dsgn shall indicate that the rts have already been prepared. Appeal no. 97-35190 shall be consolidated with consolidated appeal nos. 96-36038 and 97-35036. The consolidated briefing schedule in appeal nos. 96-36038 and 97-35036 shall govern appeal no. 97-35190. In cons appeal nos. 96-36038 and 97-35036, the opening brief was filed on 2/10/97 and the answering brief was filed on 3/24/97. In order to indicate that these briefs also serve as the principal brfs in appeal no. 97-35190, the clerk shall write "appeal no. 97-35190" on the 2/10/97 opening brief and the 3/24/97 ans brf. Aplts in appeal no. 97-35191 stated in their NOA that they intended to raise as issues in appeal no. 97-35191 the dc's refusal to enforce a settlement agreement between Exxon Corp. and certain seafood processors and the court's refusal to allocate any share of the punitive damages award to certain seafood processors. However, those issues have been briefed in consolidated appeal nos. 96-36038, 97-35036, and 97-35190, and will not be briefed a second time in appeal no. 97-

35191. Appeal nos. 97-35193 and 97-35235 are consolidated. The following cross-appeal briefing schedule shall govern appeal nos. 97-35191, 97-35192 and consolidated appeal nos. 97-35193 and 97-35235. The opening brief of Exxon Corp. ("Exxon") in appeal no. 97-35191, and Joseph Hazelwood ("Hazelwood") in appeal no. 97-35192, are due 6/26/97. If Exxon wants to file an oversized brief, it shall file a motion pursuant to 9th Cir. R. 32(g) by 6/19/97. The motion to exceed the brief lengths shall be accompanied by a copy of the proposed opening brfs in both appeal nos. 97-35191 and 97-35192. In consolidated appeal nos. 97-35193 and 97-35235, aplts (hereinafter "plaintiffs") shall file the second cross-appeal brf by 8/19/97. The second xap brief shall serve as plntfs' opening brief in cons appeal nos. 97-35193 and 97-35235, and the ans brf in appeal nos. 97-35191 and 97-35192. If plntfs want to file an oversized brf, they shall file a motion pursuant to 9th Cir.R. 32(g) by 8/12/97. The motion to exceed the brf lengths shall be accompanied by a copy of plntfs' proposed second xap brf. The third xap brfs shall be filed by Exxon and Hazelwood by 10/14/97. The third xap brfs shall serve as Exxon's reply brief in appeal no. 97-35191 and Hazelwood's reply brf in appeal no. 97-35192, and Exxon and Hazelwood's ans brfs in cons appeal nos. 97-35193 and 97-35235. If Exxon wants to file an oversized third xap

brf...The fourth xap brief shall be filed by plntfs by 11/11/97. The fourth xap brf shall serve as plntfs' reply brief in cons appeal nos. 97-35193 and 97-35235. If plntfs want to file an oversized fourth xap brf...The clerk shall not grant any extensions of time absent extraordinary circumstances. These appeals shall be calendared together. (FAXED TO ATTYs OESTING AND DAUM) [96-36038, 97-35036, 97-35190, 97-35191, 97-35192, 97-35193, 97-35235] (hh) [96-36038 97-35036 97-35190 97-35191 97-35192, 97-35193, 97-35235]

* * *

- 6/26/1997 Rec'd amicus' (American Tort Reform) brief in 15 copies of 39 pages; deficient: motion to file pending MOATT; served on 6/26/97. Motion in front of brief [97-35191] (jr)[97-35191]
- 6/26/1997 Received Amicus Pacific Merchant Shipping Association's brief in 15 copies of 38 pages; deficient: motion to file pending; served on 6/26/97 [97-35191] (sm) [97-35191]
- 6/26/1997 Filed Pacific Merchant Shipping Association's motion for leave to file brief of amicus curiae; served on 6/26/97 [3256051] (MOATT) [97-35191] (sm) [97-35191]
- 6/30/1997 Filed original and 15 copies Exxon Corporation and Exxon Shipping's first brief on cross-appeal, (Informal: n) of 94 pages and 6 excerpts of record; served on

- 6/26/97 [97-35191, 97-35190] (sm) [97-35190 97-35191]
- 6/30/1997 Filed Washington Legal Foundation's motion for leave to file brief as amicus curiae; served on 6/26/97 [3257053] (MOATT) [97-35191] (sm) [97-35191]
- 6/30/1997 Received Amicus Washington Legal Foundation's brief in 15 copies of 48 pages; deficient: motion to file pending; served on 6/26/97 [97-35191] (sm) [97-35191]
- 7/25/1997 Filed order MOATT (SL) the motions of the American Tort Reform Association, rec'd 6/26/97, the Washington Legal Foundation, rec'd 6/30/97, and the Pacific Merchant Shipping Association, rec'd 6/26/97, for leave to file briefs as amicus curiae in support of apmts, is referred for disposition to the merits panel. [3257053-1], [3257056-1], [3255123-1], [3256042-1], [3256051-1] [97-35191] (jr) [97-35191]
- * * *
- 8/13/1997 Received from plaintiff, copy of proposed brief, served on 08/12/97. (MOATT with motion) [97-35191, 97-35192, 97-35193] (sm) [97-35191 97-35192 97-35193]
- 8/15/1997 Filed order MOATT (Appellate Commissioner) The court is in receipt of the mtn of pltfs/apmts in consolidated appeal nos. 97-35193 and 97-35235 ("plaintiffs") to file an ovszd xap2 brf. In support of the mtn, pltfs have submitted a draft of the

opening brf containing 56,219 words. The court is mindful that the proposed brf serves as both the opening brf in consolidated appeal nos. 97-35193 and 97-35235, as well as the ans brf in appeal nos. 97-35191 and 97-35192. The court is also aware that the opening brfs in appeal nos. 97-35191 and 97-35192 contain a total of 33,125 words, and that several mtns for leave to file amicus brfs have been filed. However, pltfs' proposed brf is too long. Accordingly, pltfs' mtn to file an oversized second brf is granted in part and denied in part. Pltfs shall file a second xap brf not exceeding 45,000 words by 8/29/97. The cross-briefing schedule established in this court's 4/16/97 order is revised to indicate that pltfs' second xap brf is due 8/29/97. In all other respects the briefing sched established in the court's 4/16/97 order shall remain in effect. (FAXED TO CNSL 2:45 P.M.) [97-35191, 97-35190, 97-35192, 97-35193, 97-35235] (gail) [97-35191 97-35192 97-35193 97-35235]

9/2/1997 Filed original and 15 copies aples/x-aplts Grant Baker, et al., aplts Daniel R. Calhoun, et al., second brief on cross-appeal (Informal: n) of 210 pages and 5 excerpts of record in 7 volumes; served on 8/29/97 [97-35191, 97-35192, 97-35193] (hh) [97-35191 97-35192 97-35193]

* * *

10/31/1997 Filed joint motion for limited remand

- [97-35191]; served on 10/3/97 to (MOATT). [3334075] (jr) [97-35191]
- 10/31/1997 Filed original and 15 copies Exxon Corporation & Exxon Shipping's 3rd brf on x-appeal (Informal: no) of 95 pages and 4 copies excerpts of record in 2 vols; served on 10/14/97. Csl notified to submit 1 copy each of vol. 1 & 2 of excerpt. [97-35191, 97-35193] (jr) [97-35191 97-35193]
- 11/4/1997 Rec'd original and 15 copies Hazelwood's substitute 3rd x-appeal brf of 12 pages; served on 10/14/97 to (PRO MO with motion to file). [97-35191, 97-35192, 97-35193] (jr) [97-35191 97-35192 97-35193]
- * * *
- 11/13/1997 Filed original and 15 copies plaintiffs' (in 97-35193) reply brief (Informal: no) 31 pages; served on 11/12/97. [97-35191, 97-35192, 97-35193] (jr) [97-35191 97-35192 97-35193]
- 1/5/1998 Filed order (Appellate Commissioner) the parties' jt motion for limited remand to allow the DC to entertain a post-jdgmnt motion is granted. [3334075-1] in 97-35191 Within 60 days of this order or 7 days of the DC's ruling on the post-jdgmnt motion, whichever occurs earlier, defendants Exxon Corporation and Exxon Shipping Company (Exxon) shall file with this court a status rpt or any appropriate motions. Aplt Hazelwood's motion for leave to file a substitute brf is granted. [3338801-1] The clk shall replace the answering/rpy brf previously

filed by aplt Joseph Hazelwood with the brf rec'd on 11/4/97. in 97-35191, 97-35192, 97-35193, Plaintiffs' motion for leave to file UNDER SEAL volume 8 of plaintiffs' supp'l excerpts of record is granted. [3306891-1] The documents placed under seal by this order are the same documents subject to the DC's protective order(s). Brfing is completed in these appeals. in 97-35192, 97-35191, 97-35193, The appellate proceedings are stayed pending the limited remand. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]

1/5/1998 Filed original and 15 copies substitute 3rd x-appeal brf of Hazelwood of 12 pages & supp'l excerpt of record in 1 vol; served on 10/14/97. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]

* * *

2/19/1998 Filed order MOATT (SH) the court continues the stay of appellate proceedings pending the limited remand. Within 60 days of this order or 7 days of the DC's ruling on the post-judgment motion, whichever occurs earlier, Exxon shall file with this court a status rpt or any appropriate motions. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]

* * *

7/10/1998 Filed order MOATT (SH) within 7 days of the DC's ruling on the post-jdgment motion, Exxon shall notify this court of the DC's decision and move for appropriate relief. Exxon shall file status rpts with this court every 60 days from this order until the DC rules on the post-jdgment motion. [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]

* * *

9/11/1998 Filed order (Appellate Commissioner) the stay of appellate proceedings imposed by this court's 1/5/98 order is lifted. [3367840-2] in 97-35191, 97-35192, 97-35193, 97-35235. The opposed motion of Exxon and defendant Joseph Hazelwood for consolidation of appeal # 98-35796 with appeal #s 97-35191 & 97-35192 is granted to the extent that these appeals will be calendared together. [3504787-1] Brfing is completed in appeal #s 97-35191, 97-35192, 97-35193 & 97-35235. [3513499-1] in 97-35192 In appeal # 98-35796, the opening brf and excerpts of record are due 10/13/98, the answering brf is due 11/18/98; and the optional rpy brf is due within 14 days after service of the answering brf. The clk shall not grant any further extension of time to file brfs absent extraordinary circumstances. In appeal # 98-35796, the clk shall enter David W. Oesting, Brian B. O'Neill, James vanR. Springer, and David C. Tarshes as csl for plaintiffs

Grant Baker, et al. (MOATT) [97-35191, 98-35796] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796]

* * *

- 10/2/1998 Filed order (Appellate Commissioner) defendant Joseph Hazelwood's motion to clarify this court's 9/11/98 order is granted. In appeal # 98-35807, the following briefing schedule governs: the opening brf and excerpts of record are due 10/13/98, the answering brf is due 11/13/98; and the optional rpy brf is due within 14 days after service of the answering brf. The clk shall not grant any further extension of time to file brfs absent extraordinary circumstances. All the above captioned appeals shall be calendared together. (MOATT) [97-35191, 97-35192, 97-35193, 97-35235, 98-35796, 98-35807] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796 98-35807]
- 11/23/1998 Filed order MOATT (SH) in appeal # 98-35807, defendant Joseph Hazelwood's motion for an extension of time to file the rpy brf is granted. [3565390-1] The optional rpy brf is due 12/2/98. In appeal #s 98-35796 & 98-35807, the clk shall file the answering brf rec'd on 11/16/98. The answering brf shall be deemed filed in both appeals. The court sua sponte consolidates the protective appeal filed 9/23/98 by defendants Exxon Shipping & Exxon Corp. with appeal # 98-35796. The court sua sponte consolidates the protec-

tive appeal filed 9/28/98 by defendant Joseph Hazelwood with appeal # 98-35807. Brfing will be completed upon filing of the optional rpy brfs in appeal #s 98-35796, 98-36087, 98-35807 & 98-36117. All the above captioned appeals shall be calendared together as soon as practicable. [97-35191, 97-35192, 97-35193, 97-35235, 98-35796, 98-35807, 98-36087, 98-36117] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796 98-35807 98-36087 98-36117]

12/2/1998 Filed order (Appellate Commissioner) in appeal #s 98-35796, 98-36087, 98-35807, & 98-36117, aplts' unopposed motion to unseal the opening brf filed on 10/15/98 is granted. The clk shall UNSEAL the opening brf. The excerpts of record filed with the opening brf shall REMAIN UNDER SEAL. (MOATT) [97-35191, 97-35192, 97-35193, 97-35235, 98-35796, 98-35807, 98-36087, 98-36117] (jr) [97-35191 97-35192 97-35193 97-35235 98-35796 98-35807 98-36087 98-36117]

* * *

4/2/1999 Filed order (Deputy Clerk: eu) The motions of the American Tort Reform Association, the Pacific Merchant Shipping Association, and the Washington Legal Foundation (collectively, the "Movants") for each of the movants to file a brief amicus curiae in support of defendant-appellant, are hereby GRANTED. The briefs received are ordered filed. SO OR-

DERED. [3257053-1], [3256051-1] [97-35191] (sm) [97-35191]

4/2/1999 Filed original and 15 copies Washington Legal Foundation's brief of 48 pages; served on 6/26/97, pursuant to order of 04/02/99. [97-35191] (sm) [97-35191]

4/2/1999 Filed original and 15 copies American Tort Reform Association's brief of 39 pages; served on 6/26/97, pursuant to the order dated 04/02/99. [97-35191] (sm) [97-35191]

4/2/1999 Filed original and 15 copies Pacific Merchant Shipping Association's brief of 38 pages; served on 6/26/97 pursuant to order of 04/02/99. [97-35191] (sm) [97-35191]

* * *

5/3/1999 ARGUED AND SUBMITTED TO James R. BROWNING, Mary M. SCHROEDER, Andrew J. KLEINFELD [97-35191, 97-35192, 97-35193, 97-35235] (jc) [97-35191 97-35192 97-35193 97-35235]

* * *

11/22/1999 Filed order (James BROWNING, Charles E. WIGGINS, Andrew J. KLEINFELD,): The motion to consolidate related appeals is GRANTED in part and DENIED in part. The motion is granted insofar as it requests that the new appeal, 99-35898, be assigned to this panel. The motion to consolidate the appeals is denied without prejudice. [99-35898, 96-36038, 97-35191] (hh) [96-

36038 97-35191 99-35898]

* * *

3/13/2000 Filed order (Deputy Clerk: aw) Due to the death of Judge Wiggins, Judge Schroeder has been drawn to replace him on the panel. [97-35191, 97-35192, 97-35193, 97-35235] (gail) [97-35191 97-35192 97-35193 97-35235]

* * *

11/7/2001 FILED OPINION: AFFIRMED in part, VACATED in part, and REMANDED... Each party to bear its own costs. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; Mary M. SCHROEDER; Andrew J. KLEINFELD, author) FILED AND ENTERED JUDGMENT. [97-35191, 97-35192, 97-35193, 97- 5235] (jr) [97-35191 97-35192 97-35193 97-35235]

* * *

11/28/2001 Filed original and 50 copies plaintiffs' petition for rehearing with suggestion for rehearing en banc 18 pages; served on 11/28/01 to (PANEL & ALL ACTIVE JUDGES). [97-35191, 97-35192] (jr) [97-35191 97-35192]

1/9/2002 Filed order (Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD): The petition for rehearing is DENIED. [4308504-1] [97-35191, 97-35192, 97-35193, 97-35235] (sm) [97-

35191 97-35192 97-35193 97-35235]

1/17/2002 MANDATE ISSUED [97-35191, 97-35192, 97-35193, 97-35235] (jr) [97-35191 97-35192 97-35193 97-35235]

6/26/2002 RECORD RETURNED. (See control card for details.) (jay) [97-35191]

APPENDIX C**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES****UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT****Docket No. 04-35182**

3/8/2004 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 3/8/04; appellee's designation of RT is due 3/17/04; appellant shall order transcript by 3/29/04, ; court reporter shall file transcript in DC by 4/27/04,; certificate of record shall be filed by 5/4/04; appellant's opening brief is due 6/14/04; appellees' brief is due 7/13/04, appellants' reply brief is due 7/27/04. [04-35182] (gar) [04- 182]

* * *

3/8/2004 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting cross appeal briefing schedule as follows: first cross-appeal brief is due 6/14/04 (Exxon); second cross-appeal brief is due 7/26/04 (Baker); third cross-appeal brief is due 8/25/04 (Exxon); optional cross-appeal reply brief is due 9/8/04 (Baker). [04-35183, 04-35182] (gar)

[04-35182 04-35183]

* * *

3/10/2004 Filed notice of appearance of David W. Oesting, Brian O'Neill, James van R Springer & David C. Tarshes for plaintiffs/aples. [04-35182] (dg) [04-35182]

3/11/2004 Filed plaintiffs' motion to consolidate appeals, to denote appeals as a comeback case, and to establish a schedule that allows swift appellate resolution, served on 3/9/04 (MOATT by promo) [04-35182, 04-35183] (dg) [04-35182 04-35183]

* * *

3/19/2004 Filed Exxon Mobile Corp & Exxon Shipping Co.'s memorandum in response to cross-appeal motion to consolidate cases and denote appeals as comeback case, and in opposition to plaintiffs' motion for expedited briefing [5008005-1] served on 3/18/04 (MOATT by promo)

3/25/2004 Filed reply to response to motion to consolidate cases, to denote appeals as a comeback case, and to establish a schedule that allows swift appellate resolution [5008005-1]; served on 3/23/04 (MOATT by promo) [04-5182, 04-35183](dg) [04-35182 04-35183]

* * *

6/14/2004 14 day oral extension by phone to file

Appellant Exxon Mobile Corp in 04-35182, Appellee Exxon Mobile Corp in 04-35183's cross-appeal brief. [04-35182, 04-35183] first cross-appeal brief due 6/28/04 in 04-35182, in 04-35183[Exxon]; second cross-appeal brief due 8/9/04 [Baker]; third cross-appeal brief due 9/8/04 [Exxon]; optional cross-appeal reply brief is due 14 days after service of third cross-appeal brief [Baker]. (lw) [04-35182 04-35183]

6/14/2004 14 day oral extension by phone to file Appellant Exxon Shipping Co. in 04-35182, Appellee Exxon Shipping Co. in 04-35183's cross-appeal brief. [04-35182, 04-35183] first cross-appeal brief due 6/28/04 in 04-35182, in 04-35183 [Exxon Shipping]; second cross-appeal brief due 8/9/04 [Baker] ; third cross-appeal brief due 9/8/04 [Exxon Shipping]; cross-appeal reply brief is due 14 days after service of third cross-appeal brief [Baker.] (lw) [04-35182 04-35183]

6/22/2004 Filed notice of joint xap1 brief by defs Exxon Mobile Corp & Exxon Shipping Co. Briefing schedule is now as follows: Five additional pages or 1,400 words are authorized for xap1 brief only. No exts of time requested and the oral exts rcv'd on 6/14/04 will govern. (CASE-FILE) [04-35182, 04-35183] (dg) [04-35182 04-35183]

- 6/29/2004 Received original and 15 copies Exxon Mobile Corp & Exxon Shipping Co. 1st cross-appeal brief, (Informal: no) of 59 pages, with 4 vols excerpts of record, served on 6/28/04 deficient: excerpts contain trial exhibits, documents from other cases & the covers are tan instead of white. Notified counsel. [04-35182, 04-35183] response to brief deficiency notice due 7/13/04 (dg) [04-35182 04-35183]
- 7/9/2004 Filed Appellants Exxon Mobile Corp & Exxon Shipping Co.'s motion to file joint opening brief & excerpts of record (excerpts rejected by deputy clerk because they contain documents not found on district court docket) served on 7/8/04 [5123030] (MOATT by promo) [04-35182, 04-35183] (dg) [04-35182 04-35183]
- 7/21/2004 Filed original 4 copies Grant Baker et al partial joinder of Exxon's mtn to file jt opn br and EOR , served on 7/19/04 MOATT VIA PROMO [04-35182, 04-35183] (crw) [04-35182 04-35183]
- 8/2/2004 Filed notice of joint xap2 brief by . Briefing schedule is now as follows: xap2 brief due 8/30/04 for plaintiffs; xap3 brief due 9/29/04 by defs; the reply brief is due 14 days from service of 3rd brief. Five additional pages are authorized for xap2 brief only. (CASE-FILE) [04-35182, 04-35183] (dg) [04-

35182 04-35183]

- 8/5/2004 Filed Exxon Mobile Corp's response in opposition to motion for leave to file amicus brief, served on 8/4/04 (MOATT by promo) [04-35182, 04-35183] (dg) [04-35182 04-35183]
- 8/13/2004 Filed Amicus W. Findlay Abbott reply to defs and aplts opposition to mtn for leave to file amicus brief, served on 8/9/04 MOATT VIA PROMO [04- 5174, 04-35182, 04-35183] (crw) [04-35174 04-35182 04-35183]
- 8/31/2004 Received original and 15 copies plaintiffs' 2nd cross-appeal brief (Informal: no) 68 pages and 7 vols of exerpts of record (videotape, CD & 1 audiotape trial exhibit);served 8/30/04 deficient: xap1 brief not filed. [04-35182, 04-35183] (dg) [04-35182 04-35183]
- 9/21/2004 Filed notice of joint third brief on cross-appeal by aplts/x-aples Exxon Mobile Corp. and Exxon Shipping Co. Briefing schedule is now as follows: xap3 brief due 10/20/04 for Exxon Mobile Corp. and Exxon Shipping Co. The optional reply brief is due 14 days from service of the joint xap3 brief. Five additional pages or 1,400 words are authorized for xap3 brief only. (CASE-FILES) [04-35182, 04-35183] (hh) [04-35182 04-35183]

* * *

- 10/21/2004 Received original and 15 copies Exxon Mobile Corp, Exxon Shipping Co. 3rd cross-appeal brief, (Informal: no) 59 pages and 1 excerpts of record, served on 10/20/04 deficient: XAP1, XAP2 briefs not filed. 7/9/04 mtn to file referred to MOATT [04-35182, 04-5183] (crw) [04-35182 04-35183]
- 10/27/2004 Filed order (Appellate Commissioner) Aples/x-aplts mtn to consolidate these x-appeals is denied. These cross appeals, as well as 4-35174, relate to Baker v. Exxon Corp, CITE, and shall be assigned to the pno that heard that prior appeal (MMS,JRB,AJK) Aplts/x-aples mtn to dismiss cross appeal 4-35183 is denied w/o prejudice to renewing the arguments in the merits brief. CITE. W. Findlay Abbot's mtn for leave to file an amicus brief is denied. Aplts/cross aples mtn to submit jt x-appeal briefing is granted. The clk is directed to file the jt XAP1 br rcvd 6/29/04. The clk is also directed to file the XAP2 br rcvd 8/31/04 and the XAP3 br rcvd 10/21/04. The opt rpy br is due 14 days from svc of this order. Aples/x-aplts mtn for expedited decision is denied. These cross appeals shall be calendared with related appeal 4-35174 upon the completion of briefing in all three appeals. MOATT/ES) [04-35182, 04-35183] (crw) [04-35182 04-35183]

10/27/2004 Filed original and 15 copies Exxon Mobil Corp, Exxon Shipping Co. first brief on cross-appeal, (Informal: no) of 59 pages and 4 excerpts of record; served on 6/28/04 [04-35182, 04-35183] (crw) [04-35182 04-35183]

10/27/2004 Filed original and 15 copies pltfs second brief on cross-appeal (Informal: no) of 68 pages and 7 excerpts of record; served on 8/30/04 [04-35182, 04-35183] (crw) [04-35182 04-35183]

* * *

10/27/2004 Filed original and 15 copies Exxon Mobile Corp, Exxon Shipping Co. third brief on cross-appeal (Informal: no) of 59 pages and 5 copies 1 excerpts of record; served on 10/20/04 [04-35182, 04-35183] (crw) [04-35182 04-35183]

10/27/2004 Filed notice of joint xap brief by Appellee Grant Baker in 04-35182, Appellee Sea Hawk Seafoods in 04-35182, Appellee Cook Inlet Processor in 04-35182, Appellee Sagaya Corp. in 04-35182, Appellee William McMurren in 04-35182, Appellee Patrick L. McMurren in 04-35182, Appellee William W. King in 04-5182, Appellee George C. Norris in 04-5182, Appellee Hunter Cranz in 04-35182, Appellee Richard Feenstra in 04-5182, Appellee Wilderness Sailing in 04-35182, Appellee Seafood Sales, Inc. in 04-35182, Appellee Rapid Systems Pacific in 04-35182, Appellee Nautilus

Marine Ent. in 04-35182, Appellee W. Findlay Abbott in 04-35182, Appellant Grant Baker in 04-35183, Appellant Sea Hawk Seafoods in 04-35183, Appellant Cook Inlet Processor in 04-35183, Appellant Sagaya Corp. in 04-35183, Appellant William cMurren in 04-35183, Appellant Patrick L. McMurren in 04-35183, Appellant William W. King in 04-35183, Appellant George C. Norris in 04-35183, Appellant Hunter Cranz in 04-35183, Appellant Richard Feenstra in 04-35183, Appellant Wilderness Sailing in 04-35183, Appellant Seafood Sales, Inc. in 04-35183, Appellant Rapid Systems Pacifi in 04-35183, Appellant Nautilus Marine Ent. in 04-35183, Appellant W. Findlay Abbott in 04-35183. Briefing schedule is now as follows: xap reply brief due 12/15/04 for Grant Baker in 04-35182, for Sea Hawk Seafoods in 04-35182, for Cook Inlet Processor in 04-35182, for Sagaya Corp. in 04-5182, for William McMurren in 04-35182, for Patrick L. McMurren in 04-35182, for William W. King in 04-35182, for George C. Norris in 04-35182, for Hunter Cranz in 04-35182, for Richard Feenstra in 04-35182, for Wilderness Sailing in 04-35182, for Seafood Sales, Inc. in 04-35182, for Rapid Systems Pacifi in 04-35182, for Nautilus Marine Ent. in 04-35182, for W. Findlay Abbott in 04-35182, for Grant Baker in 04-35183, for Sea

Hawk Seafoods in 04-35183, for Cook Inlet Processor in 04-35183, for Sagaya Corp. in 04-35183, for William McMurren in 04-35183, for Patrick L. McMurren in 04-35183, for William W. King in 04-35183, for George C. Norris in 04-35183, for Hunter Cranz in 04-35183, for Richard Feenstra in 04-35183, for Wilderness Sailing in 04-35183, for Seafood Sales, Inc. in 04-35183, for Rapid Systems Pacific in 04-35183, for Nautilus Marine Ent. in 04-35183, for W. Findlay Abbott in 04-35183 Five additional pages are authorized for xap4 brief only. (CASE-FILE) [04-35182, 04-35183] (sf) [04-35182 04-35183]

- 11/8/2004 Filed order (Deputy Clerk: JES) The briefing schedule for these cross-appeal is amended as follows: Appellees/cross-appellants optional reply brief is due 11/24/04. These cross-appeals shall be calendared with related appeal no. 04-35174 upon the completion of briefing in all three appeals. [04-35182, 04-35183] (sf) [04-35182 04-35183]
- 11/22/2004 Filed original and 15 copies Plaintiffs reply brief, excerpts in one volume. (Informal: no) of 32 pages; served on 11/19/04 [04-35182, 04-35183] (sf) [04-35182 04-35183]
- 11/22/2004 Rec'd errata to brief from Plaintiffs/Cross-Appellants re: errata sheet to 8/30/04 brief of Plaintiffs (original

plus fifteen copies) served 11/19/04
(RECORDS) [04-35182, 04-35183] (sf)
[04-35182 04-35183]

* * *

1/4/2005 Rec'd errata to 11/19/04 reply brief of
plaintiffs/Cross Appellants brief.
served 12/28/04 (RECORDS) [04-
35182, 04-35183] (sf) [04-35182 04-
35183]

1/7/2005 Filed order MOATT (JES) Briefing in
these cross-appeal is complete. These
appeals are ready for calendaring be-
fore Chief Judge Schroeder, Judge
Browning, and Judge Kleinfeld.
[04-35182, 04-35183] (sf) [04-35182 04-
35183]

* * *

1/27/2006 ARGUED AND SUBMITTED TO Mary
M. SCHROEDER, James R. BROWN-
ING, Andrew J. KLEINFELD [04-
35182, 04-35183] (gb) [04-35182 04-
35183]

* * *

12/22/2006 FILED PER CURIAM OPINION: VA-
CATED AND REMANDED (Termi-
nated on the Merits after Oral Hear-
ing; Other; Written, Signed,
Published. Mary M. SCHROEDER;
James R. BROWNING, dissenting;
Andrew J. KLEINFELD.) FILED AND
ENTERED JUDGMENT. [04-35182,
04-35183] (crw) [04-35182 04-35183]

* * *

1/8/2007 Filed order (Deputy Clerk: jr) Granting appellee's motion to extend time to file a petition for rehearing. The petition for rehearing is due 1/12/07. (PHONED AT 4:30PM) [04-35182] (sf) [04-35182]

1/12/2007 Filed original and 50 copies Appellant Exxon Mobile Corp and Appellant Exxon Shipping Co. petition for panel rehearing and petition for rehearing en banc. (PANEL AND ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) 20 pages, served on 1/12/07 [04-35182, 04-35183] (sf) [04-35182 04-35183]

* * *

2/13/2007 Filed order (Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD): The plaintiff-Appellees are requested to file a response to the Defendant-Appellants petition for rehearing and Rehearing En Banc by March 2, 2007. (PHONED AT 12:50 PM) [04-35182, 04-35183] (sf) [04-35182 04-35183]

3/2/2007 Filed Appellees response to Exxon's petition opposing petition for en banc rehearing or rehearing en banc. served on 3/1/07 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [04-35182, 04-35183] (sf) [04-35182 04-35183]

- 5/23/2007 FILED ORDER AND AMENDED PER CURIAM (MARY SCHRODER; R. BROWNING, Andrew J. KLEINFELD) (Orig. opinion id: [6042913-1] in 04-35182, [6042913-1] in 04-35183) . . . The petition for panel rehearing is DENIED. ... The petition for rehearing en banc is DENIED. [Vols. I & II] [6059727-1][04-35182, 04-35183] (gva) [04-35182 04-35183]
- 5/29/2007 Filed Appellant Exxon Mobile Corp, Appellant Exxon Shipping Co. motion to stay the mandate. (PANEL) [04-35182, 04-35183] served on 5/29/07 [04-35182, 04-35183] (sf)[04-35182 04-35183]
- 6/11/2007 Filed order (Mary M. SCHROEDER, James R. BROWNING, Andrew J. KLEINFELD, JJ.): granting appellant's motion to stay the mandate [6189797-1] It is ordered that the mandate is stayed pndg the filing of the pet for writ of cert in the Supreme Court. The stay shall continue until final disp by the Supreme Court. [6189797-1] [04-35182, 04-35183] (gar)[04-35182 04-35183]
- 11/7/2007 Filed Supreme Court order, certiorari denied on 10/29/07. Supreme Court No. 07-276 [04-35183, 04-35182] (gva) [04-35182 04-35183]
- 11/7/2007 Received letter from the Supreme Court dated 10/29/07 re: The petition for a writ of certiorari is granted lim-

ited to Questions 1,2, and 3(1) presented by the petition. Justice Alito took no part in the consideration or decision of this petition. (PANEL) [04-35183,04-35182](gva)[04-35182 04-35183]

11/14/2007 NO ORIGINAL RECORD (jay) [04-35182]

APPENDIX D

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Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|-----------------------|---|----------------|
| UNITED STATES OF |) | No. A90-015-CR |
| AMERICA, |) | |
| |) | |
| Plaintiff, |) | GOVERNMENT'S |
| |) | MEMORANDUM |
| v. |) | IN AID OF |
| |) | SENTENCING |
| EXXON CORPORATION AND |) | |
| EXXON SHIPPING |) | |
| COMPANY, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

I. INTRODUCTION

The United States, Alaska, Exxon and Exxon Shipping Company have entered into one of the

largest and most comprehensive settlements in the history of law enforcement that resolves all criminal and civil litigation between the federal and state governments and the defendants arising out of the Exxon Valdez oil spill. The value¹ of these comprehensive settlements exceeds \$1.1 billion and is set forth in two separate documents, namely a plea agreement and a consent decree. In addition, the United States and Alaska have entered into agreements with the Native Groups and the private plaintiffs that will assist in resolving their pending civil litigation for damages caused by the oil spill.

United States v. Exxon Corporation and Exxon Shipping Co. is a criminal prosecution arising out of this nation's largest oil spill. The 11 million gallons of oil that spilled from the Exxon Valdez polluted a vast expanse of the previously pristine waters and shores of Prince William Sound and the Gulf of Alaska, and killed a multitude of wildlife.

Consequently, the United States in the plea agreement seeks imposition of the largest criminal fine by far, \$150 million, in an environmental case to date. This fine reflects the seriousness of the conduct that caused the grounding of the Exxon Valdez, and the resulting environmental injury, and sends a strong message that companies that violate criminal environmental statutes face serious punishment. Almost half of this fine would go into a fund to be used to carry out wetlands conservation projects throughout North America.

¹ Among other things, this plea agreement includes an assessed fine that is 50% above the fine proposed to be assessed in the prior plea agreement filed in March 1991, it doubles the amount of compensatory payments and has a cash value that is 25% greater than the prior plea agreement.

In addition, the plea agreement provides for immediate payment of \$100 million to the State of Alaska and to the United States--double the restitution contained in the prior plea agreement. This payment will provide immediately needed funds for the rehabilitation of Prince William Sound and other areas affected by the spill. The entire amount of this payment is to be used exclusively for restoration projects within the State of Alaska relating to the Exxon Valdez oil spill. The restitutionary components of a sentence for an environmental crime cannot be understated. Unlike other economic crimes in which it is possible to compensate the victim years after the offense occurs by, e.g., adding interest to the payments, in environmental cases, the victim of the crime--the environment--must be aided more quickly through in kind efforts funded by restitutionary payments.

This plea agreement, however, addresses more than punishment and compensation. It also acknowledges that the defendants made substantial efforts, at a cost of approximately \$2.5 billion, to rectify the consequences of their conduct by financing oil spill clean-up efforts and engaging in other responsible action following the spill. Consequently, the plea agreement does not ask that either defendant be placed on probation, and provides that all but \$25 million of the fine be remitted. It thus provides the government with a necessary prosecutorial tool by sending a message to the public that the government will take into account steps voluntarily taken by responsible parties to correct the consequences of acts that constitute environmental crimes. In this case, for every \$20.00 voluntarily spent by Exxon to rectify

the consequences of their conduct, the government has agreed to provide a \$1.00 remission of the fine.

This criminal prosecution and the resulting plea agreement cannot resolve all the issues relating to the oil spill. However, the government believes that the purposes of criminal prosecution -- conviction of the guilty, just punishment for wrongful conduct, deterrence of future criminal conduct, and the need to provide compensation to victims -- coupled with the conduct of the defendants since the spill, are effectively addressed by the plea agreement, and the United States respectfully urges the Court to approve it. By any measure, the fine in this case is off the charts.

II. FACTUAL BACKGROUND

Most of the significant facts that underlie the criminal charges in this case have been set forth in prior pleadings.² In addition, attached hereto and made a part hereof is the Government's Statement of Factual Basis for Defendants' Guilty Plea that was filed on March 22, 1991.

III. THE PLEA AGREEMENT

Pursuant to the plea agreement, Exxon Corporation has pled guilty to a violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a), and Exxon Shipping has pled guilty to

² See e.g., Bill of Particulars, July 31, 1990; Government's Consolidated Opposition to Motions of Exxon Corporation to Dismiss Counts One, Two, Three, Four and Five, Sept. 20, 1990; Government's Opposition to Motion of Exxon Shipping Company to Dismiss Count Four for Failure to Charge an Offense, Sept. 20, 1990; Factual Basis for Guilty Plea of Exxon Shipping Company, March 22, 1991.

violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1)(A); the Refuse Act, 33 U.S.C. §§ 407 and 411; and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a). The total maximum statutory fines that the court could impose for these violations as to both defendants is \$420,000.00, unless the loss-doubling provision of 18 U.S.C. § 3571(d) is applied. However, in the plea agreement, the defendants have agreed to the imposition of a fine of \$150 million. In addition to the agreed-upon fines, the defendants have agreed to make compensatory payments of \$100 million to the State of Alaska and the United States. The parties have agreed that the provisions of Rule 11(e)(1)(C), Fed. R. Crim. P., apply to the plea agreement.

IV. FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE

The relevant sentencing factors set forth in 18 U.S.C. § 3553 are discussed below.

A. § 3553(a)(1) - The nature and circumstances of the offense

The government incorporates by reference the factual background set forth in Section II of this Plea Agreement.

B. § 3553(a)(2)(A) - The need of the sentence to reflect the seriousness of the offense

The Exxon Valdez oil spill is the largest oil spill in United States history. So too is the proposed sanction. As an aid to the Court in determining whether the sentence set forth in the plea agreement is appropriate, the United States filed a "Summary of Effects of the Exxon Valdez Oil Spill on Natural

Resources and Archaeological Resources" on April 8, 1991. Although the injuries were serious, Prince William Sound and the affected areas are on the road to recovery. This is in large part because of the multi-billion dollars expended by Exxon and the two governments in clean up efforts, natural recovery, and the restoration that will be possible with the \$1 billion that will be available if this plea agreement and the consent decree are approved. The government firmly believes that the \$1.1 billion provided in the consent decree and the plea agreement will provide sufficient funds for the restoration of Prince William Sound and the Gulf of Alaska.

C. § 3553(a)(2)(A) - The need of the sentence to promote respect for the law

More than any other case in environmental litigation, this case has riveted the attention of the nation, and has been a sobering lesson that the environment is a vulnerable victim that requires great care in the conduct of environmentally hazardous activities. Acceptance of the plea agreement should heighten the business community's and the public's awareness of, and respect for, laws designed to protect the environment. Indeed, as outlined below, Exxon has taken, and will continue to take, a number of actions since the spill that demonstrates its commitment in this regard. The remitted portion of the fine will also promote respect for the laws. It is only because of Exxon's voluntary efforts, cooperation, and responsible action that remission is appropriate. As noted earlier, for every \$1.00 of the fine remitted, Exxon spent \$20.00 correcting the harm created by

the spill. Nonetheless, must still pay a fine of \$25 million cash, which will be one of the largest criminal fines ever paid into the federal treasury in the history of the United States and certainly eclipses all prior environmental fines.

D. § 3553(a)(2)(A) - The need of the sentence to provide just punishment for the offense

The maximum statutory penalties allowable for the crimes to which the defendants have pled guilty total \$420,000.00. The fine proposed in this plea agreement is \$150 million, with \$25 million paid immediately. Both amounts represent the largest criminal fine ever imposed in an environmental criminal case. A fine of this magnitude is warranted in light of the conduct of the defendants' employees and agents, and of the harm to the environment and the people of Alaska. In addition, the unremitted amount of the fine is sufficient to provide punishment and deterrence for the unintentional conduct in question.

There is no question that Exxon has paid dearly for this oil spill. Not only did Exxon spend in excess of \$2.5 billion in response to the spill, but is also committing to pay in excess of \$1.1 billion pursuant to these comprehensive settlement agreements. As a result, the total amount of the penalties, compensatory payments and voluntary expenditures will exceed \$3.5 billion.

E. § 3553(a)(2)(B) - The need of the sentence to afford adequate deterrence to criminal conduct

Criminal violations of environmental statutes have the potential to, and often do, result in

enormous injury. Accordingly, adequate deterrence is essential to future avoidance. The United States believes that the sentence imposed in this case must, and would, if approved, send a strong message to businesses and individuals alike. As the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping in failing to exercise the high standard of care required in transporting crude oil through a pristine environment. Imposition of the statutory fines that would apply in this case, amounting to no more than \$420,000.00, would utterly fail to send that message. For that reason, the United States believes that 18 U.S.C. § 3571(d) should be applied to raise the amount of the fine otherwise permissible for the offenses set forth in the plea agreement. The fines and restitution contained in the plea agreement are of a magnitude that should deter future corporate carelessness with the environment.

F. § 3553(a)(3) - The kinds of sentences available

Only two sanctions apply to an organization convicted of a crime. Those sanctions - a fine or a term of probation - are set forth in 18 U.S.C. § 3551(c). In considering whether to impose a fine and the amount of the fine, the court should consider, in addition to the factors set forth in § 3553(a) and described elsewhere in this sentencing memorandum, the factors set forth in 18 U.S.C. § 3572. Those factors, which are discussed below, amply support imposition of the fines set forth in the plea agreement.

The first of those factors is whether the defendant is an organization. If so, the Court should consider its size. Exxon Corporation, including its affiliates, is one of the largest and most profitable organizations in the world. This proposed sentence is one of the largest in the world.

The next factor to be considered is any measure taken by the organization to discipline any employee responsible for the offense. In this case, Exxon Shipping fired Captain Hazelwood for his conduct of using alcohol four hours before assuming duty and for his leaving the bridge during a hazardous maneuver. Mr. Cousins was reassigned to the status of AB as disciplinary action for his role on the grounding.³

The last factor the court should consider in determining the amount of the fine is any measures taken by the defendants to prevent a recurrence of the offense. Since the grounding, Exxon Corporation has revised its substance abuse policy substantially. Specifically, employees who have had or are found to have a substance abuse problem will not be permitted to work in safety sensitive positions and employees who have returned from rehabilitation will be required to participate in an aftercare program. The policy subjects persons in safety sensitive positions to unannounced periodic or random drug and alcohol testing and permits the defendants to conduct unannounced searches for drugs and alcohol on property owned or controlled by the defendants.

³ Following the grounding, Mr. Cousins' license was suspended for nine months by the USCG.

In addition, the defendants have created the position of loading mate in the Ports of Valdez and San Francisco. The loading mate has the responsibility of loading and unloading cargo from tanker vessels in port. The creation of this position should eliminate a significant source of fatigue. The National Transportation Safety Board concluded that the third mate's fatigue and excessive workload contributed to the grounding of the Exxon Valdez. It should also be noted that Exxon will spend \$1.6 billion in 1991 on capital projects to enhance environmental and safety performance apart from the expenditures relating to the spill. Exxon also has committed to contribute \$50 million to fund improvement of the response capabilities of the oil industry to deal with large-scale oil spills.

In addition, since the date of the spill, the defendants have spent more than \$40 million to improve vessel operating safety, personnel training and oil spill capability. Exxon Shipping has established a new environmental affairs group and hired two former Coast Guard captains with oil spill experience. Exxon's division for U.S. oil and gas operations has created a New Environmental and Safety Department to review and coordinate management of environmental and safety concerns. A primary reason the government would request a term of probation in this case would be to serve as a vehicle for the Court to order restitution as a condition of probation. Since the terms of the plea agreement and consent decree include payments of in excess of \$1 billion in compensatory payments to the State of Alaska and the United States by the defendants, the United States does not believe probation is required in this matter.

G. § 3553(a)(6) - The need to avoid unwarranted sentence disparities among defendants guilty of similar conduct

There have been only a few other prosecutions for negligent oil spills, and none have involved environmental harm as widespread as that caused by the Exxon Valdez spill. The only other case that approaches this one is United States v. Ashland Oil Co., No. 88-146 CR (W.D. Penn. 1988), where the court imposed a fine of \$2.25 million for a negligent spill of about 700,000 gallons of diesel oil into the Monongahela River. That spill, at the time, was the largest inland oil spill in U.S. history, forcing more than a million people in five states to go without water, or to sharply curtail their use of it. The governors of Pennsylvania and Ohio issued emergency proclamations imposing mandatory restrictions on water use in affected communities. Numerous schools, churches and businesses were forced to close, some for more than a week. As the 20-mile-long oil slick moved down the Monongahela and Ohio Rivers, authorities in five states raced to find alternative water supplies or to find a means of removing diesel fuel from their drinking water.

The present case involves a spill many times larger than the Ashland spill, and Exxon is several times larger than Ashland. Thus, it is appropriate that the fine in this case be proportionally larger than in Ashland, in light of all of the circumstances. The government believes that the record \$125 million to be paid in this case, more than 50 times the amount paid in the Ashland criminal case, when coupled with the other terms and conditions of this plea agreement, appropriately reflects the

seriousness of the offenses to which defendants have pled guilty. It must be stressed, however, that in and of itself, the net fine proposed in this plea agreement is far greater than the aggregate of all previously imposed fines for violations of the Clean Water Act since it became law.⁴

H. § 3553(a)(7) - The need to provide restitution to any victim of the offense.

While restitution is an important consideration, the criminal sentence cannot provide relief to every victim of the oil spill. However, many of those injured by the spill have been compensated or will be compensated. For example, the plea agreement provides \$100 million in compensatory payments to the State of Alaska and to the United States and a separate civil settlement requires the defendants pay up to \$900 million over the next ten years, and possibly an additional \$100 million if reopener conditions are met, for the restoration of Prince William Sound and other areas affected by the spill. The defendants have already paid more than \$300 million to third parties in settlement of claims resulting from the oil spill and there are presently pending, in federal and state court, a multitude of claims requesting various forms of relief. It would be extremely complicated, in light of all the pending litigation, for this Court to fashion an order of restitution for all those who claim to have suffered losses resulting from the oil spill.

⁴ Attachment B is an Environmental Crimes Penalty History chart that illustrates how the proposed sentence is off the chart when compared to the penalties ordered in other criminal cases from 1983 to 1990.

Under 18 U.S.C. S 3663(d), the Court may decline to make a restitution order if the Court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any of the victims. A protracted hearing to determine restitution for every victim of the oil spill may run afoul of Fed. R. Crim. P. 32(a)(1), which generally requires that sentence shall be imposed without unnecessary delay. Consequently, the agreed upon disposition will satisfy the loss to the environment and will avoid the time consuming, complex, and uncertain task of assessing unrestituted losses to the federal and state natural resource trustees.⁵

The United States strongly believes that the \$1.1 billion in restitution and damage payments provided for in the plea agreement and consent decree is far preferable to the alternative: years of litigation with an uncertain result. That alternative is best illustrated by the Amoco Cadiz case, which involved an oil spill in 1978 that was five times larger than the Exxon Valdez spill. See In re: Amoco Cadiz, 20 Env't. Rep. Cas. 2041 (N.D. Ill. 1984). Thirteen years after that spill, the case is still being litigated. Should the plaintiffs prevail on appeal, the damages paid will be less than \$150 million. The United States believes that the restoration of Prince William Sound and the Gulf of Alaska should not

⁵ No court has ever ruled upon the valuation issues inherent in natural resource damages. Only one court has ever even considered the specific cost of the clean up of an environmental crime in a sentencing hearing. In that case, United States v. Boas (N.D. Ohio), the parties spent five days in a sentencing hearing litigating whether a clean up effort cost \$350,000.

await years of legal battles over damages and liability.

V. LEGAL AUTHORITY TO IMPOSE THE FINE SET FORTH IN THE PLEA AGREEMENT AND TO THEREAFTER REMIT A PART OF THE FINE

The plea agreement calls for imposition of a \$125 million fine on Exxon Shipping, and a \$25 million fine on Exxon Corporation. The Court's authority to impose these fines rests on 18 U.S.C. § 3571(d), which permits a fine of up to double the gross pecuniary loss to persons other than the defendant caused by the offense. If sentencing under this statute were litigated, the government would be prepared to prove that the offenses to which the defendants have entered pleas of guilty caused pecuniary losses to others in excess of \$75 million, providing a basis for a fine of \$150 million. In the plea agreement at page 4, defendants agree that there is a legal basis for the Court to impose the agreed fines.

The plea agreement calls for remission of \$105 million of Exxon Shipping's fine, and 520 million of Exxon Corporation's fine, in recognition of defendants' conduct following the spill. The Court has the authority to order remission of part of a fine it has imposed, because the Court has the inherent authority to reduce a sentence it has imposed. In United States v. Benz, 282 U.S. 304 (1931), the Supreme Court upheld a district court's reduction of a defendant's prison sentence after it began, stating:

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made.

They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented.

Id. at 306-07 (citations omitted). More recent decisions of the Supreme Court on sentencing authority have cited the rule laid down in Benz without question. See United States v. DiFrancesco, 449 U.S. 117, 138 (1980). Lower courts following Benz have distinguished between a court's power to reduce a sentence, which is inherent, and a court's power to suspend execution of a sentence, which a court may do only by imposing probation. See United States v. Ellenbogen, 390 F.2d 537, 540-41 (3d Cir. 1968), cert. denied 393 U.S. 918.

The distinction between reduction and suspension is logical: reduction of a sentence is unconditional, while a suspended sentence may be reimposed at some future date. A defendant whose sentence is suspended is entitled to be placed on a term of probation with a definite ending date and express conditions, so that he knows what conduct, during what period, will subject him to reimposition of his sentence. A defendant whose sentence is reduced without condition has no such need.

VI. CONCLUSION

This prosecution was brought after investigation determined that criminal conduct was involved in the grounding of the Exxon Valdez. In the plea agreement submitted to the Court for approval, both defendants have offered guilty pleas and have agreed to pay fines totaling \$150 million, \$125

million of which would be remitted, and have agreed to pay \$100 million in compensatory payments to the State of Alaska and to the United States. The government believes that this would be a just resolution of the criminal charges, and respectfully urges the Court to accept the plea agreement.

All state and federal trustees of the natural resources affected by the oil spill are in complete and total support of this plea agreement. They are satisfied that the \$1 billion in restitutionary and compensatory payments to be made no later than 30 days after the acceptance of the plea agreement and on the schedule set forth in the consent decree will ameliorate the harm caused by the spill. They have authorized counsel to urge the Court, on their behalf and for the benefit of Prince William Sound and the Gulf of Alaska, to approve this plea agreement.

The fine amount will be placed into good use. The parties have agreed that all of Exxon's fine and greater than one third of Exxon Shipping's fine should be imposed for violation of the Migratory Bird Treaty Act. Consequently, by operation of law, Title 16, United States Code, Section 4406(b), \$12 million of the fine will be directed to the North American Wetlands Conservation Fund to be used solely to carry out approved wetlands conservation projects in the United States, Canada and Mexico. The remaining part of the fine will be directed to the Victims of Crime Act (VOCA) account of the United States Treasury to assist victims of crime.

As a result, of the \$125 million of actual dollars required to be paid by the defendants pursuant to this plea agreement, \$112 million will go directly to the environment. The total amount of payments due

pursuant to the plea agreement and consent decree is a just remedy for the nation's largest oil spill.

The Government believes that this plea agreement is in the best interest of justice and strongly urges this Honorable Court to give its approval.

Respectfully Submitted,

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Acting Assistant Attorney General
Environment and Natural
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By: s/ [illegible] Dated: Sept. 30, 1991

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APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

In re) No. A89-095 Civil
) (Consolidated)
the EXXON VALDEZ)
_____)

RE: ALL CASES

**MOTION OF EXXON DEFENDANTS (D-1, D-2
and D-10) AND ALYESKA DEFENDANTS (D-3,
D-9, D-11, D-12, D-14, D-19, D-20 and D-21) FOR
PARTIAL SUMMARY JUDGMENT ON CLAIMS
FOR PUNITIVE DAMAGES BASED ON TAPAA
DISPLACEMENT OF GENERAL MARITIME
LAW**

The Exxon defendants and the Alyeska defendants hereby move for partial summary judgment on claims for punitive damages asserted against them in each and every of the cases comprising this consolidated litigation on the ground that the Trans-Alaska Pipeline Liability Act, 43 U.S.C. § 1653, displaces general maritime law with respect to punitive damage claims relating to spills of North Slope oil from the Trans-Alaska Pipeline System and from vessels transporting oil from the Valdez Marine Terminal of the Trans-Alaska Pipeline System.

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that, as a matter of law, plaintiffs may not recover

punitive damages. The Exxon defendants and the Alyeska defendants have filed herewith a memorandum of law in support of this motion.

Dated at Anchorage, Alaska this ____ day of April, 1993.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

In re) No. A89-095 Civil
) (Consolidated)
the EXXON VALDEZ)
_____)

RE: ALL CASES

**MEMORANDUM OF EXXON DEFENDANTS (D-1, D-2 and D-10) AND ALYESKA DEFENDANTS (D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21)
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGE CLAIMS
BASED ON TAPAA DISPLACEMENT OF
GENERAL MARITIME LAW**

* * *

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The above-identified defendants move for partial summary judgment dismissing with prejudice all punitive damage claims asserted against them in all spill-related actions pending in this Court. By enacting the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-56 (“TAPAA”), Congress has prescribed a comprehensive remedial scheme for TAPS oil spills which leaves no room for punitive damage claims. This conclusion follows inescapably from well-established principles governing legislative displacement of judge-made maritime law:

First, as we show in Part II(A), courts consistently have held that where Congress has legislated a statutory remedy in an area formerly governed by judge-made federal law, judge-made remedies purporting to afford relief over and above that provided by statute cannot stand. More specifically, cases in the maritime area establish that where Congress has enacted a remedial scheme providing for compensatory damages only, courts may not “supplement” that scheme by awarding punitive damages under general maritime law.

Second, as we show in Part II(B), both this Court and the Ninth Circuit have recognized that TAPAA establishes a comprehensive remedial scheme for TAPS oil spills. That scheme, which creates strict liability up to specified limits for harm caused by a spill of TAPS oil, provides only for compensatory relief and manifestly does not contemplate punitive damages.

Third, as we show in Part II(C), all punitive damage claims asserted in these consolidated cases, no matter how denominated, are governed by federal maritime law. Punitive damages are a purely judge-made adjunct of the maritime claims plaintiffs seek to assert. As such, they cannot be sustained. Judges administering maritime law (whether sitting in federal or state courts) may not alter the balance struck by Congress. Since TAPAA indisputably applies to the EXXON VALDEZ spill, all punitive damages claims must be dismissed.

II. ARGUMENT

A. Where Congress Has Legislated a Comprehensive Remedial Scheme Providing for Compensatory Damages Only, Courts May Not “Supplement” That Scheme by Awarding Punitive Damages Under the General Maritime Law

The relevant principles governing Congressional displacement of judge-made federal law originate with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). There, the Supreme Court considered whether the “pecuniary loss” limitation of the Death on the High Seas Act, 46 U.S.C. §§ 761-67 (“DOHSA”), left room for recovery for loss of society in a wrongful death cause of action pleaded alternatively under general maritime law. The Court refused to permit such an award, holding that to allow recovery of non-pecuniary damages under judge-made maritime law would undermine the legislative policy judgment expressed in DOHSA. The Court emphasized that it was Congress’ prerogative to make such judgments, and that once Congress had done so, the courts were not free to alter those judgments under the rubric of creating general maritime law: “[W]e need not pause to evaluate the opposing policy arguments [for or against allowing non-pecuniary recoveries]. Congress has struck the balance for us.” 436 U.S. at 623. The Court further made clear that courts could not circumvent this principle by construing Congress’ failure to mention non-pecuniary damages as an invitation to “supplement,” or “fill gaps” in, the statutory scheme. Emphasizing that DOHSA “speaks directly to [the] question” of recoverable damages, *id.* at 625, the Court reiterated that “we

have no authority to substitute our views for those expressed by Congress in a duly enacted statute.” *Id.* at 625-26.

In a subsequent decision, the Court made equally clear that courts could not circumvent DOHSA’s pecuniary loss limitation by “importing” non-pecuniary wrongful death remedies available under state law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). Citing *Higginbotham*, the Court again held that Congress’ policy judgment on the measure of recoverable damages was conclusive. *Id.* at 232.

The Ninth Circuit applied the rule of *Higginbotham* to punitive damages in *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir. 1989). At issue in *Bergen* was whether the estates of seamen killed on the high seas could recover punitive damages under (1) DOHSA, (2) the Jones Act, 46 U.S.C. App. § 688, or (3) general maritime law. The Ninth Circuit answered all three questions in the negative. Citing an earlier ruling that “[p]unitive damages are non-pecuniary damages unavailable under the Jones Act,”¹ the court held that the same was necessarily true under DOHSA. 816 F.2d at 1347. Finding *Higginbotham* and *Tallentire* controlling, the court further held that courts could not “supplement” the limited statutory remedies with punitive damages under general maritime law. *Id.* at 1348.

The Ninth Circuit expressly rejected the

¹ See *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984).

argument that Congress had not “spoken to” the issue of punitive damages when it enacted the limited compensatory remedies embodied in DOHSA:

Plaintiffs argue that DOHSA is a remedial statute and that punitive damages fill a “gap left by Congress’ silence.” It is true that punitive damages have nothing to do with losses suffered. Their purpose is punishment and deterrence.... Nonetheless, *Higginbotham* and *Tallentire* make it clear that Congress intended DOHSA to preempt anything but pecuniary damages where DOHSA applies. “Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements.” [*Higginbotham*, 436 U.S. at 625.] The pecuniary remedies available under DOHSA therefore cannot be supplemented by punitive damages under the general maritime law.

Id. at 1348-49. The court also rejected the argument that the DOHSA plaintiffs alternatively could recover punitive damages as a general maritime law supplement to their parallel Jones Act claims. “If all those actions could be supplemented by the general maritime law, DOHSA’s preemption of maritime law would be nullified.” *Id.* at 1349.

Bergen technically left unanswered whether a court could permissibly supplement the remedies of a Jones Act plaintiff whose claims were not also cognizable under DOHSA. *Id.* at 1349 n.3. The Supreme Court recently put that question to rest,

however, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), a decision that broadly reaffirms the *Higginbotham* principle that a Congressional remedy supplants any purportedly more expansive judge-declared maritime remedies.

In *Miles*, the Court considered the general maritime law remedies available to a Jones Act wrongful death plaintiff who had no claim under DOHSA because the death occurred on territorial waters rather than the high seas. At issue was whether a court could award general maritime law damages for (1) loss of society or (2) the decedent's lost future earnings, despite the unavailability of either remedy under the Jones Act itself. The Court answered both questions in the negative:

[W]e must ... keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

498 U.S. at 27. Citing *Higginbotham*, the Court emphasized that “to sanction more expansive remedies in a judicially-created cause of action” would be “inconsistent with our place in the constitutional scheme.” *Miles*, 498 U.S. at 32.

In the wake of *Miles*, the Sixth Circuit and multiple district courts, including this Court and at least four others from this Circuit, have applied the Supreme Court's reasoning to disallow punitive damages for general maritime law personal injury or death claims also cognizable under the Jones Act.

Miller v. American President Lines, Ltd., 1993 U.S. App. LEXIS 5538 (6th Cir., Mar. 23, 1993); *Jackson v. Unisea, Inc.*, A91-606 (D. Alaska, Sept. 23, 1992) (Holland, C.J.); *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827 (D. Hawaii 1992); *In re Aleutian Enterprise, Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991).² As stated in *Aleutian Enterprise*:

[*Miles and Higginbotham*] emphasize[] that federal courts sitting in admiralty should respect the pronouncements of Congress.... [T]he reasoning of *Miles* is inescapable in its application here. The remedies provided by Congress in the Jones Act do not encompass punitive damages. The claimants ask this Court to supplant Congress' judgment in this regard by awarding punitive damages under the general maritime law. That is not the proper function of this Court within our system of governance.

777 F. Supp. at 795-96.

Miles thus makes clear that the rule established in *Higginbotham* and applied by the Ninth Circuit in *Bergen* is one of general application. Where Congress has legislated a remedial scheme providing

² *Accord, Shearer v. Vonmar Trawlers, Inc.*, A91-125 (D. Alaska, Mar. 5., 1993) (Sedwick, J.); *Ortega v. Oceantrawl, Inc.*, A91-174 (D. Alaska, Oct. 8, 1992) (von der Heydt, J.); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992); *In re Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Haltom v. Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *In re Mardoc Asbestos Case Clusters 1, 2, 5 & 6*, 768 F. Supp. 595 (E.D. Mich. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

only for compensatory relief, courts may not-supplement that scheme with more expansive relief--including punitive damages--under general maritime law.

This principle is underscored in cases applying *Higginbotham* in the context of federal pollution statutes such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (“FWPCA”), and the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-45 (“MPRSA”). The leading decision is *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (“*Milwaukee II*”), in which the Supreme Court considered the effect of the FWPCA’s National Pollution Discharge Elimination System (“NPDES”) permitting scheme on the federal common law of nuisance. The case arose from a dispute between the State of Illinois and the City of Milwaukee over the latter’s discharge of sewer effluents into Lake Michigan. In *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”), the Court had recognized a nuisance remedy under “federal common law” for interstate water pollution. Only a few months later, however, Congress enacted the 1972 Amendments to the FWPCA, which established the NPDES permitting scheme. Milwaukee thereafter obtained effluent discharge permits, but at the same time, Illinois proceeded to judgment in its *Milwaukee I* nuisance suit and obtained injunctive relief imposing effluent limitations more stringent than those imposed under Milwaukee’s NPDES permits. When the case again reached the Supreme Court, Milwaukee argued that the NPDES scheme necessarily displaced the preexisting federal common law remedy for nuisance.

In a broadly-worded opinion, the Court upheld

Milwaukee's defense. Citing *Higginbotham*, the Court reiterated that judicial deference to Congressional legislative policy judgments is mandated by core notions of separation of powers that underlie our democratic system of government:

In [*Higginbotham*], the Court refused to provide damages for "loss of society" under the general maritime law when Congress had not provided such damages in the Death on the High Seas Act.... [T]he question was whether the legislative scheme "spoke directly to a question" -- in that case the question of damages -- not whether Congress had affirmatively proscribed the use of federal common law. Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal'" when Congress has addressed the problem.

Milwaukee II, 451 U.S. at 315 (citations omitted).

The Court further made clear that, unlike state law, judge-made federal law is *not* entitled to an initial "presumption" of continuing validity in the face of a Congressional enactment addressing the same subject matter. On the contrary, the Court held that where Congress has spoken in an area formerly governed by judge-made federal law, there is a presumption of displacement:

[T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that

employed in deciding if federal law pre-empts state law. In considering the latter question “we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” ... Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present “we start with the assumption” that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Id. at 316-17 (citations omitted).

The Court had little difficulty concluding that the enactment of the NPDES scheme foreclosed federal common law nuisance claims. Congress had spoken to the subject of effluent limitations in the 1972 legislation. As in *Higginbotham*, judicial imposition of a different and potentially more expansive scheme of regulation through judge-made remedies would have both usurped Congress’ legislative role and impermissibly undermined the policy balance struck by Congress:

[T]he problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations

than those imposed under the regulatory regime by reference to federal common law ... [¶] The question is whether the field has been occupied, not whether it has been occupied in a particular manner.

Id. at 320-24.

In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court applied *Milwaukee II* to federal common law nuisance claims asserted by coastal fishermen who claimed that governmental entities had damaged fishing grounds by discharging and dumping sewage and other wastes into coastal waters in violation of the FWPCA and the MPRSA. The plaintiffs alleged “tangible economic injuries” from the alleged nuisance and sought both compensatory and punitive damages. 453 U.S. at 5, 12. Rejecting those claims, the Court held that “the federal common law of nuisance is entirely preempted by the more comprehensive scope of the FWPCA [and the MPRSA],” even though neither statute afforded a private damage remedy. *Id.* at 13-18, 21-22. *Sea Clammers* thus reiterates that when Congress enacts a statute that “speaks to” a given subject area without providing for private recovery of damages, no such recovery may be awarded under federal common law.

Lower federal courts have not hesitated to apply *Milwaukee II* and *Sea Clammers* to foreclose preexisting judge-made remedies purporting to afford relief more expansive than that afforded under federal pollution statutes. In *Conner v. Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), the First Circuit confirmed that the reasoning of *Milwaukee II*

and *Sea Clammers* applies equally to federal common law claims alleged specifically to arise under federal *maritime* law. In *Conner*, Massachusetts fishermen sought damages under the maritime common law of nuisance for injuries suffered when coastal pollution discharges caused the state to restrict commercial fishing. 730 F.2d at 836. The court held that the FWPCA displaced the maritime common law nuisance claims even though the Act itself did not provide a compensatory damages remedy for private parties:

The Act does not provide a compensatory remedy for losses of the type complained of here. It does authorize the government to remove hazardous substances discharged into navigable waters and to recover at least part of the cost. 33 U.S.C. § 1321(c)(1) and (f)(2). Present plaintiffs allege that the damage is irreversible, and the cleanup provisions may thus provide no relief. [¶] The Supreme Court has emphasized, however, the comprehensiveness of the policy implemented in FWPCA rather than the adequacy of the implementation. “*The lesson of Milwaukee II is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution.*”

730 F.2d at 840-41 (emphasis added) (quoting *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478

(7th Cir. 1982)).³ See also *National Audubon Soc’y v. Department of Water*, 869 F.2d 1196, 1200 (9th Cir. 1988) (“[t]he Court’s statement [in *Sea Clammers*] that federal common law nuisance claims for water pollution are preempted by the FWPCA is unequivocal ...”).

Finally, in *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), the Second Circuit held that these same principles apply fully to traditional maritime negligence claims as well as maritime nuisance claims. *Oswego* involved not the FWPCA’s NPDES permitting scheme, but rather the separate provision of that Act dealing with federal government recovery of oil spill cleanup costs from owners of discharging vessels. The cleanup cost provision gives the government a strict liability remedy against the vessel owner up to a specified limit, with additional liability thereafter contingent on a showing of “willful negligence or willful misconduct within the privity and knowledge of the owner.” 33 U.S.C. § 1321(f)(1); see also *Oswego*, 664 F.2d at 333 & n.8. At issue in *Oswego* was whether the liability limits specified for the government’s statutory remedy foreclosed the government’s pursuit of the vessel owner for additional compensatory relief under judge-made maritime remedies for negligence or nuisance. *Id.* at 333-34.

Even before *Milwaukee II*, several courts had examined this issue and concluded that to sanction

³ Foreshadowing the later decisions of the Supreme Court in *Tallentire* and the Ninth Circuit in *Bergen*, the *Conner* court further held that a court could not circumvent such statutory displacement of maritime remedies by “borrowing” analogous remedies available under state law. 730 F.2d at 842.

such non-statutory cleanup cost recoveries would impermissibly nullify the statutory liability limits.⁴ *Oswego* is noteworthy for Judge Newman's scholarly opinion, which exhaustively analyzed the issue under the broad separation of powers rationale of *Milwaukee II* and *Sea Clammers*. The court began by observing that, "as [*Milwaukee II*] instructs, ... the doctrine of separation of powers creates a *presumption* that legislation preempts the role of federal judges in developing and applying federal common law ..." 664 F.2d at 339 (emphasis added). While noting that this presumption sometimes may apply "less forcefully" in the maritime area in light of the greater "law-creating functions for federal courts," the court emphasized that "statutory ... preemption of maritime law has occurred both as to prior judge-made law and the authority to fashion new law." *Id.* at 337. Citing *Higginbotham*, the court concluded that the "presumption of legislative preemption" applies to judge-made maritime law. *Id.* at 337-38.

The court further enumerated the relevant factors to consider in determining whether that presumption may be overcome in any given case:

Ultimately determining whether non-statutory maritime law, as to both liabilities and remedies, survives enactment of a statute requires careful analysis of several

⁴ See *United States v. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); *United States v. Tug J.P. McAllister*, 1981 A.M.C. 780, 789-91 (D.P.R. 1980); *United States v. M/V Big Sam*, 480 F. Supp. 290 (E.D. La. 1979), *rev'd in part on other grounds*, 681 F.2d 432 (5th Cir. 1982), *reh'g denied*, 693 F.2d 451 (5th Cir. 1982).

factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. Any terms of the statute explicitly preserving or preempting judge-made law are of course controlling, as is clear evidence of Congressional intent to achieve such results. In the absence of clearly expressed legislative intent, legislative history may provide useful guidance.... A judgment must be made whether applying judge-made law would entail “filling a gap left by Congress’ silence” or “rewriting rules that Congress has affirmatively and specifically enacted.” ... The detail and comprehensiveness of a statute will frequently aid this determination. Finally, Congress is less likely to have intended preemption of “long-established and familiar principles” of “the common-law or the general maritime law.”

Id. at 339 (citations omitted).

Applying these factors, the court readily concluded that the “comprehensive remedial scheme” embodied in the FWPCA’s cleanup cost provision precluded the government from pursuing potentially broader remedies under general maritime law:

Without any doubt the FWPCA legislates on the subject of recovery by the United States of its costs of cleaning up oil spilled into American waters. Section 1321(f) establishes a comprehensive remedial scheme providing for both strict liability up to specified limits and recovery

of full costs upon proof of willful negligence or willful misconduct within the privity and knowledge of the owner. *We must therefore start with a presumption that non-FWPCA maritime liabilities and remedies for oil spill clean up costs of the United States have been preempted.*

Id. at 339-40 (emphasis added). The court found nothing to rebut this presumption in either the statute or the legislative history. Focusing principally on the language of several savings clauses included in the cleanup cost provision,⁵ the court pointedly observed that none of those clauses preserved any preexisting non-statutory right to recoup cleanup costs:

[I]t would be ... anomalous for Congress to have drafted express language to preserve [other non-statutory] remedies ... while leaving the preservation of [non-statutory cleanup cost] remedies against shipowners to be inferred by courts. *Once Congress legislates comprehensively on the subject of Government remedies for oil spill clean up costs, the responsibility lies with Congress to spell out expressly what, if any, role remains for courts to fashion and apply non-statutory remedies.* None of the savings clauses of the Act preserves the non-statutory remedies the Government is asserting in this case.

⁵ See 33 U.S.C. § 1321(h)(2) (preserving government's rights against third parties); 33 U.S.C. § 1321 (o)(1) (preserving claims for property damage).

Id. at 341 (emphasis added).⁶ After reviewing the other relevant factors noted above, the court concluded, as in *Higginbotham*, that judicial supplementation of the government's express statutory remedies would be inappropriate. "To permit a judge-made remedy so significantly different from the one Congress has expressly provided would amount to rewriting the rule that Congress has enacted." *Oswego*, 664 F.2d at 344.⁷

We now turn to the single question crucial to the application of *Higginbotham* and its progeny to this case; that is, whether TAPAA provides a comprehensive remedy that displaces judicial supplementation.

B. TAPAA Displaces the General Maritime Law of Punitive Damages

TAPAA was intended "to facilitate the development and delivery of oil and gas and, at the same time, to protect the environment." *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1476 (9th Cir. 1992) (quoting *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 873 (9th Cir. 1981)). "[T]o deal with the environmental risks of the pipeline," Congress enacted a comprehensive regime of strict liability for pipeline-related oil spills in § 1653. *Slaven*, 973 F.2d

⁶ *Accord, Dixie Carriers*, 627 F.2d at 739-42; *Steuart Transp. Co.*, 596 F.2d at 615-19.

⁷ Since *Oswego* was decided, numerous other courts have followed its reasoning, favorably citing Judge Newman's separation of powers analysis and reaching similar results. *See, e.g., Conner*, 735 F.2d at 839; *United States v. M/V Big Sam*, 681 F.2d 432, 442 (5th Cir. 1982), *reh'g denied*, 693 F.2d 451 (5th Cir. 1982); *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 760 F. Supp. 174, 175-78 (W.D. Wash. 1991).

at 1476 (quoting *Heppner*, 665 F.2d at 868). Section 1653(a) imposes strict liability on the holders of the pipeline right-of-way for damages resulting from environmental accidents along the right-of-way. *Heppner*, 665 F.2d at 874. Section 1653(c)--with which this Court is by now very familiar--covers spills from vessels carrying TAPS oil.

As this Court has acknowledged, § 1653(c) creates “a comprehensive liability scheme for marine spills of Trans-Alaska Pipeline System (TAPS) oil.” *In re the Glacier Bay*, 741 F.Supp. 800, 802 (D. Alaska 1990), *aff’d*, 944 F.2d 577 (9th Cir. 1991). The statute imposes strict liability, up to a maximum of \$100 million per incident, 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 vessels carrying TAPS oil. 43 § U.S.C. 1653(c)(1),(3). The first \$14 million of such liability falls on the owner and operator of the vessel and the remainder falls on the Trans-Alaska Pipeline Liability Fund (“the Fund”). *Id.* § 1653(c)(3).

In the event the total claims allowed exceed \$100 million, the Fund must reduce all payments proportionately, and the claimants may assert claims for the unpaid portions of allowed claims against any responsible party under other applicable federal or state law. *Id.* § 1653(c)(3). Upon payment of allowed claims, both the Fund and the vessel owner become subrogated to the rights of the claimants under applicable federal or state laws for purposes of litigating fault with each other or third parties. *Id.* § 1635(c)(8). In the event the Fund brings a subrogation claim against the vessel owner and the vessel owner fails to satisfy it, the Fund may

recover from any “affiliate” of the vessel owner. *Id.* § 1653(c)(8),(11).

Congress clearly intended the foregoing provisions to operate as a “comprehensive remedial scheme” for TAPS oil spills. The Ninth Circuit emphasized that very point at length in its decision in *Glacier Bay*. Affirming this Court’s holding that TAPAA impliedly repealed the Limitation of Vessel Owner’s Liability Act, 46 U.S.C. App. §§ 181-89, the court characterized § 1653(c) as “a comprehensive liability scheme, which includes, as necessary elements, both strict liability and negligence principles.” 944 F.2d at 582.

The Ninth Circuit then went on to explain the workings of that scheme in great detail. Turning to the strict liability component first, the court emphasized the statute’s overriding compensatory purpose:

TAPAA establishes a comprehensive liability scheme applicable to damages resulting from the transportation of trans-Alaska pipeline oil.... The vessel owner and the Fund must initially pay \$100,000,000 of liability regardless of fault. This strict liability provision ensures that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation....

Id. at 580-82. The court further explained that in addition to imposing strict liability for damages sustained by injured parties, the statute was intended to assure, through potential subrogation actions by the parties *against* whom strict liability was imposed, that any party whose negligence

caused such a spill could ultimately be held responsible for such damages:

[I]n TAPAA, Congress did not simply create a strict liability statute. Congress did not intend the owner and Fund to pay for damages caused by either the unseaworthiness of the vessel or negligence. It therefore included the subrogation section, allowing, for example, the Fund to seek reimbursement of its strict liability contribution from the owner in the event that owner negligence caused the spill. The effect of the subrogation section is clearly to provide those involved in the transportation of trans-Alaska oil an incentive to operate in a safe manner....

Id. at 582. Summing up Congress' overall design, the Ninth Circuit concluded:

TAPAA is intended to operate as a whole, not as independent parts. After an oil spill, innocent victims receive prompt compensation. Then, the parties involved with the transportation of the spilled oil and the Fund litigate fault. Ultimately, the costs of the spill are borne by the responsible party.... *The comprehensive nature of TAPAA cannot be overemphasized....* We can only conclude that TAPAA was designed to supersede any conflicting law; by TAPAA's nature, it was intended to become *the* controlling statute with regard to trans-Alaska oil.

Id. at 582-83 (first emphasis added). *Accord, Slaven*, 973 F.2d at 1473-76 (“[T]he purpose of section

1653(c) is to make the producers of Alaskan crude fully bear the risks and environmental costs of transporting oil.... [The statute represents] Congress's dedicated effort to enact a 'comprehensive remedial' scheme for [TAPS] oil spills").

Given TAPAA's comprehensive nature, the *Milwaukee II* "presumption of preemption" clearly applies. To paraphrase *Oswego*, "[w]e must therefore start with the presumption that non-[TAPAA] ... maritime liabilities and remedies for oil spill[s] ... have been preempted." 664 F.2d at 340. If Congress, having enacted the comprehensive remedial scheme embodied in TAPAA, did not expressly authorize or preserve punitive damage claims, then to allow them under the general maritime law would directly contravene the Supreme Court's "admonition [in] *Miles* that courts are not to 'sanction more expansive remedies in a judicially-created cause of action than Congress has allowed....'" *La Foie*, 797 F. Supp. at 831. As stated in *Oswego*, "[o]nce Congress legislates comprehensively on the subject of ... remedies for oil spill[s] ..., the responsibility lies with Congress to spell out expressly what, if any, role remains for the courts to fashion and apply non-statutory remedies." 664 F.2d at 341.

In the case of TAPAA, nothing in the statute suggests *any* role for private punitive damage claims. At the outset, it is clear that there is no claim for punitive damages under the Act itself. Section 1653(c)(1) expressly limits liability to "damages ... sustained by [the claimant] ... as the result of" an oil spill. This language on its face excludes punitive damages. As has been held by courts construing similar language defining

recoverable damages in commercial air crash cases: “[t]he term ... ‘damage sustained’ is entirely compensatory in tone.... Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not ‘sustained’ by the victim.” *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989), *rev’d in part on other grounds*, 111 S. Ct. 1489 (1991) (Warsaw Convention’s provision for recovery of “damage sustained” did not authorize recovery of punitive damages)⁸

Similarly, no provision of TAPAA authorizes or otherwise preserves claims for punitive damages under other applicable law. While the Act contains several provisions that contemplate the possibility of non-statutory claims for *compensatory* damages, none is drafted broadly enough to encompass non-statutory claims for *punitive* damages. The most

⁸ *Accord, In re Korean Airlines Disaster of September 1, 1983*, 932 F.2d 1475, 1485-86 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1280-82 (2d Cir. 1991) (both holding that Warsaw Convention’s reference to “damages sustained” did not encompass punitive damages).

TAPAA’s implementing regulations further confirm this fact. Consistent with §1653(c)(1)’s restriction of liability to “damages ... sustained by” the claimant, the regulations define “damages” to mean “any economic *loss*, arising out of or directly resulting from an incident, ...” 43 C.F.R. § 29.1(e) (emphasis added). This formulation likewise forecloses any claim for punitive damages. *See Bergen*, 816 F.2d at 1349 (“punitive damages have nothing to do with losses suffered”). And, as the Ninth Circuit recently held in *Slaven*, courts should “accord [TAPAA’s implementing] regulations ‘controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute’”. 973 F.2d at 1476 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

obvious example is the proration provision, § 1653(c)(3), which provides in pertinent part:

If the total claims allowed [by the Fund] exceed \$100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

On its face, this provision speaks only to the “unpaid portion of any claim” that is “allowed” by the Fund but “reduced proportionately” because of proration. As discussed above, Fund-allowed claims--*i.e.*, strict liability claims allowed pursuant to § 1653(c)(1)--are limited to compensatory damages only. The “unpaid portion” of a prorated Fund-allowed claim therefore could not, by definition, include punitive damages. The proration provision accordingly provides no evidence that Congress contemplated supplemental litigation of *punitive* damage claims.

A similar analysis applies to TAPAA’s subrogation provision, § 1653(c)(8). That provision self-evidently preserves only the rights of parties *against* whom strict liability is imposed (such as the vessel owner or the Fund) to recover damages from parties ultimately at fault for a spill. *See Glacier Bay*, 944 F.2d at 582. It preserves no claims at all for TAPAA plaintiffs, and even as to TAPAA defendants, it would appear to preserve, at most, claims for recoupment of sums paid out to satisfy strict liability claims for compensatory damages.

Nor are punitive damages preserved by TAPAA’s extremely limited savings clause, § 1653(c)(9), which is the only other provision of the Act addressing non-

statutory remedies. The savings provision states only that “[t]his section shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.” The first part of this clause on its face preserves only the law of strict liability--*i.e.*, liability *without* fault--and accordingly cannot be construed to authorize supplemental punitive damage claims. The second part is limited to *state*-imposed requirements. Ignoring for the moment its use of the conspicuously narrow term “requirements,” this phrase cannot be construed to authorize the imposition of anything, in the nature of a “requirement” or otherwise, under *federal* maritime law. Since federal maritime law is the only possible source of punitive damages in this case (see pp. 22-25, *infra*), the phrase cannot be construed to authorize supplemental punitive damages claims. Cf. Order No. 38 (Clerk’s Docket No. 1178), reported as *In re the Exxon Valdez*, 767 F. Supp. 1509, 1515-16 (D. Alaska 1991) (construing § 1653(c)(9) as limited grant of permission for states to enact strict liability laws not inconsistent with TAPAA or other general maritime law).⁹

⁹ In context, the narrow term “requirements” obviously refers to financial responsibility or other substantive regulatory requirements which are properly ancillary to a strict liability scheme. See H.R. Conf. Rep. No. 624, 93rd Cong., 1st Sess. 28-29 (1973), reprinted in 1973 U.S. Code Cong. & Adm. News 2523, 2530-31 (“Conference Report”). Construing § 1653(c)(9) to authorize state-law punitive damages would contravene not only maritime choice of law principles but also the narrow reading accorded similar statutory language in analogous contexts. Cf. *United States Department of Energy v. Ohio*, 112 S. Ct. 1627, 1639-40 (1992) (federal environmental statute subjecting federal facilities to state-imposed “requirements” referred to “substantive standards” and did not authorize state imposition of “punitive measures”).

In short, although TAPAA contains several provisions contemplating resort to non-statutory remedies for non-TAPAA relief, none of those provisions contains even a suggestion that Congress contemplated resort to such remedies for purposes of recovering punitive damages. Indeed, the very fact that Congress expressly contemplated and preserved such non-statutory remedies in the limited instances where it did so post-proration claims, subrogation claims and non-TAPAA strict liability claims preserved by § 1653(c)(9) is strong evidence that it did *not* intend broader preservation of more expansive judge-made remedies under general maritime law. To paraphrase *Oswego* once again, “it would [have been] ... anomalous for Congress to have drafted express language to preserve [limited compensatory claims] while leaving the preservation of [punitive damage claims] to be inferred by the courts.” 664 F.2d at 341. The “presumption of preemption” is not overcome, and punitive damage claims asserted in connection with TAPS oil spills must be deemed displaced.

The narrow scope of § 1653(c)(9) is further confirmed by comparison with the broader savings clause of the FWPCA’s oil spill provision. Congress modeled several of TAPAA’s other provisions on the FWPCA. *See* 43 U.S.C. § 1653(c)(3) (incorporating by reference FWPCA financial responsibility requirements set forth in 33 U.S.C. § 1321(p)); Conference Report at 2530-31 (noting that TAPAA adopted FWPCA dollar limits on vessel owner strict liability). In marked contrast to its TAPAA counterpart, the FWPCA’s oil spill provision specifically preserves state authority to impose “requirement[s] or liability[ies] with respect to the discharge of oil” 33 U.S.C. § 1321(o)(2) (emphasis added). TAPAA’s conspicuous omission of additional “liabilities” (other than strict liability) as distinguished from “requirements” forecloses any interpretation of § 1653(c)(9) as authorizing punitive damages.

The remaining considerations identified in *Oswego* compel the same conclusion. The first inquiry is whether, despite all of the foregoing, allowing a judge-made punitive damages remedy would permissibly “fill[] a gap left by Congress’ silence.” 664 F.2d at 339. As discussed in the previous section, the Ninth Circuit’s *Bergen* decision conclusively answers that question in the negative. *Bergen* flatly rejected an identical argument that Congress, by enacting a remedial statute providing for limited compensatory damages only, had not also “spoken to” the issue of punitive damages. 816 F.2d at 1348-49. It was enough that Congress had adopted a remedial scheme speaking to the tort in question--in that case, wrongful death on the high seas. Congress having done so, courts were not free to “supplement” the scheme with more expansive judge-made remedies. *Id.* It is beyond dispute that “[w]hen Congress enacted TAPAA, Congress spoke directly to the issue of TAPS oil spills.” Order No. 38, 767 F. Supp. at 1515. *Bergen* is therefore controlling and any “gap filling” argument must be rejected. *Accord, Milwaukee II*, 451 U.S. at 324 (“The question is whether the field has been occupied, not whether it has been occupied in a particular manner”); *Conner*, 730 F.2d at 841 (“The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution”).¹⁰

¹⁰ For the same reason, any argument that a court may “import” or “borrow” a supplemental punitive damages remedy from state law must be rejected as well. The argument is

Nor can it credibly be argued that, as of TAPAA's 1973 enactment, punitive damages constituted "long-established and familiar principles" of general maritime law which Congress should not lightly be presumed to have abandoned. *Oswego*, 664 F.2d at 339. Prior to 1973, no reported federal appellate decision had ever affirmed an award of punitive damages under general maritime law.¹¹ While a few early maritime cases discussed the possibility of awarding "vindictive" damages for what amounted to intentional misconduct,¹² they virtually never did so in practice.¹³ By opting not to authorize punitive

foreclosed entirely by the decisions in *Tallentire*, *Bergen*, and *Conner*, all discussed in the previous section.

¹¹ The first federal appellate decision to do so was *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973). *Robinson* awarded punitive damages against a shipowner for willful failure to pay "maintenance and cure" to an injured seaman. Twenty years later, however, courts still disagree on the threshold issue of whether punitive damages should be available for such conduct. See *La Voie*, 797 F. Supp. at 831-32 & nn.3-4.

¹² See, e.g., *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (unlawful boarding and plundering of neutral ship); *Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577 (9th Cir. 1905) (wrongful imprisonment of ship's purser by ship's master); *The Normannia*, 62 F. 469 (S.D.N.Y. 1894) (fraud on steamship passenger); *Gallagher v. The Yankee*, 9 F. Cas. 1091 (N.D. Cal. 1859) (No. 5196) (unlawful deportation of United States citizen); *Ralston v. The State Rights*, 20 F. Cas. 201 (E.D. Pa. 1836) (No. 11,540) (use of icebreaker to ram vessels of competing steamship line).

¹³ See, e.g., *The Amiable Nancy*, 16 U.S. at 558-59; *Pacific Packing*, 136 F. at 579-80; *The Normannia*, 62 F. at 479-80; *Ralston*, 20 F. Cas. 201. The only reported 19th Century federal maritime decision in which punitive damages were actually awarded appears to have been *Gallagher*, 9 F. Cas. 1091, in which the court assessed punitives of \$3,000 against a ship's

damages for oil spills from TAPS vessels, Congress departed from no “long-established and familiar principles” of maritime law. On the contrary, Congress’ treatment of punitive damages in TAPAA conformed precisely to the *de facto* treatment of punitive damages in admiralty for the preceding 200 years.

Moreover, allowing punitive damages would have *undermined* TAPAA’s central aims. Congress intended TAPAA both to promote early development of North Slope oil and to provide prompt compensation for spill victims through a strict liability scheme with limits keyed to, *inter alia*, the availability of marine insurance.¹⁴ Punitive damages inhibit development, increase uncertainty, impair insurability and prolong litigation. *Cf. Korean Air Lines*, 932 F.2d at 1489-90; *Lockerbie*, 928 F.2d at 1287-88 (both holding punitive damages incompatible with Warsaw Convention objectives analogous to those of TAPAA). Given their unpredictable character and potentially devastating impact, punitive damages would impermissibly disrupt the balance struck by Congress.

master who knowingly transported a United States citizen to the Sandwich Islands in furtherance of an unlawful “sentence” of deportation by a shoreside “vigilance committee.”

¹⁴ See 43 U.S.C. § 1651(a) (“[t]he early development and delivery of oil and gas from Alaska’s North Slope to domestic markets is in the national interest because of growing domestic shortages and an increasing dependence on insecure foreign sources”); Conference Report at 2530-31 (\$14 million limit intended to avoid “too heavy an insurance burden” on vessel owners).

**C. Judge-Made Federal Maritime Law
Governs All Punitive Damage Claims in
This Case**

The last issue posed is a simple one: Do the prayers for punitive damages in these cases have any source other than judge-made federal law? This Court has repeatedly held that they do not; they can only arise under federal common law, *i.e.*, the general maritime law. The EXXON VALDEZ spill was a maritime tort and is governed by federal maritime law. *See* Order No. 38, 767 F. Supp. at 1511-13 (citing cases).¹⁵ As this Court explained:

“[W]hen a common law action is brought, whether in a state or in a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court--that is, the general maritime law, as declared by the Supreme Court of the United States, or as modified from time to time by act of Congress.”

767 F. Supp. at 1513 (citation omitted); *accord*, *Unigard Security Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 366 n.1 (9th Cir. 1992) (“Substantive maritime law controls tort claims

¹⁵ *See also* Order No. 109 (Clerk’s Docket No. 3161) at 12 (“[O]il spills from tank vessels ... are maritime torts”); Order No. 121 (Clerk’s Docket No. 3194) at 7 (“[T]he oil spill and the resulting damages constituted a maritime tort Regardless of the forum, state or federal, the substantive law to be applied is federal maritime law”); Order re Motion to Dismiss or Stay (filed Nov. 13, 1992 in *Exxon Shipping Co. v. Airport Depot Diner*, No. A91-222 Civil) at 8 (“[T]he issues [in this case] are governed by federal maritime law, not state law”).

arising on navigable waterways of the United States with a sufficient nexus to traditional maritime activity, whatever the forum or asserted basis of jurisdiction”).

Punitive damages can be available in this case *only* to the extent that they are recognized and awarded as a matter of federal maritime law. As the Ninth Circuit expressly has held, “federal law, rather than state law, controls the damages issue when the cause of action arises under maritime law.” *Protectus Alpha Nav. Co. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985) (punitive damage claim for maritime tort arose under general maritime law). Further, punitive damages under maritime law are without dispute a purely judicial invention. And even as a judge-made remedy, “punitive damages are not a favorite of the law and are never awarded as of right.” *Id.* In short, it would be difficult to imagine a judge-made federal remedy more clearly and appropriately subject to the doctrine of statutory displacement than the punitive damage claims asserted by plaintiffs here. Under *Higginbotham* and its progeny (including *Miles*, *Milwaukee II*, *Sea Clammers*, *Bergen* and *Oswego*), the enactment of TAPAA displaced this disfavored remedy and left no room for any award of punitive damages in this case.

III. CONCLUSION

For all the reasons stated above, TAPAA displaces the general maritime law of punitive damages, and all punitive damage claims pending against the Exxon and Alyeska defendants should be dismissed.

Dated at Anchorage, Alaska this 15th day of

April, 1993.

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Phillips Alaska Pipeline Corp. (D-20)
Unocal Pipeline Company (D-21)

By: /s/ Charles P. Flynn
Charles P. Flynn

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|------------------|---|-------------------|
| In re |) | No. A89-095 Civil |
| |) | |
| the EXXON VALDEZ |) | (Consolidated) |
| |) | |
| _____ |) | |

ORDER NO. 158

Motions for partial summary judgment
Punitive damages: TAPAA displacement

The Exxon defendants¹ and the Alyeska defendants,² collectively “defendants”, filed a motion for partial summary judgment,³ seeking to dismiss plaintiffs’ prayers for punitive damages.⁴

¹ Comprised of Exxon Corporation (D-1), Exxon Shipping Company (D-2), and Exxon Pipeline Company (D-10).

² Comprised of Alyeska Pipeline Service Company (D-3), George Nelson (D-9), Amerada Hess Corporation (D-11), Arco Transportation Alaska, Inc. (D-12), Mobil Alaska Pipeline company (D-14), BP Pipelines (Alaska), Inc. (D-19), Phillips Alaska Pipeline Corporation (D-20), and Unocal Pipeline Company (D-21).

³ Clerk’s Docket No. 3462.

⁴ Punitive damages are a form of relief, not a cause of action. Dr. Franklin Perkins Sch. v. Freeman, 741 F.2d 1503, 1524 (7th Cir. 1984).

Defendants argue that the Trans-Alaska Pipeline Authorization Act (“TAPAA”), 43 U.S.C. §§ 1651-56, displaces general maritime law. Cousins (D-8) joins in the motion.⁵ Plaintiffs oppose the motion.⁶ Defendants filed a reply,⁷ with the Alyeska defendants additionally filing another reply.⁸

Joseph Hazelwood (D-7) filed his own motion for partial summary judgment based upon the TAPAA displacement.⁹ Hazelwood relies upon the motion filed by the Alyeska defendants and the Exxon defendants.¹⁰ Plaintiffs oppose, relying upon their

A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff’s case. It is part and parcel of a liability determination and does not have any independent being until a jury has decided, based on the preponderance of the evidence, that not only was a defendant’s conduct negligent, but that it was gross, willful, wanton or malicious.

Mason v. Texaco, Inc., 948 F.2d 1546, 1554 (10th Cir. 1991), cert denied, 112 S.Ct. 1941 (1992); accord Elliott v. State Farm Mut. Auto. Ins. Co., 786 F. Supp. 487, 491 (E.D. Pa. 1992).

⁵ Clerk’s Docket No. 3584.

⁶ Clerk’s Docket No. 3541.

⁷ Clerk’s Docket No. 3594.

⁸ Clerk’s Docket No. 3595. This reply does not comply with the Local Rules. Rule 6(D)(1) requires double spacing. Moreover, both replies do not comply with the spirit of the Local Rules. Both use smaller than normal type, which is dizzying to read, especially coupled with the lack of margins on the right-hand side of the page. Rule 6(E) requires clear and legible documents. These replies fall short of that mark. Similar documents in the future will be rejected.

⁹ Clerk’s Docket No. 3488.

¹⁰ Clerk’s Docket No. 3462.

opposition in the Alyeska and Exxon motion.¹¹ However, plaintiffs represented by the law firm of Faegre & Benson submit their own memorandum in opposition on behalf of all plaintiffs in cases removed from the state court, notwithstanding that Faegre & Benson does not represent all plaintiffs removed to this court, to focus upon the availability of punitive damages under state law.¹² Hazelwood replied,¹³ relying upon the replies of the Alyeska defendants and the Exxon defendants.¹⁴ Thus, the TAPAA displacement motions are fully briefed and are ready for decision by this court.¹⁵ Oral argument has been heard and the court now renders its decision.

Plaintiffs suggest that this court defer a decision on these motions until after the Ninth Circuit resolves the pending interlocutory appeal dealing with this court's denial of remand motions. This court declines to defer its decision, finding that a decision on the availability of punitive damages needs to be made regardless of the Ninth Circuit's decision on the remand question.

This is a motion for partial summary judgment and the standards provided in Rule 56, Federal Rules of Civil Procedure, apply. No inquiry into facts is necessary to decide this motion. It is purely a legal question whether TAPAA displaces general

¹¹ Clerk's Docket No. 3541.

¹² Clerk's Docket No. 3552.

¹³ Clerk's Docket No. 3586.

¹⁴ Clerk's Docket Nos. 3594 & 3595.

¹⁵ Because defendant Cousins joined in the motion so late, this court did not allow additional briefing by him. Clerk's Docket No. 3582.

maritime law and the availability of punitive damages. This court may grant partial summary judgment, dismissing all punitive damages, if defendants show that they are “entitled to a judgment as a matter of law.” Rule 56(c), Federal Rules of Civil Procedure.¹⁶

Defendants argue that when Congress “speak[s] directly to a question, the courts are not free to ‘supplement’ Congress’ answer so thoroughly that the Act becomes meaningless.” Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 and 625 (1978) (construing the “pecuniary loss” limitation of the Death on the High Seas Act (“DOHSA”), 46 U.S.C. §§ 761-767,¹⁷ to deny loss of society damages because “Congress has struck the balance for us”). This is because “[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.” Mobil Oil, 436 U.S. at 625; accord Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986) (finding that DOHSA preempts state statutes because the Court “defer[s] to Congress’

¹⁶ Plaintiffs submit that typical summary judgment standards do not apply because defendants’ motion rests upon plaintiffs’ allegations. Plaintiffs submit that the court ought to treat defendants’ motion as a motion for judgment on the pleadings, which is governed by the same standard as a motion to dismiss. See e.g., Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1387 n.6 (9th Cir. 1987), appeal dismissed and cert. denied, 486 U.S. 1040 (1988). Under either standard, however, the result is the same.

¹⁷ Title 46 U.S.C. § 762 provides that: “The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought”.

purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary”); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (construing the Jones Act, 46 U.S.C. § 688, to disallow nonpecuniary damages because the Jones Act incorporates the Federal Employees’ Liability Act (“FELA”), which contains an explicit pecuniary loss limitation). The Miles court stated:

In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

Miles, 498 U.S. at 27. Defendants argue that in enacting TAPAA, Congress has set the boundaries. Defendants argue that TAPAA does not provide for punitive damages, that this court may not “supplement” TAPAA by reference to common law because “Congress has struck the balance”, and, therefore, punitive damages are not recoverable by plaintiffs. See Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993) (finding that Miles precluded “wives of injured mariners [from] ... recover[ing] for loss of society and loss of consortium in their own actions filed under the Jones Act or under general admiralty law”); Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th

Cir. 1987), modified on other grounds, 866 F.2d 318 (9th Cir.), cert. denied, 493 U.S. 871 (1989) (disallowing punitive damages because DOHSA displaces punitive damages recoverable under general maritime law); Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985); In re Aleutian Enter., Ltd., 777 F. Supp. 793 (W.D. Wash. 1991); Jackson v. Unisea, Inc., 824 F. Supp. 895 (D. Alaska 1992).

The court must make clear what it is deciding. The court is deciding whether Congress intended TAPAA to displace federal common law, not whether Congress intended TAPAA to preempt state law.¹⁸ “[T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law.” City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) (“Milwaukee II”) (citing judicial deference to Congressional legislative judgments, the Court found that the Clean Water Act

¹⁸ This court has had occasion to discuss TAPAA’s preemptive effect upon state law. The court found that TAPAA preempted AS 46.03.822, the Alaska statute providing for strict liability for oil spills, to the extent that the Alaska statute was inconsistent with TAPAA. In re the Exxon Valdez, 767 F. Supp. 1509, 1515 (D. Alaska 1991) (“Order No. 38”). This is because “states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not actually conflict with federal law or interfere with the uniform working of the maritime legal system.” Pacific Merchant Shipping Ass’n v. Aubry, 918 F.2d 1409, 1422 (9th Cir. 1990), cert. denied, 112 S.Ct. 2956 (1992) (detailing three instances when Congress’ intent is to preempt: when Congress expressly states; when Congress legislates so comprehensively that no room is left for state regulation; or when state law conflicts with federal law).

amendments displaced the federal common law nuisance remedy). An intent to displace federal common law can be ascertained by assessing the scope of the legislation and determining whether the legislation addresses a problem formerly governed by federal common law. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981) (citing the comprehensive nature of the federal statute displacing the federal common law).

Ultimately determining whether non-statutory maritime law . . . survives enactment of a statute requires a careful analysis of several factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. Any terms of the statute explicitly preserving or preempting judge-made law are of course controlling, as is clear evidence of Congressional intent to achieve such results. In the absence of clearly expressed legislative intent, legislative history may provide useful guidance. The “scope of the legislation” must be assessed....A judgment must be made whether applying judge-made law would entail “filling a gap left by Congress’ silence” or “rewriting rules that Congress has affirmatively and specifically enacted.” . . . The detail and comprehensiveness of a statute will frequently aid this determination. Finally, Congress is less likely to have intended preemption of “long-established and familiar principles” of “the common law or the general maritime law.”

In re Oswego Barge Corp., 664 F.2d 327, 338-39 (2nd Cir. 1981) (footnotes omitted and citations omitted); National Audubon Soc'y v. Dep't of Water, 869 F.2d 1196, 1200-01 (9th Cir. 1988); Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1985); Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 618 (4th Cir. 1979).¹⁹

The obvious starting point in determining whether TAPAA was intended to displace federal common law is the statute itself. An intent to displace federal common law can be ascertained by assessing the scope of the legislation and determining whether the legislation addresses a problem formerly governed by federal common law. Middlesex County, 453 U.S. 1. TAPAA unquestionably addresses a problem formerly governed by federal common law. The real issue concerns the scope of TAPAA.

Title 43 U.S.C. § 1653(c)(1) provides:

Notwithstanding the provisions of any other law ... the owner and operator of the vessel ... shall be strictly liable ... for

¹⁹ The Steuart court stated:

We therefore conclude that § 1321(f)(1) [of the Clean Water Act] was designed to replace, rather than to supplement, the judicial remedies developed in the absence of a comprehensive statute. Since the judicial remedies are inconsistent with the statute, the statute provides the sole means for the federal government to recover oil removal costs.

Steuart, 596 F.2d at 618; accord United States v. M/V Big Sam, 681 F.2d 432, 442 (5th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader, 760 F. Supp. 174, 175-78 (W.D. Wash. 1991).

all damages ... sustained ... as the result of discharges of oil from such vessel.

(emphasis added). However, “[s]trict liability ... shall not exceed \$100,000,000.” 43 U.S.C. § 1653(c)(3). Because of this dollar limit, TAPAA provides that “[t]he unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.” 43 U.S.C. § 1653(c)(3).

TAPAA further provides that “[t]his subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.” 43 U.S.C. § 1653(c)(9). Any party upon whom strict liability is imposed may recover the damages it paid in strict liability against any negligent party. 43 U.S.C. § 1653(c)(8).

TAPAA is only concerned with strict liability and the subrogation rights of those entities held strictly liable. TAPAA does not discuss punitive damages. Defendants submit that plaintiffs cannot take much solace in TAPAA’s failure to expressly discuss punitive damages. Defendants argue that the reference in § 1653(c)(1) to “all damages”, which are “sustained” necessarily limits TAPAA’s contemplated damages to compensatory damages only. The argument of defendants is that punitive damages are not “sustained”. Punitive damages are imposed by law as punishment. See e.g., Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989), rev’d on other grounds, 499 U.S. 530 (1991) (holding that the phrase “’damage sustained’ is entirely compensatory in tone”); accord Rein v. Pan Am World Airways, Inc. (In re Air Disaster at Lockerbie Scotland), 928 F.2d 1267 (2nd Cir.), cert. denied, 112 S.Ct. 331 (1991); In re Korean Air Lines

Disaster, 932 F.2d 1475 (D.C. Cir.), cert. denied, 112 S.Ct. 616 (1991).

The difficulty with defendants' argument is that TAPAA is not intended to occupy the entire field of trans-Alaskan oil spills. TAPAA is certainly a comprehensive, remedial statute. Kee Leasing v. McGahan (In re the Glacier Bay), 944 F.2d 577, 583 (9th Cir. 1991); accord Slaven v. BP America, Inc., 973 F.2d 1468, 1476 (9th Cir. 1992). However, TAPAA was intended to provide plaintiffs with a new strict liability remedy.

TAPAA does not deal with liability based upon fault as between the injured party and the vessel owner or operator, except to the extent that TAPAA expressly preserves other remedies. 43 U.S.C. § 1653(c)(3) & (c)(9). Reading TAPAA to displace those other federal and state remedies would be to disregard Congress' plain language. TAPAA's silence as to punitive damages does not preclude plaintiffs' requests for punitive damages.²⁰

This result is confirmed by inferences that can be drawn from the legislative history. Congress, in enacting TAPAA, stated:

²⁰ The Department of Interior promulgated regulations under TAPAA. 43 U.S.C. § 1653(c)(4). These "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

The regulations define "damages" as "economic loss". 43 C.F.R. § 29.1(e). There can be no doubt that punitive damages are not economic losses. Thus, the Secretary's regulations are silent as to punitive damages. Given that TAPAA is silent as to punitive damages, the Secretary's regulation is completely consistent with the statute. This, however, does not answer the distinct question of displacement.

[T]hat existing maritime law would not provide adequate compensation to all victims ... in the event of the kind of catastrophe which might occur. Consequently, the Conferees established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to \$100,000,000.

Strict liability is primarily a question of insurance....Since the world-wide maritime insurance industry claimed \$14 million was the limit of the risk they would assume, this was the limit provided

H.R. Conf. Rep. No. 624, 93rd Cong., 1st Sess. 28 (Nov. 7, 1973), reprinted in 1973 U.S. Code Cong. & Admin. News 2523, 2530. The legislative history shows that Congress wanted the full burden of risk to fall upon those who transported oil and that TAPAA's strict liability scheme was intended to reach the full extent of insurance. The legislative history does not show that Congress wanted to limit the exposure of those who transport trans-Alaskan oil to the extent of their insurance. Rather, Congress envisioned TAPAA as follows:

[TAPAA is] a landmark provision for environmental protection and one that may well mark the standard for future oil spills everywhere. It is admittedly forcing a tougher liability standard on Alaskan oil than exists for other oil, but the House has consistently maintained that the environmental risks of transporting this oil

were significantly greater. The oil companies have, in turn, consistently promised that both the pipeline and the sea leg were safe. We are doing no more than holding them to this promise.

119 Cong. Rec. 36,606 (Nov. 12, 1973). The stated legislative purpose of forcing a tougher standard on Alaskan oil is completely at odds with radically limiting a potential plaintiffs' remedy, one that is presumably available in the context of other oil spills. See e.g., In re Sause Bros. Ocean Towing, 769 F. Supp. 1147, 1155 (D. Or. 1991). This court "can only conclude that if Congress had intended to make such an inroad on the rights of claimants ... it would have said so in unambiguous terms' and 'in the absence of a clear Congressional policy to that end, we cannot go so far.'" Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 302 (1959) (quoting Brady v. Roosevelt S.S. Co., 317 U.S. 575, 581 & 584 (1943)). The legislative history of TAPAA thus evidences Congress' concern about compensatory damages, evidences Congress' desire to impose liability without regard to fault, and, most importantly, evidences Congress' mandate that trans-Alaskan oil producers live up to a higher standard than others.

Congress, in enacting TAPAA, was expanding recovery, not restricting recovery. Congress intended TAPAA to speed up payments to injured persons. 43 U.S.C. § 1653(c)(3) (stating that "[t]he Fund shall expeditiously pay claims"). Congress dispensed with fault, but Congress did not intend to limit the liability of vessel owners and operators. Kee Leasing v. McGahan (In re the Glacier Bay), 741 F. Supp. 800, 804 (D. Alaska 1990), aff'd, 944 F.2d

577 (9th Cir. 1991)²¹; accord Slaven v. BP America, Inc., 973 F.2d 1468, 1474 (9th Cir. 1992). Rather, Congress designed TAPAA to provide quick, and by the plain language of TAPAA, not necessarily complete, recovery to the injured party. The fact that the remedy has proved not to be quick does not alter the Congressional intent of TAPAA.

Given that Congress intended to impose stricter conditions upon the transport of Trans-Alaskan oil, it would be illogical for Congress to have also disallowed punitive damages, especially when punitive damages are available as to oil spills not involving Trans-Alaskan oil. TAPAA was not intended to supply the entire field of potential liability and indeed TAPAA refers to other substantive law. Congress intended TAPAA to be the starting point. After the terms of TAPAA have been extinguished (that is, the \$100 million has been paid), general maritime law applies with all its rights and remedies. TAPAA only displaces general maritime law to the extent of TAPAA's terms.²²

There is some disagreement as to whether the punitive damages asserted in In re the Exxon Valdez, A89-095 Civil (Consolidated), are governed by federal maritime law. This court has repeatedly

²¹ The Ninth circuit's opinion in Kee Leasing affirmed the district court's removal of a restriction on liability, the Vessel Owners' Limitation of Liability Act, 46 U.S.C. §§ 181-87.

²² In Order No. 121 (Clerk's Docket No. 3194), filed December 23, 1992, this court concluded that TAPAA displaced general maritime law, which includes the doctrine of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), only to the extent of the terms of TAPAA. Accord Order No. 139 (Clerk's Docket No. 3421) filed April 8, 1993; In re the Glacier Bay, 746 F. Supp. 1379, 1386 (D. Alaska 1990).

held that the Exxon Valdez oil spill is a maritime tort, subject to this court's maritime jurisdiction. In re the Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991); Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 n.1 (9th cir. 1992). Federal law governs the damages issue when the cause of action arises under maritime law. Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985).²³

As a matter of federal law, punitive damages are available for the purpose of punishment and to deter a defendant and others from engaging in disfavored conduct. Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985) (allowing punitive damages as a matter of federal law); see also Evich v. Morris, 819 F.2d 256, 258 (9th Cir.), cert. denied, 484 U.S. 914 (1987) (allowing punitive damages under general maritime law, citing In re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981); Duplantis v. Texaco, Inc., 771 F. Supp. 787 (E.D. La. 1991). While it is true that "punitive damages are not a favorite in the law and are never awarded as of right, no matter how egregious the defendant's conduct," punitive damages may be awarded. Protectus, 767 F.2d at 1385. Punitive damages may be awarded where the defendant's conduct "manifests 'reckless or callous disregard' for the rights of others" or where the defendant's conduct "shows 'gross negligence or actual malice or criminal indifference.'" Id. (citations omitted).

²³ Cf. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989) (stating that in a diversity action, state law determines punitive damages issues).

The motions for partial summary judgment based upon TAPAA's alleged displacement of general maritime law (Clerk's Docket Nos. 3462 & 3488) are DENIED.

DATED at Anchorage, Alaska, this 21st day of October, 1993.

/s/ _____
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
_____)

ORDER NO. 174

Motion For Summary Judgment
against Seafood Wholesaler, Processor,
Cannery Employee, and Tenderer Plaintiffs

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have moved for summary judgment against seafood wholesaler, processor, cannery employee, and tenderer plaintiffs.¹ Plaintiffs have responded², and defendants have replied.³ Having been fully briefed, the motion is ready for ruling.⁴

Exxon filed this motion for summary judgment against the above-named plaintiffs who seek purely economic losses, unrelated to physical injury, alleg-

¹ Clerk's Docket No. 3981.

² Clerk's Docket Nos. 4120, 4121, and 4112.

³ Clerk's Docket Nos. 4085, 4246, and 4248.

⁴ Exxon's request for oral argument is denied. Clerk's Docket Nos. 4249 and 4275.

edly caused by the Exxon Valdez oil spill. Exxon argues that Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), precludes these plaintiffs from recovering economic losses "absent physical damage to a proprietary interest." Defendants' Motion for Summary Judgment, Clerk's Docket No. 3981, at 11 (quoting IMTT-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1194 (5th Cir. 1993), cert. denied, No. 93-788, 1993 WL 462810 (U.S. Jan 18, 1994), (quoting Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1024 (5th Cir. 1989), cert. denied, 477 U.S. 903 (1986)). Only commercial fishermen have been excepted from the Robins rule. Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

Plaintiffs raise three arguments in response to Exxon's motion. First, plaintiffs argue that the Open exception to the Robins rule should include plaintiffs other than commercial fishermen. Second, plaintiffs argue that they should be able to recover economic damages under Alaska's Environmental Conservation Act (the Alaska Act), AS 46.03.822, despite the Robins rule.⁵ Finally, plaintiffs argue that Congress, in enacting the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1653(c), did not intend the Robins rule to apply to claims which exceed TAPAA's \$100 million claims limit.

The court has previously recognized that a plaintiff's "claims do not become transformed into claims of a commercial fisherman merely because [plaintiff] possessed a business arrangement whereby plaintiff was paid for services out of a crew's catch." Order

⁵ The Alaska Act provides for strict liability for any oil spills, including spills of oil that has been transported through the trans-Alaska pipeline.

No. 121 (Clerk's Docket No. 3194) at 5 n.10, citing Slaven v. BP America, Inc., 786 F. Supp. 853, 861 (C.D. Cal. 1992) ("Every party in a commercial transaction is dependent upon those they deal with. ...[T]he fishermen exception is intended to be a narrow exception carved out for 'the favorites of admiralty.'"). See also Matter of Ballard Shipping Co., 810 F. Supp. 359, 363 (D.R.I. 1993) ("[T]he differences between [seafood] dealers and fishermen are more compelling than the alleged similarities. The dealers are primarily commercial middlemen; their product is from the sea, but many characteristics of their job mirror those of dealers of innumerable other products."); Slaven v. BP America, Inc., 786 F. Supp. 853, 861 (C.D. Cal. 1992) (fishermen's exception to Robins does not apply to fishbrokers who suffered only financial harm) ; Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986) (relied on Robins to reject claims by wholesale and retail seafood enterprises, but not commercial fishermen, who did not sustain physical damage to property after a Mississippi River chemical spill). When creating the fishermen's exception to Robins, the Oppen court stated "it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill..." Oppen, 501 F.2d at 570. For these reasons, the court finds that the fishermen's exception to Robins applies to commercial fishermen, not to plaintiffs herein.

Regarding plaintiffs' argument that they should be allowed to recover economic damages under the Alaska Act despite Robins, the court has previously

held:

Robins Dry Dock applies to the claims under the Alaska Act to the extent that damages claimed are in excess of liability imposed by TAPAA because general maritime law would be the applicable law. State law may supplement federal maritime law, such as in the exercise of a state's police power, but state law may not conflict with federal maritime law, as it would be redefining the requirements or limits of a remedy available at admiralty.

Order No. 38 (Clerk's Docket No. 1178) at 12 (citations omitted). See Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 461 n.7 (5th Cir. 1982), vacated on other grounds, 706 F.2d 1356 (5th Cir. 1983) ("When admiralty law speaks to a question, state law cannot override it.") (citations omitted). In Order No. 36, this court stated:

Congress may have intended for the states to be able to simply extend the strict liability provisions of TAPAA to higher limits without subjecting those higher limits to Robins Dry Dock, but Congress did not specifically do so, nor did it have the authority to grant the states permission to do so.

Order No. 38, Clerk's Docket No. 1178 at 14 (footnote omitted). For these reasons, the court finds that "Robins Dry Dock applies to limit the damages recoverable under the Alaska Act in excess of the \$100 million recoverable under TAPAA." Id.

In Order No. 38, the court also addressed plaintiffs' argument that TAPAA abrogates Robins for

claims extending beyond the \$100 million limit. The court stated:

When Congress enacted TAPAA, Congress spoke directly to the issue of TAPS oil spills. TAPAA imposes strict liability “notwithstanding the provisions of any other law” to the extent of \$100 million. 43 U.S.C. § 1653(c). Therefore, to the extent of its coverage, TAPAA, as specific federal maritime legislation, displaces the general maritime law, including the rule of Robins Dry Dock, regarding strict liability.

Order No. 38 (Clerk's Docket No. 1178) at 11-12 (emphasis added). In Order No. 121, the court stated:

Congress' abrogation of federal maritime law, including Robins Dry Dock, operates only to the extent of the terms of TAPAA, to the \$100 million mark. After the \$100 million is paid, federal maritime law, including Robins Dry Dock, once again applies, except with respect to commercial fishermen.

Order No. 121 (Clerk's Docket No. 3194) at 9-10 (emphasis added) (citations and footnote omitted). For these reasons, the court finds that Robins applies to claims which exceed TAPAA's limit.

Accordingly, Exxon's motion for summary judgment against seafood wholesaler, processor, cannery employees and tenderer plaintiffs⁶ is granted.

⁶ Clerk's Docket No. 3981.

DATED at Anchorage, Alaska, this ____ day of
January, 1994.

/s/
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re) A89-095 CV (HRH)
the EXXON VALDEZ)
_____) (Consolidated)

**RE: A89-095, A89-106, A89-140, A89-147,
A89-149, A89-200, A91-099, A91-136,
A91-137, A91-142, A91-416**

P-22, P-34, P-35, P-38, P-39, P-40, P-41, P-102, P-105, P-114, P-116, P-139, P-165, P-166, P-246, P-302, P-303, P-1194, P-1195, P-1215, P-1219, P-1221, P-1223, P-1226, P-1231, P-1235, P-1251, P-1292, P-1313, P-1316, P-1366, P-1375, P-1376, P-1384, P-1387, P-1399, P-1405, P-1412, P-1413, P-1414, P-1423, P-1440, P-1601

**REPLY MEMORANDUM IN SUPPORT OF
MOTION BY DEFENDANTS AND
COUNTERCLAIMANTS EXXON
CORPORATION (D-1) AND EXXON SHIPPING
COMPANY (D-2) TO CERTIFY MANDATORY
PUNITIVE DAMAGE CLASS PURSUANT TO
FED. R. CIV. P. 23(b)(1)(B)**

* * *

**II. THE REQUEST TO CERTIFY A MANDATORY
PUNITIVE DAMAGE CLASS IS BOTH
TIMELY AND FEASIBLE**

* * *

Finally, it bears emphasis that the certification of

a mandatory punitive damage class would not in any way disrupt the existing trial schedule or prejudice any of the parties. Certification would not alter the substantive rights of any parties or change any of the contentions to be tried commencing on May 2. As a practical matter, its only effect would be to reinstate what all parties to the negotiated trial plan (including the plaintiffs now before the state court) contemplated as of December 20, 1993--a consolidated trial in this Court, binding on all plaintiffs and defendants alike, of all punitive damage claims arising from the EXXON VALDEZ oil spill.

**III. THE COURT HAS DISCRETION TO
CERTIFY A MANDATORY PUNITIVE
DAMAGE CLASS PURSUANT TO RULE
23(B)(1)(B)**

* * *

Under the general standard for (b)(1)(B) certification set forth in Dalkon Shield, it follows that a court may properly certify a mandatory punitive damage class where by reason of such consideration, "separate punitive damage claims necessarily will affect later claims." 693 F.2d at 852.

Plaintiffs' various arguments that this is not such a case are equally unpersuasive. Plaintiffs initially argue that any limitations on the amount of permissible punishment can be dealt with in post-trial motions in the later-tried cases. This argument only highlights, however, the need for a mandatory class. The primary rationale for (b)(1)(B) certification is to permit equitable treatment of competing claimants to the limited fund. Deferring enforcement of limitations on permissible

punishment only guarantees that the later claimants will be disadvantaged.⁶ * * *

* * *

⁶ Plaintiffs argue that they are willing to take this risk, and sarcastically state that they have no need for Exxon's "help" or "magnanimity." It is not only the interests of the named plaintiffs presently before the federal and state courts that are at stake, however. Also at stake are the interests of the thousands of absent members of the various classes and subclasses on whose behalf the class action plaintiffs are asserting punitive as well as compensatory claims in this Court. These unnamed plaintiffs, whose interests must also be considered, stand to suffer real prejudice absent mandatory class certification. The state court plaintiffs are engaged in an obvious race to judgment. In addition to pressing for the rescheduling of a simultaneous trial, they are pressing the state courts to impose arbitrary time and evidence restrictions on defendants' case. If successful, such measures will increase the likelihood that the state cases will go to judgment first. As discussed *infra*, any punitive damages awarded in such a judgment will necessarily impair the interests of the plaintiffs before this Court. * * *

APPENDIX I

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)
_____)

ORDER NO. 187

**MOTION FOR SUMMARY JUDGMENT
ON CLAIMS OF COMMERCIAL FISHERMEN
BASED ON PRICE DIMINISHMENT**

Defendants Exxon Corporation (D-1) and Exxon shipping Company (D-2) (collectively Exxon) have moved for summary judgment on claims of commercial fishermen based on price diminishment.¹ Plaintiffs oppose the motion² and Exxon has responded.³ The court has considered the briefs and has heard oral argument.

Exxon seeks summary judgment on the claims of commercial fishermen that the 1989 oil spill caused a price decrease for salmon they harvested in 1989 and subsequent years. Exxon argues that even if the commercial fishermen could prove that the oil spill affected salmon prices, the alleged effect on prices cannot be considered a direct impact of the oil spill,

¹ Clerk’s Docket No. 4024.

² Clerk’s Docket Nos. 4165, 4129, and 4112.

³ Clerk’s Docket Nos. 4085, 4248 and 4267.

thus precluding recovery.⁴

Exxon divides the commercial fishermen into two categories. The first category includes fishermen who hold permits in areas that were not closed to fishing in 1989. As an example, Exxon refers to the “Bristol Bay plaintiffs” who do not allege that the oil spill either reached Bristol Bay or caused Bristol Bay fishing season closures. Rather, they allege that the oil spill caused the price of Bristol Bay salmon to decrease in 1989 and certain succeeding years.

The second category of commercial fishermen includes those fishermen who hold permits in areas closed or partially closed to fishing in 1989, but reopened after 1989. These fishermen claim damages based on higher prices they allegedly would have received for the salmon in the years following the 1989 spill. These fishermen include Upper Cook Inlet driftnetters and Kodiak area purse seiners.

Essentially, both categories of commercial fishermen allege that the oil spill created a “taint” on Alaska salmon which negatively impacted salmon prices throughout Alaska, including areas untouched by oil.

Resolution of the issues raised by Exxon centers around the application of the commercial fishermen’s exception to Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover

⁴ Exxon’s motion does not address damages attributed to lost harvests. Clerk’s Docket No. 4024 at 10 n.15.

economic damages without accompanying physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

Regarding the “Bristol Bay plaintiffs,” Exxon argues that the commercial fishermen’s exception to Robins Dry Dock does not apply to areas which did not suffer a direct impact from the oil spill. It is undisputed that Bristol Bay was neither oiled nor closed to fishing due to the 1989 spill.

Based upon Oppen and related cases, the court holds that the commercial fishermen’s exception applies to fisheries that were actually oiled and closed to fishing. Oppen contemplated “[t]he right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters...” Oppen, 501 F.2d at 570. The court in Louisiana ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170 (E.D. La. 1981), aff’d, 728 F.2d 748 (5th Cir. 1984), cert. denied, 477 U.S. 903 (1986), interpreted the commercial fishermen’s exception to include “commercial fishing areas” into which pollutants or contaminants were introduced. Id. at 1173 (emphasis added). The court in Testbank dismissed claims of commercial fishermen “allegedly affected in areas other than those specifically closed by the Coast Guard...” Id. at 1174.

In a similar situation, this court considered whether the Trans-Alaska Pipeline Liability Fund could consider claims beyond the geographic proximity of the spill. The court stated:

From the so-called “environmental impact” requirement recognized by the Benefiel court and from other authorities discussed by the Fund, the court concurs with the Fund’s

determination that Congress meant to require that losses have a geographic proximity to the spill. Geographic proximity is an appropriate and useful aspect of the required proof of causation.

Case No. T92-1000-CV, Clerk's Docket No. 95, at 12-13. The court further stated "[g]iven the environmental impact requirement, geographic proximity to a spill is a logical requirement." Id. at 22.

The commercial fishermen's exception was intended to protect those areas which suffered diminished aquatic life from the introduction of contaminants. Oppen, 501 F.2d at 570. No such loss of aquatic life occurred in Bristol Bay. To expand this particular, special, and limited exception to open and uncontaminated fisheries where fishermen were not prohibited from plying their trade would be an unauthorized⁵ extension of Oppen. Accordingly, the court grants Exxon's motion for summary judgment regarding commercial fishermen's claims for price diminishment in areas which were neither contaminated nor closed following the 1989 Exxon Valdez oil spill.

A further word of explanation may be in order here for the non-lawyers who will review this ruling. There is no question but that the Exxon Valdez grounding impacted, in one fashion or another, far more people than will ever recover anything in these proceedings. There is an understandable public

⁵ Essentially, Oppen expands Robins Dry Dock only slightly, so that a commercial fisherman may seek recovery only when his injury flows directly from the action of escaping oil on life in the sea. Oppen, 501 F.2 at 569.

perception that if one suffers harm which is perceived to be a result of the conduct of another, the harmed person should be compensated. That perception does not always square up with the institutional guidelines (statutes and case law) under which the court must operate. It is the function of both Congress and the courts (principally the courts of appeal and supreme courts) to determine the extent to which public expectations with respect to financial responsibility are to be realized. Legal liability does not always extend to all of the foreseeable consequences of an accident. In the area of harm to one's body, the reach of what is recoverable is very great. Where one's property is injured, the extent of legal liability is considerable, but not to the same extent as with bodily injury. Where pure economic loss is at issue—not connected with any injury to one's body or property, and especially where that economic loss occurs in a marine setting—the reach of legal liability is quite limited except as to commercial fishermen.

In making this and other related decisions, the court applies the rules of law provided to it by Congress and the appellate courts. This court has no power to change those rules. The court is obligated to apply those rules as they currently exist.

The foregoing should not be viewed as an apology for the current state of the law. Indeed, the court defends it. Were it otherwise, we would have a form of organized anarchy in which no one could count on what rule would apply at any given time or in any given situation. In the terminology of the day, both the plaintiffs and the Exxon defendants are entitled to a "level playing field" where, over relevant time, the rules of law applicable to a given situation are

stable. Thus it is that commercial fishermen must demonstrate that the alleged harm flows directly from the contamination of fisheries in which they fish. Such was not the case in Bristol Bay.

Exxon next argues that the commercial fishermen whose season was closed in whole or in part in 1989 “are not entitled to recover damages for any effect on prices allegedly attributable to a public perception of a ‘stigma’ attaching to salmon they actually harvested in 1989 or later years.” Clerk’s Docket No. 4024 at 10 (footnote omitted). Exxon argues that under Oppen, commercial fishermen may recover losses that flow directly from the 1989 interruption of fishing, but cannot recover losses incurred in later years when spill-related fishing restrictions were removed.

Oppen extended to commercial fishermen “[t]he right ... to recover for injuries to their businesses caused by pollution of public waters....” Oppen, 501 F.2d at 570. This right is not limited to the extent Exxon suggests, but applies to those injuries “established in the proceedings.” Id. As stated in Oppen, “[a]ll that we do here is to permit the plaintiffs to attempt to prove their case....” Id. Oppen does not preclude commercial fishermen from pursuing a claim for price diminishment during 1989 or subsequent years.

Exxon also argues that the commercial fishermen’s claim fails under Benefiel v. Exxon Corporation, 959 F.2d 805 (9th Cir. 1992). In Benefiel, California gas purchasers asserted a cause of action under the Trans-Alaska Pipeline Authorization Act because of increased gasoline prices allegedly caused by the Exxon Valdez oil spill.

The Ninth Circuit found that a series of independent intervening events caused the price increase and affirmed dismissal for failure to state a claim. Benefiel, 959 F.2d at 807-808.

Exxon argues that the claims of the commercial fishermen herein are factually similar to the claims raised in Benefiel. In each case, Exxon argues, an intervening chain of events affected the price of the product. However, Exxon argues, in neither case did a direct relationship exist between the oil spill and the alleged economic loss. Here, Exxon argues that Japanese fish buyers and processors employed tactics to exploit negative publicity and perceived fears of contamination, resulting in diminished fish prices. Thus, Exxon argues, the commercial fishermen's claims depend upon intervening forces instead of a direct impact, and proximate cause cannot be established.

As stated in Benefiel, proximate cause "presents an issue for the trier of fact to resolve." Benefiel, 959 F.2d at 808. Only when "causation cannot reasonably be established under the facts alleged by a plaintiff" does the question of proximate cause become one for the court. Id. Such a situation is not presented here.

In In re the Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990), the court permitted Cook Inlet commercial fishermen to pursue claims for price diminishment. Exxon argues that Glacier Bay did not consider claims for depressed prices in the years following the 1987 Glacier Bay spill. The issue, however, remains one of proximate cause, and the court finds that commercial fishermen in oiled areas which were closed or partially closed due to the 1989

Exxon Valdez oil spill must be permitted to attempt to prove their claim that fish caught in 1989 and subsequent years were devalued in the market because of the spill. This is not the kind of remote or speculative claim of economic loss dealt with in Benefiel. We deal here with the price of raw fish from the impacted area, not a subsequent product such as roe or other secondary markets for fish or fish products. We deal here with the sale of fish from the impacted area, not secondary businesses such as the sale of fishing gear. It is for a jury to decide whether any diminishment of fish prices was caused by the Exxon Valdez oil spill or whether it was, as Exxon argues, the result of groundless fears or market manipulation. Accordingly, Exxon's motion for summary judgment on claims of price diminishment for commercial fishermen whose fishing grounds were contaminated by oil or season was closed or partially closed is denied.

In summary, Exxon's motion is granted in part and denied in part. Exxon's motion is GRANTED with respect to commercial fishermen whose fisheries were neither closed nor contaminated.⁶ Exxon's motion is DENIED with respect to commercial fishermen whose fisheries were contaminated and either closed or partially closed.

⁶ Individual causes of action and court numbers are listed in Appendix 1 attached to Clerk's Docket No. 4024 and Appendix 1 attached to Clerk's Docket No. 4267.

DATED at Anchorage, Alaska, this 23 day of
March, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

APPENDIX J**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

In re)
) No. A89-0095-CV (HRH)
 the EXXON VALDEZ)
) (Consolidated)
 _____)

ORDER NO. 188

Motion For Summary Judgment
 on Claims of Commercial Fishermen
 Based on Diminished Value of
Limited Entry Permits and Fishing Vessels

Exxon Corporation (D-1) and Exxon Shipping (D-2) (collectively Exxon) have moved for summary judgment on claims of commercial fishermen based on the diminished value of limited entry permits and fishing vessels.¹ Plaintiffs oppose the motion² and Exxon has replied.³ The briefs have been considered and the court has heard oral argument.

Resolution of the issues raised by Exxon centers around the application of the commercial fishermen's exception to Robins Dry Dock 6 Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to recover

¹ Clerk's Docket No. 4137.

² Clerk's Docket No. 4276.

³ Clerk's Docket No. 4383.

economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without accompanying physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

In a motion for summary judgment, the standards provided in, Rule 56, Federal Rules of Civil Procedure, apply. No inquiry into facts is necessary to decide the instant motion. The motion presents purely legal issues, and the court can grant summary judgment if Exxon shows that it is “entitled to a judgment as a matter of law.” Rule 56(c), Federal Rules of Civil Procedure.

Exxon seeks judgment on the claims of commercial fishermen that are based on allegations that the 1989 oil spill resulting from the grounding of the Exxon Valdez caused the value of their salmon and herring limited entry permits and commercial fishing vessels to diminish. Oppen created a particular, special, and limited exception to the Robins Dry Dock rule that, in the maritime setting, there could be no economic recovery without physical harm. Oppen did not open the door to any and all claims by commercial fishermen who were affected by pollution of public waters. Rather, Oppen limited those claims to situations in which “the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized from their commercial fishing in the absence of the spill. “This reduction of profits must be established with certainty and must not be remote, speculative or conjectural.” Oppen, 501 F.2d at 570 (emphasis added). Oppen permits recovery to commercial fishermen when their injury—loss of profits—flows directly from the action of escaping oil

on the life in the sea[.]” Id. at 569 (citation omitted). Because Oppen is a limited exception to Robins Dry Dock, nothing more should be read into the exception. Thus, the sole injury for which commercial fishermen may recover, absent physical harm, is for loss of profits which they would have realized but for the spill. Oppen, 501 F.2d at 570.

Based upon its interpretation of Oppen, the court denied Exxon’s motion for summary judgment for potentially provable future lost profits attributable to sockeye over-escapement into the Kenai River.⁴ The court has also issued an order denying Exxon’s motion for summary judgment on certain commercial fishermen’s claims for lost profits in years following the 1989 spill. Thus, the court has consistently followed Oppen’s ruling that commercial fishermen may pursue claims for lost profits which are directly related to the oil spill.

Absent physical harm, commercial fishermen have a limited right to pursue lost profits. Without such line-drawing, “a court could plausibly decide that wave upon wave of successive economic consequences were foreseeable.” Getty Refining & Marketing Co. v. M/T Fadi B, 766 F.2d B29, 833 (3d Cir. 1985). At a time when the continuing validity of Oppen is in question (East River Steamship Corp. v. Transamerica Delaval. Inc., 476 U.S. 858 (1986)), it would be inappropriate to expand Oppen to include recovery beyond lost profits. Oppen did not eliminate entirely the Robins Dry Dock physical harm requirement for commercial fishermen. Rather, Oppen created a narrow and limited exception for commercial fishermen. As stated above, that

⁴ Order No. 172, Clerk’s Docket No. 4434.

exception allows commercial fishermen to pursue lost profits even though they may not have suffered physical harm. No other claimant has that option.

Plaintiffs' claims for reduced permit and vessel values are not damages contemplated by Oppen. Plaintiffs do not claim—the court does not here deal with—physical damage to any vessel or any preclusion or limitation of plaintiffs' use of their limited entry permits. Plaintiffs' claims are, in the language of Oppen quoted above, “remote, speculative, and conjectural.” The boats and permits in question have not been sold. We do not know when, or if they will ever be sold. When and if they are sold, we have no way of ascertaining what the market for permits or boats will be. The court does not question that there is a market for both limited entry permits and Alaskan fishing vessels. The problem is that the plaintiffs have never entered that market.⁵ The court also does not doubt that the going price for limited entry permits and Alaskan fishing vessels dropped significantly when the full impact of the Exxon Valdez grounding was realized. Again, however, that tells us nothing about whether plaintiffs' limited entry permits or vessels will ever be exposed to the relevant market, or what their value will be at some unknowable future date.

Finally, this is not a case of plaintiffs who paid too much for an asset based upon fraud or misrepresentation with respect to the value of the asset at the time of its purchase. Plaintiffs have not

⁵ This motion, and the court's ruling on it, have no application to a plaintiff who has in fact sold a limited entry permit or vessel at a loss at a time relevant to the Exxon Valdez grounding.

pleaded claims for fraud or misrepresentation.

For the above stated reasons, Exxon's motion for summary judgment on claims of commercial fishermen based on diminished value of limited entry fishing permits and fishing vessels is granted.⁶

DATED at Anchorage, Alaska, this 23 day of March, 1994.

/s/ _____
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

⁶ To the extent that plaintiffs argue that their claims are cognizable under TAPAA or Alaska law, those arguments are rejected pursuant to this court's Order No. 174, Clerk's Docket No. 4444.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
_____)

ORDER NO. 189

MOTION FOR SUMMARY JUDGMENT
ON CLAIMS BY AREA BUSINESSES AND
MUNICIPALITIES
ON ROBINS DRY DOCK GROUNDS

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively Exxon) have moved for summary judgment or partial summary judgment on claims by area businesses and municipalities.¹ Plaintiffs oppose the motion,² and Exxon has replied.³ The court has considered the briefs of the parties and has heard oral argument.

¹ Clerk’s Docket No. 4040. Exxon’s motion was originally directed against the seven municipal plaintiffs: City of Cordova, Kodiak Island Borough, City of Larsen Bay, City of Old Harbor, City of Ouzinkie, City of Port Lions, and City of Seward. The court remanded these cases to state court (Order No. 166, Clerk’s Docket No. 4277) and the motion is moot and is denied as to these municipal plaintiffs.

² Clerk’s Docket Nos. 4205, 4207, 4208, 4265, 4283, and 4112.

³ Clerk’s Docket Nos. 4407, 4085, and 4248.

In a motion for summary judgment the moving party must “bear the initial responsibility of informing the district court of the basis for its motion, and . . . demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 317. Additionally, Rule 56(e), Federal Rules of Civil Procedure, provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleadings, but the adverse party’s response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Plaintiffs argue that Exxon’s motion fails to satisfy the prerequisites of Rule 56(e). The court finds, however, that the motion, and the box-load of well-indexed exhibits, which the court has perused, meet the requirements of Rule 56(e). On the other hand, the vast majority of plaintiffs did not submit affidavits or other evidence to refute Exxon’s arguments.⁴ Apparently, these plaintiffs have chosen

⁴ A day prior to oral argument on this motion, and long after the court had done its initial work-up of this motion, certain plaintiffs in consolidated cases No. A92-0198-CV and No. A92-0203-CV moved the court to lift its stay on further

to “rest upon the mere allegations . . . of [their] pleadings. . . .” Id.

Exxon moves for summary judgment on the economic claims of area businesses arising from the 1989 Exxon Valdez oil spill. Exxon argues that these claims are barred by Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings, an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without accompanying physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

In Order No. 174,⁵ the court granted Exxon’s motion for summary judgment against seafood wholesaler, processor, cannery employee, and tenderer plaintiffs. These plaintiffs suffered economic damages without physical harm from the oil spill. In entering this order, the court noted the following: “When creating the fishermen’s exception to Robins, the Oppen court stated ‘it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by

motion practice to allow four plaintiffs to move for leave to file supplemental affidavits. (Clerk’s Docket No. 4641). With trial less than two months away, motion practice has to be at an end. The physical impact rule which the court employs is not new—it is very old law which plaintiffs must have known of when they first opposed Exxon’s motion. The motion to lift stay is denied.

⁵ Clerk’s Docket No. 4444.

the oil spill. . . .” Order No. 174 (Clerk’s Docket No. 4444) at 4, quoting Oppen, 501 F.2d at 570. The court will be guided by the above principle in deciding the instant motion.⁶

In making its motion, Exxon argues that Robins not only bars recovery of plaintiffs who did not suffer physical damage, but also bars recovery of plaintiffs who had physical contact with oil but whose economic losses are unrelated to such oiling. In Naviera Maersk Espana, S.A. v. Cho-Me Towing, Inc., 782 F. Supp. 317, 320 (E.D. La. 1992), the court stated “to be recoverable, the economic loss claimed must flow directly from the alleged physical damage to plaintiff’s property.” Id., citing Nicor Supply Ships Associates v. General Motors Corp., 876 F.2d 501 (5th Cir. 1989). The court in In re oriental Republic of Uruguay, 821 F. Supp. 934 (D. Del. 1993), reached a similar conclusion which bears quoting at length:

Obviously the number and variety of different forms of economic harm arguably resulting from ... discharge of oil into the Delaware River are limited only by the boundaries of human imagination. The Robins rule of preclusion prevents this unending chain of potential tort liability for economic losses by setting forth a bright line rule of limitation which discards traditional precepts of foreseeability and . . . relies instead on whether the alleged pecuniary loss resulted

⁶ In Order No. 174, the court rejected arguments that seafood wholesalers, etc., should be allowed to recover damages under the Alaska Act and TAPAA despite Robins Dry Dock. For the reasons stated in Order No. 174, the court rejects the same arguments raised by plaintiffs herein.

from physical harm arising from the defendant's negligence. If, however, any party who sustained some form of physical damage as a result of the defendant's alleged negligence were entitled to seek relief in tort for any and all economic losses incurred in connection generally with the defendant's negligence, irrespective of whether said economic damage had any relation to the physical harm sustained, then the Robins rule of limitation largely would be eviscerated. For example, the restaurant owners, boat owners and shipping concerns . . . could easily circumvent the Robins rule by merely demonstrating that they incurred some amount of physical property harm . . . as a result of the . . . spill. . . . [T]hese parties would be entitled to recover (in negligence) all their economic loss damages arising generally from the oil spill, irrespective of how insubstantial their physical property damage might be and without regard for whether their pecuniary losses were related to said property damage to any extent whatsoever. Accordingly, the Court rejects [a] broad construction of the physical harm exception and concludes that the physical harm exception to the Robins rule will apply only where the alleged economic harm derives directly from the plaintiff's physical property damage.

Republic of Uruguay, 821 F. Supp. at 939-40 (footnote omitted).

Thus a plaintiff who claims economic damage due to oiled property must show a direct relationship

between the alleged physical and economic damages. Essentially, the issue remains one of proximate cause, and the court finds that a plaintiff survives a motion for summary judgment under Robins if the plaintiff makes a reasonable showing that the economic damages were related to physical damages.⁷

In support of its motion, Exxon has submitted excerpts of depositions, interrogatory answers, and responses to requests for admission of 95 area business whose economic claims, according to Exxon, do not derive from commercial fishing or oiled property. Exxon arranged its evidence into two groups: (1) plaintiffs who had no physical contact with oil (Appendix A); and (2) plaintiffs who had physical contact with oil but claim unrelated economic losses (Appendix B).⁸

The court has painstakingly reviewed the evidence relating to the 95 area business plaintiffs. The evidence shows that, except for a select few

⁷ In responding to Exxon's argument, the area businesses refer the court to Shaughnessy v. PPG Indus., Inc., 795 F. Supp. 193 (W.D. La. 1992), in which the court permitted fishing and hunting guides to recover economic damages without physical harm following contamination of certain wetlands, estuaries, and marshes. Shaughnessy is distinguishable from the case at bar in that it involved a land-based plaintiff and a land-based polluter, and the case proceeded under non-maritime theories. Regardless, this court has already ruled that only commercial fisherman are excepted from Robins. Clerk's Docket No. 4444.

⁸ "Appendices" A and B are part of the box-load of exhibits which accompany Clerk's Docket No. 4040. They should not be confused with "Attachments" A, B, and C which are stapled to Clerk's Docket No. 4040, or "Tables" A, B, and C which are stapled to Clerk's Docket No. 4407.

which the court will discuss later in this order, the area businesses are not entitled to recover economic damages under Robins Dry Dock. It is either undisputed that the businesses did not have oiled property or, if they did have oiled property, there was no causal connection between the property damage and their economic loss. Approximately one-fourth of the 95 area businesses which were listed in Exxon's motion submitted opposing evidence in the form of affidavits. The majority of the affidavits did not establish a claim under Robins Dry Dock.

Among those plaintiffs who submitted opposing evidence are certain guides for sport fishermen and nature lovers. According to these plaintiffs, their affidavits establish that:

Their businesses are dependent upon the condition of the waters and the fish in areas impacted by the EXXON VALDEZ spill. When the availability of salmon and other fish and the attractiveness of the marine environment were impaired by the spilled oil, these plaintiffs lost revenues because existing reservations were canceled and potential patrons were discouraged from booking new reservations. Some had their activities directly disrupted by the presence of oil in waters where they would have fished or observed wildlife with their clients.

Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) at 6 (footnotes omitted).

Upon review of the evidence, the court finds the plaintiff guides have failed to show that their economic claims were related to any physical

damage to property owned by the plaintiffs. Under the court's interpretation of Robins Dry Dock and Oppen, the plaintiff guides are not entitled to recover for their claimed damages.

Certain suppliers of goods and services to commercial fishermen also responded to Exxon's motion with affidavits. Plaintiffs argue that the affidavits show that:

[T]hey have lost revenues because the fishermen who would be their customers have had less need for new and repaired equipment than they would have had if the oil spill had not impaired their fishing activities. Other plaintiffs in this general category are specialists in the servicing and repair of commercial fishing boats and equipment both on land and on the water, including fishing grounds. As their affidavits testify, the reduction in fishing activity caused by the spill severely reduced the need for the repair services which are these plaintiffs' principal businesses. Still other plaintiffs provide a variety of services to the fishing industry, and the demand for those services was similarly reduced.

Additionally, the reduction in fishermen's revenues impaired their ability to pay for needed goods and services, further depressing these plaintiffs' revenues and profits.

Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) at 7-8 (footnotes omitted).

Upon review of the evidence, the court finds that these plaintiffs who offer services to commercial

fishermen have alleged neither physical damages nor economic damages related to physical damages. Accordingly, under Robins Dry Dock and Oppen, these plaintiffs are not entitled to recover for their economic damage claims.

Also opposing Exxon's motion are two scientists who studied the sea otter population in Prince William Sound. These scientists seek compensation for emotional distress, loss of income from scientific activities, lost research funding, destruction of intellectual property, lost future intellectual property, and destruction of "our" study. Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205) Exhibits 16 and 17. None of these claims are compensable under Robins. These scientists also claim that they were developing a business to provide live otters to aquariums and zoos. The scientists argue that they literally fished for sea otters. Due to the oil spill, the scientists have lost their permit to remove healthy sea otters from Prince William Sound, and can no longer collect income by providing otters to zoological organizations.

The court finds that the purposes for which the scientists collected otters does not put the scientists within the commercial fishermen's exception to Robins. One of the scientists stated in his deposition as follows:

- A. My personal permit did not allow me to capture for export. It allowed me to capture literally hundreds of otters for scientific research purposes.
- Q. But you couldn't capture an otter and

sell it, could you?

- A. No, you can't sell the otters. We could not. That's not what we were doing. We were simply providing a service where – you know, for people that had permits to hold the animals.

Deposition of Charles W. Monnett at 2, attached as Exhibit 3 to Exxon Reply Memorandum (Clerk's Docket No. 4407).

The deposition shows that the scientists were not harvesting and selling otters in the same sense that commercial fishermen “lawfully and directly make use of a resource of the sea . . . in the ordinary course of their business.” Oppen, 501 F. 2d at 570. Rather, the scientists, as part of their overall research activities, captured otters “for scientific research purposes.” Monnett Deposition at 2, attached as Exhibit 3 to Exxon Reply Memorandum (Clerk's Docket No. 4407).⁹ Although the scientists' “economic” affairs may have been “discommoded by the oil spill,” Oppen, 501 F.2d at 570, that alone does not create a Robins Dry Dock claim. Simply put, scientists are not fishermen and otters are not fish which may be lawfully taken and sold. These scientists did not earn their livelihood from the capture and sale of marine animals. Rather, they were paid principally for their scholarly endeavors.

⁹ One of the scientists specifically expressed concern over the “element of apparent profiteering.” Clerk's Docket No. 4407, Exhibit 3 at 4. The scientist also spoke of an agreement with Shedd Aquarium in Chicago in which the scientists would provide otters to Shedd, and Shedd would provide “essentially a \$20,000 infusion—into our program.” Clerk's Docket No. 4407, Exhibit 3 at 5.

The scientists did not suffer property damage from the oil spill, are not commercial fishermen, and are not entitled to a recovery under Robins Dry Dock.

Another plaintiff who opposes Exxon's motion was developing a business of selling oil extracted from salmon carcasses for use as fishing bait. This plaintiff was not a commercial fisherman. The plaintiff bought salmon carcasses from a company in Kodiak. This plaintiff did not suffer any physical damage from the oil spill. Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205), Exhibit 18. The evidence shows that the plaintiff is not entitled to any recovery under Robins Dry Dock or Oppen.

Among the plaintiffs targeted in Exxon's motion was the Kodiak Electric Association. This plaintiff alleges that it suffered reduced power usage by processors subsequent to the oil spill. No physical damage is alleged.¹⁰ Plaintiffs' Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk's Docket No. 4205), Exhibit 19 at 3. This plaintiff is not entitled to recovery under Robins.

Plaintiffs also argue that many businesses which constitute the entire economies of certain coastal communities were dependent on the fisheries impaired by the spill. In particular, plaintiffs refer to businesses in the City of Cordova. Although not oiled, plaintiffs argue that "Exxon determined that all businesses in Cordova were 'directly impacted'

¹⁰ This claim is a good example of the reason for the Robins Dry Dock rule. If this claim were actionable, then why not the claims of the association's fuel suppliers? Foreseeability provides no meaningful limits on the extent of liability in a situation such as this.

and therefore entitled to compensation for lost profits resulting from the spill.” Plaintiffs’ Memorandum in Opposition to Exxon Motion for Summary Judgment (Clerk’s Docket No. 4205) at 9 (footnote omitted). Plaintiffs also argue that “[a]nother Exxon official advised the Cordova Committee of Concerned Businesses that Exxon’s guidelines ‘recognize that Cordova businesses were uniquely and directly impacted by the closed Prince William Sound fisheries.’” Id. (footnote omitted).

As an example, plaintiffs refer to Cordova Air Service. The affidavit submitted on behalf of Cordova Air Service reveals that it did not suffer any physical damage from the oil spill. Rather, Cordova Air Service claims that it “did not receive the business it would have from the local commercial salmon and herring fishermen had there been no spill.” Id., Exhibit 13 at 2.¹¹ Plaintiffs also submitted the affidavit of R & P Marine which specializes in the manufacture of fishermen’s nets. R & P Marine alleges purely economic losses. Id., Exhibit 8. A similar purely economic claim is established in the affidavit of Viking Net Supply Company of Cordova. Id., Exhibit 7. Plaintiffs argue that “[t]here is also evidence sufficient, at a minimum, to raise a genuine issue of fact as to the similar dependence on the entire economies of other coastal communities, including particularly Kodiak, on the fisheries impaired by the spill. Id., at 9 (footnote omitted).

¹¹ Cordova Air Service did not suffer any real property damage from the spill. Clerk’s Docket No. 4040, Appendix B, Exhibit 7 at 95-96. Certain aircraft belonging to Cordova Air Service were oiled, but the oil was washed off and Cordova Air Service is not making a claim for oiled aircraft. Id. at 153.

None of plaintiffs' evidence, however, is sufficient to satisfy the Robins Dry Dock requirement that physical harm must have been suffered before economic damages may be recovered. Acknowledgement by certain Exxon officials that the businesses of Cordova and other communities were directly impacted by the closed fisheries, does not, in and of itself, create a claim under Robins Dry Dock.¹²

A further word of explanation may be in order here for the non-lawyers who will review this ruling. There is no question but that the Exxon Valdez grounding impacted, in one fashion or another, far more people than will ever recover anything in these proceedings. There is an understandable public perception that if one suffers harm which is perceived to be a result of the conduct of another, the harmed person should be compensated. That perception does not always square up with the institutional guidelines (statutes and case law) under which the court must operate. It is the function of both Congress and the courts (principally the courts of appeal and supreme courts) to determine the extent to which public expectations with respect to financial responsibility are to be realized. Legal liability does not always extend to all of the foreseeable consequences of an accident. In the area of harm to one's body, the reach of what is recoverable is very great. Where one's property is injured, the extent of legal liability is considerable, but not to the same extent as with bodily injury. Where pure economic loss—not connected with any

¹² Exxon officials may have had the Trans-Alaska Pipeline Liability Fund in mind in making the statements to which plaintiffs refer. Claims under the Fund are not restricted by Robins Dry Dock, although causation must still be proved.

injury to one's body or property is at issue, and especially where that economic loss occurs in a marine setting—the reach of legal liability is quite limited except as to commercial fishermen.

In making this and other related decisions, the court applies the rules of law provided to it by Congress and the appellate courts. This court has no power to change those rules. The court is obligated to apply those rules as they currently exist.

The foregoing should not be viewed as an apology for the current state of the law. Indeed, the court defends it. Were it otherwise, we would have a form of organized anarchy in which no one could count on what rule would apply at any given time or in any given situation. In the terminology of the day, both the plaintiffs and the Exxon defendants are entitled to a “level playing field” where, over relevant time, the rules of law applicable to a given situation are stable. Thus it is that one must either qualify as a commercial fisherman or demonstrate that one has suffered harm to physical property before that individual may seek economic losses; and to be recoverable, economic losses must, in a meaningful way, flow from the physical damage. Tar from an oil spill tracked by customers onto the floor of a fishing gear store does not cause lost sales of gear.

Exxon also moved for summary judgment against five aquaculture associations: Blue Star Aquaculture; Scurvy Creek Fisheries Enhancement, Inc.; Prince William Sound Aquaculture Corporation; Cook Inlet Aquaculture Association; and Kodiak Regional Aquaculture Association. Only the latter three oppose Exxon's motion. Plaintiffs' Supplemental Opposition to Exxon Motion for

Summary Judgment (Clerk's Docket No. 4207).

Prince William Sound Aquaculture Corporation, Cook Inlet Aquaculture Association, and Kodiak Regional Association have submitted evidence which establishes that they engaged in commercial fishing. Plaintiffs' Supplemental Opposition (Clerk's Docket No. 4207) and attached exhibits. Accordingly, these three aquaculture associations are entitled to pursue their claims based upon the fishermen's exception to Robins Dry Dock. There is also evidence that Prince William Sound Aquaculture Corporation and Kodiak Regional Association suffered physical damage from the oil spill which may have resulted in economic loss. Plaintiffs' Supplemental Opposition (Clerk's Docket No. 4207) and attached exhibits. Under Robins Dry Dock, these two aquaculture associations may go forward with their claims for physical and consequential economic damages.

All three of the aquaculture associations which responded to Exxon's motion argue that, because of the spill, they were unable to collect a 2% enhancement tax levied on commercial fishermen. The commercial fishermen, who were precluded from fishing subsequent to the spill, did not pay the enhancement tax to the aquaculture associations. The failure to collect this tax did not result from the aquaculture associations' inability to engage in commercial fishing or from any physical damages they may have suffered. Accordingly, they are not entitled to recover the tax from Exxon.

Plaintiffs Rod Berg / Rod 'N Real Alaska, Tim Berg / Berg's Fishing Charters, Greg Samson / Greg's Sportfish Guide Service, and Rodney Arno / Alaska Sojourns, Inc., have stated in requests for

admission that none of their personal property was oiled. These plaintiffs submitted affidavits in response to the instant summary judgment motion which contradict the requests for admission. Rule 36(b), Federal Rules of Civil Procedure, which governs the effects of admissions states that “[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” *Id.* (emphasis added). At the hearing, counsel orally moved to withdraw the admissions, and now seeks leave to file a similar written motion.¹³ The motion is DENIED. The court may have been inclined to grant the motion had it been made during the discovery phase of the case. The motion, however, was made long after fact discovery was to have been completed, after all briefing was submitted on the instant summary judgment motion, and very close to trial. The court will enforce Rule 36(b) as to all plaintiffs who formally admitted that no personal property was oiled. Accordingly, summary judgment is GRANTED on the claims of Rod Berg / Rod ‘N Real Alaska, Tim Berg / Berg’s Fishing Charters, Greg Samson / Greg’s Sportfish Guide Service, and Rodney Arno / Alaska Sojourns, Inc.

Finally, plaintiff Chris Garcia states in his affidavit that he is a commercial fisherman and a distributor of “Fish Hog” long line fishing gear. Plaintiffs’ Opposition to Exxon Motion for Summary Judgment (Clerk’s Docket No. 4205), Exhibit 9. He claims lost fishing income which is actionable and lost gear distribution income unrelated to physical property harm (and not flowing from his commercial

¹³ Clerk’s Docket No. 4665.

fishing) which is not actionable. This plaintiff may proceed with his claim for lost fishing income, but not the claim for other economic damage.¹⁴

In summary, Exxon's motion for summary judgment is DENIED, to the extent explained in this order, regarding the claims of: Cook Inlet Aquaculture Association; Kodiak Regional Aquaculture Association; and Prince William Sound Aquaculture Corporation. With these exceptions, the court GRANTS Exxon's motion for summary judgment or partial summary judgment regarding the remaining plaintiffs as listed in Tables A, B, and C attached to Exxon's Reply Memorandum (Clerk's Docket No. 4407).

DATED at Anchorage, Alaska, this 23 day of March, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

¹⁴ The court notes that Exxon specifically excluded commercial fishing claims from this motion. Clerk's Docket No. 4040, at 1 n.l. Thus, Garcia's commercial fishing claim is not subject to the motion.

APPENDIX L

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

In re)
) No. A89-0095-CV (HRH)
the EXXON VALDEZ)
) (Consolidated)
)
_____)

ORDER NO. 190

**Exxon’s Motion For Summary Judgment
on Native Class Claims for Non-Economic Injury**

Defendant Exxon Shipping Company (D-2) and Exxon Corporation (D-1) have moved for summary judgment on the Alaska Native class (Alaska Native) claims for non-economic injury.¹ Plaintiffs oppose the motion,² and Exxon has replied.³ The court has considered the briefs of the parties and has heard oral argument.

Exxon seeks summary judgment on all Alaska Native claims for compensatory damages for injury to “culture” or the “subsistence way of life”. Specifically, the motion seeks summary judgment on the Alaska Native non-economic claims “for alleged injury to [their] ‘subsistence way of life’, which is

¹ Clerk’s Docket No. 4053.

² Clerk’s Docket No. 4373 and Clerk’s Docket No. 4112. Direct action Native plaintiffs represented by Richard A. Jameson & Associates join in the opposition to Exxon’s motion. Clerk’s Docket No. 4372.

³ Clerk’s Docket No. 4450, No. 4085, and No. 4248.

said to be a ‘personal, economic, psychological, social, cultural, communal and religious form of daily living’ that is ‘dependent upon the preservation of uncontaminated natural resources, marine life and wildlife.’” Exxon Motion for Summary Judgment at 1, Clerk’s Docket No. 4053 (footnote omitted). The motion is not addressed to claims for damages measured by the economic value of any loss of subsistence harvest which were proximately caused by the Exxon Valdez oil spill.⁴

Exxon argues that the Alaska Native claims are precluded by the rule of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Robins Dry Dock established that in maritime settings an injured person must have suffered direct physical harm to recover economic losses. A limited exception to this rule was created for commercial fishermen who may recover economic damages without physical harm. Union Oil v. Oppen, 501 F.2d 558 (9th Cir. 1974).

Robins Dry Dock does not address non-economic damages of the type claimed by the Alaska Natives. Nonetheless, Robins Dry Dock offers guidance because the “Robins Dry Dock principle ‘is essentially a principle of disallowance of damages because of remoteness. . . .’” Holt Hauling & Warehousing Systems, Inc. v. M/V Ming Joy, 614 F. Supp. 890, 895 n.13 (E.D. Pa. 1985) (citations omitted). Oppen is inapplicable because the instant motion does not involve commercial fishermen.

The Alaska Natives argue that their claim is cognizable as a maritime public nuisance. They

⁴ To the extent that the Alaska Natives raise claims under Alaska law or TAPAA, those claims were rejected pursuant to this court’s Order No. 174, Clerk’s Docket No. 4444.

argue that private individuals who can show a special injury, different in kind from that suffered by the general public, can recover damages in maritime public nuisance. Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973). This court has previously recognized that “[t]he law remains that a private litigant cannot recover damages for a public nuisance unless he or she can show a special injury different in kind from that suffered by the general public.” Order No. 146 at 8, Clerk’s Docket No. 3671, citing Oppen v. Aetna Ins. Co., 485 F.2d 252, 259 (9th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 721 (D. Kan. 1991); Burgess v. M/V Tamano, 370 F. Supp. 247, 250-51 (D. Me. 1973); Restatement (Second) of Torts § 821C(1). In Order No. 146, the court dismissed the sport fishermen’s nuisance claim because they could not show that their claims were different from those suffered by the general public. The court noted that the “sport fishermen were unable to allege private claims because [they] suffered no private injury.” Order No. 146 at 15, Clerk’s Docket No. 3671.

The Alaska Natives argue that the unique nature of their subsistence lifestyle is the keystone to their culture. While all Alaskans are entitled to engage in subsistence activity the Alaska Natives argue that only they engage in a centuries-old system of subsistence that is a central part of their culture and inextricably linked to the natural resources damaged by the spill.

Exxon argues that the Alaska Natives’ right to hunt and fish, share fish and game with family and friends, and commune with nature does not create a private nuisance claim because all Alaskans have

the same rights. Exxon argues that a fervent environmentalist who adores nature or an avid sport fisherman or hunter suffered the same injury as the Native Alaskans. Thus, Exxon argues, the Alaska Natives' nuisance claim is not different in kind from that of the general public. Exxon concedes that the Alaska Natives may practice subsistence living to a greater degree than the general public, but argues that differences in the intensity with which a public harm is felt cannot justify a private claim for public nuisance. See, Restatement (Second) of Torts § 821C, comment b ("The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to a greater extent of degree.").

The Alaska Natives' non-economic subsistence claims have their origins in Title VIII of the Alaska National Interest Lands Conservation Act.⁵ By ANILCA, Congress found and declared that:

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence[.]

⁵ All aboriginal hunting and fishing rights in Alaska, including those associated with submerged lands, were extinguished by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603(b).

16 U.S.C. § 3111. Why Congress made a distinction between Native and non-Natives by way of a reference to “cultural existence” in the case of Natives, and “social existence” in the case of non-Natives, is unclear and of no great significance here.

The court takes notice of the fact that hunting and fishing for the family table is traditional throughout all of rural America. For great numbers of those who reside in the Lower 48 states and many urban Alaskans, hunting and fishing has no doubt become more social and recreational in nature; but the hunt and the need to put food on one’s table is very much a part of American culture. As quoted above, Congress has recognized that the “opportunity for subsistence uses” of fish and wildlife is vitally important to rural Alaskans, both Native and non-Native. 16 U.S.C. § 3111(1).

The Alaska Natives’ non-economic subsistence claims are not “of a kind different from [those] suffered by other members of the public exercising the right common to the general public that was the subject of interference.” Restatement (Second) of Torts § 821C(1). Although Alaska Natives may have suffered to a greater degree than members of the general public, “differences in the intensity with which a public harm is felt does not justify a private claim for public nuisance.” Clerk’s Docket No. 4450 at 8. See, Restatement (Second) of Torts § 821C(1) (stating, in comment b, that it is not enough to suffer the same kind of harm, but to a greater degree). All Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives.⁶ All Alaskans,

⁶ McDowell v. State, 785 P.2d 1 (Alaska 1989) , rejected the rural preference contained in ANILCA (16 U.S.C. § 3113), and

and not just Alaska Natives, have the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings. Neither the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native subsistence lifestyle unique. These attributes of the Alaska Native lifestyle only make it different in degree from the same subsistence lifestyle available to all Alaskans. The Alaska Natives do not have a viable, maritime, public nuisance claim, as their claim is only different in degree, but not in kind, from that suffered by the general population of Alaska.⁷

The Alaska Natives cannot establish a claim for private nuisance because a claimant must have a possessory interest in the land allegedly burdened by the nuisance to support such a claim. Restatement (Second) of Torts § 821E. The oil spill from the Exxon Valdez affected the waters, beaches, and shorelines of Prince William Sound and the Gulf of

in substance opened all state lands to subsistence hunting and fishing by all Alaskans. State lands, except “non-subsistence areas”, are still open to subsistence hunting and fishing by all Alaskans. AS 16.05.258. Federal lands are subject to a preference in favor of all “rural” Alaska residents (16 U.S.C. § 3113). Whether the subsistence fishing in the waters of Prince William Sound, Upper Cook Inlet, and the territorial waters around Kodiak are subject to state or federal regulation is a subject of ongoing litigation.

⁷ A private action for public nuisance will fail “when the class becomes so large and general as to include all members of the public who come in contact with the nuisance.” Order No. 146, at 9 n.1 (Clerk’s Docket No. 3671) (quoting Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1009 (1966)).

Alaska. Title to the submerged areas is owned by the State of Alaska and the United States. Title to adjacent upland is owned by one of the government entities or Native corporations.⁸ The Native corporations are either direct action plaintiffs or members of the landowner class in the Exxon Valdez litigation. If a claim for private nuisance existed, it would belong to Native corporations and landowner plaintiffs, but not to the individual Alaska Natives. The Alaska Natives do not dispute that they cannot recover under a private nuisance theory. Such a claim is not available to the Alaska Natives.⁹

Even if the Alaska Natives could present a claim for nuisance, it is doubtful whether a claim for public nuisance can be asserted under federal common law or maritime law.¹⁰ In Conner v. Aerovox, Inc., 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1984), the court stated that “the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Federal Water Pollution Control Act].”

⁸ ANCSA settled all aboriginal land claims in Alaska through the formation of regional and village corporations which were entitled to select and take title to some 44 million acres of federal land in Alaska.

⁹ The Alaska Natives also failed to dispute Exxon’s argument that they cannot recover under negligent infliction of emotional distress. The court agrees that this claim is unavailable to the Alaska Natives.

¹⁰ Although most courts distinguish between federal common law and maritime law, at least one court has suggested that “[t]o the extent that maritime law is judge-made, it can be viewed as simply one branch of federal common law.” Matter of Oswego Barge Corp., 664 F.2d 327, 333, 334 (2d Cir. 1981), cert. denied, 477 U.S. 903 (1986).

Conner, 730 F. Supp. at 842, quoting Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981). Conner held that Sea Clammers encompassed “all federal judge-made law of nuisance whether maritime or general federal law.” Conner, 730 F.2d at 842. See also, Louisiana v. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1030 n.13 (5th Cir. 1985) (the Supreme Court has apparently foreclosed a federal cause of action for public nuisance claims regarding obstruction of navigable waterways) ; Marquez-Colon v. Reagan, 668 F.2d 611, 614 n.2 (1st Cir. 1981) (the Supreme Court held in Milwaukee v. Illinois, 451 U.S. 304 (1981) and Sea Clammers “that the federal common law of nuisance for interstate and coastal water pollution has been entirely preempted by [the FWPCA]”); Matter of Oswego Barge Corp., 664 F.2d 327, 338 n.13 (2d Cir. 1981) (suggesting that the Supreme Court understood in Sea Clammers that the FWPCA preempted both federal common law and maritime nuisance); Secko Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008 (E.D. La. 1993) (federal common law does not recognize a cause of action for public nuisance in a water pollution case). In Nat'l Audubon Soc'y v. Dept. of Water, 869 F.2d 1196, 1200 (9th Cir. 1988), the Ninth Circuit, while not addressing maritime nuisance, held that federal common law nuisance claims for water pollution are preempted by the FWPCA.

In the last analysis, what the Alaska Natives seek is a recovery which is not founded upon any legal theory currently recognized by maritime law. They assert that theirs is a non-market economy, and that their damages should not be measured by

market economy standards.¹¹

The court does not reject the notion that there are cultural differences between Alaska Natives and many non-Native Alaskans.¹² The existence of two cultures is not inconsistent with a conclusion that both have suffered injury of the same kind as a consequence of the Exxon Valdez oil spill, and that it is for the public to demand satisfaction on behalf of all of those injured.

The court is concerned that rural Alaska residents might view this decision as evidencing a lack of understanding of their commitment to a subsistence lifestyle as permitted by Title VIII of ANILCA or holding that cultural considerations are without value and/or not valued by the court. The court does neither.

This court was designated by Congress as the enforcer and protector of the rural Alaska preference as regards subsistence uses of fish and wildlife. 16 U.S.C. § 3117. In a series of decisions (some unpublished and some published),¹³ this judge has

¹¹ The Alaska Natives tacitly recognize that their cultural damage claim must in the end be converted to dollars. How, they do not say.

¹² Although Congress arguably dealt Alaska Native culture a heavy "hit" by using for-profit business corporations as the vehicle to settle aboriginal lands claims, Title VIII of ANILCA and some recent amendments to ANCSA (for example, 43 U.S.C. § 1636 (1988)) suggest that the oft-repeated cycle of separation (*i.e.*, segregation or self-determination) and assimilation in federal Indian policy has now taken a turn back toward separation.

¹³ See, for example, Kenaitze Indian Tribe v. Alaska, No. A86-0367-CV, Order of July 9, 1987, Clerk's Docket No. 67, rev'd on appeal, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905

presided over the development of subsistence hunting and fishing law in Alaska under ANILCA and under AS 16.05.258 (1986), § 6, ch. 52, SLA 1986, which, until the McDowell decision (see footnote 6, supra), was applicable as to both federal and state lands. See 16 U.S.C. § 3115(d). Suffice it to say, the court accepts without qualification the cultural importance of the subsistence lifestyle to residents of rural Alaska in general, and Alaska Natives in particular, in rendering this decision.

In other related proceedings, this court has already presided over cases commenced by governmental entities which have led to the payment of over \$1,000,000,000.00 from Exxon in the form of criminal sanctions and civil damages for injury to the environment and natural resources. To the extent that one might view the grounding of the

(1989) ; and Bobby v. State of Alaska, 718 F. Supp. 764 (D. Alaska 1989). The most protracted litigation in the subsistence area has been that of Katie John and others who seek to protect their subsistence fishing traditionally done at the confluence of Tanada Creek and the Copper River at a site now abandoned but formerly known as Batzulnetas. Katie John [et al.] v. Alaska, No. A85-0698-CV, Order of Jan. 19, 1990, Clerk's Docket No. 68. The latter case terminated when the State of Alaska's fishing program fell out of compliance with ANILCA, a subject discussed in some detail in Kluti Kaah Native Village of Copper Center [et al.] v. Alaska [et al.], No. A90-0004-CV, Order of Aug. 15, 1990, Clerk's Docket No. 37. Ms. John's efforts continue in Katie John v. United States and Alaska v. Babbitt, No. A89-0488-CV (Consolidated) which raises the important questions of whether or not the State of Alaska is still entitled to regulate subsistence hunting and fishing on federal land in Alaska and, if not, whether navigable waters (such as the Copper River and Prince William Sound) are subject to state or federal regulation as regards the taking of fish for subsistence purposes.

Exxon Valdez as a clash of cultures, the segment of society which demands oil and its products has paid and will continue to pay for the grounding of the Exxon Valdez. These funds are largely in trust arrangements intended for use in restoring, rehabilitating, and augmenting the natural resources of the area affected by the Exxon Valdez oil spill. The area residents generally, and Alaska Natives in particular, should derive direct benefit from this effort. The goal is restoration of what has been lost to all cultural interests.

At the risk of making this decision too long, and at the risk of straying too far from the legal field, the court would observe that the entry of oil companies into Alaska in the late 1950s and thereafter was not the first (and likely not the last) challenge to Native culture. Who moved in on whom as between the Alutik, Indian, and Yupik/Inupiat peoples is lost in the anthropological fog of ten to fifty thousand years ago. Then came the Russians, then the American whalers, then the miners, and with them the United States Government came to Alaska.

All of these incursions have impacted and, to a lesser or greater degree affected, Native culture. Some would no doubt say that little good has come from any of the cross-cultural contacts. Be that as it may, we are powerless to prevent change; and accidents are no stranger to human existence, especially those who venture into the open waters surrounding the State of Alaska. Inattention can be, and often is, fatal. However, one's culture—a person's way of life—is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life.

If (and we think this is not the case) the Native culture was in such distress that the Exxon Valdez oil spill sapped the will of the Native peoples to carry on their way of life, then a Native subsistence lifestyle was already lost before March 24, 1989. Development of the Prudhoe Bay oil fields, the construction of processing facilities, and the trans-Alaska pipeline on the North Slope of the Brooks Range were, in all probability, a much greater and certainly longer-lasting incursion into Native culture than the Exxon Valdez oil spill, yet the Inupiat have thrived. The court doubts that they are less committed nor less successful in preserving their Native culture than are the Native people of Prince William Sound, Kodiak, or the Cook Inlet area. The Exxon Valdez oil spill was a disaster of major proportions, but it did not deprive Alaska Natives of their culture.

The affront to Native culture occasioned by the escape of crude oil into Prince William Sound is not actionable on an individual basis. To those who say it ought to be, the court must answer: Congress and the appellate courts make law, not this court. The loss of enjoyment of life claim (a claim roughly comparable to that which the Alaska Natives would assert) has in recent decades become recognized by appellate courts as a compensable aspect of a personal (bodily) injury claim. No personal injury claims are made in this case, so enjoyment of life damages are unavailable. The Alaska Natives' claims for non-economic losses is rejected, and the plaintiffs must find recompense for interference with their culture from the public recoveries that have been demanded of and received from Exxon.

For the above stated reasons, the court GRANTS

Exxon's motion for summary judgment on Native claims for non-economic injury.¹⁴

DATED at Anchorage, Alaska, this ____ day of March, 1994.

/s/ [illegible]
United States District Judge

cc: L. Miller
D. Serdahely
D. Ruskin

¹⁴ This order does not affect subsistence claims for economic injury, to the extent that such claims are proved. Alaska Natives who are commercial fishermen or who have physical injury claims or economic claims causally connected to physical damage may continue to pursue these claims. This order does not affect any claims asserted by the Native Corporations.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
) A89-095-CV (HRH)
The EXXON VALDEZ) **(Consolidated)**
) **Honorable H. Russel**
) **Holland**
_____)

RE: ALL CASES

THIRD AMENDED REVISED TRIAL PLAN¹
(Proposed)

* * *

The following plan for a phased trial is hereby adopted.² In the event of any inconsistency between

¹ This pleading has been submitted and is approved by the Court without any waiver of the plaintiffs' rights to be remanded back to state court. By entering into this trial plan, plaintiffs also reserve the right to argue that there may be multiple punitive damages trials regardless of remand of the pre-1993 or September 1993 removals.

² This proposal anticipates consummation of the pending settlement between the Alyeska defendants and the plaintiffs. All provisions of this plan are subject to reconsideration if the settlement should fail for any reason. In addition, should the settlement be approved and should the Alyeska defendants succeed in obtaining an order barring or restricting claims for repayment, indemnity or contribution against the Alyeska defendants arising from judgments or settlements of the claims covered by this plan, defendants reserve the right to seek revision of this plan to assure reservation of defendants'

this plan and the Local Rules of this Court or the terms of Order No. 143 herein, the terms of this plan shall control.

I. Trial Date

The principal trial of these consolidated cases is set for May 2, 1994 at 9:00 a.m. at Anchorage, Alaska.

II. Parties Bound by the Outcome

The following defendants shall be found by the results of this trial: Edward Murphy, Gregory Cousins, Robert Kagan, Exxon Shipping Company, Exxon Corporation³ and Joseph Hazelwood.

All plaintiffs in this Court shall be bound by Phase I and Phase III of the trial, and those plaintiffs who appear and participate either personally or through a representative at the second phase of the trial in proving the quantification of their damages shall be bound by Phase II of the trial. All plaintiffs who appear and participate either personally or through a representative at Phase IV of the trial shall be bound by the results of Phase IV.

III. Sequential Phased Jury Trial Plan

A. Sequence of Trial.

1. Phase I – A first phase to establish the liability of defendants Murphy, Cousins, Kagan and Hazelwood for negligence; further, as to the Exxon Defendants and Hazelwood, to

contribution or indemnity rights in light of the Alyeska settlement.

³ Exxon Shipping Company and Exxon Corporation are hereafter referred to as the “Exxon Defendants.” The parties have reached a stipulation that a single verdict will be returned as to the Exxon Defendants. See ¶ III, F, below.

establish whether there was conduct undertaken with reckless indifference to the interests, rights and safety of others and sufficiently outrageous to be deemed equivalent to actual malice (“willful misconduct”)⁴;

2. Phase II – A second phase to establish proximate cause and damages, if any, of the following plaintiff groups:

Phase II A – lost harvest, price, and permit valuation claims of salmon and herring fisheries in the five geographical areas most greatly affected by the Spill (PWS, Kodiak, LCI, UCI and Chignik) as well as boat valuation claims as specified in the **Stipulation and Order Concerning Commercial Fishing Subclasses’ Boat Devaluation Claims**, dated as of December 20, 1993;

Phase II B – claims of the Alaska Native Class;

Phase II C – lost income claims of cannery workers.

The cases, claims and issues asserted in separate cases in this docket are hereby consolidated or severed for purposes of trial, pursuant to Rule 42 F.R.Civ.P. and in accordance with the definition of the Phases

⁴ It is understood that use of “willful misconduct” herein is intended to define the type of aggravated misconduct necessary to justify an award of punitive damages, and that the standard will be the subject of pretrial motion practice and settlement of substantive jury instructions.

set out herein.

Plaintiffs whose claims are to be tried in Phase II may seek to try their individual claims in Phase IV if, and only if, written notice of request for severance of such claims from Phase II is filed and served within thirty (30) days of entry of an order approving this Plan in its current form. Any party may oppose a requested severance of claims included within Phase II by motion made within fifteen (15) days of service of the request.

3. Phase III – A third phase to determine liability for and the amount of punitive damages, if any, for all plaintiffs in this Court whether their compensatory damages are determined in Phase II or Phase IV, if the jury has determined that any defendant is liable for “willful misconduct.”

4. Phase IV – A separate “cleanup” to determine proximate cause and damages, if any, for remaining plaintiffs. This cleanup phase can be tried or otherwise resolved by a new factfinder or factfinders. The plaintiffs whose claims are tried in Phase IV shall be entitled to share in the amount awarded in Phase III as punitive damages, if any. The amount allocated to Phase IV plaintiffs as punitive damages shall be that fraction of the total award established in Phase III whose numerator is the total amount of Phase IV compensatory damages and whose denominator is the total of the compensatory damages established in both Phase II and

Phase IV.

Without limiting the generality of the foregoing, the following compensatory damage claims shall be tried in Phase IV.

- a. Property damage claims.
 - b. Commercial fishers not included in paragraph II (A) (2) above.
 - c. Tenderers.
 - d. Seafood processors, buyers or brokers.
 - e. Aquaculture associations.
 - f. Area businesses.
 - g. Others whose claims were not tried in Phase II.
 - h. Those whose claims are severed from Phase II pursuant to request as provided in paragraph III, A, 2 hereof.
5. The first three phases shall be tried by a single jury.⁵ Phases I and III will be initiated by opening arguments and concluded by closing arguments and the submission of a special verdict form to the jury. In Phase II, the presentation of each plaintiff group shall be initiated by opening arguments and concluded by closing arguments and the submission of a special verdict to the jury. The provisions of this Plan establishing deadlines for designation of exhibits, depositions, witnesses and the like shall not

⁵ Defendants reserve objection to jury trial of any claim or issue as to which there is no right to trial by jury.

be applicable to proceedings reserved for Phase IV. Schedules of final pretrial of some or all of the claims reserved for Phase IV shall be established by trial planning procedures at a subsequent time.

B. Composition of the Jury.

The Court shall empanel a jury of 12. No jurors shall be designated as alternate jurors. All jurors shall be allowed to retire and deliberate, and the jurors shall be unanimous in order to return a verdict. Any verdict shall require at least six jurors.

A valid verdict on Phase I must be the unanimous verdict of all jurors to whom the Phase I issues were submitted, except for those jurors, if any, who are excused, provided that the jury must consist of at least six jurors. If, after a verdict has been returned in Phase I, jurors are excused before verdicts are reached in Phases II or III, a valid unanimous verdict may be returned by the remaining jurors for either Phase II or Phase III, so long as there are six or more jurors remaining on the jury. Nothing contained in this section is intended to waive grounds for mistrial other than the discharge of jurors due to illness or incapacity.

C. Jury Questionnaire, Preliminary Instructions and Voir Dire.⁶

1. Counsel for the parties shall attempt to develop a juror questionnaire, preliminary instructions to the jury panel and proposed

⁶ Assuming that individual defendants have not been dismissed by the time of trial, defendants maintain that appropriate accomodation will need to be made regarding the jury selection process.

questions for general voir dire by the Court by the close of business on April 8, 1994. To the extent there is disagreement about any of these matters, the court shall resolve the disagreement.

2. A jury panel of approximately 100 persons shall be called to Court by the Clerk of Court on Monday, May 2, 1994. The Clerk shall also arrange for a secondary panel, which can be called upon on short notice to supplement the initial panel should it be exhausted.

3. The Court will deliver preliminary instructions to the jury panel on May 2 regarding how the jury selection process will be carried out.

4. The Court will allow one attorney for each side to make a statement of up to 10 minutes to the entire panel for the purpose of informing them of what the case is about. These statements shall be delivered after the Court delivers its preliminary instructions; they shall not be a substitute for the formal opening statements which will precede the presentation of the evidence.

5. Jurors will then be excused to the jury room to complete the juror questionnaire. When the questionnaire is completed, panel members will be excused for the day. A copy of each completed questionnaire shall be made available to designated counsel for each side.

6. At a time which the Court considers sufficient to allow counsel an appropriate opportunity to review the completed questionnaires, the Court will meet with two

counsel for each side for the purpose of excusing those panel members as to whom there is a consensus about an excuse for cause. All jurors not so excused may then be placed in random order using a computer program managed by the jury clerk. Counsel will be provided with a print-out of the panel listing as soon as the jury clerk may reasonably do so.

7. Those jurors not excused for cause by stipulation will be recalled for general voir dire by the Court. At the conclusion of general voir dire, counsel shall be provided a brief time to assert additional challenges for cause if any appear.

8. The first 24 of the remaining jurors shall be seated in the jury box for individual voir dire by counsel. Each side shall be permitted up to 10 minutes of voir dire of each individual juror. At the conclusion of the voir dire of each individual juror by both sides, each side shall be permitted to exercise any challenge for cause. Challenges for cause and the Court's rulings on such challenges shall be conducted at the side bar. If a juror is excused for cause, that juror will be replaced with the next person on the random list. Failure to exercise a challenge for cause at the conclusion of the individual voir dire for a juror shall be deemed waiver of any ground for challenge then appearing of record. This process shall be followed as to each juror until 24 jurors have been cleared for cause.

Each side shall have six preemptory

challenges. Preemptory challenges shall be exercised by “blind strike,” i.e., counsel for each side will be provided with the list of names of the 24 jurors cleared for cause, and each side will be permitted to strike six jurors from the list. The Court will take as the trial jury the first 12 jurors as set out on the list who have not been stricken by either party.

D. Trial Day.

The trial day shall run from 8:00 a.m. until 2:00 p.m. with two short breaks. Conferences may be held, if necessary, after the close of the trial day, and otherwise as may be necessary.

E. Trial Time.

The Court defers any ruling on the duration of the entire trial or any phase thereof at this time. This issue shall be taken up at a subsequent pretrial conference.

F. Preliminary Instructions.

Counsel for the parties shall attempt to develop a set of substantive preliminary instructions to be submitted to the Court by the close of business on April 8, 1994, which shall be given to the 12-person jury panel prior to opening arguments. To the extent there is disagreement, the Court shall resolve the disagreement.

G. Trial Notebook.

Each juror shall be provided with a trial notebook, which may include photographs of all witnesses. The jury shall be able to enter notes in the notebook and to take the notebooks into deliberations. Trial notebooks shall include a glossary of terms, to which

the parties shall attempt to agree. To the extent they are unable to stipulate to the terms of a glossary, on or before March 1, 1994, each side shall submit their proposed glossary, or any portion thereof as to which there is disagreement, to the Court for review. These submissions may be accompanied by supporting briefs. The Court may then rule on what, if any, terms, or other submitted matter, may be included in the jurors' trial notebooks.

H. Jury View.

Any party requesting a jury view shall file a motion for such view no later than January 31, 1994, or any such application shall be deemed waived.

I. Procedures Applicable to Submission of Evidence and Verdicts as to the Liability of the Exxon Defendants.

Solely to facilitate the trial of this litigation, and for the purpose of this litigation only:

1. The contention that Exxon Corporation is liable in this litigation for the acts or omissions of Exxon Shipping Company, its agents or employees, shall not be tried by any party, but shall be deemed resolved for purposes of this litigation by this compromise, and not on the merits.
2. As to Exxon Corporation and Exxon Shipping Company, any verdict form used in this case shall provide for only a single verdict as to any claim for compensatory damages, only a single verdict as to whether or not conduct warranting an award of punitive damages under the legal standard to be

defined by the Court occurred, and, in the event of a verdict finding that such conduct occurred, only a single verdict as to the amount to be awarded as punitive damages, if any. Each such verdict shall be entered as to the "Exxon Defendants."

3. Judgment may be entered as against Exxon Corporation and Exxon Shipping Company jointly and severally on any verdict for compensatory damages or punitive damages returned as to "Exxon Defendants."

4. Any evidence not otherwise admissible against Exxon Corporation that is an admission, business record or otherwise admissible as against Exxon Shipping Company shall be admissible to the same extent as against the "Exxon Defendants," but to no greater extent. Likewise, any evidence not otherwise admissible against Exxon Shipping Company that is admissible as against Exxon Corporation as an admission, business record or otherwise shall be admissible to the same extent as against the "Exxon Defendants," but to no greater extent.

5. The jury may be instructed, and counsel may discuss with the jury, the following: Any acts or omissions of Exxon Shipping Company or any knowledge or information chargeable against Exxon Shipping Company shall be chargeable against the "Exxon Defendants," and each of them, and any acts or omissions of Exxon Corporation or any knowledge or information chargeable against Exxon Corporation shall be chargeable against the

“Exxon Defendants,” and each of them.

6. Except as provided in this subsection for the plan, any claim against or defense of law or fact that would have been available to Exxon Corporation or Exxon Shipping Company shall still be available; and specifically, (1) unless law applicable absent the special provisions of this subsection so provides, in no event shall one of the Exxon Defendants be subject to liability for acts of the other Exxon Defendant if such acts could not result in liability to such other Exxon Defendant; and (2) unless the law applicable absent the special provisions of this subsection so provides, in no event shall one of the Exxon Defendants have a defense to liability for acts of the other Exxon Defendant if such defense would not be available to such other Exxon Defendant.

J. Final Instructions.

Not later than by the close of business on April 8, 1994, both parties shall submit their respective request for final jury instructions. Such submission shall consist of joint submission of instructions requested by both sides, accompanied by individual submissions of requests for instructions as to which the parties have not been able to agree. Requests of instructions may be accompanied with supporting briefs.

K. Special Procedure for Determination of Punitive Damage Liability.

Defendants’ recommended special procedures for determination of punitive damage liability, if any are withdrawn without prejudice.

IV. Specification of Factual Contentions

The issues framed by the following contentions, and only those issues, remain to be tried:

A. Specification of Phase I Contentions in the Parties' Cases in Chief.

1. Plaintiffs' Phase I Contentions.

The conduct of the Exxon Defendants concerning tanker operations in Prince William Sound was undertaken negligently and with reckless indifference to the interests, rights and safety of others and was sufficiently outrageous to be deemed equivalent to actual malice.

a. The transportation of crude oil in Price William Sound creates an extreme hazard to an environmentally sensitive area.

b. The Exxon Defendants were aware of the danger of an oil spill from tanker traffic in Prince William Sound and of the catastrophic consequences, including damage to Plaintiffs and members of the Plaintiff classes, that would result from such a spill, and acknowledged publicly their responsibility to prevent such spills.

c. The Exxon Defendants acted negligently and with reckless indifference to the interests of others in allowing the EXXON VALDEZ to run aground.

d. The Exxon Defendants acted negligently and with reckless indifference when they failed to adopt and/or implement a policy which provided for

effective detection, monitoring and aftercare of a vessel master in a safety-sensitive position who had been treated for alcohol abuse, who had a history of mental and emotional problems, and who had a history of dereliction of duties.

e. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when, with knowledge of Captain Hazelwood's past record, including alcoholism, dysthymia and other mental and emotional problems, and his prior dereliction of duty aboard vessels, they failed to disqualify him as a master in 1985; they returned Hazelwood to duty as a master after his admission to an alcohol abuse center; they assigned him to the EXXON VALDEZ, a vessel operating in environmentally sensitive waters; and they failed to investigate or remove him as Master of the EXXON VALDEZ after continuing reports of alcohol use, other mental and emotion problems, an continuing reports of dereliction of duties.

f. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when they failed to adopt and put into effect policies and practices which would insure proper operation of, and training of Exxon Shipping personnel in the use of navigational devices aboard the EXXON VALDEZ, including, *inter alia*, the radar's Fairway Option (which was inoperable for some time prior to and during the March

23, 1989 voyage) and the vessel's ocean computer in the cargo control room (which had been inoperable since sea trials in 1987).

g. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when they adopted a policy of inadequate manning levels in transporting their crude oil and failed to adopt and put into effect policies and practices which would insure against fatigue-impaired performance by the crew. As a result of such failures, the crew of the EXXON VALDEZ suffered from fatigue on the night of March 23-24, 1989. By way of example, Second Mate LeCain was fatigued and in bed in his cabin during his assigned watch, which began at midnight AST on the morning on March 24, 1989, and Cousins, himself fatigued, stood a second consecutive watch in place of LeCain. Chief Mate Kunkel, also fatigued, was in bed during both of the watches which Cousins stood.

h. The Exxon Defendants acted negligently and with reckless indifference to the interests of others when they failed to adopt and implement an ice-and-navigation policy where, since the early 1980s, ice was known by the Exxon Defendants to be a significant hazard to navigation. By way of example, the Exxon Defendants were advised shortly before March 24, 1989 by an Exxon master to limit transit of Prince William Sound to

daylight hours because of dangerous ice conditions, which they did not do.

i. But for the reckless indifference of the Exxon Defendants, the grounding of the EXXON VALDEZ could have been avoided. After the grounding and discharge of in excess of 234,000 barrels of oil into Prince William Sound, the Exxon Defendants adopted policies and practices which they could have and should have adopted prior to the spill. These practices and policies related to, among other things, alcohol use and abuse, manning of vessels and fatigue, sailing in Prince William Sound during icy conditions and a monitoring/safety policy.

j. On late March 23, 1989, there were heavy concentrations of ice all across Valdez Arm, requiring a diligent, competent navigation watch capable of conning the vessel, watching for ice and fixing the vessel's position frequently, none of which occurred.

k. As a direct result of acts and omissions of the Exxon Defendants as set forth in paragraphs c. - j., above, the wrongful conduct set out below in paragraphs l. - n. occurred on March 23 - 24, 1989, all of which is attributable to the Exxon Defendants:

l. Hazelwood acted negligently and with reckless indifference to the interests of others throughout March 23-24, 1989. Captain Hazelwood's conduct during this period was that of an impaired master of a

vessel. By way of example:

(1) Captain Hazelwood drank alcohol within four hours of the vessel getting underway from Valdez.

(2) Captain Hazelwood returned to the vessel about 42 minutes before sailing and assumed his duties in an impaired condition.

(3) Captain Hazelwood left the bridge to go to his stateroom about 15 to 20 minutes after getting underway, and the vessel proceeded through the Narrows with Captain Hazelwood off the bridge.

(4) Captain Hazelwood was off the bridge for more than one hour and had to be summoned to the bridge shortly before the Pilot disembarked. Once summoned, Hazelwood was slow coming from his cabin to the bridge.

(5) After the Pilot's departure, Captain Hazelwood reported to the Vessel Traffic Center (VTC) that the vessel was going to divert from the Traffic Separation Scheme (TSS) to the northbound (inbound) lane, alter course and reduce speed.

(6) Contrary to his report to the VTC, Captain Hazelwood did not decrease the speed of the vessel and changed the vessel course differently from that reported to the VTC to take her completely out of the TSS. Captain

Hazelwood reported none of these changes to the VTC.

(7) While on a heading to proceed out of the TSS, while the vessel was increasing to sea speed, Captain Hazelwood put the vessel's steering in auto gyro on a course heading for Bligh Reef, with hazardous ice conditions present; he thereafter increased the vessel speed.

(8) Captain Hazelwood subsequently turned the con of the vessel over to Third Mate Cousins, notwithstanding Hazelwood's knowledge (a) that Cousins was an inexperienced third mate, had no maneuvering experience in confined waters and had no pilotage for these waters; (b) that Cousins was fatigued from work; (c) that the vessel's speed was increasing to sea speed in hazardous ice conditions; (d) that the vessel's steering was in auto gyro; and (e) that Kagan, an inexperienced helmsman, needed close supervision.

(9) Captain Hazelwood instructed Cousins to turn back to the TSS at a location dangerously close to Bligh Reef.

(10) Captain Hazelwood told Cousins he would be off the bridge only a few minutes but did not return until after the grounding.

(11) Captain Hazelwood continued to act as would an impaired master after

the grounding by reason of his conduct and omissions, including but not limited to, (a) failing to sound the general alarm; (b) leaving the engine on full speed ahead; (c) failing to report promptly the grounding to the Coast Guard; and (d) continuing to attempt to dislodge the vessel from Bligh Reef despite the danger in doing so.

(12) When the Coast Guard arrived in the early morning of March 24, 1989, Captain Hazelwood smelled of alcohol and was smoking in the wheelhouse with heavy fumes present until ordered by the Coast Guard to extinguish his cigarette. Open and empty containers of alcoholic beverages, including empty cans of beer and a bottle of Jack Daniels, were observed in Hazelwood's cabin.

m. Defendant Cousins acted negligently on March 23-24, 1989. Cousins' conduct was caused principally by reason of his fatigued condition and lack of experience. By way of example:

(1) He assumed a second consecutive watch despite his fatigued condition.

(2) He continued to navigate the EXXON VALDEZ alone, despite the vessel's dangerous course and speed and the severity of ice conditions.

(3) He continued to navigate the EXXON VALDEZ without the required pilotage endorsement for Prince

William Sound.

(4) He failed to turn the vessel so as to avoid Bligh Reef.

n. Defendant Kagan acted negligently when he failed to properly maneuver the vessel as helmsman. Kagan was known by the Exxon Defendants to be an unskilled, marginal helmsman.

o. Pilot Murphy acted negligently when he failed to act after smelling alcohol on Captain Hazelwood's breath and witnessing him leave the bridge.

p. The Exxon Defendants are liable for the actions and omissions of their own employees, including defendants Hazelwood, Kagan and Cousins.

2. Defendants' Phase I Specifications.

Defendants will present a coordinated and cohesive defense without duplication of witnesses or proliferation of issues. Minor differences in contentions continue to exist, but these will not result in delay or confusion at trial.

For example, the Exxon Defendants admit that Captain Hazelwood's departure from the bridge of the EXXON VALDEZ was negligent and a proximate cause of the grounding, but they deny that Captain Hazelwood's actions were willful misconduct. Captains Hazelwood and Murphy deny that it was negligent for Captain Hazelwood to leave the bridge as the EXXON VALDEZ approached Busby Island Light and deny that this departure from the

bridge was a proximate cause of the grounding. Captain Hazelwood's and Captain Murphy's evidence to this point will be identical to Exxon's evidence that Captain Hazelwood's actions were not willful misconduct.

In general, all defendants deny and will offer evidence to contradict plaintiffs' Phase I specifications set out above. Third Mate Gregory Cousins and Captain Murphy wish to state that they specifically deny that their individual actions were negligent.

Without prejudice to defendants' right to offer evidence to contradict each of plaintiffs' contentions, defendants will contend as follows:

- a. Captain Hazelwood was not impaired on the night of the grounding.
- b. When Joseph Hazelwood left the bridge on the EXXON VALDEZ at or about 23:53 on March 23, 1989, he left instructions which, if followed, would have steered the EXXON VALDEZ safely back to the designated traffic lanes.
- c. The Sperry SRP 2000 ship control system aboard the EXXON VALDEZ appears to have malfunctioned at or about 23:53. This failure led the bridge team to believe that the ship was under hand control when it was not. This misapprehension apparently contributed to a delay in execution of Captain Hazelwood's order to turn back into the traffic lanes once the vessel came abeam of

Busby Island Light.⁷

d. The EXXON VALDEZ ran aground as the result of an accumulation of mistakes and errors on the part of numerous individuals, including Sperry Marine, Inc. and the Coast Guard personnel standing watch at the Vessel Traffic Center in Valdez.

e. No one involved in the grounding was guilty of willful misconduct.

f. Alcohol was not a proximate cause of the grounding.

g. Captain Hazelwood's actions after the grounding were reasonable and prudent under the circumstances.

h. Exxon Defendants contend that there is no evidence of the Exxon Defendants' strict complicity in the actions of Joseph Hazelwood on which plaintiffs base their claim of willful misconduct.

i. A finding of predicate acts for imposition of punitive damages on the basis of the facts cited in plaintiffs' specification of Phase I issues would have adverse economic impacts on the Alaska economy.

3. Without creating any implied expansion of the foregoing specification of issues of fact to be tried, the following issues of fact are no longer in the case for any phase, unless the

⁷ Third mate Cousins does not join in the contentions set forth in this paragraph.

Court finds that the Exxon defendants open the door:

a. Whether the tank and ballast arrangements of the EXXON VALDEZ, including the absence of a double bottom, was actionable for any reason.

b. Whether representations Exxon made concerning oil spills, oil spill preparedness or any other matter of fact or opinion germane to the grounding of the EXXON VALDEZ or the spillage of its cargo is actionable for misrepresentation.

4. Without creating any implied expansion of the foregoing specification of issues of fact to be tried, the following issues of fact are no longer in the case in Phases I or II, unless the Court finds that the Exxon defendants open the door:

a. Whether the preparedness of Exxon, Exxon Shipping or any other person to respond to the grounding or the oil spill was adequate, negligent or willfully deficient.

b. Whether the response of Exxon, Exxon Shipping or any other person to the grounding or the oil spill was adequate, negligent or willfully deficient.

B. Specification of Phase II Contentions in the Parties' Cases in Chief.

1. Plaintiffs' Phase II Specifications.

As a natural and foreseeable consequence of the Defendants' actions and omissions, the EXXON

VALDEZ oil spill caused damage to the environment of Prince William Sound and beyond and thereby caused substantial damage to Plaintiffs and members of the Plaintiff classes, who depend upon that environment for their livelihood and lifestyle.

a. On March 24, 1989, shortly after midnight AST, as a result of Defendants' negligence and reckless indifference to the interest of others, the EXXON VALDEZ ran aground on Bligh Reef in Prince William Sound, discharging at least 11,000,000 gallons of Alaska North Slope crude oil into Prince William Sound.

b. The discharge and spread of crude oil into one of the most diverse and complex ecosystems in the world, upon which the Plaintiffs and members of the Plaintiff classes depend for their livelihood and lifestyle, caused grave and long-standing direct damage to these Plaintiffs.

c. The discharge of crude oil into one of the richest marine fisheries communities in the world damaged commercial fisheries and the persons whose livelihood depends upon the health of those fisheries, including commercial fishers. The jury will be asked to answer special interrogatories at the conclusion of each sub-phase as follows:

(1) 1989 Harvest Sizes

(a) PWS pinks

(b) UCI sockeye

(c) Other harvest sizes for PWS,

Chignik, Kodiak, LCI and UCI, to the extent the parties are unable to stipulate to harvest sizes

(2) 1989 Fish Prices (PWS, UCI, LCI, Kodiak, Chignik)

(a) PWS pinks

(b) PWS herring roe

(c) UCI sockeye

(d) The parties will attempt to stipulate to a formula for deriving the prices of other areas, by species, based upon jury findings as to a-c, so judgment can be entered on salmon and herring price claims, if any, for PWS, Kodiak, Chignik, UCI and LCI.

(3) Post-1989 Fish Prices⁸

(a) 1990 Salmon and Herring

(b) 1991 Salmon and Herring

(4) Post-1989 Harvest Sizes⁹

(a) PWS pinks in 1991, 1992 and 1993

(b) PWS herring in 1993

(5) Permit and Boat Devaluation¹⁰

(a) PWS salmon permit holders

⁸ Subject to Robins and causation motions to dismiss.

⁹ See prior footnote.

¹⁰ See prior footnote.

- (b) PWS herring permit holders
- (c) Kodiak salmon permit holders
- (d) UCI salmon permit holders
- (e) LCI salmon permit holders
- (6) Offsets, if any

d. The discharge and spread of crude oil damaged cannery workers whose livelihood depends upon the health of affected commercial fisheries. The jury will be asked to answer special interrogatories at the conclusion of this phase to quantify lost wages in 1989 on an aggregate basis, and any offsets thereto.

e. The discharge and spread of crude oil and its consequent impact on traditional subsistence foods damaged Alaska Natives whose culture, traditions, society, beliefs and relationships are dependent upon a subsistence way of life.

The jury will be asked to answer special interrogatories at the conclusion of this phase to quantify that damage and determine if there are any relevant offsets.

2. Defendants' Phase II Specifications.

a. Certain persons engaged in commercial fishing were damaged for the 1989 season as a proximate result of the grounding of the EXXON VALDEZ or the spillage of its cargo, but the amounts claimed by fishing plaintiffs are overstated, and alleged post-

1989 damages were not proximately caused by the Spill.

b. The Spill did not depress the price of Alaska seafood landed in 1989 or thereafter, nor was the Spill the proximate cause of any decline in the value of commercial fishing permits or fishing boats.

c. Certain cannery workers may have suffered a lose of income in 1989, but the majority of cannery workers have been compensated for losses.¹¹

d. Certain Alaska Natives are entitled to compensation for out-of-pocket losses, if any, but plaintiffs' evidence fails to provide a reasonable basis for estimation of damages, if any, proximately caused by the Spill. Otherwise, Alaska Natives were not damaged in an ascertainable amount as a proximate result of the Spill.

e. The Spill caused transitory damage to land and wildlife, but this damage has not had a significant long-run effect on the commercial or subsistence use of the resources of Prince William Sound or to its shoreline.

f. The Exxon Defendants are entitled to offset sums received by plaintiffs in partial satisfaction of their claims or which were realized in discharge of plaintiffs' duty to

¹¹ This contention does not concede that any loss of income sustained by cannery workers is cognizable under maritime law.

mitigate damages.

C. Specification of Phase III Contentions in the Parties' Cases in Chief.

1. Plaintiffs' Phase III Specifications.

The nature and extent of the defendants' acts and the circumstances in which those acts occurred, as described above, together with the following acts and circumstances, justify the assessment of a substantial punitive damage award.

- a. Defendants' financial and social condition and standing.
- b. The costs of the spill to Exxon Defendants to date have had no material adverse impact on the Exxon Defendants' financial condition.
- c. The risks that the defendants ignored.
- d. The scope and severity of the harm caused by defendants.
- e. The attitude and conduct of defendants upon discovery of the misconduct, including the cover-up of the misconduct and denial of the damages before Congress and the public.
- f. In light of the great risk to society presented by acts such as those of the Exxon Defendants, the necessity to punish Exxon and to deter like acts by Exxon or others in the future.

2. Defendants' Phase III Specifications.

- a. If there were evidence of willful misconduct (which there is not), it still

would not be appropriate for a jury to award punitive damages against the Exxon Defendants for the following reasons:

(1) Exxon and Exxon's employees have demonstrated long-standing commitment to good corporate citizenship. This record of positive corporate behavior makes it inappropriate to punish Exxon under the circumstances of this case.

(2) Long prior to the accident, the Exxon Defendants conducted tanker operations in Prince William Sound, and in Alaska generally, with a high level of concern for the well-being of the community and the environment. Exxon was a leader in developing many procedures designed to prevent oil spills from tankers or from other oil and gas operations. The Exxon Bridge organization manual and the ExxBridge project are examples of this self-starting, forward-looking commitment to safety.

(3) Prior to the accident, Exxon Shipping had a commendable record for safety and a continuing commitment to prevent accidents; and if and when accidents did happen, they responded to such accidents quickly and effectively.

(4) Long prior to the Spill, Exxon and its affiliates demonstrated a self-starting, forward-looking concern about the need to be able to deal effectively

with marine oil spills when they occur. The Correxite line of dispersant is one example of Exxon's before-the-accident commitment to do its utmost to minimize the consequences of accidental oil spills.

(5) The Exxon Defendants accepted responsibility to clean up the Spill immediately after the accident and persevered with unprecedented skill and at unprecedented expense to remediate the effects of the Spill. As a result, the environmental and economic effects of the Spill were mitigated, and, in purely economic terms, many offsetting benefits were realized by Alaska residents and the Alaskan economy.

(6) The Exxon Defendants quickly and voluntarily undertook to pay legitimate claims for compensatory damages or to advance funds against claims to minimize the impact of the Spill on the fishing industry. They provided speedy and voluntary financial and other assistance to the governments or administrations of the affected municipalities and native communities to mitigate the effects of the Spill and to pay for an incremental level of local governmental service and support.

(7) The Exxon Defendants sincerely and publicly apologized to the people of Alaska and the public generally for the

Spill.

(8) Punitive damages are not warranted because it is obvious, as a matter of economics and common sense, that the multi-billion dollar cost of the Spill and the Cleanup are more than enough to motivate the Exxon Defendants to take additional steps to increase even further the level of care with which operations are conducted in Alaska. These steps also satisfy the exemplary purpose of punitive damages.

(9) The Exxon Defendants have, in fact, taken vigorous and precedent-setting steps to provide additional safeguards against the risk of damage to the public from Exxon's operations in Prince William Sound.

(10) The impact of punitive damages would fall on innocent shareholders and employees whose conduct before and after the accident should be encouraged, not punished.

(11) Punitive damages are not warranted on this record because an award of punitive damages would harm Alaska's economy by going far beyond the needs of deterrence.

b. If there were evidence of willful misconduct (which there is not), it still would not be appropriate for a jury to impose more than nominal punitive damages upon the Exxon Defendants for the following reasons:

(1) The Exxon Defendants' post-accident conduct proves that imposition of a huge award is not necessary to achieve the only purposes of punitive damages.

(2) The amount necessary to deter a corporation like Exxon can only be rationally determined on the basis of the revenues and profits related to the allegedly wrongful conduct, not by the total worldwide revenues realized by the Corporation. It is therefore clear that punitive damages cannot be measured, as plaintiffs contend, on the basis of Exxon's worldwide revenues and profits, but by the financial measurements actually relevant to the Exxon Defendants' decision-making. Exactly what sums were and are relevant to such decisions cannot be determined at this stage of the proceedings, but it is certain that even if the revenues and profits of all North Slope operations were to be considered, the costs and liabilities arising from the Spill already exceed any reasonable purpose for punitive damages.

(3) The amounts already paid by the Exxon Defendants as a consequence of the grounding of the EXXON VALDEZ, together with the remaining, but unresolved, liabilities for compensatory damages which the Exxon Defendants will pay, more than exceed the amount necessary to deter any conduct that

might conceivably be relied upon for an award of punitive damages, or any amount necessary to deter willful misconduct of others. Such amounts are more than sufficient, even if judged by Exxon's worldwide revenues and total corporate assets.

(4) Judged by the penalties society imposes for conduct clearly more deliberate and malicious than any conduct alleged by plaintiff, an award of more than nominal damages would be irrational.

V. Statement of Relevant Facts About Which There is No Dispute

The following facts are stipulated and may be read to the jury:

1. The Exxon Defendants admit that Captain Hazelwood was negligent in leaving the bridge of the EXXON VALDEZ at or about 11:53 p.m., local time, that such negligence was a proximate cause of the Spill, and that the Exxon Defendants are responsible for this act of negligence.
2. For purposes of AS 46.03.822, Exxon Shipping Company was the owner and operator of the EXXON VALDEZ, and Exxon Corporation owned the cargo of Alaska North Slope crude oil that was aboard the EXXON VALDEZ at the time of the Grounding; accordingly, the Exxon Defendants are strictly liable for damages proximately caused by the Spill pursuant to the terms of AS 46.03.822.

The parties continue to make progress on stipulations of fact, and contemplate that such stipulations will be filed as supplements to this plan from time to time.

VI. Issues of Law to be Resolved

A. Plaintiffs' Issues.

1. Causes of Action.
 - a. Alaska Environmental Conservation Act (AS 46.03.822)
 - b. Negligence and Punitive Damages
 - c. Additional causes of action pleaded in state and federal complaints not disposed of by motion practice prior to trial or abandoned by the plaintiffs asserting such theories.
2. Legal Issues.
 - a. The form of preliminary instructions to be given to the jury at each phase or sub-phase of the trial.
 - b. The form of final instructions to be given to the jury at the conclusion of each phase or sub-phase of the trial.
 - c. The verdict form to be given to the jury at the conclusion of each phase or sub-phase of the trial.

B. Defendants, Specification of Legal Issues.

In addition to resolution of legal issues relating to instructions, admission of evidence and conduct of the trial, defendants contend that the following issues of law will need to be resolved prior to or during trial.

1. Whether certain conduct is the proximate cause of damage claimed by specific plaintiffs or plaintiff groups?¹²
2. Whether claims for damage other than for damage awarded by the Trans Alaska Pipeline Liability Fund are preempted in this case by the terms of the Trans Alaska Pipeline Authorization Act?
3. Whether any claim for punitive damages may be based on an alleged duty to meet standards in excess of or in addition to applicable Coast Guard regulations, including but not limited to the minimum manning requirements specified for the EXXON VALDEZ by applicable Coast Guard regulations and certificates?
4. Whether any claim for punitive damages based on the assignment of Robert Kagan as an able seaperson is precluded by federal law?
5. Whether, as a matter of federal maritime law, the acts of a vessel's officers or crew may be attributed to their employer without a showing of the employer's strict complicity in the willful misconduct of such officers or crew?
6. Whether any claim for damages based on reductions in fish harvests attributable to closures or other management decisions made by the State or other governmental bodies are cognizable as a matter of federal maritime law?

¹² This issue includes all questions arising under Robins Dry Dock and concepts of standing.

7. Whether defendants are entitled to an offset for payments received by plaintiffs from Exxon, the TAPLF or others?

8. Whether, as a matter of federal maritime law, there must be clear and convincing evidence of intentional malice or such outrageous conduct as to be the equivalent of actual malice before a jury may award punitive damages?

9. Whether, as a matter of federal maritime law, the overall wealth of a corporation is relevant to enhance the amount of punitive damages a court may allow?

10. Whether claims for punitive damages are barred as a result of judgments entered pursuant to settlement of governmental claims against the Exxon Defendants?

11. Whether defendants may be subjected to liability for punitive damages where defendants have been denied an adequate opportunity to prove their defense by limits on the length of trial, the number of witnesses or exhibits, the time for examination or cross-examination or otherwise?

12. Whether, as a matter of law, the conduct cited by plaintiffs is sufficient to permit imposition of punitive damages?

13. All issues of law raised in defendants, list of motions below to the extent not conclusively resolved by such motions.

VII. Witnesses

A. Plaintiffs preliminarily estimate that they will

call 100 non-expert witnesses¹³ and 45 expert witness. Plaintiffs estimates are based on the assumption that they will be allowed 30 days for trial of Phases I, II and III.

B. Defendants estimate that, depending on the identity of plaintiffs' witnesses, they will call between 20 and 40 fact witnesses and between 20 and 30 expert witnesses during Phase I, and between 10 and 25 fact witnesses and between 10 and 15 expert witnesses during Phase III. Defendants cannot currently estimate the number of witnesses they would call in the entirety of Phase II. For the commercial fishers trial, exclusive of the sublethal science case, defendants estimate between three and eight fact witnesses and between seven and 10 expert witnesses.

VIII. Proposed Schedule for Fact-Based or Law-Based Dispositive Motions

A. Plaintiffs' Fact-Based Motions. At this time, plaintiffs plan no such motions.

B. Plaintiffs' Non-Fact-Based Motions. At this time, plaintiffs anticipate bringing no such motions.

C. Defendants' Phase I Motions.

1. March 1, 1994: Motion by Captain Murphy for summary judgment.

D. Defendants' Phase II Motions.

1. Motions based on application of Robins Dry

¹³ A substantial number of the non-expert witnesses are expected to be the subject of brief videotaped testimony from depositions.

Dock and Benefiel principles.

- a. October 15, 1993: Motion for summary judgment on claims for damages attributable to governmental fisheries management decisions occasioned by the grounding of the EXXON VALDEZ or the State's "zero tolerance" policy.
- b. October 20, 1993: Motions for summary judgment as to claims of distal links in the seafood distribution chain, including seafood buyers, brokers, processors, tender boat operators and cannery workers.
- c. October 29, 1993: Motion for summary judgment as to all claims based on losses allegedly sustained because the price of fish was depressed after the Spill (including all claims made by fishermen outside the Spill area).
- d. November 5, 1993: Motion for summary judgment as to claims made by operators of area businesses, municipalities (and all others who allege purely economic loss).
- e. November 8, 1993: Motion for summary judgment on claims seeking recovery for emotional distress, cultural or "hedonic" damages.
- f. November 8, 1993: Motion for summary judgment on claims for damage to real property not impacted with oil.
- g. November 24, 1993: Motion for summary judgment as to all claims based on decline in the value of boats or fishing permits.

h. December 31, 1993: Motion for summary judgment as to plaintiffs' recently-asserted claims for lost or reduced harvests subsequent to 1989.

i. February 1, 1994: Motion for partial summary judgment that plaintiffs who submitted claims to the TransAlaska Pipeline Liability Fund, and had those claims determined by the Fund, subject to review by this Court, are precluded from seeking a greater amount of compensatory damages from defendants.

j. March 1, 1994: Motion for summary judgment as to claims for alleged archeological damage.

2. Fact-based Phase II motions.

a. December 31, 1993: Motion for summary judgment on claims for the alleged subsistence value of real property or for interpleader of overlapping claims.

b. December 31, 1993: Motion for summary judgment on the mining operations and cleanup claims of Jahn H. Preston and J&P Enterprises, Inc.

c. April 4, 1994: Motion for summary judgment as to claims for alleged archeological damage not based on sound title.

d. April 5, 1994: Motion for summary judgment for claims of alleged archeological damage founded on the doctrine of res ipsa loquitur.

e. April 6, 1994: Motion for summary judgment for claims of alleged liability for damage to archeological assets resulting from vandalism.¹⁴

IX. Motions in Limine¹⁵

A. Plaintiffs' Motions. Plaintiffs will provide a list of motions in limine at the conclusion of expert discovery, but anticipate bringing an in limine motion on whether any defendants may raise a defense based upon the Sperry steering mechanism on board the EXXON VALDEZ.

B. Defendants' Motions In Limine

1. Phase I –

a. November 1, 1993: Motion to exclude the report of the National Transportation Safety Board and all testimony based directly thereon.

b. November 2, 1993: Motion to exclude evidence relating to post-accident remedial measures taken by Exxon or Exxon Shipping during Phase I of the trial.

c. November 4, 1993: Motion to establish that every element of any claim for punitive damages must, as a matter of the federal maritime law applicable to this

¹⁴ To the extent archeological discovery is still ongoing, pursuant to the Discovery Master's Scheduling Order in DM-159, additional dispositive motions regarding such claims may need to be filed at a later date.

¹⁵ Briefing on such motions is limited to 15 pages for any opening memoranda and oppositions, and to five pages for replies.

case, be established by clear and convincing evidence.

d. November 5, 1993: Motion to exclude Joseph Hazelwood's private medical records as to Exxon and Exxon Shipping Co.

e. November 12, 1993: Motion to exclude evidence relating to Joseph Hazelwood's citations or convictions for driving under the influence of alcohol.

f. November 15, 1993: Motion to exclude evidence concerning Joseph Hazelwood's use of alcohol prior to August 1985.

g. November 19, 1993: Motion to preclude reference to the redactions of the Hazelwood medical records sustained by the Discovery Master.

h. December 1, 1993: Motion to exclude evidence of defendants' total wealth, net worth or earnings as proof of the amount appropriate to punish or to deter the Exxon defendants.

i. December 2, 1993: Motion to exclude evidence concerning prosecution of legislative advocacy activities.

j. December 15, 1993: Motion to preclude presentation of testimony in support of the report of David Pisoni.

k. December 31, 1993: Motion to exclude evidence relating to establishment of the minimum manning requirement for the Exxon Valdez, or to disputes over manning

requirements for unlicensed mariners.

1. February 1, 1994: Motion to exclude evidence of the blood and urine tests administered to members of the EXXON VALDEZ crew on March 24, 1989.

2. Phase II Motions –

a. November 8, 1993: Motion to exclude testimony of environmental experts who depend on empirical observations made by out-of-court declarants.

b. November 9, 1993: Motion to exclude reference to the jury verdict in the Glacier Bay litigation.

c. February 1, 1994: Motion to exclude any evidence of opinions based on ethnographic and similar surveys.

3. Phase III Motions -

a. November 10, 1993: Motion to preclude presentation of testimony in support of the report of Sam Rhodes.

b. November 29, 1993: Motion to preclude evidence relating to natural resource damage or general environmental impact of the Spill.

X. Deposition Designations

A. Not later than January 15, 1994, plaintiffs shall hand-deliver designations of those excerpts of depositions or other prior testimony which they intend to present to the jury to liaison counsel for defendants.

B. Not later than March 15, 1994, defendants shall

hand-deliver designations of those excerpts of depositions or other prior testimony which defendants intend to present to the jury to liaison counsel for plaintiffs.

C. Not later than 30 days after service of a designation of deposition testimony by any party (the “sponsoring party”), all other parties (the “responding party”) shall (a) notify the sponsoring party of their objections, if any, to designated testimony or to exhibits used in conjunction with designated testimony, and (b) counterdesignate those portions of the deposition which the responding party contends should be included in the sponsoring party’s designation pursuant to Rule 106 of the Rules of Evidence or at the discretion of the Court, which counterdesignations shall be read as part of the proponent’s examination, and (c) counterdesignate those portions of the deposition which the responding party wishes to present as if on cross-examination, and which shall be offered by the responding party as cross-examination of the deponent.

It is the intent of the parties that each party has the right to control its case in chief and the ability to designate pursuant to Rule 106, and the ability to counterdesignate is not to be used to incorporate additional material, except for appropriate cross-examination material, or where necessary to present the context of designated testimony pursuant to Rule 106, or where necessary to avoid an unreasonable requirement to repeat designated testimony because of the combination of subjects in the deposition dialogue.

D. In every case where one or more of the

responding parties has designated additional testimony to be offered in connection with a deposition, the sponsoring party may amend its designations, and in each case, the responding party may counterdesignate to any such amendment until neither party claims the right to further supplement the designation.

E. The parties should attempt to resolve any disputes about the inclusion or admissibility of designated testimony. Disputes which cannot be resolved by agreement shall be presented to the Discovery Master in sufficient time to allow for editing of videotapes or preparation of transcripts.

XI. Designation and Pre-marking of Exhibits

A. By January 24, 1994, plaintiffs shall identify and premark in good faith those exhibits they may use at trial, including summaries of voluminous material proffered pursuant to Rule 1006 of the Rules of Evidence, charts, models, animations and illustrative exhibits. By March 8, 1994, defendants shall identify and premark in good faith those exhibits they may use at trial, including summaries of voluminous materials proffered pursuant to Rule 1006 of the Rules of Evidence, charts, models, animations and illustrative exhibits. By April 2, 1994, each side shall identify and premark any additional exhibits they may use in cross examination of witnesses identified by other parties.

B. The parties shall use their best effort in good faith to identify and segregate which exhibits are expected to be first offered in Phase I of the trial, which exhibits are expected to be first offered in Phase II of the trial, and which exhibits are expected to be first offered in Phase III of the trial. This

identification of exhibits shall not be binding. Both sides recognize that exhibits, if identified, may be used in any of the first three phases of the trial.

C. Exhibits designated by plaintiffs shall be marked in sequence beginning with the designation PX-1 et seq. Exhibits designated by defendants shall be marked in sequence DX-1 et seq.

D. Each side shall prepare an index of its exhibits generally in the following format:

| <u>No.</u> | <u>Description</u> | <u>Preadmitted</u> | <u>Objections</u> |
|-------------------|--------------------|--------------------|-------------------|
| <u>Identified</u> | <u>Admitted</u> | <u>Rejected</u> | |

The description shall, inter alia, include each deposition exhibit number previously assigned to that document. The designations of exhibits filed on January 24, 1994, March 8, 1994 and April 2, 1994, respectively, shall be provided in the index format specified in this paragraph. Such index shall be delivered in writing and as a computer-readable magnetic record in WordPerfect format.

E. Objections. Within 21 days of the designation of any party's intended trial exhibits, all other parties shall notify the sponsoring party which exhibits can be preadmitted and to which exhibits objections, including objections to authenticity, are made based on the face of the document. Such notification shall be given by endorsement upon a copy of the index of exhibits furnished by the sponsoring side. The grounds for objection shall be briefly stated. Except for express agreement to admissibility, all objections endorsed on the catalog and all objections not apparent from the face of the exhibit are reserved.

F. Disposition of objections. Defendants propose:

The Court may be requested to rule on objections to exhibits in advance of trial if any party considers such action necessary.

Plaintiffs propose: **The Court shall conduct a hearing on April 1, 1994. At this hearing, the Court shall pre-admit the exhibits to which there is no objection. As to exhibits about which there is objection, the Court shall rule on as many as possible.**

G. Rebuttal and surrebuttal exhibits. Exhibits intended for use in the plaintiffs, rebuttal or the defendants' surrebuttal cases may be identified as specified in Paragraph XII, B hereof.

XII. Witness Sequence

A. Pretrial designation. Sixty (60) days prior to the commencement of trial the parties shall provide the other side with a listing of witnesses they then intend to call at Phase I, Phase II or Phase III of the trial (including those who will be presented by deposition). This notice shall provide the principal points of testimony expected to be elicited from the witness, the Phase of the trial at which the witness will be called, and the estimated time for the testimony of the witness. Witnesses not so identified may not be called to testify absent special order of the Court.

B. Designation during trial. Commencing on the Friday before trial, and each Friday thereafter, the side entitled to go forward with the evidence shall be required to give the opposing side notice of the anticipated sequence of witnesses for the next five trial days, and the exhibits which shall be offered with those witnesses. Notices provided hereunder should include the sponsoring side's best estimate of

the anticipated length of direct examination.

C. If, at any time after giving notice, the party going forward with the evidence has reason to know or believe that the sequence of witnesses will change, that party shall give notice of such proposed change as expeditiously as is practical. Trial counsel shall provide opposing counsel with a telephone number in Anchorage at which messages may be left on a 24-hour basis.

All parties other than the party by whom a witness is called shall be required to identify to all other parties those exhibits which will be used in the examination or cross-examination of a witness not called by them. Ordinarily, such exhibits shall be identified not less than one full trial day prior to the day on which the witness party expects to use such exhibit, and, if less than 24 hours before such anticipated use, as soon as practical after the decision to use the document has been made.

On the first day of trial, and on each Monday thereafter, in a manner to be prescribed by the Court as trial progresses, the parties shall identify to the Court, to the extent possible, objections to the admissibility of exhibits expected to be used on direct or in cross-examination of witnesses to be called during the ensuing five (5) trial days.

Not later than 48 hours after defendants have given notice that they expect to rest their case in chief within five (5) trial days, plaintiffs shall give notice of the identity and sequence of witnesses they intend to call and shall identify additional exhibits, if any, they propose to offer in their rebuttal case. Likewise, not later than 48 hours after plaintiffs have given notice that they expect to complete their rebuttal

case within five (5) trial days, defendants shall give notice of the identity and sequence of the witnesses they intend to call and shall identify the additional exhibits, if any, they propose to offer in their surrebuttal case. In either case, the notices may be supplemented to include rebuttal or surrebuttal witnesses or exhibits responding to evidence offered in the opposing side's case after the first rebuttal or surrebuttal notice has been provided.

XIII. Daily Stenographic Transcript

The parties are authorized to make arrangement for appointment of a stenographic reporter to make an official stenographic transcript of proceedings at the parties' expense. This reporter shall be directed to provide at least the following capabilities: (a) in-court readbacks from machine-stenographic notes, (b) delivery of electronic copy of un-edited daily transcript immediately at the close of the trial day, (c) delivery of a machine-readable digital record of any part of the transcript in an agreed-upon computer format, and (d) delivery of daily transcript not later than 6:00 p.m. of the day on which the transcript is taken. Any party may arrange with the court reporter for daily or other expedited transcripts at their own expense.

XIV. Modification of the Courtroom

The parties are authorized to use an electronic document presentation system at trial. The parties are to report to the Court what, if any, modification of the court may be required. The parties are authorized to take the necessary steps in contracting and working with the Alaska Telephone Utility and other entities to have installed all necessary equipment including a T-1 line or lines that will

provide each side with its own electronic terminal capacity in the courtroom that is connected to off-site electronic information storage of the respective party.

XV. Good Faith

The parties shall act in good faith in carrying out the provisions of this trial plan to achieve the purposes of Civil Rule 1.

XVI. Further Pretrial Conferences

Additional pretrial conferences may be set sua sponte, on joint application of the parties, or after motion made by any party.

DATED this ___ day of March, 1994.

BOGLE & GATES

By: s/ Douglas J. Serdahely
Douglas J. Serdahely
Attorneys for Defendant
Exxon Shipping Company
(D-2)

CLOUGH & ASSOCIATES

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COHEN, MILSTEIN,
HAUSFELD & TOLL

By: s/ Jerry S. Cohen

Jerry S. Cohen
Co-Lead Counsel for
Plaintiffs

APPENDIX N

**EXCERPTS FROM THE
TRANSCRIPTS OF PROCEEDINGS
VOLUMES 1 - 47**

May 2, 1994 - Sept. 16, 1994

[3]

* * *

THE COURT: This is a continuation of trial in case A89-0095 civil In re: the Exxon Valdez.

We have seated a jury in this case, good morning ladies and gentlemen. Is there any reason why I should not go straight to my preliminary instructions?

* * *

[5]

The Exxon defendants admit that Joseph Hazelwood, the captain of the Exxon Valdez, was negligent in leaving the bridge of the vessel on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence. the Exxon defendants contend that there were other legal causes of the grounding as well. Defendant Hazelwood denies that he was negligent in any manner. The Exxon defendants and Hazelwood deny the claim for punitive damages.

Next, all parties have agreed that any acts or omissions of Exxon Shipping Company or any knowledge or information chargeable against Exxon Shipping Company shall be chargeable against the

Exxon defendants and each of them Third, all parties have agreed that any acts or omissions of Exxon Corporation or any knowledge or information chargeable against Exxon Corporation shall be chargeable against the Exxon defendants and each of them.

[6]

Fourth, all parties agree that Exxon Shipping Company was the owner and operator of the Exxon Valdez and Exxon Corporation owned the cargo of Alaska North Slope crude oil that was aboard the Exxon Valdez at the time of the grounding. Accordingly the Exxon defendants are strictly liable for damages proximately caused by the spill pursuant to the terms of Alaska Statutes 46.03.822. Fifth, the Exxon defendants have stipulated, one, that Captain Hazelwood was voluntarily hospitalized in April, 1985 for treatment that included alcohol rehabilitation, and that senior management of Exxon Shipping Company learned of such treatment contemporaneously.

Two, that senior management knew in may, 1985, shortly after his discharge from the hospital, that Captain Hazelwood's admitted that in the past, he had occasionally consumed alcohol aboard Exxon vessels and that he had returned to his ship from port drunk several times.

And three, that such conduct constituted a clear violation of Exxon Shipping Company's prohibitions against the use of alcohol and/or intoxication aboard Exxon vessels.

Six, the Exxon defendants stipulate that at all times relevant to this action they have been aware that transportation of large quantities of Alaska

North Slope crude by tanker through Prince William Sound involved the risk that if a casualty resulted in a major oil spill, the spill could

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result in significant impact on the environment of Prince William Sound and its environs.

Due to the number of plaintiffs asserting claims for damages, the parties have agreed to divide the trial into two and possibly three parts or phases. These phases may be generally described as follows:

In phase one, plaintiffs will seek to prove, one, that the Exxon defendants' conduct leading up to the grounding of the Exxon Valdez on March 24, 1989 was reckless; and two, that the reckless conduct was a legal cause of the grounding of the Exxon Valdez. Also in this phase, plaintiffs seek to prove that defendant Hazelwood was reckless, or at least negligent.

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. Reckless conduct requires a conscious choice of a course of action, either with knowledge of a serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

In phase one, the Exxon defendants will contend that the conduct that resulted in the grounding of the Exxon Valdez was not reckless, as distinguished from being merely negligent. The negligence of the Exxon defendants will not be an issue in this trial.

Defendant Hazelwood will contend that he was not reckless or negligent.

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At the end of this first part of the trial, you will be asked to render a verdict as to the phase one issues on the basis of the evidence presented and the instructions on the law, which I will give you at the close of the evidence and after the presentation of the arguments of counsel.

In phase two, the parties will present evidence for and against claims for some of the actual damages alleged to have been caused by the oil spill. This phase will be divided into two parts, which we will call phase two A and phase two B. In phase two A – strike that.

Phase two A will relate to claims made by commercial fishermen and their crews for compensatory damages. In phase two B, the parties will present evidence for and against claims made by Alaskan natives for actual damages. We will have opening and closing arguments and instructions of the law as to each sub part of phase two. You will be asked to return a verdict on the fishermen's claims for damages at the end of phase two A, and a separate verdict on the Alaska natives claims for damages at the end of phase two B.

If at the end of phase one you find that the grounding was legally caused by reckless acts or omissions attributable to the Exxon defendants, phase two B will be followed by phase three of the trial. If at the end of phase one you find that the grounding was not legally caused by reckless acts or

omissions attributable to the Exxon defendants, there will be

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no third phase of this trial.

Phase three of the trial, if held, will deal with the claims of plaintiffs that they should recover punitive damages from the Exxon defendants. Punitive damages are not favored in the law, and are never awarded as a right, no matter how egregious the defendant's conduct but may be imposed for that conduct which manifests reckless or callous disregard for the rights of others. Punitive damages serve the purpose of punishing a defendant, of teaching a defendant not to do it again, and of deterring others from following the defendant's example.

If you have found the Exxon defendants to have acted recklessly, the plaintiffs will ask for punitive damages. The Exxon defendants deny that any punitive damages are warranted in this case, even if you return a verdict of reckless conduct at the end of phase one of this trial.

Again, phase three of the trial will begin with opening statements by the plaintiffs outlining their claims. The Exxon defendants may also make opening statements outlining their case immediately after plaintiffs' statement. At the conclusion of the evidence introduced by plaintiffs and the Exxon defendants during phase three of the trial, the parties will present closing arguments. At the end of these arguments I will instruct you on the law which you are to apply in reaching your verdict for phase three of the trial.

* * *

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DIRECT EXAMINATION OF JOEL ROBERSON,
(by deposition)

BY MS. WAGNER:

Q State your full name and address?

A Joel Roberson, 1009, Stanley Court, Forney Texas,
75126.

Q What age are you?

A 43.

Q Let's touch on your termination. What were the
circumstances of your termination at Exxon?

A The company came out with a reduction in force
program that offered some severance pay. I took
advantage or applied to be included in the program
and was accepted.

Q Was there anything that motivated you to do that
in the way of your relationship with Exxon at the
time?

A Well, yes, primarily the fact that my job was
eliminated, essentially.

Q What do you mean your job was eliminated, they
eliminated a radio officer job?

A They were in the process of obtaining waivers to
sail their vessels without radio officers, yes.

* * *

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Q On March 23rd, 1989, you went ashore; is that
correct?

A That is correct.

Q While we are on this, let's take this period of going ashore and cover that. Can you trace your movements from the time you were leaving the vessel, which you started to do, and tell us where you went with Captain Hazelwood and the chief engineer?

A We left the vessel. There was a gentleman – I was under the impression at the time that he was the pilot that brought the ship in. That may or may not be correct. He gave us a ride into town and dropped us off at the agent's office. We remained in that office for some time. Probably longer than an hour. Following that, we were picked up by Mr. Murphy, we went to the Pizza Palace for lunch.

Q While you were at lunch, there was just the four of you; is that correct?

A Yes. The four of us were seated at a table. At one point during the meal, the agent stopped by.

Q And what did you have to drink at lunch?

A As I recall, I had two beers.

Q And what did the chief engineer have?

A I believe he also had two beers.

Q And what did Captain Hazelwood have?

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A Iced tea.

Q And the pilot?

A I believe he had the same, iced tea.

Q And about how long were you there?

A It's difficult to say. Certainly longer than an hour, possibly two.

Q And then what did you do?

A We got back into Mr. Murphy's car and he dropped us off toward the center of town. We agreed to meet back at the Pipeline Club. I went inside a gift shop, looked around for a while. Mr. Glowacki left. I don't know where he went. The captain came inside the gift shop with me. A few minutes later, I went next door to the supermarket, purchased some magazines and then walked over to the post office.

* * *

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Q And who was at the Pipeline Club when you arrived?

A I joined Captain Hazelwood and chief Glowacki.

Q And when you joined them, were they drinking?

A They had glasses in front of them at the table, yes.

Q And what were they drinking?

A I don't know.

Q Was it some type of alcohol?

A I assumed that it was.

Q But they gave you no indication of how long they'd been at the club prior to your arriving and seeing them there; is that correct?

A Not that I recall, no.

Q While you were at the Pipeline Club, what did you have to drink?

A I had beer.

Q How many?

A I wasn't counting. At least two.

Q And while you were there how many drinks did Captain Hazelwood have?

A Again, I don't know. There were drinks on the table when I arrived. I purchased a round.

Q Anyone else purchase a round after you?

A I believe so. Again, I don't know how many.

Q After the Pipeline Club, where did you go?

A We walked over to the Pizza Palace, I believe it's called.

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Q And what did you do at the Pizza Palace?

A I stood around and waited while the chief engineer Glowacki ordered pizzas to take back to the ship.

Q And then what?

A Then we moved over into the Harbor Club. I believe it's called located adjacent.

Q Did all three of you move as a unit? In other words you went in and ordered the pizza and the three of you remained there, or did Captain Hazelwood leave that group?

A No, we went over as a unit, as I recall.

Q And you went over to the harbor –

A I believe that's.

Q Harbor Club?

A Yes, I believe that's correct.

Q What did you have to drink in the Harbor Club?

A A bourbon and water.

Q Just for placement of time, about what time is this?

A I don't know it was still daylight.

Q It was still daylight?

A Yes.

Q Late afternoon, is that generally correct?

A Late afternoon, I think that would be the general time frame.

Q Did you sit down at the Harbor Club?

A Yes.

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Q And what did Captain Hazelwood have to drink?

A I don't know.

Q What did he order?

A He ordered a brand that I don't recall. Although I took it to be Russian vodka.

Q Did they have it? Or I mean, did they say we don't have that?

A The bartender indicated that he didn't have that brand.

Q And do you know what he ultimately gave Captain Hazelwood to drink?

A No, I don't know what he ultimately gave him to drink. He did set up several bottles on the bar to show him what stock that he had.

Q Of vodka, was it the bottles or couldn't you tell?

A I assume it was all vodka, yes.

Q And Captain Hazelwood picked the one that he wanted?

A That's a little vague in my memory.

Q Well, did you reach a conclusion that Captain Hazelwood

ultimately – he didn't get the brand he wanted but he got some other brand?

A My impression was that he settled for a different brand.

Q When he was served it was he served it in a short glass or a tall glass; do you recall?

A No, I don't have a recollection of the glass.

Q How many drinks did you have there, to the best of your

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recollection?

A Just one, as far as I know.

Q Could Captain Hazelwood possibly have had more than one?

A Your question was is it possible that he more than one? I would certainly think that, yes, that was possible, certainly.

Q And how long were you at this club, approximately?

A Only a few minutes, as I recall. Half an hour. Not long at all.

Q Now after the Harbor Club, what did you do?

A Captain Hazelwood asked the bartender to call the agent to arrange transportation back to the ship.

apparently he couldn't get through, and a cab was called. We boarded the cab. The cab made one stop, picked up another passenger at the Pipeline Club. We then drove back to the terminal, through the check point, back into the cab and on down to the head of the jetty or pier, or whatever you like to call it now, to the ship.

* * *

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Q Did you go up to the bridge at all between the time you felt the grounding and it awakened you and your hearing the captain on the MARSAT radio telephone?

A Yes, I did.

Q And how soon after the grounding did you go to the bridge?

A Well, again, I would estimate it was about half an hour, but to explain it or to backtrack from the time you refer to here, me overhearing the captain on the radio, I went to the bridge to tell him to come down to the radio room, that he had a MARSAT telephone call.

Q I see. Who was that's from?

A That was from Mr. Myers.

Q Was there a point in time when the house began filling with vapors and you also mentioned there was a stream of oil shooting in the area from the deck 40 to 50 feet high, do you recall that?

A Yes.

Q How – what I want to do is just point out about that point in time, was that the house was filled with vapors, is that how you were describing?

A The very early stages following the grounding.

* * *

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Q Do you remember him telling Paul Myers anything about the fact that Captain Hazelwood was not on the bridge at the time of the grounding?

A I vaguely recall some reference to the fact that he had just laid below to his cabin to do some paperwork.

Q Now, after this telephone call, what did you do? You were down in the radio room for this period of time. Let me just back a up minute. You said that Captain Hazelwood was there, and you can correct me if I'm wrong, he was only there for part of this time, then who else talked with Mr. Myers in addition to Captain Hazelwood?

A I did. He instructed me to stay on the line with Mr.

Myers, and he returned, the captain returned in the direction of the bridge.

Q Now, you've stayed on the line with Mr. Myers. What did you discuss with him, to the best of your recollection?

A For quite a while, we stood there listening to each other breathe, then he asked about the circumstances, what it felt like. There was a lot of shock or disbelief, I think, on both of our parts. He was asking me how bad the list was.

Q And was there a list?

A Yes.

Q And in which direction?

A To starboard.

Q A starboard list, and can you give me the approximate

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number of degrees of list, or describe it in any way?

A As I recall, I described it as a ten degree list.

Q And this ten degree list that existed from the time of the grounding, was this something that gradually took place, or was there a ten degree list shortly after the grounding occurred?

A The list was relatively rapid. It was – there was a sudden jarring motion, and it seemed to me that the list started to become noticeable about the same time as vapors were starting to fill the radio room.

Q You were in close proximity to Captain Hazelwood then, as you've testified. After the grounding did you ever smell alcohol on his breath?

A I think I did later. This was after the Coast Guard was already aboard. I didn't notice any of them prior to that.

Q About what time did the Coast Guard come aboard; do you know?

A No, I don't recall the time.

Q Now, when the Coast Guard came aboard again, it's in your prior testimony, but do you recall a conversation that took place when the Coast Guard was talking with Captain Hazelwood that you

overheard in connection with the nature of the problem?

A Yes.

Q Can you describe, first of all, where did this conversation take place?

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A Directly outside the radio room in the passageway.

Q And you were at that time where?

A In the radio room.

Q And Captain Hazelwood was just outside the radio room?

A Yes, in the – in the passageway.

Q And there were Coast Guard personnel there. How many; do you recall?

A I believe there were three. The two I'm sure of, Coast Guard people. Possibly three or more, as I recall, one other individual.

Q And can you tell us what you overheard?

A One of the Coast Guard's men asked the captain what seemed to be – he said, what seems to be the problem. And Captain Hazelwood says, you're looking at it. As I recall, the Coast Guard officer asked about the anchors, whether one or both of the anchors were down. Captain Hazelwood indicated that they were both out and the Coast Guard officer said good. At that point they turned and went in the direction of the bridge.

Q Did you ever learn subsequent to this time you've just described that the Coast Guard personnel

aboard smelled alcohol on Captain Hazelwood's breath?

A I had heard the two Coast Guard officers talking between themselves in the radio room. One indicated to the other that he smelled alcohol on the captain's breath.

Q In your interview with the NTSB, I want to focus on one

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incident, and you can refer to the bottom of the first page if you need to refresh your recollection of the NTSB interview, but it's in connection with when if you were ever asked if you had seen Captain Hazelwood drinking on the vessel prior to the grounding, and you start relating an incident. Can you tell us the circumstances of the incident that you told the NTSB about?

A Yes. I don't recall the exact day. I believe it was on the weekend. The captain had come to the radio room before lunch time and asked me to come down to the lounge after lunch, that he had something to show me.

Well, subsequent to that he called me into his office. I don't recall if this was before or after lunch, but he indicated that he had a confiscated bottle that he wanted me to witness the destruction of down in the lounge. I went into the lounge, Greg Cousins was there. The captain came in and reached under a jacket that was on one of the recliners and pulled out a bottle. I think in the NTSB account it indicates that I said that the bottle was handed to me. I don't recall that. I do recall that the bottle sat on the deck for some period of time.

Q What was in the bottle? What kind of liquor?
Well, what was in the bottle?

A Clear liquid.

Q Was it alcohol?

A At this point, I wasn't sure. I think I assumed that yes,

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it was alcohol. Captain indicated that Greg and I should have some. I was very uncomfortable in the situation. I had been called on in the past to witness destruction of confiscated or out of date controlled substances aboard the ship in the medicine chest, and it was a pretty unusual situation.

Q So did you all have some drinks from this bottle, then?

A I had a cup with orange juice. I had tipped the bottle into the cup. I tasted it. I was puzzled at the time. There was no taste of alcohol, pretty much just sat there and observed the video that the captain started.

Q Did you observe Captain Hazelwood drink from the bottle?

A I do recall that he had a glass. I don't have a specific recollection of him pouring from the bottle, no.

Q What about Cousins?

A Again I would have to say the same thing. I do recall that he had a glass. I do recall him handling the bottle, but as far as a recollection of him actually drinking from the bottle or pouring from the bottle, I don't have that.

Q Did this bottle have a label on it?

A Yes, it did. I don't recall what the label – the printing on the label. It seems to me that it was somewhat silver in color with a reddish stripe.

Q Well, based on your experience did you have an opinion when you saw the bottle with the label that there was some kind of alcohol in it?

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A My impression was that yes, it was an alcohol bottle.

Q Did you have an opinion whether it was vodka or anything else before you were going to taste it, because of its color? Was it a clear liquid?

A It was a clear liquid. I don't know if I formed an opinion as to what type of alcohol it was, either vodka or some other colorless alcohol.

Q Did anyone else, other than Cousins, yourself, and Captain Hazelwood, was anyone else in that room with you?

A Yes, the chief mate.

Q Kunkel?

A No.

Q Another chief mate?

A It was his predecessor. I want to say Klees, but I'm not sure of his last name. Now in addition to that, I don't recall any other – anyone else coming into the room. But there were windows on the door and I do recall one or two people looking in the window without coming up.

Q Did you ever hear anything or did you ever observe anything in connection with their performance? Did you ever hearing anything in connection with Kagan's performance – let's stay with Kagan, concerning his performance as a helmsman?

A Just that I'd been on the bridge on a few occasions when Kagan was at the helm.

Q Did you observe anything in connection with his performance

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on the helm?

A I didn't observe anything out of the ordinary, no.

Q Did you ever hear any criticism of Kagan's ability as a helmsman?

A Yes, I had, although I'm not sure what sequence in time that would be, but I had heard those remarks.

Q Do you remember in general what the remarks were?

A Generally, that he had difficulty steering the vessel, that he had a very short attention span.

Q Were there any announcements made over the P.A. System on the ship after the grounding concerning smoking, not smoking in any areas, or anything of that nature?

A No, there weren't.

Q Were there any announcements at all made over the P.A. System after the grounding during those early morning hours?

A No.

Q What were the first announcements that were made over the P.A. System after the grounding that you can recall?

A I don't recall the P.A. System ever being in use.

Q Did you ever have any discussions with Chief Officer Kunkel about the stability of the vessel?

A Yes, I did.

Q What were the first discussions that you had with him concerning the vessel's stability?

A The morning after the grounding.

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Q And the morning about – was it daylight?

A Yes.

Q And what did he tell you?

A He seemed to be concerned, if not upset. The captain was no longer aboard, I believe, although I'm not totally sure that Captain Deppe and Captain Wallace were aboard. Mr. Kunkel indicated that he was unsure of the stability of the vessel. He thought it was a very dangerous situation, that he thought that the crew should be removed from the vessel and he seemed to be concerned that whoever he had expressed those feelings to didn't seem to be that concerned. He said it was a situation on his stability computer that was essentially useless. It was a condition that there were no calculations for.

Q You testified with regard to an incident involving what you believe to be alcohol on the Valdez and involving Captain Hazelwood. Do you ever recall, in addition to that, do you ever recall anybody bringing alcohol onto the Exxon Valdez?

A I can't say that I have.

Q When you came back to the ship on one occasion in San Francisco, did you see anything that led you to believe somebody was bringing alcohol back on board?

A I can just say that I observed a bottle, what I took to be alcohol, aboard the launch as the launch was traveling from San Francisco back to the Valdez and also to another vessel that was anchored.

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Q In whose possession was that?

A Greg Cousins.

Q And in the same record, it's possible that there was only one drink; is that correct?

A That is correct.

Q Why don't you tell us what you observed?

A The launch was leaving from San Francisco bound for the vessel Exxon Valdez which was anchored. I think there was another Exxon vessel also anchored nearby. We were on the dock waiting for the launch. Mr. Cousins had an athletic type bag with him and I saw him on at least two occasions open the bag and remove a glass bottle. Aboard the launch, I again saw him with the bottle. As I recall, he offered me a drink and a couple of the other crew members that were aboard the launch.

Q Who else was aboard the launch?

A There was an A-B that – I don't suppose anybody has a crew list. I could recognize his name, but I don't recall it at the present time.

Q Wayne, the A-B from the Exxon Valdez?

A Yes.

Q Anybody else you can recall?

A That was aboard the launch?

Q Yes.

A Yes, the second mate, Lloyd LeCain was aboard and also a gentleman that I took to be the master of the other vessel.

[150]

Q And do you recall what –

A Also the ship's cook was aboard, our second cook, Melanie Wright. I believe she was there, yes. I think that's the case. I believe there was a pump man aboard. I don't recall his name.

Q Do you recall what the other vessel was?

A No, I don't.

Q Was it an Exxon vessel?

A Yes.

Q Was it the Galveston?

A It's possible, but I don't recall.

Q Now about when did this incident occur?

A In the relative early stages of joining the vessel. It seemed to me about the time that Lloyd LeCain joined the vessel because I recall that he was on the launch and there was another second mate prior to – to him joining. So that's the time frame, as best I can recall.

Q What did the bottle look like?

A Pure glass.

Q What size and shape?

A As I recall, it wasn't so cylindrical or too narrow and cylindrical, such as a fifth bottle, but it was more – somewhat shorter and larger in diameter.

Q When you say shorter and larger –

A As compared to a fifth bottle.

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Q Was it round?

A Yes, as I recall, it was round.

Q Did it have a label on it?

A I don't know that I saw a label.

Q Do you know what color – what the color of the liquid inside was?

A As I recall, it was clear.

Q Clear as – clear as in colorless?

A Yes.

Q From looking at the bottle, itself, there's nothing you saw in the bottle that identified to you that it was alcohol that was there?

A Not that I recall.

Q Did Greg say anything to anybody that said this is vodka, this is Everclear, anything that would lead you to believe there was alcohol in the bottle?

A Not that I recall.

Q Did you smell any odor of alcohol at that time?

A Not that I recall.

Q Associated with the bottle?

A No, I don't recall any odor.

Q Now Mr. Russo asked you some questions about an incident involving the destruction of the bottle on the Valdez. Did Captain Hazelwood ever suggest to you that he was playing a practical joke when he did that?

[152]

A No, he didn't.

Q As a matter of fact, after that, you had a discussion with Mr. Cousins; did you not?

A Yes.

Q About the incident?

A More or less, yes.

Q Did you tell Mr. Cousins that you were uncomfortable about it?

A I think I indicated to him that I was surprised.

Q Did you, during that conversation, get the impression that Mr. Cousins was uncomfortable about what had happened?

A During that conversation, I don't recall. I did have the – during the incident, I had the impression that he was uncomfortable.

Q When you talked with Mr. Cousins after the incident, did you tell him that you were surprised that there would be alcohol on the ship?

A In a roundabout way, yes.

Q Did he in any way suggest to you that what was in that bottle was not alcohol?

A No, he didn't.

Q Did he in any way suggest to you that it had been a joke?

A No.

Q As you sit here today, you don't think it was a joke; do you?

[153]

A No.

Q Mr. Sherman provided me the names of the A-Bs aboard the Valdez, at least those A-Bs who were present at the voyage that ended in the grounding, and your responses were possibly yes and no. Were you saying that you recognized their names or – and in particular, Mr. Claar, as to whom your answer was yes, did Mr. Claar take a drink?

A My response indicated as to whether or not these individuals were aboard the launch. I indicated that – I indicated yes to Mr. Claar. My recollection is that he was aboard and that he did take a drink from this bottle.

Q I believe – and he was the only one you have a distinct recollection of taking a drink; yes or no?

A Other than Mr. Cousins.

Q Yes, sir?

A Yes, as I recall, that's correct.

Q And those A-Bs as to whom in response to Mr. Sherman you said possibly, well, they probably were aboard the launch and possibly may have taken a drink from Mr. Cousins?

A That is correct.

Q And finally, as I understand the chronology, this incident with Mr. Cousins aboard the launch was before what we had been referring to as the bottle destruction episode aboard the Valdez?

A Yes.

[154]

Q Mr. Roberson, under all the circumstances, to include Mr. Cousins' demeanor and the actions that took place in the launch, did you conclude that he had been – had something to drink?

A Yes.

* * *

[171]

DIRECT EXAMINATION OF LISA HARRISON

BY VIDEO EXAMINER:

Q Please state your full named and spell your last?

A Lisa Marie Harrison, H-a-r-r-i-s-o-n.

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Q And your address?

A 3311 Eagle Avenue.

Q And –

A Valdez, Alaska.

Q You were employed by the Pipeline Club?

A Yes, I was.

Q In Valdez, and what period of time were you employed there?

A I believe I started in 1984, September of '84.

Q And in what capacity were you first employed there?

A As cocktail waitress for about four months and then I became a bartender. And usually I always worked daytime bartending, few night shifts.

Q And how long did you work at the Pipeline Club?

A Until April of '89.

Q And during this time period, approximately five years that you worked there?

A Yes.

Q And you were employed on a full-time basis?

A Yes.

Q You were mainly working the day shift?

A Yeah, when I first started, I worked like three day shifts and two night shifts and then I worked just – just varied, you know. Summertime I worked some swing shifts but mainly, five days a week.

Q When you were working at the Pipeline Club as a bartender,

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what were the hours of your – of the day shift?

A 10:30, 6:30.

Q When your relief person came on, the person that would take over from you when your shift ended?

A Um-hum.

Q What time would that person then come on?

A They came on at 6:30. They were usually there about six, you know, to start checking on their banks and things, but they come behind the bar at 6:30.

Q Going back to March 23rd, 1989, first of all, do you know who Joe Hazelwood is?

A Now I do, yes.

Q Before March, now, we'll say before March 24th, 1989, did you know who he was?

A No, I didn't know him like I knew a lot of the tanker people by name or by ship. I saw him on March 24th, but until I seen his picture the following day, I didn't know who he was.

Q Okay. On March 23rd, 1989, okay, did you have occasion to see an individual you later learned was Joe Hazelwood?

A Yes.

Q And where did you have that opportunity to observe him?

A In the bar.

Q And that would be the Pipeline?

A Yeah.

[174]

Q Okay. Now, do you recall when the first time you saw him was?

A I would say just because it's been so long, approximately 11:30 or noonish.

Q And could you describe to us the circumstances in which you saw him?

A He came in and ordered a drink and just – he was very quiet, sat up and had a drink and left a short time later and then he returned with another gentleman that used the phone, I would say around two, and came up and ordered a drink for himself

and the gentleman and took it to him. And he sat off in the corner and he left after that drink and I never seen him again until I saw him on TV. But he wasn't – I mean, he didn't come up and socialize with the people. He was – he looked like he just wanted a quiet drink, be by himself.

Q You say he ordered a drink. Do you recall what kind?

A Yeah.

Q What kind was that?

A He had a double Smirnoff on the rocks.

Q Okay.

A Each time.

Q Was there – this first drink that he ordered from you, was that a double shot as well?

A Yes.

Q How much would be poured in a double (inaudible)?

[175]

A A double on the rocks would go in like a roly poly, a tumbler glass. You know, you repour it. We don't use (inaudible) or –

Q Okay. In terms of the amount of alcohol that would go into a double, would it be –

A I'd say like three and a half ounces.

Q Three and a half ounces?

A Three, three ounces probably a good – yeah, I'd say three ounces.

Q Okay. And do you have any knowledge as to the proof of Smirnoff?

A It was the blue label. It wasn't the hundred proof. It was the silver, which you know, I believe was like 80 or I'm not real sure. It was – if you want to look, it was the blue label.

Q Okay. And was anybody with him at this time?

A The second time he came back in, there was a – another gentleman that, like I said, used the phone but – and then after that drink, he left, so – and the gentleman never came back in. He just used the phone and left, so –

Q Okay, let's back up to the first time.

A No, he was by himself the first time.

Q First time by himself, and could you describe, he came up – well, how did he get his drink? Did he come up and order it?

[176]

A He came up to the bar and ordered it.

Q Okay, and what did he do after he ordered the drink?

A He just went back to one of the high-tops over by the juke box and you know, there might have been a football game or you know, something on the TV, but usually it was real quiet. I probably had four or five customers, maybe even drinking coffee at that time of the day, or you know, having a drink at the bar but no one else was sitting – the first time he was in there no one else was sitting in the outside of the room, you know, at the tables.

Q As far as – you mentioned he came back again?

A Yeah.

Q And what did he have to drink at that time?

A The same thing. I know because I started to grab – what was it, it's like Wild Turkey, just because I had a gentleman in prior to that and he said no, he corrected me and, I said oh, I'm sorry. I wouldn't have made you pay for it, but it was, it was vodka.

Q Wild Turkey is a bourbon?

A Right, but it's right next to it up on the top shelf, so –

Q And he – did that double, that had as much alcohol in it as the first one?

A Oh, yeah.

Q Like three, three and a half ounces?

A Probably about three ounces.

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Q Okay. The second time then, is it possible that he ordered another drink in addition to the double Smirnoff?

A He ordered two drinks, one for himself and one for the other gentleman on the phone.

Q Now as far as your interaction with Mr. Hazelwood, let's say the second time there, did you have any conversation with him?

A Just the part about trying to pour the wrong drink, you know, and he kind of snapped about it, but it wasn't – I mean, it's not like – most people do, if you make a mistake, they're not very happy about it, but that was it and he walked away. It wasn't – I

mean, there might have been some brief conversation but nothing that stuck in my mind.

Q All right. Do you recall how he paid for the drink?

A Probably cash. I'm not real sure.

Q How close were you – how close were you to Mr. Hazelwood?

A About two feet.

Q And how long did you have the opportunity to observe him the second time he was in?

A I said maybe – maybe 15 or 20 minutes. He was there and he was gone.

* * *

[181]

Q The cap, was it – what color was it, if you recall?

[182]

A I believe white, or – I'm not sure. Could have been gray. I'm not real sure, but it was – other people recognized

* * *

[200]

DIRECT EXAMINATION OF ERMA LEE

BY VIDEO EXAMINER:

Q Please state your full name and spell your last.

A Erma Lee, L-e-e.

Q What is your address?

A 313 E-l-g-u-e-a, Harley, New Mexico, 88043.

Q Could you give me the dates of your residence in Valdez?

A I lived in Valdez from August of '78, and I left there in October of '90 – of '90, yes.

Q How long were employed by the Pipeline Club?

A Ever since I've been up here. I think the first year I worked there was probably late '78.

Q That would have been through October of 1990 then?

A Uh-huh.

Q Was that full-time employment?

A No. When I started out, I was just doing part-time,

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probably the last ten years on and on. Mostly full-time shifts, five days a week.

Q And what type of job did you hold there?

A Bartender.

Q Had you always been a bartender there?

A Yeah. Well, I helped in the kitchen, around the motel, little odds and ends at the beginning, but for at least the last ten years, I was bartending.

Q Did you have any particular shift that you worked?

A Mostly always worked nights, especially the last at least five years.

Q When would that shift begin?

A Well, for a while it was like 6:00 to closing, whatever time that was. And then it changed to 6:30.

Q When did it change to 6:30?

A It was after – it was after the oil spill that it changed to 6:30, or during the oil spill, sometime in there.

Q Do you recall if you were working on March 23rd, 1989?

A Yes, I was.

Q And –

A And I went to work at 6:00 that night.

Q Do you know Captain Joe Hazelwood?

A Yes, I do. I don't know him really well, but I know him when I see him.

Q How do you know him?

[202]

A Just from coming in there off and on, you know, from the time, I guess – seemed like a long time. Quite a few of the tanker – at that time, quite a few of the tanker guys in, so you know who is who.

Q Did you know him by name?

A Uh-huh.

Q This was before the spill, did you know him by name?

A Yeah, I knew who he was, yes, by name.

Q Okay. Did he come into the bar often?

A Usually when they were in, you know, in port. If he was in town, he did usually come into the Pipeline Club, maybe have one drink and leave. I've never,

ever saw him sit there for a long time, you know. He was just kind of in and out. And how you get to know who they are, you know, is you get a lot of the younger guys that come in and stay for a while, so they will say, he's the Captain, and go over and say hi. So I got to know who he was. Because I never really ever talked to him that much. He's kind of a quiet guy, so, you know, just to speak to him when he come in, I don't know who he was.

Q On March 23rd, 1989, did he come into the Pipeline?

A Yes, he did.

Q You were working at that time?

A Uh-huh.

Q Do you recall about what time he came into the Pipeline Club?

[203]

A Well, I went to work at 6:00, and I cannot put an exact time on it, because it was kind of busy. It was ladies dart night and I had four teams of gals there. So I would say he came in somewhere between probably 6:30 and 8:00. That's a broad time, but I can't say exactly what time.

Q And that was into the bar as opposed to the restaurant?

A Yes, uh-huh.

Q Do you recall if he ordered any alcohol?

A He had one drink on my shift.

Q And do you recall what that drink was?

A I can't. I tried to remember that. I'm not positive. I can take a guess, but I'm not real positive on what it was. He sat at the table.

Q Whereabouts was that table, if you can recall?

A It was right by the – when you came in the front door, it was like the second table right when you come in.

Q When you say –

A Before you get to the bar, from the door to the bar there is like two big high-top tables and he sat at the second table.

Q Was he with anyone when he came in?

A No, he was by his self.

Q And did he join anybody while he was there?

A No. Now, there was a couple of the guys that were in there of his crew that went by and said hi to him, you know, seen him over there and talked to him, and then they left and

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he got up and left. He wasn't there very long.

* * *

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DIRECT EXAMINATION OF JANICE DELOZIER
BY MR. GERRY:

Q Would you state your full name?

A Janice Lynn Delozier, D-e-l-o-z-i-e-r.

Q Mrs. Delozier, how long have you lived in Valdez?

A Five years this past June.

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Q Where is your physical address in Valdez?

A 155 Gulkana Street.

Q How long have you lived there?

A Three years this past February.

Q So coming to Valdez five years ago, where have you been employed? Let's start with the first job.

A I really didn't intend to work, but I got a good offer from a dentist that came to town, so I went to work for him in February of '88.

Q And the dentist's name?

A Doctor Allen Stewart.

Q Are you still employed there?

A No, I am not.

Q How long did you work there?

A About 18 months.

Q And what was your job there?

A Dental assistant.

Q Now, in March of 1989 you were employed by Dr. Stewart?

A That's right.

Q Do you recall the events of March 23rd, 1989?

A Uh-huh, I sure do.

* * *

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Q What did you do during this time period that the office was closed from 1 to 3?

A I had the dental receptionist, Mrs. Vculek, give me a ride over to the Pipeline to meet some friends for coffee.

Q When you say the Pipeline, what are you referring to?

A A restaurant club and motel all under one roof.

* * *

[217]

Q You said you saw Captain Hazelwood, a person you later identified as Captain Hazelwood in the Pipeline?

A Uh-huh.

Q What day would that have been?

A Thursday, the day of the – the day of the two-hour lunch.

Q That was March 23rd?

A The 23rd.

Q The 23rd of March?

A Uh-huh.

Q Could you tell us how it was that you came to see Captain Hazelwood in the Pipeline?

A Yes. As I say, when you walk in the Pipeline, the kitchen is to your – the restaurant is to your immediate right, a separate room, and as you walk up to the bar, the right side is curved and there is a coffee machine up against the wall. I was probably the second to the third bar stool coming out from

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the wall. To my left is an opening area where waitresses stand in and place their order for their drinks. A couple of little split rails are there where you can put your body between. He walked in off the street into the building, came up to that little open waitress station, made eye contact, nodded, you know, as in a gesture, ordered a drink, ordered a specific drink and watched Ms. Hoots pour it and he watched her pour from a well pour bottle, which I guess he saw that it wasn't what he ordered, so he kidded her about it. And she apologized and said she would pour it out or fix him what he wanted, and just cast it aside.

Q Ms. Delozier, how far were you from Captain Hazelwood when he ordered this drink?

A The same way at the bar. One bar stool between me and the waitress station.

Q Would four or five feet sound correct?

A Yeah, three, three-and-a-half, four, not that much of a distance. Like a chair and then the space, the bar stool and then the space.

Q Did you have any problems at all in distinguishing the man's features due to the lighting conditions?

A No, I did not.

Q Anything odd at all that would have hindered your vision of Captain Hazelwood?

A No, sir.

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Q How long did this – how long was Captain Hazelwood at the bar?

A Probably just a couple minutes.

Q And you said he ordered some kind of drink?

A Yes, sir.

Q Was that an alcoholic drink?

A Yes, sir, it was.

Q Do you recall what he ordered?

A Yes, I do.

Q What was that?

A Smirnoff on the rocks.

Q Was that the drink that he obtained, if you know?

A There was a mistake made. He did take vodka on the rocks. It was not the brand that he had asked for.

Q And you said he had some kind of conversation with Lisa Hoots about this?

A He told her that it was not what he had asked for and she apologized to him. He was not upset about it, he just kind of jokingly said it would be all right.

Q Did you watch Lisa Hoots pour the drink?

A Yes, I did.

Q Do you recall what kind of glass it was put in?

A When you pour a drink on the rocks, you fill the rocks glass with ice and pour directly onto it. You do not use a shot glass or a little metal beaker like a lot of bartenders

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mix with. She poured it directly on to the rocks glass which was somewhat filled with ice.

Q Now after Captain Hazelwood got the vodka on the rocks, what did he do, if you know?

A He took the drink and just walked back a few feet to what they call a high-top table which is just called that because it rises up higher than a small cocktail table.

Q How far was that from where you were seated, located?

A About six, six to seven feet.

Q And the shape of the table?

A It's round and they generally have three to four tall bar stools pushed underneath them.

Q How did Captain Hazelwood sit, as far as his position at the table, vis-a-vis where you were sitting? What I'm trying to say, was he facing you, was his back to you?

A He took the chair to the back of the high-top in front of the juke box and he would have been facing towards the coffee people, yes, sir, facing ahead towards us.

Q From your vantage point, did you have the opportunity to see his fashion?

A Yes, sir, I did.

Q Do you recall how long you had been at the Pipeline before Captain Hazelwood came in and ordered his first drink?

A 15 to 20 minutes.

Q So that would have put it about what time, approximately?

[221]

A He probably got there about a quarter till two.

Q Once he went over to this table, did you see him drink the drink that he had ordered?

A I did not stare at him. I did look that way a couple times. I didn't see him drinking the drink. I only saw the drink in his hand at one point like mid – either he was, I assume, putting it down or picking it up. I did not watch him drink the drink, no, sir.

Q Was there anything that happened while you were there that would give you an indication that he had consumed his drink?

A He got another one. He ordered another one.

Q And would you relate how that happened?

A Well, he had some friends join him.

Q Did you see these friends come in?

A Yes, I did.

Q Did the friends come in together or separately or how?

A That one gentleman that I remember coming in came up to the bar and placed a drink [sic] for two drinks. One of them was intended for Mr. Hazelwood and Mr. Hazelwood said that he had a drink already, thank you.

Q That was going to be my next question. How did you know that the drink that this man ordered was for Captain Hazelwood?

A He turned around and gestured and Mr. Hazelwood said he had a fresh drink but that this gentleman could pay for it. So they were kind of joking back and forth. So the gentleman

[222]

did not take Mr. Hazelwood a drink.

Q When you said that the man gestured, could you describe what kind of gesture that was?

A I believe the gentleman got a scotch and water and he said, and another drink for my friend, as in like –

Q What you're doing is pointing in a direction and the gentleman would have been pointing in the direction of Captain Hazelwood?

A At the high-top table, yes, sir.

Q And you mentioned something about Captain Hazelwood stating that –

A He had a drink.

Q But this other gentleman could pay for –

A He said, I have a drink, but you want to charge him for my drink, you can charge again, was what I think he meant.

Q Okay. Now, did this gentleman go and visit with Captain Hazelwood?

A He went and sat with him, yes, he did.

Q Was there anybody else that came in?

A There was a third person there, I did not see the third person enter the building, nor did I see him go to the table, he was just there.

Q Now, do you have any idea who the second man was, the man who wanted to buy the drink for Captain Hazelwood?

A No, I don't.

[223]

Q At the time that person came in, you had no knowledge of who it was?

A No, I did not.

Q And up until that time, you had no knowledge of who this other individual was?

A I did not know who he was. I, in my own mind, assumed he was aboard the vessel. I did not know his name or what his job might have been.

Q Now, this person while you were at the Pipeline did not buy Captain Hazelwood a drink?

A No, sir, he did not.

Q But you mentioned Captain Hazelwood ordered another drink?

A He came back up to the bar, yes, sir.

[242]

Now, the man you identified as Captain Hazelwood, could you tell us what he looked like when you noticed him at the bar?

A He had a coat on, an open coat, it came down to probably the pockets of his pants. It was hanging open. He had a hat on, a small hat, kind of like a golfer's hat. I wouldn't call it a beret, just a small hat with a little deal on the front, kind of – he wore it kind of, I want to say cocked to one side a little bit. He had a beard. I wouldn't call it a full beard. It

was kind of sparse, I guess is the word. Kind of dark under the eyes, maybe like dark circles or kind of shadowy like crows' feet or little lines. Basically I noticed his eyes were kind of dark under them.

Q And approximately the age of this man?

A 50 – up to 55.

Q How tall was the man that you saw in the Pipeline Club?

A I thought he was about 5'9".

Q And your recollection is his age was somewhere in the 50s?

A Early 50s, yes.

Q All right. What else do you recall about the way he was dressed?

A He had a hat on, a small hat. He had a beard.

Q Did this hat have a clip on it?

A A what?

Q A clip, a snap on?

A It had a small bill on it.

[243]

Q Do you recall ever saying that the cap appeared to have a snap on it?

A Uh-huh, I did say that.

Q You said that to the state police, is that correct?

A Yes, sir.

Q You said that to a state trooper by the name of Burke when you were interviewed by him on April 4th, 1989, is that correct?

A Correct.

Q Does that refresh your recollection that you remember at the time that the cap had a snap on it?

A It seems like it had a snap that would make the bill closed or the bill open.

Q And you also described this as a golf cap, correct?

A Yes, sir.

Q I'd like you to describe for us what you mean by a golf cap?

A Do you ever watch golf?

Q Sometimes. I try to avoid it.

A Small type hat. Some have a snap in front. It has a little opening in the back I presume where you can adjust. They are usually tweed, like heavy tweed, corduroy. I have one like it, not a cowboy hat, just a little cocky like – I wouldn't call it a beret. A beret to me has no bill.

Q But this golf cap that you've just described, it's your

[244]

recollection that was the type of hat that this individual was wearing?

A Yes, sir.

Q What portions of his face were covered with hair, do you recall?

A His entire chin.

Q His chin?

A Not up in here. Right in here was kind of clean-shaven.

Q Let the record reflect that the witness has indicated a portion below her lip and above her chin was clean-shaven. That's what you indicated, correct?

A Yes, sir.

Q What else?

A Just the beard.

Q When you say the beard, were the sides of his face covered with hair?

A No. He did not have mutton chops either.

Q So I want you to describe then for me, as best you can, how were the sides of his face? Were they clean-shaven, too?

A I guess his beard to me started from – started down from his cheekbones. Some of them start higher, real bushy. His was a nice kept spar – scarce beard.

Q So in other words, was his beard like a strip from his cheekbones down to his chin?

A No, it was a molded shape. Probably he kept it up very

[245]

well. Probably he had a beard for a while. That's how it looked.

Q What about, was there a space between his sideburns and where the beard began?

A No.

Q Were his cheeks clear of a beard, or were they also covered with hair?

A Clear.

Q They were clear, all right. This is hard to describe in words, I understand that. I'm just trying to visualize what you recall seeing. If you would just, you know, indicate to us, your face, you know, where you saw the hair, and then I'll describe it for the record?

A The cheekbones was exposed. The beard started, like I say, this right here –

Q Was clean?

A Uh-huh. And his beard was very well groomed. It wasn't full out. It was a nice groomed beard.

Q And I don't recall what you said about whether there was a space between his sideburns and where the beard started?

A His hair was cut down to here and a beard started, and I don't think there was a space between where the hair started and a space of skin and then beard.

Q Do you recall how his hair was cut?

A He's balding.

[246]

Q Was his hair over his ears or was it above his ears or what?

A It was thinning right in here, and what there is he combs back.

Q So his hair, the witness indicated the top of her head and saying it's thinning up there?

A Yes, sir.

Q And it was combed back where?

A Where his hair does start?

Q Yes.

A Right about where the – what hair he does have, he combs back. He doesn't part it or anything.

Q He doesn't part it?

A No.

Q He just combs it back?

A Right.

Q So in other words, he doesn't, like some people do, comb their hair to cover up their bald spot?

A No, he does not.

Q So you can see his, you know, the bare portion of his head on the top?

A Especially on the sides.

Q On the sides, all right, and the rest of it was combed back, correct?

A Thin, yes.

[247]

Q Can you describe the color of his hair?

A Gray, grayish. Probably at one time it was brown, ash brown, but it's graying. His beard had some gray in it.

Q What portion of his beard was gray, if you recall?

A Mingled. It wasn't like one pronounced –

Q Uh-huh. You –

A – that you see on some gentleman. It was just mingled.

Q What about his hair, was there any portion of his hair that was gray, do you recall?

A Maybe a little on the temples.

Q All right.

A A little bit of gray. He wasn't totally gray.

Q But you recall that his temples were gray enough that they were noticeable to you as being gray?

A Slightly.

Q How would you describe his complexion?

A Kind of olive.

* * *

[259]

DIRECT EXAMINATION OF WILLIAM E.
MURPHY

BY MS. WAGNER:

Q Would you please state your full name and spell your last?

A William Edward Murphy, M-u-r-p-h-y.

Q What age are you, about?

A I'm 46.

Q Is this a notebook that you use for your transits with vessels?

A Well, yes. It's a – the notebook changes every month, but that's correct. I have a monthly notebook and I record all ship movements and other data in that notebook, all ship movements that I take part in.

Q In connection with your service aboard the Exxon Valdez on the 22nd and 23rd, did you check your wristwatch with the Valdez clock?

A Yes – let me go back. Some of these entries, for example the time of standby engine and last line, for example, or of first line to the dock in case of docking and finish of engines, I asked the mate on watch who was recording those things what times he logged, entered in those. Although the times – the time I disembarked, for example, I don't know what they have logged that, so I refer to my personal wristwatch but normally it's the times that the ships' personnel have logged in their deck log.

Q While we are on this document – at this time, would you

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describe your license that you – is the license you have today the same license you had on March 23rd, 1989?

A Yes, it is.

Q Would you describe for the record what that license is?

A Well, I have two licenses, the federal license is a U.S. Coast Guard license, Second Mate of Oceans.

Q Second Mate of all oceans, is that right?

A That's right. Master of vessels not more than 1,000 gross tons on oceans. And my state – and with endorsement as first class pilot on vessels of any gross tons upon the waters of southwest Alaska. And my state license is as a first class pilot on vessels of any gross tons upon the waters of southwest Alaska with a VLCC, very large crude carrier endorsement. I don't believe the VLCC endorsement on the state license – at the time of the accident that was in the regulatory process, so I

think that would be the only change in my license now as opposed to then.

* * *

[270]

Q Now, let's just turn to the outbound voyage. When you came out on March 23rd, what location did you get off the vessel? You showed us where you got on. Is it in the same general area or is it –

A In the same general area. Abeam Rocky Point or slightly south of that area, or southwest, rather.

Q To the best of your recollection, when you got off the vessel on March 23rd, where were you? Where was the vessel in the traffic with relation to the traffic separation scheme?

A The vessel was in the middle of the outbound lane of the traffic separation scheme.

Q In the general area you indicated before where you boarded the vessel, is that correct?

A Yeah, in the general area abeam of Rocky Point or slightly southwest of that.

Q But in the outbound lane?

A In the middle of the outbound lane.

Q What is the pilot's function aboard the vessel?

A I know of nowhere where a pilot's function is written down in a law book or a guide to pilot. It's pretty much dictated by custom administration over the centuries, really, but essentially a pilot comes aboard to provide local knowledge, and in the case of most pilotage district, certainly ours, ship handling expertise. The relationship between the master and

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the pilot is that of one professional with another. In almost all cases the master turns over the conn over to the pilot, that is the direction of the ship navigational control over to the pilot who directs the navigation of the vessel to its destination and then docks it. And generally the master who always retains command keeps an eye on the pilot. If the pilot does something the master thinks is inappropriate, either in terms of endangering the vessel, or I suppose in abusing the equipment, the master is there to advise the pilot of that and ultimately take the conn away from him if he thinks the pilot is doing something –

Q Which will endanger the vessel?

A – which would endanger the vessel perhaps. The master is always retains command. The master is always in command of the vessel.

* * *

[272]

Q When the Exxon Valdez was loaded, such as she was when you took her out

[273]

on the 23rd and in the conditions you took her out

on the 23rd, which we'll get into, the weather conditions and so forth and the current, the weather was calm on the 23rd?

A That's my recollection.

* * *

[276]

Before you left the vessel, did you make any date with

[277]

Hazelwood for the next day?

A Yes.

Q Go on and tell us about that?

A Well, we hadn't seen each other for a number of years, and I believe it was he suggested we have lunch together. He said he was going to be in town the next day, probably at his agent. He had some business to do there. And we agreed that he would telephone me. I thought that I was going to be free, and we'd have lunch together.

Q Okay, and then the next day, can you tell us how you were contacted by Hazelwood?

A I was telephoned by him. He said he was at his agent's office and would I come back and pick him up for lunch.

Q So that was sometime prior to noon?

A I think it was during the noon hour, it was somewhere around the noon hour.

Q And you went and picked him up?

A Yes.

Q Where did you pick him up at, the terminal?

A No, no, front of his agent's office in Valdez, the town of Valdez.

Q Was he with anyone?

A Yes, he was with two other gentlemen.

Q Do you know who they are?

A I know who they are now. At the time I recognized the

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chief engineer, whom I had met previously, and the other fellow I didn't recognize. He was introduced to me as the radio officer, radio electronics officer.

Q Then what did you do?

A They got in my car and we drove down to the Pizza Palace restaurant.

Q And you had lunch?

A Correct.

* * *

[279]

Q You boarded the vessel at 2020 and you proceeded as you indicated to the bridge via the captain's cabin. About what time did Captain Hazelwood appear on the bridge?

[280]

A I don't remember what time it was. It seems to me that I had been aboard, oh, 10 or 15 minutes, and I did not know that the captain was not aboard. I believe I heard the third mate say, here comes the captain, or the captain is coming aboard, or words to that effect. That was the first I had learned that he was not in fact aboard. Shortly after that, the captain appeared on the bridge.

Q When the captain came to the bridge, did he say anything to you, where he was or why he was late getting back to the ship?

A No, we greeted one another and I was – at that time, I think I was – the ship's agent was on the bridge, we were chatting and Captain Hazelwood came to the bridge. He and I greeted each other. He and the agent greeted one another and then Captain Hazelwood and the agent went below, I presume, to the captain's stateroom.

Q When you were having this conversation with the captain, did you smell any alcohol on his breath?

A Yes.

Q When did you first smell the alcohol on Captain Hazelwood's breath? That is, he comes up – comes on the bridge, and was it when he came up to you and was standing a certain distance from you, or can you describe these circumstances?

A Yes. I think it was – I don't know if I was standing or I was sitting on a stool near the chart table having a cup of coffee and talking with the agent, and Captain Hazelwood came

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through the chart room door and he and I greeted each other and I smelled something on his breath then.

Q Right away?

A I believe so, yes.

Q How many feet was he standing from you?

A Oh, probably close enough. I don't know. How close do men they shake hands, a couple, three feet, something like that.

Q A few feet?

A Yeah.

Q You shook hands?

A Pardon me?

Q You shook hands with him, you shook hands with Captain Hazelwood, I take it?

A I don't really remember. Probably.

Q Did you continue to smell alcohol on his breath as you continued with this conversation?

A Well, we talked for just a short time, then he and the agent went below.

Q All right, but then subsequently Captain Hazelwood came up to the bridge again, right, when you got underway?

A Yes.

Q And did you have any further conversations with him on the bridge?

A Yes.

[282]

Q When you were getting underway, did you continue to smell alcohol at that time?

A Yes.

Q Now, you had left him at lunchtime at about what time?

A Let me go back. I don't remember every instant when I was with Captain Hazelwood that I smelled alcohol on his breath. I smelled alcohol on his breath, that's what I smelled.

Q When you described it though, when you –

A The smell that I associate with the smell of alcohol, that's what I smelled on his breath.

Q But you're not – you're still standing by your testimony it was in the chart room when you met him as you describe?

A Yes, I am.

Q A few feet away?

A That's correct.

Q Are you standing by your testimony you continued to smell alcohol on his breath when you had subsequent conversations with him when you were getting underway?

A Yes.

Q And he was on the bridge?

A Yes.

* * *

[287]

Q Would soon thereafter – do you recall at the NTSB interview you had you told them it was about a five minute interval from the time you told the third mate to have the captain come to the bridge?

A Yeah, it was something in the range of a few minutes, five possibly. About five minutes and maybe less.

Q On page 2 of the NTSB summary interview which you told me you reviewed before you testified, if you could just read the bottom of this paragraph where I have that little line. Do you want to read out loud what you told the NTSB?

A The master arrived on the bridge about five minutes later.

Q That was your recollection at the time you were interviewed by the NTSB, is that correct?

A Yes.

Q Where is the captain's cabin located with respect to the bridge?

A It's on the deck immediately below the bridge deck.

Q Did Captain Hazelwood, when he came to the bridge, did you have any conversation as to where you've been, trying to find out where he's been this period of time?

A No.

Q Did you smell alcohol on his breath?

A Yes.

Q Did you smell it – at what point did you smell it? He walks into the wheelhouse and comes to where you are, is that

[288]

correct?

A Yes.

Q And he's standing a few feet from you?

A Yes.

Q And you start to have a conversation, do you?

A Uh-huh.

Q Is that – right at that point, did you smell the alcohol?

A Yes.

Q Did you smell the alcohol even before he opened his mouth to say anything, do you remember?

A I don't remember.

Q You continued to have a conversation with him then for a period of minutes before you left the vessel, is that correct?

A That's correct.

Q And about how many minutes was that?

A Oh, it must have been about 10 minutes, somewhere in the range of 10 minutes.

Q Did you continue to smell the alcohol during that 10 minute period while you were having the conversation with him?

A I believe I did.

* * *

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Q During this 10 minute period, did you hear Captain Hazelwood issue any orders whatsoever on the helm or engine?

A No, no. He – I still had the conn.

Q So when you left the bridge, he then had the conn but you hadn't heard him issue any orders, is that correct?

A I turned over the conn to him and I don't recall having heard him issue any orders to the rudder or the engine.

Q And you left the vessel, according to notebook at 23:20, is

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that correct?

A Yes. Is that what it says there? I don't know.

Q Yes, I'm just reading your entry, 23:20?

A Then yes, that's when I left the vessel.

Q All I'm trying to do is, would you agree that the period of time Captain Hazelwood was off of the bridge from the time he left the bridge, which you've testified to is about 20 minutes after getting underway, and the period of time he returned to the bridge, was approximately an hour-and-a-half, would you agree with that?

A The time he was off the bridge?

Q Yes.

A While I was on the vessel?

Q Yes?

A The time he wasn't present on the bridge?

Q Yes.

A Something in that range.

Q Okay, that's all I want.

For a captain on a vessel like this that had a licensed officer with a pilotage endorsement to be off the bridge for approximately an hour a a-and-a-half from the Port of Valdez and where you get off the vessel at Rocky Point, that is not the norm, is it?

A That's not the norm, no.

* * *

[301]

Q After lunch, did you drop them someplace?

A I did, yes.

Q Where did you drop Captain Hazelwood?

A In the – it's been renamed. At that time, there was an establishment called, I think, the Valdez Market, and there are other businesses connected to it. In that complex, in the parking lot in front of the Valdez Market complex.

Q And the two other officers got off there, too?

A Yes, I believe they did.

* * *

[303]

Q Now, when you saw Captain Hazelwood for the first time up on the bridge, did he appear – did he in any way appear to you to be intoxicated?

A No.

Q Did he in any way appear to you to be impaired?

A No.

Q Did he in any way appear to you to be slurring his speech?

A No.

Q Did you observe him swaying or misstepping?

A No.

Q Was he slurring his words?

A No.

Q Did he appear to you to be at that point in time in any way intoxicated or impaired?

A He gave no such appearance.

* * *

[305]

Q You had an opportunity to speak with Captain Hazelwood at that point?

A Yes.

Q And to observe him?

A Yes.

Q Did he appear to you to be in any way intoxicated?

A No, he did not.

Q Was he slurring his words?

A He was not.

Q Was he swaying in walking about the bridge?

A No.

Q Did he appear to you to be the same as he's appeared a quarter of nine, 9:00 that evening?

A Yes.

Q Did he appear to you to be the same as he appeared at lunch?

A Yes.

[306]

Q Was he basically acting the same?

A Yes, he was.

Q And the same as he had been acting the night before?

A Yes.

* * *

[308]

DIRECT EXAMINATION OF JOSEPH
HAZELWOOD

* * *

[310]

Q Were there any events leading up to your going into South

[311]

Oaks that led to the decision to go into South Oaks, any significant events?

A Well, there was culmination of a couple of events. I had reached a point in my life where, I hate to use the mumbo-jumbo of the '80s, the mid life crisis, but due to expanded vacations, I was spending more and more time at home and less and less time at sea, and I had a young daughter who was growing up and I came to realize at that juncture in my life that I had missed a significant portion of her growing up and a significant portion of life, not to be critical of life ashore, as it were, rather than life at sea. Been married for approximately 20 years, 16 of which I had been on a ship somewhere, 16 out of the 20 years. And I was reevaluating my life. I wanted to continue that, continue going to sea. And some occasions I would get down in the dumps and depressed and I would abuse alcohol at home on my vacations. I had been doing this for a while on vacations. I wasn't particularly pleased about it, and whether I was – I didn't really know what I was suffering from, if I was truly suffering from something.

I did a sea tour over the holidays into '84 and '85 on the Exxon Yorktown in the east coast products trade, and went on vacation, I think, in late January,

mid to late January of 1985. And some time during that vacation period, I was contacted by a port captain, Captain Mark Pierce. And he

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just – he had interacted with me a couple times in December of that sea tour, the previous sea tour, December and January, and Captain Pierce and I have been friends for a long time and we communicate with each other rather well, with as few words as possible. And he says, I think you might have a problem with your life, see what you can do to fix it up.

Q Now, I'm going to ask you a couple questions about – specific questions about what you just said.

You mentioned that you abused alcohol?

A Uh-huh.

Q In your own mind's eye, what is abusing alcohol, how many drinks?

A Specific number, I couldn't really attach to it.

Q Could I give you a description and see whether you agree with it?

A Sure.

Q How about in the evening, four or five doubles, followed by wine and then a couple more doubles after the meal?

A I think that's the description I gave in my deposition.

Q And this was a pattern that had at least set up right

before your going in the South Oaks?

A Well, not a pattern, per se. It wasn't a clockwork pattern. It happened sporadically, yeah.

Q Now, when you had four or five doubles followed by wine and then a couple more doubles after the meal, what effect did that

[313]

have on you? I mean, did you – I guess the vernacular is, did you hold your liquor?

A Well, I didn't trip over any furniture. I could detect a little clumsiness on my part. I just wasn't – I wasn't blotto, I guess is the expression.

Q We've described anywhere from 14 to 20 shots, if you take the four or five doubles plus a couple more doubles after the meal plus the wine, and my question is, other than feeling some clumsiness, you didn't feel blottoed, could you function?

A Well, I hadn't planned nor did I function outside of sitting on the couch and maybe looking at a magazine.

Q You could sit there and read a magazine?

A Well, I could look at the pictures.

Q Did you pass out?

A No.

Q Would you admit with me that this amount of drinking took place weekly?

A Sometimes it would be weekly, sometimes it would be biweekly. There was no lock and step pattern that it followed that I recall.

Q Now, when Captain Pierce talked to you – let me ask a couple more questions.

At any point up going into South Oaks, did you lie about your drinking?

A I'm not sure. Before, during or after?

[314]

Q Have you ever lied about drinking to your wife?

A In a social sense, probably, yeah.

Q Indeed you were asked that questions in your deposition on page 2181. Can you dig that out? You're going to have to squint to get those page numbers. And I'm on page 2181, line 25, which is at the bottom, and I'm going to go to page 2182, line 7. And I'll read – you were under oath when you gave the deposition, do you recall that?

A Uh-huh.

Q And the deposition was in this case, that's a correct statement, isn't it?

A Yes.

Q And the question asked was, okay, Captain, have you told lies about your drinking, and there is an interjection from the lawyers; when, and at what point in time. At any time. Answer, to my wife. Question, to anyone. I am sure I have, like anybody else.

Did I get that right?

A Yes.

Q Let me ask another question, if I could, about this period just prior to South Oaks, and about the time Mr. Pierce called you up. Had you been having any trouble in your marriage at or about that time?

A Not at that time specifically. There had been problems like any other relationship.

[315]

Q Had you and your wife discussed marriage counseling?

A We had discussed it, yeah.

Q Have you ever had a faulty memory as a result of drinking?

A I don't know about a faulty memory. I couldn't remember a phone number, you know, specific instances. But I suppose on empirical data there is probably some faulty memory.

Q Have you ever had a faulty memory as a result of abusing alcohol?

A In the sense of maybe I forgot what I said to somebody, or forgot what I – possibly, yeah, what I read.

Q Now at the time that Captain Pierce talked to you about going into South Oaks, was your wife supportive of the idea?

A She had detected that I was moodier than I had been before. She was supportive, yeah.

Q Up to the time you went into South Oaks, had there been occasions where you knew you already had too much to drink and you continued drinking?

A I probably had those occasions. I don't know if I gave it that much thought, I had too much to drink.

Q There had been occasions where you felt that you had too much and you had another?

A I don't know if I gave it that much thought, really.

Q Could you go to page 1,239 of your deposition transcript, and I'm going to begin at line 23 and then

pick up the question, the answer to the question at page 1240, line 5.

[316]

A Okay, yeah.

Q And the question is, were there occasions where you knew you already had too much to drink and you continued drinking. And the answer, your answer at page 1240, line 5 is, I felt I had too much and had another, yes.

Do you see that?

A Yeah, okay. It's in conjunction with the previous question and answer.

Q Well, I'll tell you what, just to be fair, why don't you read to the jury from the previous question and answer all the way to page 1240, line 5, and put it in the context that you wanted it?

A Well, the question was is, when you started drinking one of these moods, as you described, could you have stopped at any time you wanted to. Answer, I don't know how to answer that. Could I or did I. There were a couple of occasions I have a general recollection if something came up that I had to go do and I just went and did it and drank nothing else. So if you say out of control, or once the ball started rolling down the hill I couldn't stop, I would have to disagree with that characterization. That's the only way I can answer.

Q And then does it continue on?

A Yeah, were there occasions when you knew you had already had too much to drink and continued drinking. There was an objection, talking about the periods of time when he was

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abusing alcohol according to his definition. The questioning attorney, correct. My answer, I felt I had too much, and had another, yes.

Q On any of these questions when I asked you about your deposition transcript, if you want to go high or low in the transcript, just let me know and we'll do that?

A Very well.

Q Now, this Mark Pierce that called you, who was he?

A He was assigned on a temporary assignment in Baytown, Texas, in the Gulf Coast Fleet, to which I was attached as the port captain. He was not a supervisory role, he was kind of liaison between the masters and deck officers of the Gulf Coast Fleet, kind of a liaison or conduit to management in the operational sense of things.

Q Was he a personal friend?

A I considered him a personal friend.

Q Did you pal around with him at work, or was it a personal friend in a work trip?

A Personal friend in a work relationship, and we corresponded over the years and bumped into each other occasionally.

Q In the three or four months prior to the phone call from Captain Pierce, had you been out with him socially?

A I think I – socially I had gone out to dinner with himself and his wife in Galveston, Texas, sometime in early December, I believe.

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Q One time?

A Yes.

Q Did Captain Pierce in his telephone call to you say anything about the fact that your problem, whatever it was, had some effect on your job?

A I don't think he couched it in those terms. He said, if you've got a problem, take care of it.

Q And the conversation with Captain Pierce was about a minute-and-a-half?

A Minute-and-a-half, yeah.

Q And as a result of this minute-and-a-half conversation, you went through the yellow pages and picked South Oaks out of the yellow pages?

A That's correct.

Q And you talked to your wife?

A Yes.

Q And you went to South Oaks?

A Yes.

Q And you had your bag packed when you went to South Oaks, you brought a suitcase with you or a bag or a gym bag that had clothes in it?

A Yeah.

Q When you went to South Oaks, you had no understanding, would it be fair to say, as to what the diagnosis was going to be or the treatment?

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A No. I left that for them to make that determination.

Q And you went to South Oaks with your bag packed and then you were admitted to South Oaks and you spent 28 days there?

A Yes.

Q And then you got out of South Oaks?

A That's correct.

Q Now, did you get a second call from Mr. Pierce, or did you call him?

A I believe I called him back.

Q I'm sorry, and about when was that?

A I think that was later that same day, in the afternoon, I believe.

Q Of the day that he called you?

A Yes.

Q And what did you tell him?

A I said I would be availing myself of this treatment facility. I don't know if I mentioned it by name or not. I called and made an admission appointment that I would be checking in there, I think this was on a Thursday or Friday I spoke to him, I would be going in there on Monday.

Q Did he give you an administrative contact?

A Yes, he – as I recall, he said when you check in, or you're going through the admissions procedure, your contact, or their contact would be a Mr. Ben Graves and he gave me a phone number for him.

[320]

Q Did you meet Mr. Graves?

A No.

Q Have you ever met Mr. Graves?

A No.

Q So would it be fair from the time you were born until the time we sit here today, you have never met Mr. Ben Graves?

A Not to the best of my knowledge.

Q I don't know. You know, in all of the research I've done, I can't come up with it.

Now, when you talked to Captain Pierce over the phone, you called him back, did you give him any details about what the program was?

A No.

Q Was it just generally vague?

A I just told him I was going to be getting some help the following Monday.

Q Now, there is a fellow at Exxon named Mr. Tompkins who claims he was on this call with you, or on a call with you and Mr. Pierce in which this subject was discussed?

A You mean like a conference –

Q A conference call?

A Uh-huh.

Q Have you ever been on a conference call with Mr. Tompkins on this subject?

A Not on this subject, no, not to my knowledge. I wasn't

[321]

aware of it.

Q Now, while you were at South Oaks, your treating physician was a Dr. Vallury?

A That's correct.

Q And we're going to play his videotape after we finish with you.

A Uh-huh.

Q When you got out of South Oaks, was there a recommendation with regard to drinking?

A Yes, not to – general recommendation was not to drink.

Q When you left South Oaks, did they have an aftercare program?

A Yes.

Q Did you go to the aftercare program?

A For a period of time, yes.

Q At some point in time, did you quit going to the aftercare program?

A Yes.

Q You dropped out of it?

A Yes.

Q Would you tell us why you dropped out of the aftercare program?

A Well, my primary reason for dropping out was the people that were in this aftercare group I was assigned to randomly,

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I guess, had an overwhelming obsession with – all they talked about was drinking.

Q Now this aftercare program was run by South Oaks?

A The out patient unit of South Oaks, yeah.

Q And you didn't finish the program, you dropped out of the program?

A As I understood it, there was no start or finish. People were – it was a dynamic process that people were cycling through all the time.

Q Well, if you go to 1290 of your deposition transcript, on the top of the page of 1290 I think you describe your leaving the aftercare program as dropping out. Could you just check that and see if I'm right?

A Yeah, I kind of dropped out. I quit going, yeah. As far as a start and finish, a lot of time – I don't know if there was a –

Q Now, at the time you got out of South Oaks, did you still have alcohol in your house?

A As I recall, yeah.

Q At the time you got out of South Oaks, one of the things you did in conjunction with the 28 day program is you started participating in Alcoholics Anonymous?

A I attended the meetings, yeah.

Q And indeed, for the first 90 days after you got out, did you go to meetings?

A That's correct.

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Q Did your wife go to any program like Alcoholics Anonymous?

A She went in to – I guess it's called Alanon.

Q Alanon. And in Alcoholics Anonymous, what is Alcoholics Anonymous?

A It's a self-help program for people that have a desire to stop drinking.

Q And indeed, under the third tradition of Alcoholics Anonymous, the desire to stop drinking is the one requisite of the help, isn't it?

A As I recall, yes.

Q And in Alcoholics Anonymous, you get something called a sponsor?

A You're advised to pick a sponsor, yeah.

Q Did you pick either a permanent sponsor or a temporary sponsor?

A I had a couple temporaries.

Q And you had temporary sponsors from mid '85 through when?

A Until fall of '88, I think so, possibly – yeah, fall of '88.

Q Now, you were on – while you went to South Oaks, you were on a paid disability?

A During the inpatient portion of that, yes.

Q And then when you took the 90 days off from South – the 90 days off from Exxon to go to the 90 days of AA and to go to some aftercare –

[324]

A Yes.

Q – Exxon didn't pay you then, did they?

A No.

Q Now when you came out of South Oaks, did you have any kind of plan to abstain from drinking?

A I had a generalized plan to not drink, see how it went.

Q With regard to the decision to attend Alanon, was that your wife's decision?

A As far as I know, yeah.

Q Did you enjoy going to the AA meetings?

A For the most part, yeah, it was pretty enlightening, and I met some nice people.

Q At some point in time you had a conversation with Ben Graves – this Mr. Graves who you never met, you had a conversation with him on the telephone?

A That's correct.

Q Who said what to who?

A He called me up and asked me some questions. I believe it was – I'm not sure of the date. I think it was in May sometime.

Q This is right about the time you got out of South Oaks?

A Shortly thereafter. It's kind of a goofy hook up. He was in Newark, and he left a message, or something like that and I contacted him at a hotel or motel.

Q And you talked to him on the phone?

[325]

A Uh-huh.

Q What did he ask you?

A He asked me some questions, including whether I had ever drank on Exxon vessels.

Q What did you tell him?

A I told him yes, I had.

Q Did you tell him that you had ever returned to Exxon vessels drunk?

A No.

Q Did you ever tell him you had returned to Exxon vessels after drinking?

A Yes.

Q I'm going to show you what is in evidence as number – plaintiffs' Exhibit No. 160. You've seen this before, this is the so-called Graves' report?

A Yes.

Q Probably more than you've ever wanted to?

A Yes.

Q And I want to know on the Graves' report, do you know who Mr. W.J. Davis is?

A No, I sure don't.

Q How about Mr. F.J. Iarossi?

A Yes.

Q Who is he?

A At the time, he was the President of the Exxon Shipping

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Company.

Q And on the second page of the Graves' report, there is the statement: I asked Joe if he ever drank aboard ship. He commented that he occasionally drank aboard ship but not frequently. He also indicated that he came back to the ship from port drunk on several occasions.

Did I read that right?

A Yes.

Q Now with regard to drinking aboard ship, that's a violation – that was at the time a violation of Exxon policy, wasn't it?

A That's correct.

Q And why would Mr. Graves say – well, I'm speculating why Mr. Graves would say anything.

With regard to this conversation that you had with Mr. Graves, and what you told him about violating corporate policy and about returning to ship after drinking, did anybody ever follow up on that and, say, reprimand you, or –

A No, not a specific reprimand, no.

Q Now, other than this conversation that you had with Mr. Graves on the telephone this one time, were there any other conversations with Exxon people about this drinking on ship and returning to ship after drinking?

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A Directed at me specifically.

Q Yeah. Did anybody call you in and say, we have these reports, I want we want to clear them up, we

have them, what are we going to do about them, or words to that affect?

A For those incidents that I spoke to Mr. Graves about?

Q Yes.

A Not that I'm aware of, no.

Q Do you recall how long this telephone call with Mr. Graves was?

A I'd say five or seven minutes, maybe ten minutes at the most.

* * *

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Q Now at some point in time there has to be some kind of a discussion about going back to work?

A That's correct.

Q What was that discussion?

A There was a couple of discussions.

Q What was the first one?

A I was contacted by my physician, Dr. Vallury, who informed me that he had been contacted by Exxon physician named Dr. Montgomery, and he indicated to me that he had relayed to Dr. Montgomery that I was fit to return to sea duty.

Q At some point in time, a Ms. Helen Shorret (ph) called you?

* * *

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Q We were talking about captains and I wanted to stop here for a second because we were talking about

captains, but I want talk about what a ship captain is, and that is a subject to which you have dedicated a major portion of your adult life, is that a correct statement?

A Yes.

Q Would you tell us what a ship captain is?

A His primary goal is the safety of his crew, secondary goal is safety of the ship, and the third or tertiary is the safe

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and expeditious delivery of the cargo to the owner, whoever that may be.

Q It takes some years and training to become a captain, a supertanker captain?

A Yeah, a number of years and formal – more on-the-job training than formalized classroom, is what you're saying.

Q Are most of your colleagues ship captains that are graduates of a maritime academy or the Merchant Marine Academy or the Coast Guard Academy?

A Yes, in this day and age, yes.

Q And that's because of both the complexities of the job and the responsibilities of the job?

A No – yes and no. It's a little more complex and a little more higher tech than it used to be, but the job is essentially the same.

Q The job is one of great responsibility?

A Yes.

* * *

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Q Now let's go back, we discussed captains and unions, let's go back to Ms. Shorret's phone call and this is after the 90 days of unpaid leave?

A That's correct.

Q And she said the Gulf Coast port captains Tompkins and Sheehy want to talk to you?

A That's correct. She was the manning assignment clerk who handled the masters and I think chief mates. So she would call me up on occasion and say tell me where the ship was going to be, where it was, and when I was supposed to meet it. So it wasn't a lightning bolt that she called me with this information.

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Q Was there an appointed date to meet?

A Yes, as I recall, yes.

Q Where were you going to meet?

A As I recall, it was a Greens Point, or something. I forget the name of the hotel out at international airport at Houston.

Q Who was the first one that you met with?

A I met Captain Sheehy first.

Q Where did you meet with him in the hotel?

A I first approached the registration desk to see if he was registered there, because I had only met him once before, and I was walking there in the lobby and I saw him, and we went to, it's a sidewalk cafe, it's in the lobby, some palm trees in part of the lobby, and sat down.

Q I want to focus on what you just said. You just called it a sidewalk cafe?

A I think that's what it was labeled as, something cafe. It had umbrellas and stuff like that.

Q And you were here for my opening?

A Yes.

Q And what did I call it in my opening?

A I believe you called it a bar.

Q And where did I get that?

A I guess from me. It was a lobby, bar, cafe, whatever.

Q Let's go to page 1436 of your deposition transcript?

A Okay.

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Q Let's go to line 6, and will you read – let's go to line 5, and will you read to the jury the question at line 5 and your answer?

A Then what happened. We went over to a lounge, lobby, lounge, some little bar, restaurant, there in the open air and sat down.

Q And at that point in time in your answer, and you're focusing on this event, did you call it a cafe?

A No, I guess I didn't. Lobby, lounge, bar, it was an open air bar, restaurant.

Q What did Mr. Sheehy do, Captain Sheehy?

A You mean as per my deposition?

Q If you can remember, tell me, or if you want to look at your deposition, look at your deposition.

A I think he ordered a beer. I ordered a diet soda or club soda, whatever I had.

Q This meeting at this lobby, lounge, bar, restaurant this meeting when Mr. Sheehy ordered a beer, was that the first contact in person that you had with anybody from Exxon Shipping Company, or Exxon Corporation following leaving the South Oaks medical facility?

A Yeah, I think that was the first face to face.

Q Now have you reviewed, in the time that you've spent with this case, which is more than should be visited on anyone, have you had the chance to review Mr. Sheehy or Captain Sheehy's

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version of that testimony?

A Uh-huh.

Q And he says that he discussed with you whether you were drinking anymore or not?

A Yes, sum and substance of that.

MR. NEAL: Your Honor, could I have an objection? We'll approach the bench if you don't want to talk about it in the presence of jury.

MR. O'NEILL: I don't see anything unfair about it.

THE COURT: What's the objection to?

MR. NEAL: I think it's appropriate to ask the witness what happened. He's asking him is something else now – he's comparing his testimony with somebody else's. He can ask the witness what happened there, but comparing him with what somebody else said I think is argumentative.

THE COURT: I'll watch it. Let's proceed a little bit and see how it goes.

MR. O'NEILL: Could you read his answer back, please?

(Record read.)

BY MR. O'NEILL:

Q Did that discussion take place?

A No.

Q Thank you. What did you and Mr. Sheehy discuss?

A When we first met at the lobby there by the registration desk, he indicated to me that Mr. Tompkins, his superior, or my

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superior as well, had assigned him the role of explaining to me some wrinkles or changes or alterations, if you will, that had occurred in the union contract for the crew in my absence, and that's what he was there to do.

Q So he updated you on some union matters?

A Union interpretation of the new contract for the crew members, yeah.

Q Would it be fair to say that there was no discussion of either your stay in South Oaks or aftercare or AA or drinking in your conversation with Mr. Sheehy?

A No, strictly business.

Q My statement was a correct statement?

MR. NEAL: Objection.

BY MR. O'NEILL:

Q I'll reask the question, sometimes when I say would it be fair to say, and you say no, the transcript gets goofed up.

Is this a fair statement: There was no discussion between you and Mr. Sheehy of South Oaks, aftercare, AA or drinking, is that a correct statement?

A None that I was, you know – no.

Q My statement is a correct statement?

A Your statement is a correct statement. I'm a little slow.

Q If we're going too fast or you want to take a break, you tell us. Now, you had a meeting then with Mr. Tompkins?

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A That's correct, yes.

Q And where did that meeting take place?

A It was in the same hotel, a couple decks up in a meeting room, or a conference room where he was – appeared to me he had been doing something during the earlier part of the day, I don't know what, conferring with somebody. He and I sat down in this conference room.

Q Who said what to whom?

A He indicated to me – he welcomed me back. He said it's good to see you, welcome back to the fleet, shook my hand, and after the pleasantries were over, he indicated to me, he said what you've just been through is confidential in nature and only a few people will know, he says, but we all know what the

rumor mill is like in this fleet, so be prepared for rumors to start leaking out. And I indicated to him at the same time that any sources of any rumors wouldn't be from me. And then he indicated to me, he had in a pile of papers like this, maybe a little skinnier, he had what was labeled on a cover sheet the current, I guess it was, I forgot the date, Exxon Alcohol and Drug Policy. And at that juncture, he looked me square in the eyes and told me in no uncertain terms that there would be no violations permitted of the Exxon alcohol policy.

Q Now let me ask you a question about the policy. Was that the policy manual, itself, or was it a xeroxed copy of the front page?

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A That I couldn't tell you. He just kind of patted his hand on it. As I indicated, it was a pile of papers a little thicker than that. It was a cover sheet.

Q We can dig it out, but you've testified you thought it was the xerox copy of the cover page?

A It was a xerox cover page, I don't know what was underneath it.

Q And he said you had to comply with the policy, or words to that effect?

A It was more like, there will be no violations tolerated.

Q Of the policy?

A Yes.

Q Now, I want to ask you a series of questions about whether these topics were discussed in this meeting with Mr. Tompkins?

A Very well.

Q Was AA discussed?

A No.

Q Was aftercare discussed?

A No.

Q Was the subject of your personal drinking discussed?

A No.

Q Was the subject of drinking on board vessels or returning to vessels after having drunk discussed?

A No.

Q Was – were you told not to drink?

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A With the exception of the parameters of the alcohol policy, no.

Q Were you told that you were going to be monitored?

A Well, in his imitable fashion, Mr. Tompkins kind of indicated to me I was going to be watched.

Q Did he tell you you were going to be watched?

A He didn't verbalize that, no.

Q So he did not tell you you were going to be watched?

A No.

Q Did he tell you you were going to be monitored?

A No, it was just, look forward to working with you.

Q Did he tell you or discuss with you anything that Exxon could do to facilitate attendance at Alcoholics Anonymous?

A No, that subject wasn't broached.

Q Now, there were these two meetings?

A Yes.

Q And then you were – then you rejoined the fleet?

A Yes.

Q Now, have we covered the subject matter of these two meetings fairly?

A Yes.

Q How did you rejoin the fleet?

A Following morning I flew from Houston to Jacksonville, Florida, and waited until the ship docked and joined it later that evening.

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Q Let's talk for a minute, are you aware at all that you had been recommended on prior occasions for shore side duty assignments like port captain?

A I wasn't aware of that. I remember Mark Pierce, when he first got the job, kind of approached me. I don't know, by phone or somewhere along the line, asking me if I would be interested in being his relief when his time was up.

Q His time would have been up in the summer of '85?

A No, I think he stayed on for an extra year. He was due off in the summer of '84.

Q So point in fact, in the summer of '85, Mr. Pierce, his stint as port captain ended in the summer of '85 and somebody else picked up?

A Captain Sheehy replaced him.

Q So at the same time you were going through the 90 days of unpaid leave, the port captain's job switched?

A Somewhere in there, yeah.

Q Did they offer you a port captain's job?

A No, they probably knew better.

Q A port captain's job, is it fair to say, is one of comparable status, have the same people that do it, isn't that right?

A Uh-huh.

Q With no cut in pay?

A As far as I am aware of, yeah.

* * *

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Q And I asked you a question, did they discuss the shore side assignment with you, or port captain's assignment, and you said something along the line of not if they knew what was good for them, or words to that effect?

A No, Captain Pierce proffered that early on and he knew my position on it, and he probably relayed that to the powers to be that were in charge of nominating the next candidate for that position.

Q At one point in time, you told Captain Pierce you were interested in a shore side assignment, didn't you?

A I said I might be interested in relieving him.

Q That was as port captain as a shore side assignment?

A If he was really desperate, yeah.

Q And have you ever had an opportunity to take a look at your

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Exxon personnel records in this litigation?

A Just vis-a-vis this litigation.

Q They are Exhibit 11, or pages from them are on Exhibit 11?

A Yes.

Q I'm going to pull up a page, and we can look at it on the monitor, if I can run the monitor. Do you got it on the monitor in front of you?

A Yeah, I sure do.

Q And if I can do this correctly, we're off and running. This is from one of your evaluations prior to 1985, and this subsistence here indicates some discussion of a shore side assignment, doesn't it?

A That's correct.

Q I'm trying to get another page up. This the original up there?

A I believe –

Q Does it have a good sticker on it? Let me borrow that for a minute.

A It's in here somewhere. That's too early, that's '81.

Q I pulled another entry from the record up on the monitor, and it's a pre '85 entry?

A Uh-huh.

Q And that again raises the possibility of a shore side assignment?

A Yeah.

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Q So would it be fair to say that in the summer of 1985, the subject had been raised at least a couple times in your performance reports, and you and Captain Pierce had talked about it, and you said you would be interested in it?

A Yes.

Q Now, when we left off you had finished your meeting with Sheehy and Tompkins, and you'd met one day and then the next day you were flown to New Orleans?

A No, Jacksonville, Florida.

Q And you assumed the command of the Yorktown?

A That's correct.

Q And the Yorktown was what kind of vessel?

A She was 41,000 ton handy sized tanker that had been in the products of trade. She was at that time in the dirty oil trade, heavy fuels and crude oil.

Q And the Yorktown tour of duty was 99 days?

A Something like that, I recall seeing.

Q Would it be fair to say that 99 days was as long a tour that you had had working for Exxon, or about as long a tour you had had working for Exxon?

A About as long, maybe longer.

Q Up to the time of assuming the command of the Yorktown, you had been going to AA?

A Yeah.

Q And on the 99 day tour aboard the Yorktown, would it be

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fair to say that AA was unavailable?

A Pretty much, yeah.

Q You can't go in, you're on a ship?

A No, and the ports we were calling in were remote.

Q Would it be fair to say that up to the time of assuming command of the Yorktown there had been no discussion with anybody at all from Exxon Corporation, or Exxon Shipping Company with regard – with regard to the availability of AA while you were out on a vessel, or what were we going to do about that subject? That was not discussed?

A There was no discussion, which was no surprise, no.

* * *

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Q Now, there was no AA available on the Yorktown –

A That's correct.

Q – for this first tour.

Did you call your sponsor, your AA sponsor while you were on the Yorktown?

A There was very limited phone contact. No.

Q How about the entire period from your return from South Oaks to your last tour on the Yorktown, on any of your sea tours did you call your AA sponsor?

A A couple times I did, one of my sponsors, yeah.

Q Do you know Captain Andre Martineau?

A Yes.

Q At about the time that you were given the Yorktown, was he given a shore side assignment?

A He and I were co-masters on the Yorktown originally, and then when I came back after South Oaks, I think he went to the west coast as port captain, yeah.

Q Now with regard to your tour of duty from the Yorktown, that was about from '85 to '87?

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A Yeah, the tail end of '84.

Q And you didn't go to AA meetings on the vessels, but when you were home you did go to AA meetings?

A That's correct.

Q And your wife went to Alanon meetings while you were home?

A As far as I knew, that's where she was going.

Q And you didn't drink while you were at home in the presence of your wife?

A Not that I can recall, no.

Q Now at some point in time did you resume drinking?

A Yes.

Q And that was in about May of 1986?

A It was in the spring, yeah, April or May.

Q So it was about one year after you got out of South Oaks?

A About a year, yeah.

Q And you had a glass of wine?

A Yeah, it was a glass, maybe two even.

Q In Manatee, Port Manatee?

A It was outside of Port Manatee, Florida, near Naples, yeah.

Q And after that, there were occasions when you drank with Exxon Shipping Company employees in Philadelphia, at the Mariott Hotel outside of Philadelphia?

A Well, Mariott was close to where we were docked, yeah, out of Philadelphia.

Q And that was Mr. St. Pierre and a Mr. Dengel?

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A That's correct.

Q Would it be fair to say that with regard to your decision to drink you weren't hiding anything from anybody?

A I didn't think much about it consciously.

Q You weren't avoiding drinking in front of Exxon management? It wasn't an issue, was it?

A Never had been as far as I was concerned, no.

Q In addition to this Philadelphia incident that I talked about, you, on occasion, drank beer with Exxon employees in Norfolk or New York?

A I said that in my deposition, and as best I recall, that's where we were trading, yeah.

Q And you'd have a couple, two, three beers with – whatever it was?

A Usually it was Mr. Dengel and Mr. St. Pierre, plus Mr. St. Pierre was going through kind of a sloppy divorce.

Q And Baton Rouge –

MR. CHALOS: Your Honor, excuse me, the witness was in the middle of an answer.

BY MR. O'NEILL:

Q I'm sorry, did I cut you off, sir?

A Not really. Baton Rouge, yes, I think I'll agree with that.

Q And flying home from your last assignment on the Yorktown?

A Possibly, probably. I really don't know.

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Q Would you disagree with the proposition that you had a bloody mary or a drink on flying home from your last assignment on the Yorktown?

A Entirely possible.

Q Now at some point in time, the Yorktown grounds in the Mississippi?

A No, not when I was on it.

Q Did the Yorktown ground at all while you were on it?

A Well –

Q Where?

A Bolivar Roads.

MR. NEAL: Object, covered by the discovery master. Mr. O'Neill is not aware of it.

THE COURT: Is anyone on the plaintiffs' side aware of discovery master ruling on this point?

MR. O'NEILL: I'll move on. I'm unaware of it. I'll move on and we can revisit it tomorrow.

BY MR. O'NEILL:

Q With regard to your time aboard the Yorktown, you'd drink on occasion with Exxon Shipping Company employees, not on the vessel, from 1985 to '87?

A Rather refer to them as shipmates.

Q Shipmates?

A Yeah.

Q Did anybody from '85 to '87, during this Yorktown period,

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come and ask you anything about AA, aftercare, the availability of AA, how you were doing emotionally, from Exxon Corporation or Exxon Shipping Company?

A Well, considering I thought it was a private matter, if they had broached the subject beyond or

proceeded beyond how are you doing, I probably would have slammed the door in their face.

Q But the point is, nobody did, including Sheehy and Tompkins?

A Tompkins, with the exception of the alcohol policy, no. Now, I was kind of in the dark of who knew what, to tell you the truth.

Q Did Mr. Sheehy ever say anything to you about AA?

A No.

Q Aftercare?

A No.

Q The availability of AA meetings?

A No.

Q The availability of your family as a support network?

A No. You kind of lost me on the last one.

Q Is it a fair statement to say, Captain, that from '85 to '87 you had no knowledge that either Mr. Sheehy or Mr. Koops were monitoring you specifically for alcohol use?

A I had no specific knowledge of that, no.

Q And the subject of alcohol use, your alcohol use never came

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up with either of those gentlemen, did it?

A Not that I'm aware of or can recall, no.

Q How about anybody from Houston headquarters, Mecca, is that what you guys call it. From '85 to '87,

did anybody from Houston headquarters, Dr. Montgomery or anybody like that, talk to you about whether you were going to AA meetings, whether you were drinking at all?

A Not specifically, no.

Q Now, you had – let's, again, take this through the end of your Yorktown period.

With regard to your AA attendance through the end of your Yorktown tour of duty, you continued to go at home?

A Yeah.

Q And you continued to – your wife continued to go to Alanon, or at least that's what she told you?

A Yeah.

Q And for at least the last year you had resumed drinking, at least on occasion?

A Hu.

Q And would it be fair to say you did not tell your wife you had resumed drinking?

A I don't know if the subject came up or not. I don't think so, no.

Q So the answer is no?

A Yeah, I would have to say no.

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Q Now, let's move on to the Exxon Valdez. The topic of the Exxon Valdez, and at some point in time did somebody from Exxon Shipping Company raise with you the topic of the Exxon Valdez, being assigned to the Exxon Valdez?

A Yeah. It was Captain Martineau, who was port captain on the west coast fleet at the time. He approached me. It was an officer's conference in '86 sometime, possibly spring of '87. I really – it's hard to remember this. In Houston, and asked me if I would – somebody was retiring or was leaving the Valdez, and they asked me if I was interested in going over there from the Yorktown.

Q Do you think that was Andy Martineau that asked?

A Yes.

Q And what did you say?

A I was pretty ambivalent on the subject. There was pluses and minuses to both jobs. I said, if you can't find anybody, give me a shout.

Q Was that the only conversation that you had with anybody from Exxon Shipping Company with regard to reassignment of the Valdez?

A I can't pin down the date of that conference in my mind's eye, but I think I went back and did another short hitch on the Yorktown. I may or may not have, but I thought I returned to the Yorktown and then somebody, whether it was Andy or somebody else, Sheehy, told me somewhere in that hitch that I would be

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transferring after that hitch.

Q So we have two conversations. We have Andy Martineau's talk with you in Mecca, and then some time later on, either your port captain or somebody else tells you you're going to the Valdez?

A Yeah, they do a follow up and say, you're going whenever the schedules are going to work out.

Q In either of those discussions, was the subject of AA, aftercare, emotional well-being, drinking, were any of those discussions talked about – were any of those subjects talked about?

A Subjects? Not that I recall, just –

Q When were you reassigned to the Valdez?

A I believe it was the fall of '87.

Q When was your next – when was your first tour of duty with the Exxon Valdez?

A That was late fall, early winter, I believe.

Q Yeah, it was. Were you aboard the vessel over Christmas?

A '87 into '88?

Q Yes.

A Yeah, I believe so.

Q There is a tradition – at that point in time there was a tradition in the fleet, a legitimate tradition at that point in time of providing Christmas wine?

A Yes.

* * *

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Q So is it your testimony that from 1987 to 1989 there was no requirement for pilotage from Hinchinbrook entrance up to Rocky Point?

A You mean to have an officer on board with a pilotage endorsement?

Q That's a correct statement?

A The majority of the ship masters for Exxon didn't have it.

Q My question was, is it your testimony that there was no requirement to have a master from Hinchinbrook up to Rocky Point, to have an officer from Hinchinbrook to Rocky Point that had a pilotage endorsement? I want your testimony to be

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clear. I don't care what other vessels did. What was your understanding of the requirement?

A My understanding, my lay understanding was if you had it, fine, if you didn't, fine.

* * *

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Q Was the practice of having vessels, Exxon Shipping Company vessels from Hinchinbrook up to Rocky Point without a pilot, was that practice condoned by Exxon Shipping Company, or do you know?

A I don't know if it was condoned, but the requirement, as I understood it, was waived over in '81, '85 and '88, and those masters or mates that had the endorsement retired. They weren't replaced.

Q Would it –

A On those particular ships a master would come on there, would have no endorsement, or he would go up there like

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everybody else.

* * *

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Q Now in February, 1988, the Valdez docks in Long Beach?

A February of '88? I guess she might have, yeah, all right.

Q And –

A Yeah, I guess so.

Q And indeed when the vessel did dock in Long Beach, there was a regular practice of the departing crew members to get together at either a joint called the Yankee Clipper or the Yankee Whaler?

A Usually the people predominantly that were going on vacation that lived in the east coast were getting the redeye while they waited for the limo to take out to the Yankee Whaler or would stop at the Yankee Clipper.

Q And have a couple beers?

A On occasion I did that with 10 or 12 other people.

Q Sit around and drink beer?

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A Yeah, waiting for the limo, yeah.

Q And they were primarily Exxon people?

A Well, they were shipmates you just spent two or three months with.

Q And they included Chuck Kimtis, the chief engineer?

A Yes.

Q And Nate Carr?

A Nate, yeah.

Q And Mr. Enright?

A Pat Enright, yeah.

Q And Katherine Haven?

A Well, I have a vague recollection she was there once, but she lived on the west coast. Usually her husband would drive down and pick her up.

Q Do you have a recollection of that on occasion she drank with you?

A I remember her being there. Whether she just said goodbye and took off, I don't know.

Q How about a Butch Ogen (ph)?

A Butch, yeah.

Q I want to talk a little bit about Portland?

A Uh-huh.

Q Just so we're oriented on what I'm going to talk about.

Early in 1988 do you fly back from the east coast to Portland?

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A No, I thought it was in May.

Q Is that when it is?

A Late spring sometime. She was down in the yard.

Q May?

A Yeah.

Q And you were on the east coast and you fly back to Portland?

A Well, I was on vacation and flew to Portland, yeah.

Q Let's take the vacation just prior to going to Portland. Where was vacation?

A I think that go around. I brought a couple yachts up from the Caribbean to the northeast. That was – most of my time was spent doing that, and then I flew back to work.

Q Did you spend any time at home?

A A little bit, yeah.

Q When you were at home, did you go to AA?

A I couldn't really say whether I did or not. I may have.

Q Was your wife going to Alanon then?

A I believe so.

Q Did you drink at home when you were there?

A I wasn't home all that much that hitch, as I recall.

Q Did you drink when you were at home?

A I don't think so. I don't remember.

Q As a normal practice, you didn't drink – after you got out of South Oaks, as a normal practice, you didn't drink when you

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were home, did you?

A Normal practice, yeah, because nobody familiar – my folks don't drink, my wife's folks don't drink.

Q And your wife wasn't drinking, or was she?

A She occasionally would drink, yeah.

Q But you did not drink in the presence of your wife?

A Not that I can – my recollection, we went to a wedding, you know, somewhere in there.

Q One wedding?

A Yeah, some cousin or something got married.

Q As a general practice, you did not drink in the presence of your wife?

A No.

Q And that was a different regimen than prior to going to South Oaks, because prior to going to South Oaks, you would drink in front of your wife?

A I did most of my drinking in front of my wife, yeah.

Q Now, coming back from this vacation to Portland, you flew back and you met a guy on the airplane, and as a result of some bet or another, you lost a bet with regard to a beer or you won a beer?

A I don't know who, we had a bet about the luggage. We had to transfer planes in Salt Lake. One of us bet our luggage would make it and one of us said it wouldn't.

Q Was it a Delta flight?

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A Yeah.

Q Been there, done it. God, that was such a pit. I shouldn't say that about Delta, but I think I have some privilege in the court when they sue me.

When you got off the airplane in Portland, and Captain Stalzer met you?

A That's correct.

Q And you had a couple vodkas with Captain Stalzer?

A I heard – I don't know. I bought this fellow a beer, and I had a drink.

Q And you did that while you were waiting for your luggage?

A Yeah, waiting to see the results. It was going to get there, it was just going to be a little bit late.

Q And then you went to dinner that night?

A About seven hours later.

Q And was Stalzer at dinner?

A Yeah, he, myself and the chief mate went to dinner.

Q And Stalzer is an Exxon captain?

A He was the alternate master on the Valdez.

Q And you had wine with dinner?

A Yeah, I think the three of us split a bottle of wine.

Q On this trip to Portland, did you have a beer with Mr. Cousins in his apartment, or your apartment?

A We were there. The ship got squared away, they were there about 30 or 40 days. And I had a beer with Mr. Cousins in

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there somewhere, yeah.

Q How about Mr. Carr, he's an Exxon employee?

A Yeah.

Q Did you have a beer with Mr. Carr on the vessel?

A No, I saw his testimony to that. I had a beer with him the Friday before. He was taking off for his daughter's wedding up in Seattle. My recollection, he yanked it out of the back of his rent-a-car.

Q So you were sitting in the car drinking beer?

A No, we were standing there in the parking lot, he had it in the trunk. He was waiting for a cab to take him to the airport.

Q So you disagree with him about that?

A Yeah, I recall having a drink with him.

Q If you would have drunken a beer aboard the vessel, would that have been a violation of the company policy?

A Yes. As I understood it, yes.

Q Now at some point in time, the subject of Henry Weinhardts comes up, do you know what that –

A Yes.

Q It's a beer?

A Yes.

Q Out of Portland?

A Used to be.

Q Still is. Tell me about that?

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A Mr. Kintis had mentioned, who was the chief engineer at the time, since he departed, we were living side by side over in some rented apartments while the ship was in dry dock. I had mentioned – we were working kind of long hours, and he had mentioned that he had been trying to find some and

he couldn't find anything. I don't know whether the ensign had gobbled it all up, but he couldn't locate any, and that morning I had gotten hold of the rigger foreman, asked him if he knew where any was, and he says yeah, I can track some down, I'll get you a six pack by this afternoon. That afternoon came and went and I was fixing to leave and go back to the apartment, and I called up this rigger foreman, he had a walkie-talkie with a private channel, I called him up and asked him if he'd been able to locate the Henrys, and he says, yeah, sure, I'll meet you by the gangway. I met him at the gangway, he gave me a six pack of beer, and I went back to the apartment.

Q And drank the beer there with who?

A Mr. Kimtis. It was either that evening or the next evening.

Q Now at some point in time when Mr. Herb Leyendecker – do you know who he is?

A Yes.

Q Who is he?

A He was, at that time, in the repair section of the engineering group, Exxon Shipping out of Houston, but he was up

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in Portland, I think basically checking some invoices, because this particular shipyard was kind of complex in the sense that we were trying to rectify a lot of guarantee items that the ship was roughly new, she had come out of the shipbuilder's yard and there was a squabble about a lot of deficiencies that had come out of the builder's yard, and he was up there assisting in that procedure.

Q Would it be fair to say that he was a part of Exxon management?

A In the grand scheme of things, yeah, I guess so. I really, over the years, I never had any contact with him.

Q Your answer is yes?

A Yeah.

Q And at some point in time Mr. Leyendecker asked you about the Henrys or the transmission over the walkie-talkie?

A The next day, he came over and asked me about it, and I told him essentially what I told you, said you could search my room or Chuck, Mr. Kimtis' room, refrigerator, quarters, whatever you want, they were kind of torn up because of the repairs. He did, and I assured him there had been no violation of the alcohol policy that I was aware of.

Q And you did inform Mr. Leyendecker that you drank the beer back at your apartment?

A Yeah, it was either my apartment or Mr. Kimtis' apartment. Watched the Bruins and the Edmonton Oilers.

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Q Important thing, Mr. Leyendecker was told about you drinking the beer?

A Yeah.

Q Who is Mr. Myers?

A Paul Myers is – was, when I first joined the Valdez, he was the port engineer who was the engineering counterpart of the port captain for Andy Martineau. He was port engineer. He had been the

construction superintendent of the Valdez and her sister ship, the Long Beach in San Diego.

Q Who was in May of 1988?

A At that time they had evolved the management scheme of things where there was no longer a port captain or port engineer, and they converted over to a line management format where there was a titular head of a group of ships who was known as the ship group coordinator, and he kind of wore both hats of the port captain and port engineer, and that was what Mr. Myers was.

Q As the – on an organization chart, would he appear as your boss?

A He would be my direct supervisor, yes.

Q In May of 1988, he was your direct supervisor, at least in terms of an organization chart?

A Yeah, essentially, yeah.

Q And in May of 1988, did Mr. Myers approach you with regard to this radio transmission incident, the Henrys incident?

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A It was later than May. We discussed it – the way it works, generally speaking, you have a couple repair inspectors at that time, who supervise the repairing of the vessel. The ship group coordinator isn't day-to-day involved. I don't think Mr. Myers is up in Portland that much.

Subsequent to the Portland shipyard period and trip to Valdez and down to the Lower 48, he sat in with me for five, six, seven hours. Basically debriefed me item by item of what I saw in the yard period and what I liked or didn't like. And that – the

Henry's subject came up as an aside during that period some time.

Q What did you tell him?

A I essentially told him –

Q Same thing you told me?

A Same thing I told you, yeah.

Q And did Mr. Myers at this point in time ask you anything about AA, aftercare, recovery, emotional maintenance, anything like that?

A He said he just wanted to ensure that there was no violation of the alcohol policy, and I assured him there wasn't. And he went on to the next subject.

Q And when we talk about no violation of the alcohol policy, that is the beer was not consumed on the vessel?

A Best of my knowledge. I got to the bottom of the gangway, so it was never physically on the vessel.

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Q But Mr. Myers concern expressed to you wasn't a generalized concern about you or drinking, it was a specific concern about beer being on the vessel? Do you want me to try it again?

A Yeah, violation of the alcohol policy.

Q Now, the summer of 1988 – sounds like a movie, doesn't it – you were on leave between July 24th and September 26th or about that?

A Sounds about right.

Q Did you attend AA meetings during that period of time?

A If I was home I guess I did, but that's – summer of '88. I know I was running around working on some boats. That point in time I really couldn't tell you what that summer – if I had a week or two off, I would be surprised.

Q Let's see if I can help you out using your transcript. Let's go to page 1849 of the transcript, line 9, and why don't you just take a look at it and see if it refreshes your recollection, and then I'll ask you the question again.

A Yeah, okay.

Q Does it make sense that during that period of time you attended AA maybe three to five times a week?

A Yeah, if I was home, yeah, during that time period.

Q Now during that period of time, did you do any heavy drinking?

A I guess in September I did, yeah.

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Q The heavy drinking was with an Exxon employee?

A Yeah.

Q Now I want to talk for a minute about something that's been referred to as the four hour rule.

A Uh-huh.

Q Do you have an understanding of the four hour rule?

A Essentially, shall not – Coast Guard says you shall not consume alcoholic beverages less than four hours prior to assuming your duties.

Q In October of 1988 you – or September, October, 1988 you attended some kind of a gathering with yourself, Ray Jones, Paul Myers and Harvey Borgen, do you recall that?

A Yeah, it was a luncheon in San Francisco.

Q Were those the four people that were there?

A Yeah.

Q Let me ask you a question. Up to this point in time were you at all aware of the fact that you were supposedly being monitored?

A I don't know about monitored in the structured sense. Paul Myers, once I started working for him, I started calling him LaMonte Cranston, he was like a shadow, I couldn't shake him.

Q Would it be fair to say you didn't know you were being monitored?

A Not in a checklist format, no.

Q And you met with Myers and Harvey Borgen, who is Harvey

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Borgen?

A He was the west coast fleet manager.

Q At this meeting in October, was the subject of your emotional health discussed, the subject of AA discussed, the subject of drinking discussed?

A Not particularly, no. It was a 20 year congratulatory 20 year survivors award for me, I guess, luncheon.

Q In February of 1989 you attend a conference in Dallas, radio school?

A It was a radio school, yeah.

Q And you were there for three weeks?

A Yes.

Q And you attended Alcoholics Anonymous meetings in Dallas during that three week period?

A Well, I looked into it, and they had a little different deal, they have clubhouses where you just go in there and drink coffee, basically, that was their version of it. No meetings per se.

Q Did you go to three different gatherings?

A Well, they weren't really gatherings, and there is people there coming and going. I looked them up in the phone book and attended, yeah.

Q What's a closed meeting?

A Ostensibly it's for – it's a meeting that's not open to the public, although closed meetings are open to the public,

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anybody can walk in.

Q For alcoholics, isn't it?

A People that want to consider themselves alcoholics, I guess, yeah.

Q How do you introduce yourself at the beginning of the closed meeting. Is there an introduction that goes around?

A No.

Q People don't stand up and say hi, my name is Joe Smith and I'm an alcoholic?

A Only the speaker.

Q Was the Dallas AA meeting one or two or three times you attended, gatherings, AA gatherings in Dallas, the last time you went to AA?

A Best I can recollect, yeah.

Q I want to talk about the so called launch incident, and I only use that so we can focus our attention on the subject so we know what we're talking about.

About when did this situation occur?

A It was – we had come up from discharging down in Long Beach and San Pedro, split discharge, and we headed up to San Francisco, anchored. We had about one lighter left in there. So the Galveston come alongside, it was in March 13th, 14th, somewhere around there, 1989.

Q Of 1989. So this is about two, two-and-a-half weeks before the Valdez incident?

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A No, later, maybe the 18, 17, 18. It was the trip south before the –

Q Before going north, before the fateful voyage?

A You got it.

Q You went ashore at had dinner that night at a restaurant called Viva?

A The best I can recall I went up to Viva, North Beach.

Q And you had wine with dinner?

A Yeah.

Q And you were alone?

A At that time, yeah.

Q When you drank the wine you were alone?

A Yeah, at dinner, yeah.

Q And you got on a launch at some point later on that evening to go back to the Valdez?

A Yeah, the midnight boat, 11:30.

Q Was a Mary Williamson on that boat?

A I believe I saw her and a number of other people, yeah.

Q Did you talk at all with Ms. Williamson?

A A little bit on the launch landing, a little bit on the launch, yeah.

Q Did you talk at all with Ms. Williamson about her captain, Captain Reeder?

A In passing I just said, how is he doing. She said, all right. I think she mentioned he had his son with him for a few

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days riding up and down the bay.

Q Did you say anything disparaging of Captain Reeder on the launch?

A Not particularly. I didn't really recall talking to her much about him at all.

Q How was your demeanor on the launch? Would you say it was restrained, jovial, boisterous?

A I don't know, you got to shout to be heard, open exhaust – that launch was an open exhaust launch. You couldn't hear yourself think.

Q Now at some point you get back to the Valdez and you call Captain Reeder on the radio?

A Yeah.

Q And what do you say to Captain Reeder?

A Well, prior to that I received notification that the Coast Guard was going to pay me a visit in the morning, and we, at that point we had been modernized enough to where we had cell phones, so I called up the Coast Guard inspection office, the night number to find out what all this was about, because supposedly we were going to be issued a citation for something we had done in San Francisco Bay, and we had only been there for about 12 hours, and I wanted to know what hell was going on.

And the Coast Guard man there checked his notes and he said a commander would be coming out first thing in the morning to

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either issue us a citation or discuss the issuance of a citation for disabling the main engine in San Francisco Bay, which you have to report that and have tug boats in attendance. And I inquired further of him, and he says well – I said the main engine on the ship, since we've been here today, has never been disabled. We did have a tug in attendance when we were doing some engine work for about 20 minutes in case the main engine were to

be disabled. And I said, where did you receive this information. And he said, we received it from the master of the Exxon Galveston.

And I had taken it in the shorts for Captain Reeder in 1977, and at that time I told him I wasn't going to be so demure if he tried to pull some stunt again. And I went – I used some language that probably wasn't appropriate for 30 seconds and then we got about our business and he let go.

Q What inappropriate language did you use?

A Same words you used yesterday.

Q Those weren't my words then, were they?

A Well, no.

Q Douche bag?

A It was a stream of consciousness.

Q Scum bag?

A Yeah.

Q In fact, you used words worse than those, didn't you?

A Well, yeah. I know most of them, yeah.

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Q Would you describe that as an unusual radio communication, or for you is that just a regular radio communication?

A No, I don't think I've ever done that before or since.

Q It's unusual conduct, isn't it?

A Well, the circumstances called for unusual conduct.

Q I need to find my next stack. My handwriting isn't good enough to write these out in an outline, so I just rip all these pages apart.

This incident that we've just talked about where you talked to Captain Reeder over the phone, let's focus from the time when you got to the west coast to the Valdez up to that point in time?

A Okay.

Q Isn't it true, captain, that you have no knowledge that you were allegedly being monitored specifically for alcohol use by either Mr. Myers or Mr. Borgen at any time between 1987 and the grounding of the Exxon Valdez?

A With the exception of a lot of contact with Mr. Myers, which I thought was odd, then again I don't know Mr. Myers, I had no specific knowledge that there was a monitoring program in place specifically designed for me, no.

Q Would it be fair to say that when you've been asked that question before you didn't raise Mr. Myers?

A Maybe. I'd have to – probably not.

Q Sir, can you find a document in front of you that has on

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it, a sticker that has number 127, and it looks like this.

A Yeah, I got it. Okay, yeah.

Q Exhibit 127 has been pre-admitted. It's a document that was taken off of the Exxon Valdez after the grounding. We only have terrible copies of

127, but I'm going to pull up the first paragraph or two and see if we can see it any better. What is Exhibit 127?

A It was a list of joints in San Francisco that was compiled, as I was told, by a law student who was in the Navy at the taxpayer's expense, and he compiled this while getting his law degree, he's now working for the justice department. He was a classmate of Ms. Haven's who is a third assistant, second assistant on the Valdez, in college they were classmates. He gave it to her. She distributed a bunch of copies on the ship.

Q Do you recall when you came into possession of yours?

A She had a bunch of copies, I would say, in summer or fall of '88.

Q So would it be fair to say from either the summer or fall of '88 through the grounding there was a copy of exhibit, plaintiffs' Exhibit 127 either in your office aboard the Valdez or in your stateroom, bedroom?

A Yeah, it was kicking around with a bunch of stuff.

Q Were you ever aware of the fact that Steve Day talked to Paul Myers about this Mary Williamson, Captain Reeder passage?

A Not that I'm aware of, no.

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Q And from the time of the Reeder telephone call, you spent the next three days with Paul Myers on the vessel trying to fix the turbocharger?

A More or less, yes. We went out and had a couple false starts, came back and anchored it, and redid it two or three times.

Q And in those three days, and those were the two or three days after your telephone conversation?

A Walkie-talkie, yeah.

Q The subject of either Mary Williamson and her statements about coming over on the launch, or the Captain Reeder telephone conversation never came up between you and Mr. Myers?

A Well, he was living on the ship, and the Galveston never come back alongside, so I don't know – no, didn't. Not with me and Mr. Myers, no.

Q I'm going to read you a list of names of Exxon employees, and ask you whether from the time you got out of South Oaks until the time you left San Francisco for the faithful voyage you drank with them?

A Okay.

Q Carlos Hogan?

A Oh, yeah.

Q Nate Carr?

A Uh-huh.

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Q Mr. Cousins?

A Yeah.

Q Brian Dengel?

A Yes, sir.

Q Kevin Dick?

A Yeah.

Q Patrick Enright?

A Uh-huh.

Q Kathy Haven?

A Uh-huh.

Q Charles Kimtis?

A Yes.

Q James Kunkel?

A Yes.

Q Kunkel is a yes?

A Yes.

Q Joel Roberson?

A Yes.

Q Thomas St. Pierre?

A Yes.

Q Captain Stalzer?

A Yes.

Q Robert Sturgis?

A Oh, yeah, yes.

* * *

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Q Well, you've raised the subject of this interview. We're eventually going to get to 4:30 to 6:30 in the afternoon, and when we get to 4:30 or 6:30 you will admit that you had at least three drinks, vodkas?

A Yes.

Q Whether they are singles or doubles we'll get to tomorrow.

And you had, or at least ordered a drink over at the Harbor Club while you were waiting for the pizza?

A And the taxi, yeah.

* * *

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Q One thing I want to go back to the afternoon, just for a second.

Who did you have drinks with at the Pipeline Club? Were they people off the ship?

A Yes.

Q And that was Glowacki and Roberson?

A Yeah. Initially, Mr. Glowacki was in there when I arrived, and then Mr. Roberson came in there later.

Q And your recollection is you had three drinks in the Pipeline Club?

A Yes.

Q And if I was to say that they were in glasses that were about this tall and they were free poured, would you take any disagreement with me on that (indicating)?

A Well, I ordered vodka on the rocks, and they were in a three or four – three inch tumbler glass full of ice, free poured, yes.

Q And vodka up to the top of the glass with the ice?

A Yes.

Q And the drink, when you ordered a drink at the Harbor Club,

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were you with anybody from Exxon Shipping Company?

A I was with Mr. Roberson and I had stepped in, because it was too crowded in the Pizza Palace, and to get out of the weather. And we just didn't feel like standing in this guy's establishment without ordering something. We ordered drinks and Mr. Glowacki ordered a drink, he ordered. Mr. Glowacki was in there with us. The three of us were there together.

Q And that's when he showed you the array of bottles he had on the bar with regard to vodka?

A Yes, it's – I just wanted to twist Mr. Glowacki's tail. He's a Polish immigrant. He doesn't like anything Russian.

Q Alamar is the ship agent?

A Yes.

Q Could you tell me what a ship agent is?

A Generally an agent, or an agency provides support for the vessel when you come in, mail services, if people are sick they will make sure – make an appointment with a doctor. If you need to order parts or supplies, you go through them. They are your shore representative. In this instance, they are an outside contractor.

Q Have you ever had a drink at the Pipeline Club or the Harbor Club or any drinking establishments in Valdez when any representatives of Alamar were there? Is it out of the question?

A I believe that evening I saw Gretchen Dunkin walked through

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the Pipeline Club, she was there.

Q Did you say hi to her?

A I said hello, yeah.

Q How about on prior occasions?

A Over the years, I would have to say yes.

Q Thank you.

Now at some point between the vessel passing Hinchinbrook and coming in, and the vessel departing 9:10, or about 9:10, did you have any discussion with anybody about ice, ice out off of Columbia Glacier?

A Well, I had discussions with the vessel traffic on the inbound voyage, yeah, because I had to go out of the lanes to avoid the ice.

Q Did you and Murphy ever talk about it, that you recall?

A Prior to sailing, or in the process of letting go the lines, I inquired of him what his knowledge was of the current ice conditions in the Columbia Glacier – the ice out of Columbia Bay, Point Freemantle area into the lanes. He relayed to me that he had overheard a conversation of the Arco Juneau, I believe, on the radio, that it had to divert around the ice earlier in the evening.

Q We talked for a minute yesterday about the four hour rule with regard to drinking.

A Yes.

Q Would you agree with this proposition, that on the evening

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of March 23rd, 1989 you violated the four hour rule?

A Unintentionally, yes.

Q Did you – the answer is yes, I violated the rule?

A Yes, as it turned out.

MR. CHALOS: Your Honor, objection.

THE COURT: What's the objection?

MR. CHALOS: He gave his answer and Mr. O'Neill mischaracterized it.

THE COURT: No, he didn't. The answer was qualified and he asked a followup question, that's okay.

BY MR. O'NEILL:

Q Would it be fair to say that both with regard to your first vessel assignment on the Exxon Philadelphia, and your last vessel assignment on the Exxon Valdez, that you violated Exxon's alcohol policy?

A Yes.

Q Now when you got back to the vessel, it was about 8:40?

A Approximately, yes.

Q And the pilot was there?

A Yes.

Q And you got ready to go?

A Uh-huh.

Q Are you aware at all – this is going to be a diversion into the so-called six on/six off rule, which really isn't a six on/six off rule, it's Statute 8104. Have you ever had any

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discussions about that?

A I've seen – yeah, over the years, yeah.

Q And let me see if I can state it right, because I may not have stated it right in my opening, you help me with that and we'll get it right.

When a vessel is going to leave port, like the Port of Valdez, if an officer is going to stand a watch, he has to have had six hours off duty in the prior 12 hours?

A Yes, exclusive of – there are some qualifications to that, including mooring and unmooring. That can be within that six hours. Six hours off duty prior to assuming on his own a bridge watch exclusive of a pilot or anybody else that's sailing a normal bridge watch.

Q Had you ever sailed on an Exxon vessel in a situation in which none of the deck officers had six hours off in the 12 hours immediately preceding the sailing?

A I'm sure I have at some point in my seagoing career, yes.

Q Are you aware of any specific policies or procedures that Exxon Shipping Company had whereby mates were required to report to the master before sailing how many hours off duty they had in the 12 hours immediately preceding the sailing? Was there a policy in place for you to check this six on and six off – I guess six on/six off rule?

A What's the six on part?

Q I'm sorry, the requirement that we're talking about?

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A Yeah.

Q Was there a policy in place for that?

A You mean prior to sailing, head count, how many hours have you had off?

Q Yeah.

A Not a formalized policy, no.

Q When you left the dock in Valdez, did you know at that point in time whether there was a violation of 8104 or not?

A I assumed there was not because it was an easy load. There was no topping off of tanks, which require extra mates around. It was a light load, if you can use that expression, she wasn't filled up, so the tanks weren't pressed up, which usually requires you extra manpower to do. Pretty straightforward, one man could have handled the whole load.

Q Would it be fair to say on that evening you did not know the specific amount of rest or off duty time, or off duty time each of the mates had?

A I had no specific recantation of their hours worked or not worked, no.

Q Do you recall any Exxon policy that had the effect or the purpose of making deck officers aware of 8104?

A Not a specific policy that I was aware of, no.

Q Had you ever discussed 8104 with the ship's officers that were on the Valdez that night, Cousins, LeCain or Kunkel?

A The previous trip, yes.

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Q With which one?

A All three of them, and taking corrective action.

Q Could you go to page 1992 of your deposition transcript.

A Yes.

Q And I'm going to read the questions and answers beginning on line 5 of 1992 down to line 25, and you follow and tell me if I read them correctly?

A Yes.

Q At any time before the grounding, do you recall ever having any conversations or discussions with Gregory Cousins regarding that statute. Your answer, the statute per se. The question, or the actual rule that comes out of the statute. Answer, no. Same question for Second Officer LeCain, do you recall any discussions you ever had with him regarding the statute.

Answer, no. Question, have you ever had any discussions regarding that statute with First Officer Kunkel. Answer, not the statute per se. I relieved him on some occasions on different scenarios to have him get some rest. Question, right, but did you ever – you say statute per se. Did you ever have any discussions with First Officer Kunkel regarding the rule of – with the statute. Answer, no.

Were those the questions given and the answers given?

A Yes.

Q While we're on that subject, were there any records that were kept on the ship, time cards, time entries, that would

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allow Exxon Shipping Company to monitor or know with regard to watch officers whether there was any compliance with 8104?

A With the exception of – chief mate would normally – Mr. Kunkel did keep a workbook for his activities on a daily basis. But the second or third mate wouldn't.

Q Was there a formal way for Exxon Shipping Company to know or monitor 8104 because of the ship's records?

A You mean a monthly or weekly submission?

Q Yes. Yeah.

A Not that I'm aware of, no.

* * *

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Q At the time you left the bridge to the Busby Island light, would it be fair to say that you were about two minutes away?

A Two to three. You can look out the window and see it, yeah.

* * *

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Q We're going to play, with the Court's permission, that section where you report back to the VTC, and then we're going to talk about it.

(Audio tape played)

BY MR. O'NEILL:

Q Now, in that transmission you say, we've fetched up hard north – we've fetched up hard around north of Goose Island off

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of Bligh Reef?

A Fetched up hard aground.

Q Around north of Goose Island off Bligh Reef. You weren't near Goose Island, were you?

A We were north of it, but I had Mr. Cousins take a position to find out where we were and where we were aground. Looking at the time, I couldn't believe that we were on Bligh Reef.

Q But you weren't near Goose Island, were you?

A Time-wise we should have been down in that latitude, but I can recall at that time thinking we hit some uncharted object. I couldn't believe we hit Bligh Reef.

Q Would it be fair to say that at the time you phoned this call in then to the Coast Guard you didn't know where you were?

A No, I had a position on the chart, but my mind wouldn't accept the fact that we hit it. I checked Mr. Cousins' position that I ordered him to take, but I wasn't accepting.

Q Would it be fair to say then at the moment that you called the Coast Guard, Mr. Cousins had shown you where you were on the chart but you thought you were someplace else?

A I checked the position myself. My mind still didn't want to accept it.

Q Now in the moments that follow and then the minutes and the hours, do you try to rock the vessel off of the reef?

A No.

Q Did you try at all to rock the vessel off of the reef?

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A I thought about it initially for a couple minutes when I first arrived up there, as any mariner would involved in a grounding. I thought that wouldn't be very prudent.

Q It would be bad judgment?

A In that situation, it wouldn't be the proper thing to do, no, to back her off the reef.

Q Or to rock it off the reef?

A I don't know how you rock a ship off a reef.

Q Okay, you're the captain. I'm going to play, with the Court's permission, another segment of the VTC tape and we're going to talk about what we just talked about now.

(Audio tape played)

BY MR. O'NEILL:

Q Would it be fair to say that at or after 1:00 you've told the Coast Guard that you were trying to extract the vessel from the reef?

A I remember reading those words and hearing them.

Q Did you say them? Do you have any doubt that you said them?

A Nope.

Q Did you see oil boiling up the sides of the ship?

A Both sides, yes.

MR. O'NEILL: I want to ask you about an exhibit that your lawyer is going to use. Can you put the other map up?

BY MR. O'NEILL:

[440]

Q It's Exhibit Number 851, for the record. I just want to establish two things with this chart. Is this where – about where you thought the leading edge of the ice was that evening?

A Well, I know Mr. Blank (ph) and I went around and around with this.

Q We'll fix it however you want me to fix it?

A That's the major concentration of ice I thought roughly indicated by there a silhouette.

Q You're aware that Mr. Cousins places the ice right here?

A No, I'm not. His testimony is – he comports with mine, generally. He's got a leading edge line which doesn't indicate the concentration of ice.

Q Is this his leading edge line?

A It's a leading edge outer limit of some ice, but the concentration he indicated comports with mine.

Q Have we discussed that fairly?

A Reasonably fairly.

Q At some point in time there is a detachment that boards the vessel. Do they come out in a helicopter. The vessel is aground on Bligh Reef and sometime people come aboard?

A About 10 or 11 in the morning, yeah.

Q Do you recall making a statement to a member of the boarding party in response to the question, what's the problem, answer, you're looking at it?

A I remember saying that to – they came out in a boat. It

[441]

was Mr. – Lieutenant Commander Falkenstein, Warrant Officer Delozier, and I believe it was Dan Lawn. I do recall making that statement. I thought it was one of the more absurd questions that's been asked of me. The problem was pretty obvious what was wrong, what the problem was.

* * *

[488]

Q This document, Navigation and Bridge and Organization Manual, was that a document that was on the Valdez?

A Yeah, it was in the required library of publications.

Q Required to be on the vessel?

A Yeah.

Q Were the officers required to read and study and be familiar with this document?

A Yes, they were, and sign off. There is a sign-off sheet

[489]

included.

* * *

[513]

A Uh-huh.

Q Did you, on March 23rd, 1989, go into the Pipeline Club at 1:45 p.m.?

A No.

Q Were you in the Pipeline Club at any time between 1:45 p.m. and 2:45 p.m.?

A No.

Q Did you on that day wear a golf hat?

A No.

Q Did you have a hat with a snap on it that day?

A No.

Q Were you wearing a hat that day?

A Yes.

Q What kind of hat were you wearing?

A Just a black driving cap.

Q A what?

A Driving cap, I think they call them, driving a car.

Q Did that hat have a snap on it?

A No.

Q Captain, how at all are you?

A Six feet.

Q What was your age in March of 1989?

A 42.

[514]

Q Did you wear your beard the same way in 1989 as your beard is today?

A I wore it the same. It was a little less gray then.

Q Captain, did you ever have that beard, as Mrs. Delozier described it, shaved from your chin to your lip?

A No.

Q Has it always been in the same condition, please show the jury, as it is today?

A More or less, yeah.

Q Captain, while we were on Mrs. Delozier and Mrs. Harrison, you heard Mrs. Harrison's testimony to the effect that she and Mrs. Delozier met the day after the grounding and saw your picture on television or in the newspaper, do you remember that?

A Yes.

Q Do you have a recollection of when the first time was your picture appeared in either a newspaper or either on television?

MR. O'NEILL: Objection, foundation.

MR. CHALOS: Your Honor, he can tell me if he remembers when the first time that was.

THE COURT: I'll allow the question.

THE WITNESS: The first time I had any idea that I had been photographed or – was Tuesday or Wednesday following the grounding.

BY MR. CHALOS:

[515]

Q On that Saturday, Captain, had any pictures been taken of you that were published, as far as you knew?

A No, nobody knew what I looked like.

* * *

[564]

A Yes.

MR. CHALOS: Your Honor, I have here copies of plaintiffs' Exhibit 90-A that was admitted into evidence yesterday. With your permission I would like to pass them out to the jury so they can follow along.

THE COURT: Mr. Murtiashaw, do we have that?

THE CLERK: 90-A.

THE COURT: Oh, 90-A.

* * *

[593]

What did you – come around this side, this way so Judge Holland can see as well. Show us where you saw the ice?

A After we were on the 180 heading, we steadied up on the due south heading. Generally this was the outline, this apex in here, and then it trailed off over into this area due south. We were coming down, and

this (indicating) stuck like a thumb into the north bound lane.

Q Pointing to C, now that's where Busby Island was?

A Busby Island and the light was right here. There is a little lob right there.

Q Where is your ship at this time?

A The ship, as I had lined up, would be one mile off the

[594]

light and one mile off this ice right there, Busby Island.

Q So you were shooting between the leading edge and the light, was that your plan?

A Yes.

Q Where was the ship when you were looking at the ice in this situation?

A It was up in here, mile, mile-and-a-half.

Q Where was Bligh Reef light?

A Bligh Reef light was down in here.

Q That was Bligh Reef light?

A The buoy.

Q Yeah, the buoy, I meant. How much room was there, based on what you were seeing, between the leading edge of the ice and Bligh Reef buoy?

A This area here?

Q Yes.

A About two miles.

* * *

Q So your plan at this point when you're talking to Cousins is to shoot between Busby Island light one mile off on your port hand, and one mile from the leading edge of the ice on your starboard hand?

[595]

A Being equidistant between the two.

Q Did you discuss that with Cousins?

A Yes.

Q Did he at that time say to you, Captain, I don't see the ice the same way you see it?

A No, he agreed with my assessment.

Q Did you have – at this time did you tell him that you were thinking about going below?

A Not in the first –

Q At what point in time did you tell Mr. Cousins that you were contemplating going below?

A It was – first I solicited his input and asked him if he thought it looked like a decent maneuver to do or a do able maneuver to do, and if he had any reservations I'd like to hear about that, so I tried to elicit that from my junior officers.

Q This was before you decided to go below?

A Yeah. And he said this is a piece of cake, or words to that effect. And then I leave a moment or two later. I said, do you want to handle it, do you want to do the turn. He says yeah, no problem.

* * *

[597]

Q What orders did you give him before you left?

A I –

Q Well, what I'm asking, did you tell him that you wanted him to come abeam of Busby?

[598]

A Abeam of Busby Island light and alter course to re-enter and come down the southbound lane – or the inbound lane.

Q Did you point to him on the radar –

A On the radar.

Q – visually what you wanted him to do?

A Yes, to Busby Island light, and we both visually looked out the window, you could see it flashing away.

* * *

[610]

Q You had discussed the maneuver that you were planning with Mr. Cousins?

A Twice, yes.

Q You stood at the radar with him for ten minutes discussing the maneuver?

A Yes.

Q You had told Mr. Cousins that you were about to go below?

A Yes.

Q For a few minutes?

A Yes.

Q And did he protest at all when you told him that?

A No, he said fine; said, "I can handle it," or words to that effect.

Q Okay. Now, you said that Mr. Cousins told you that he was comfortable with the situation?

A The initial conference, if you will, that we had, he was comfortable. He saw no problem with the maneuver, and then when I inquired whether he could handle it himself, he had no problem either; either the proposed maneuver or him handling

[611]

the maneuver.

* * *

[614]

Q All right, Captain, why did you leave the bridge?

A At that time, there was no – giving all those factors that I had in mind, there was no pressing need for me to do the maneuver. I had some calculations I was working on that I'd gotten some weather update and there was a storm brewing in the Aleutians. It was heading towards Prince William Sound and I wanted to make sure either we got out and passed in front of the storm enabling us to make a tide window or an area that we were shooting for in Long Beach; or, in the converse, I'd have to stay in Prince William Sound.

* * *

[615]

Q While you were down below, did Mr. Cousins call you?

A Yes.

Q When did he call you?

A As I was sitting at my desk, there's a clock over my desk, he called and said we started – "I've started to alter course" and I looked up and it was – time I predicted we'd be abeam, it wasn't too hard to figure out, it was 55 or 56, you know, just a quick glance at the clock; and it was the right time or the appropriate time that he should be turning.

Q You expected to be called about that time?

A Yes.

Q Now, what – tell me exactly what Mr. Cousins said to you?

A He said, "We're commencing the turn now" and I said, How does it look. And he said, Fine, we may, further on down the road, get into a little bit of ice; but, he said, No problem. I asked him if Mr. LeCain had appeared yet. He said no,

[616]

and I said, Okay, I'll be up in a few minutes.

* * *

[643]

Q Yesterday – I want to turn to another subject.

Yesterday your radio officer, Mr. Roberson testified – or it was the day before – testified that at some point a call came in from Mr. Myers on the MARSAT telephone?

A Uh-huh.

Q You remember that?

A Yes.

Q That was in that time frame when – the 12:30-to-1:00 time frame, as best you remember; is that right?

A Yeah, right in there, because I remember him coming up to the bridge and saying, Paul Myers wants to speak to you in the

[644]

radio shack on the radio.

Q And did you go down below to speak to him in the radio room?

A Momentarily, yeah.

Q How long did you remain in the radio room?

A I – he handed me the phone. Paul said good morning or hi or whatever, and I said – responded, and I think we – I don't know if time was impressed or not, but it seemed like two minutes I was on the phone with him and then I left.

Q You gave him a report as to what happened and what was going on?

A As near as I can recall. I said, Yes, we're aground. I don't know – I think he testified that I said something about the ice or – you know, I really – I don't recall much of what I said to him.

* * *

[697]

Q Now, you testified in response to the questions from Exxon Corporations lawyers, there was some questions about self-identification; do you remember those?

A Yes.

Q And the questions went along the lines of, Don't you want

[698]

to encourage self-identification and if somebody self-identifies, isn't that the kind of behavior that you want to encourage; do you recall that?

A Generally, yeah.

Q You didn't self-identify; did you?

A No. No.

Q You got a call from Exxon Corporation through Captain –

A Pierce.

Q – who said, You have a problem, I think you ought to get some help?

A Or work it out or – yeah.

Q And at the same time, Mr. Graves was reporting – Mr. Graves was investigating instances of drinking prior to you going into South Oaks?

A Judging from the date of that report, yeah.

Q So you didn't self-identify?

A No.

Q You got caught?

A I – I don't know how Captain Pierce came to call me.

Q Now, with regard to self-identification, and this concept of self-identification, do you know as you sat there and testified about it that Exxon Corporation, that it was in Exxon Corporation's interest to say that you had self-identified because it helps them

with regard to their argument that they properly reinstated you in a vessel – you knew that, didn't

[699]

you?

A I'm a little confused now with the –

Q At the time you testified about self-identification –

A Yeah.

Q – it was you and Exxon Corporation, you knew that the concept of self-identification was important to their defense with regard to their reinstating you as a tanker captain; you knew that, didn't you?

A The concept of self- – I didn't think in those terms, no.

Q With regard to this episode of drinking in 1988, the one where you testified that you had ten or 12 drinks –

A Yes.

Q – you were able to drive an automobile after those ten or 12 drinks; weren't you?

A Yes.

Q And you did?

A Yes.

Q And you had the poor judgment to drive an automobile after those ten or 12 drinks; didn't you?

A Yes.

Q And on that same day, would it be fair to say that after you had a number of drinks – three, four, five,

six, seven – at some point in time you had the poor judgment to continue to drink; didn't you?

A Yes.

* * *

[702]

Q Was the treatment as reported to Exxon Corporation, did it include Alcoholics Anonymous?

A Yes.

Q Lectures, seminars, workshops pertaining to alcoholism?

A Yeah.

Q And did they report to Exxon Shipping Company, the Exxon defendants, After discharge Mr. Hazelwood be given a leave of absence to get involved in AA, Alcoholics Anonymous, and aftercare?

A I don't know what they reported to the shipping company.

Q Isn't that what the IDR says?

A But I don't know where that goes. I assumed it went to the medical people.

Q Exxon USA, even higher up the hierarchy; isn't that right?

A Somewhere in the administrative.

Q Thanks. And you went to AA; is that a correct statement?

[703]

A Yes.

Q And you went to the aftercare?

A Some of it, yeah.

Q And then you quit aftercare?

A Yes.

Q And you went to lectures on alcoholism?

A While I was an inpatient, yeah.

Q And this was, as we can see, reported to Exxon USA?

A Somebody there, yeah.

* * *

[707]

Q Plaintiffs' Exhibit 127.

What is 127?

A It's a copy of a bar list for San Francisco, City of San Francisco and a couple of other places.

Q And you had this for a year in your cabin, or just short of a year in your cabin?

A Somewhere around there, yeah.

Q And you call it a bar list?

A Well, it's San Francisco bar list. I can't read the copy too well.

Q Why did you keep it?

A I thought it was pretty well read. It was pretty funny.

Q Did you ever use it?

A No.

Q So you've never been to any of these bars in this bar list?

A Oh, I've been to a couple of them.

Q Are these particularly nice joints that are described in here?

A Some are, some aren't.

* * *

[717]

Q You were asked that question repeatedly at your deposition and you answered repeatedly, I have no specific recollection of ever being monitored?

A Yes. Monitored, yes.

Q And you didn't qualify it in your deposition transcript, did you?

A I probably didn't.

* * *

[733]

Q Now, you describe Mr. Cousins calling you two minutes after you left the bridge to give a report that the vessel had turned? You described that today?

A Yes.

Q Did you describe that to Mr. Delozier?

A I don't know if he asked about it.

Q Here you talk about "I went down to here, I was at my desk, starting to do some papers and I felt a shudder. And the vessel shuddered and I was about to go up to the bridge when the phone rang and he said, 'I believe we're aground'"?

A Yes.

Q Now, I want to talk for a minute, if we could, about your testimony about rocking the – your testimony about after the accident, vessel's –

A Uh-huh.

Q – on the reef after the grounding of the Exxon Valdez?

A Yeah.

Q Okay. And would you agree with the proposition that, if you in fact tried to get the vessel off of the – off of the

[734]

reef, that that would evidence a lack of sound judgment?

A Depends on how you tried to get it off the reef, yeah.

Q My statement's a generally fair statement; isn't it?

A Not really. I mean, it depends upon the procedure you

took. I mean the ship's got to get off the reef eventually. That's –

Q You testified here today that you made the judgment not to get it off the reef?

A Yes. With the ship's engine.

Q That's right.

A That's all I had.

Q That's right. So at the point in time, when you're sitting there with the ship's engine on the reef, it

would be bad judgment to try to extract the ship just using the ship's engine?

A And rudders, yeah.

Q And as you sit here today, it is in your interest to have your testimony be such that at or about the time of the grounding you don't show evidence of bad judgment?

A It's in my interest and against yours, yes.

Q How many times did you tell people that you were trying to extract the vessel from the reef?

A I mention it here in the Delozier interview and I think two transmissions to Commander McCall, one or two.

Q And not only is it mentioned in the Delozier interview –

[735]

can I have page 5 – you mention it in the Delozier interview – could I have the – could you go back two pages?

Pick it up, I think here in the Delozier interview – see if I can call it up. The testimony or the statement given to Mr. Delozier covers the subject right about here?

A Uh-huh.

Q So it's mentioned once to Mr. Delozier?

A Well, a mention is made, yes. I experimented with the rudder and engines for a few minutes.

Q To extract the vessel off of the rock?

A Well, that refers to the initial playing around with the rudder and the engine, yes.

Q Would it be fair to say that what you told Mr. Delozier is consistent with the several transmissions that you made to the Coast Guard with regard to attempts to extract the vessel from the rock?

A No. This was a few minutes when I first arrived up there and I slowly brought the rudder back and basically saw what she was doing.

Q How many times did you tell the Coast Guard you tried to extract the vessel from the rock?

A As I recall, it was – this response here, which was when I first arrived on the bridge and the two transmissions.

Q So we have three different statements to the Coast Guard that you tried to extract the vessel from the rock?

[736]

A Three statements, yeah.

Q They're all along that line and your testimony here today is contrary to the sum and substance of those statements?

A To the statements, yes. As well as my actions.

* * *

[751]

Q And you say we fetched up a hard ground – hard aground north of, uh, Goose Island, off Bligh Reef?

A Yes.

Q In point of fact, you weren't near Goose Island?

A I think you asked this yesterday. We went through this whole thing.

Q I understand that I asked it yesterday, but you – you – you testified at great length with regard to all of the care that went on during the voyage. I want to go through this transcript to show that care didn't happen during the voyage.

A Very well.

Q And you weren't near Goose Island at all; were you?

A No, we were north of it.

Q And you didn't know where you were, did you?

A I couldn't believe where we were.

* * *

[757]

Q And you deny that you're an alcoholic?

A I don't consider myself one, no.

Q And we agree that we've had various versions from you on drinking in Valdez?

A Different versions, yes.

Q And we've had different versions from you –

A At different times and different circumstances.

Q That's right. We've had different versions at different times in different circumstances?

A Certainly.

Q So sort of the theory of relative truth; isn't it?

A No.

Q And with regard to the Paul Myers incidents and whether you told Mr. Myers that you had been drinking or not, would you agree that we've had different versions of that story?

A I would have to agree there have been different versions, but the conversation that we had was really part of a six-hour meeting, really. It wasn't a big issue.

Q We are clear on the fact that, specifically speaking, you were never told not to drink by Exxon Corporation?

A That's correct, yes.

* * *

[758]

Q You were never told – nobody ever inquired about your AA or your aftercare?

A Not specifically, no.

* * *

[766]

Q Okay. Then he says, Okay, all right. When you arrived on the bridge, did you – did you do anything at that time? And you say, I was – I tried to rudder and engines for a few

minutes to see if we could extract it from the situation,, but then –

Now, is that exactly what you did?

A Essentially, yes. I tried using the rudder and engines in the first two or three minutes I was up there and returned the rudder to midship and shut the engine down.

Q Then you say, But then I got my faculties about me. I was a little upset of course, but then I thought about it and driving her off might not be the best way to go because it just exasperates – exacerbate the damage, so I just stopped the engines.

A Yes.

[767]

Q That's what you told him about that, isn't it?

A That's all part and parcel of the same –

Q And isn't that exactly what you told us today?

A Essentially, yes.

Q And isn't that exactly what you did?

A Yes.

* * *

[769]

DIRECT EXAMINATION OF SIVANCHANDRA
VALLURY, M.D. (Read)

BY MR. GERRY:

Q Could you state your full name and residential address for the record, please, Doctor?

A My name is Sivachandra, S-I-V-A-C-H-A-N-D-R-A, middle initial M. as in Mary, Vallury, V-A-L-L-U-R-Y. I reside at 268 Bayview, B-A-Y-V-I-E-W Avenue, Massapequa, Zip 11758.

Q And by whom are you currently employed, Doctor?

[770]

A South Oaks Hospital and I'm also in private practice.

Q What type of private practice do you have?

A Individual and I also work as a senior psychiatrist at South Oaks Hospital.

Q Individual practice, you are referring to a psychiatric practice?

A That's correct.

Q Where you see patients?

A Right.

* * *

[774]

Q Is it your normal practice to provide a diagnosis when you

[775]

first meet a patient?

A Yes. If I might clarify, you had asked about the dysthymic disorder, the alcohol abuse episodic. If I might clarify, to me in treating a patient, it's not that significant, but in a statistical fashion or in the order, it's a primary dysthymic disorder and the secondary comes in as alcohol abuse episodic.

Q Now, what do you mean by primary?

A That is if a patient come in – comes in that, let's say features with dysthymia and also with alcohol, you put it in that order, depending on how the history evolved also or what was showing at that time. There are differences between a dysthymic disorder and let's say a major depression or schizophrenic. They have different connotations, so even if this went to another one of my colleagues, we might see it differently but the treatment really

doesn't differ; you address both situations simultaneously.

* * *

[777]

Q You don't tell them you have to be alcohol-free for your whole life, you say, Let's do it one day at a time?

A That we do. I do tell them.

Q You do?

A Yes. Once an alcoholic, always an alcoholic. Not in a demeaning sense, but that is the nature of the beast.

Q So it was your view, then, that Captain Hazelwood should remain alcohol-free for the rest of his life on discharge?

A Yes. I am talking generally. That, again, what I generally practiced, would apply to him logically. Again specifically what I said to him at that time, I don't recall.

Q What do you generally practice, then?

A A lifetime of abstinence from alcohol.

Q When you use the term sobriety, what do you mean in the context of treatment of a patient?

A That is – again, I can only speak for myself. Sobriety is somebody who is abstinent from alcohol.

* * *

[779]

Q What about the typed numbers opposite the diagnosis?

A This would be typed in by our medical records because, again, we don't spell out the diagnosis because we don't know whose desk this is going to lie on. This is the DSM-III, as it is set. So anybody who receives it, the medical department or whoever, then looks at the DSM-III and then collates the numbers to a diagnosis.

Q These numbers are taken from the DSM-III, then?

A Right.

Q They correspond to diagnosis?

A Right.

[780]

Q Dysthymic disorder, what number corresponds to that?

A I would say the 300.40, and the alcohol abuse episodic would be 305.02.

* * *

Q The entry below the treatment section says, I believe,

[781]

treatment dates and then it is a little hard to read. Can you read the entry below or the note below that?

A I can surmise. Regular work, presently fit for regular work.

Q The next one?

A The next one is –

Q That is checked no; right?

A That's right. That is checked no. The other one is –

Q Looks like “presently fit for work with restrictions”?

A That's right.

Q That is also checked no?

A That's right.

Q Could you read the entry beneath that? Let me read the print and I'll let you read the handwriting. “If still now not now able, I estimate patient may return to full duty on,” and then it is blank. In the meantime, any restrictions recommended as a result of this disability are –

A It says Mr. Hazelwood will complete our 28-day program. It is recommended, given the nature of his job, that after discharge Mr. Hazelwood be given leave of absence to get involved in AA and aftercare.

Q Just to clarify, my question is whether as of the date that you filled out this form, was it your view that the patient could not control – return to his work as of that date? Do you understand my question?

[782]

A Yes. And no in the sense that he couldn't return to work as of that date, but also into a little past that date, or into the future. So that he could be given a leave of absence to get involved in AA and aftercare, so not only at the writing, but also for the future, past that writing that he shouldn't return.

Q So based on this form, when do you think he should have returned to work?

A The reason why I qualified it so I wouldn't get into the question of saying when he would get back to work, that as of that date and into the future and then, as I said in my previous testimony, that all this is evaluated on an on going basis.

Now, hypothetically – and this is totally away from it, if he was drinking and falling down all over the place, he wouldn't be going back to work, so it belongs in that category. It has to be evaluated over time. There is no exact spot.

Q Based on this document and your recommendation, Doctor, was it your view that the captain could return to work as of this date of the discharge from inpatient treatment?

A No.

* * *

[784]

DIRECT EXAMINATION OF LLOYD LECAIN
(Read)

BY MS. WAGNER:

Q Please state your full name and home address?

A Lloyd LeCain, 416, Evesham Place, Longwood, Florida.

Q What is your present employment today?

A I'm selling real estate. I'm not with Exxon anymore.

Q How long have you not been with Exxon?

A About four or five months.

Q What were the circumstances of your leaving Exxon?

A I have post-traumatic stress disorder and I was retired from Exxon.

Q You have the disorder from the accident?

A That's correct.

* * *

[785]

Q And then what did you do?

A I went to work for Exxon. I went to work as an A-B. They didn't have any third mates jobs available at the time. There was a shipping slump during the '70s and after 14 days, I got promoted to third mate and I sailed as third mate until I got my second mate's license; and as soon as I got any second mate's license, I sailed second mate and I continued to sail second mate.

Q What year did you start working as a second mate with Exxon, approximately?

A I would say '77, somewhere around there.

Q So you worked about five years as a third mate?

A Uh-huh.

Q And then from '77 on through the grounding, you were working as a second mate?

A That's correct.

* * *

[800]

Q Was there any procedure that Exxon employed in connection

with reporting anyone you saw drinking aboard a vessel or the like?

A No.

Q You said before you joined the Exxon Valdez in August, 1988. Was Cousins aboard at that time?

A No, I'm talking about the fateful trip, the last trip.

Q And that was the only trip that you sailed with Cousins?

A Right.

Q Where were you at the time of the grounding? Were you asleep?

A Uh-huh. Excuse me, I was in bed, yes.

Q Can you take us from there to – take us from there to what happened and what duties you're assigned and so forth. Where did you go when you first learned of it, how did you find out about it?

A What happened was I was lying in bed and I felt the ship – I felt this feeling of like going aground. It is a unique feeling for seamen. You know what it is. Like a slight vibrations, all right. At that point I saw lights coming on through the window on deck and I got out of bed and I looked and then the chief mate opened the door and said, Lloyd, we're screwed. This is very bad.

[801]

Q That was Kunkel?

A Kunkel, yeah. So I changed the words. So at that point, I went up to the bridge and looked at what happened and then I went down and assisted the chief mate and we just – well, we got out our

hose lightering. I put the anchor down during this period.

Q Where did you go from the bridge, what location?

A I'll give it to you short. I went right to the control room where Mr. Kunkel was. We took a look at what was going on with the cargo going out of the ship.

Q At what rate was it going out of the ship?

A I don't know. It was just very fast, from what we could tell.

Q Very fast. You previously testified to that and used that. Now you say from "what we could tell." What gauge were you looking at?

A We were looking at the u-l-l-a-g-e gauge. They're digital and there is – we have digital and there was another type of gauge there. It was just really spinning by there.

Q Could you tell from what tanks this was coming from on the vessel?

A The chief officer was doing that. I was just in there looking, sort of shaking my head.

Q Did Kunkel say anything to you about the rate at which the oil was leaving the vessel?

[802]

A Not that I recall. We sort – we sort of looked at each other and said, wow.

Q The gauges were moving constantly were they, do you recall testifying to that?

A Yes, uh-huh.

Q And how long did you stay in the cargo control room?

A A couple minutes, then I sort of went around the ship seeing what was going on. We had, as you can imagine with a disaster, there are all sorts of things going on. People were opening up soundings, seeing where the oil was, the water was.

Q Just a second. You said you went around the ship. Did you look and see oil in the water around the ship?

A Yes.

Q Was there a lot of oil in the water?

A From what I could tell, yes.

Q When you went around the ship as you described, after you – you were in the cargo control room, could you smell fumes from the oil?

A Yes.

Q Did you have any fear of fire?

A Of course. I mean, it was – we didn't know how badly we were hurt.

Q Do you recall testifying at the NTSB that you had a concern for the danger of fire or explosion and there was oil all around the ship?

[803]

A Well, that's what I'm saying. We had a concern about the fire. Because – about fire, because of all the oil that was in the water. An explosion, yes, because the Coast Guard brought a little boat up alongside with an inboard-outboard engine and we were afraid of them sucking the oil into the engine and that would cause an explosion.

Q Did the situation with the oil around the ship and the fumes you've described continue throughout the next day of March 24?

A I can't recall. It was there. But the oil was gone in a couple hours. We had stopped losing oil at that point.

Q And you no longer saw oil around the ship?

A We saw oil around the ship, but we weren't losing it the way we were. Some of it went with the tide. Let's face it, Prince William Sound was full of oil, everywhere.

Q What about the fumes? Say about 3:00 in the morning, a few hours after, was there still the presence of fumes around?

A Yes. On deck.

Q Did you have any concern about the stability of the vessel after you went in the cargo control room and you saw how fast the oil was coming out?

A Certainly.

* * *

[824]

CROSS EXAMINATION OF JAMES R. KUNKEL
BY MR. MONTAGUE:

* * *

[825]

Q You have been with Exxon since 1979; is that correct?

A 1979, yes.

Q Okay. And you were employed by Exxon on March 23 and March 24 of 1989?

A Yes, I was.

Q And on March 23, 1989, you were serving as the chief mate on the Exxon Valdez?

A Yes.

* * *

[839]

Q Now, are you familiar with the federal statute which requires an officer being off duty for six of the 12 hours prior to his taking a watch while departing a port?

A Yes.

Q And on the night of the 23rd, you did not meet that requirement; isn't that correct?

A Well, I don't know what you're saying I didn't meet that requirement. See, because I – I didn't really go on watch.

Q I understand, that's a good point. What I'm saying is, at the time of departure, you hadn't had six hours off duty in the prior twelve hours?

A I wouldn't say that. I definitely had the opportunity to have six hours off, twelve hours prior to the ship sailing.

Q All right, well we'll go over that in a minute, then. See where we end up.

A All right.

Q Do you recall that most of the time you were not able to take six hours off within the twelve hours before leaving port?

[840]

A There was a number – in my experience as chief mate, which up to the Valdez, I guess would be anywheres from five to six years, there were many, many occasions when I did not have six of the previous twelve hours off.

Q Now, let's go to the – well, let me ask one other question. Prior to the grounding, you did not receive any directions from Exxon Valdez about complying with that statute?

A Now, wait a minute, from Exxon Valdez.

Q I'm sorry, from Exxon, I beg your pardon. I misspoke.

Prior to the grounding, you never received any directions from Exxon about complying with that statute; is that correct? From on shore?

A Well, not that I can recall that specific statute, but we had definite guidelines from Exxon to observe all government statutes and regulations, but more importantly, that's what my license is all about. It's my job to comply with rules and regulations of the United States Coast Guard and the U.S.

Courts. Secondary comes Exxon.

Q All right, and if somebody doesn't comply with that, then you're not doing your job; is that correct?

A If someone doesn't comply with that and they do actually take the watch, then I'm not doing my job.

Q Right, and is there any procedure in such instances where Exxon – that Exxon set up so that they would know that that existed?

[841]

A I don't know if there was any procedures where I was supposed to report it, but there were guidelines on how to handle it.

Q My question is, was there any way for Exxon to know that? Had they set up any methodology or modus operandi so they could determine if the mates such as you and the mates under you were complying? There wasn't?

A I'm not aware of a reporting procedure, no.

Q And there were no overtime records kept by the mates; isn't that correct? So there was nothing to look at?

A That's correct.

**

[875]

Q Now, one last point and then I'll be done with Mr. Kunkel. When you first joined the Valdez, the Exxon Valdez in September of 1988, you were waiting for a launch to get to the vessel? Do you remember that?

A Okay, this is 1988?

Q Yeah, September.

A Uh-huh.

Q 1988?

A Uh-huh, that's correct.

Q And you met Captain Hazelwood at the launch?

A I think I met him at the airport.

Q All right.

A I think they drove us together in the van.

Q And while you were waiting for the launch, you had a beer with Captain Hazelwood?

A That's correct.

Q And that was while you were waiting at the launch to go to the Exxon Valdez?

A Yes.

Q And to report to duty?

A Yes.

* * *

[902]

Q Okay. You were on the bridge about 2100, that's 9:00?

A Yes.

Q And sometime before that? Little before that?

A Yes.

Q Did you see Captain Hazelwood come up to the bridge?

A Yes.

Q Did he speak to you at that time?

[903]

A Yes.

Q Were you close to him?

A No.

Q Did you observe him walking on the bridge?

A Yes.

Q How would you describe his movements?

A Normal.

Q Did you at that time see any signs of impairment on Captain Hazelwood?

A No.

Q Did you see any signs of intoxication?

A No.

Q Now you were on the bridge during the undocking process?

A Yes.

Q Was Captain Hazelwood on the bridge during that period?

A Yes.

Q During that undocking process, did you hear Captain Hazelwood giving orders?

A Over the radio, yes.

Q Did you have a chance to observe Captain Hazelwood?

A Yes.

Q Were his orders proper and appropriate for that – for the undocking?

A Yes.

Q Did you happen to hear his voice?

[904]

A Yes.

Q Were his words slurred in any way?

A No.

Q Did he appear to you to be impaired during that process?

A During the undocking process.

Q Yes.

A No.

Q Did he appear to you to be intoxicated?

A No.

* * *

[908]

Q Now Mr. Kunkel, you testified that sometime around 12:30 after you had gone down to your cargo control room and gotten some figures you came up and spoke with Captain Hazelwood?

A Yes.

Q Do you remember that? How close were you to Captain

[909]

Hazelwood at the time?

A Very close, within three feet.

Q How much time did you spend with him?

A No more than five minutes, I would say.

Q During that period of time, did you have a chance to observe his demeanor?

A Yes.

Q You observed – strike that.

Did you smell any alcohol on his breath at that time?

A No.

Q Was he slurring his words when he spoke to you?

A No.

Q Did he at all appear to you to be impaired or intoxicated?

A No.

Q Did he look to you to be the same as you had seen him the day before?

A Yes.

Q When I say “the day before”, I’m talking about March 22nd when you were coming into Valdez?

A Yes.

* * *

[936]

DIRECT EXAMINATION OF DAVID DINGES,
Ph.D.

BY MR. GERRY:

Q Dr. Dinges, we’ve asked you to come here today and asked you to consult with us before about the topic of fatigue; is that correct?

A That’s correct.

Q And could you – I have your resume before me and I’d like to go – it’s pretty thick I’d like to go through it as fast as we can so that we can get to the meat of your testimony.

What do you do at the present time?

A I’m a faculty member at the University of Pennsylvania School of Medicine, and a scientist that directs the laboratory.

* * *

[948]

Q And you've heard the testimony that they were broken into two watches a day, four hours in each watch. Were there other duties, however, that they had besides the watch duties?

A There were other duties, yes.

Q What were they?

A Well, Captain Kunkel referred to some of them I think in one of his answers, but my understanding of them from the deposition record is that the mates, in addition to standing their two four-hour watches each day had additional jobs that they were supposed to do as part of their responsibilities.

The second mate, for example, Mr. LeCain, was responsible for the navigation equipment and the charts. He also had responsibility for the stores, the food supplies of the steward's department.

The third mate was responsible for safety equipment, updating the manuals and a considerable amount of paperwork.

And the chief mate, as we heard, was responsible for loading and unloading at port and for maintenance of equipment on deck.

Q From the materials that you've read, have you determined the approximate workday at sea for each of these mates?

A It was clear in the record each mate indicated that 11 to 13 hours, or an average of 12 hours a day was a typical workday

[949]

for them.

Q And now did you have access to any overtime records for these people?

A There was no overtime record keeping that I was aware of in any of the materials I reviewed.

Q And did you hear the master speak about the developments that went on that did away with the overtime records?

A I heard the testimony, yes.

Q I'll show you, sir, plaintiffs' Exhibit 215. And does this exhibit demonstrate what you discovered in your research into the background of the company and its treatment of the mates?

A Yes.

Q So that by 1983, the mates were no longer in a union, they had been declared management and been put on merit salary; is that right?

A Yes.

Q Once they were on merit salary, was overtime – were overtime records done away with?

A There was no overtime record keeping once the mates became a part of merit salary.

Q They received a pay increment that was supposed to reimburse them for the loss of overtime; did they not?

A That was my understanding from the record, yes.

Q Besides the pay increment that they had, was there a ranking system that was used to rank the mates?

[950]

A Yes, it was – there were performance assessments done and they were – were ranked then, within the fleet, as to where they stood relative to other mates.

Q And if they were at the top of the rankings, did they at times receive bonus for their good positions in the rankings?

A The record indicated that was possible, yes.

Q Can you tell us whether or not their willingness to work hours outside their regular watches was part of the assessment on the ranking system and the bonus awards?

A One of the items on the evaluation sheets for the mates indicates willingness to accept additional duties and undertake additional work.

Q Now, you – did you also check to determine whether besides the watches that they stood and the – and the other systems, that there were other things aboard the vessel.

MR. LYNCH: Could I ask Mr. Gerry just identify what he's going to show the jury before it's –

BY MR. GERRY:

Q I'm going to show you number 216, sir, and ask you if those were items that you identified which would also interrupt the ability of the mates to sleep or cause them to be unable to rest at other periods when they would otherwise be off duty?

A Yes.

Q And so all the mates were called out to tie up or let go; right?

[951]

A Yes.

Q The chief mate had to get some other mates, mate or mates to help him top off cargo?

A Yes.

Q Meal times were fixed, what's that mean?

A Well, if a mate was off duty and the mate that was on duty had to take a meal time, then the mate that was off duty had to be called to relieve that mate and then also had to take their meal time. In other words, you didn't – the meals were served at specific times, and if you slept through them you missed them, but you also had to be available to relieve whoever was on watch for the meals.

Q So if you were the second mate on the 12 to 4 watch for the evening meal, you couldn't get it right after watch, you had to wait?

A Yes.

Q And if you were the – all right, when sailing north, all hands had to be present for the weekly fire and boat drill?

A Yes.

Q When sailing northbound in ballast, sleeping was difficult especially when the vessel was riding in the trough?

A Yes.

Q They still had the time off?

A I don't know what time you're referring to.

Q When they were in the bed, but you're saying their sleep

[952]

was disrupted?

A Well, you have to take into account that in any environment where someone's working, that if they have an opportunity to sleep and they take that opportunity, that in and of itself doesn't guarantee they will get the sleep. Obviously the environment in which they sleep is important so that if you're working in a job where it's very, very hot, when you try to sleep or where there's a lot of movement of a vessel, that can disturb sleep and so you can – you can actually have less sleep than you had opportunity for sleep because of that environment.

Q And are there reports in the literature about 40 foot seas in Alaskan waters, interfering with the sleep of the mates or other persons aboard the vessel?

A I'm aware of one federal transportation report that indicated sleep disturbance from heavy seas in the Valdez trades was common, yes.

Q Now sir, does the federal government pass rules and regulations in the transportation industry to attempt to avoid fatigue on the part of persons engaging in those industry, in that industry?

A Yes.

Q For example, in aviation, are there rules as to the duration of times that pilots may fly and the number of hours that they can put in in the course of a month?

[953]

A Yes.

MR. LYNCH: Your Honor, I have an objection to this line of inquiry. It involves substantial issues

of comparability, and I suggested to Mr. Murtiashaw that this might be a matter we could take up with you at the side bar. .

(Bench Conference off the Record)

BY MR. GERRY:

Q And Dr. Dinges, is there also a statute in the shipping industry, 46 USC 8014(a), which attempts to regulate the time and eliminate the fatigue of mates in the industry?

A Yes.

MR. GERRY: And I'd – could I have the Elmo, please?

MR. LYNCH: Could I take a look at that.

MR. GERRY: Yes.

BY MR. GERRY:

Q This is – this is 8104(a) of the federal statutes, 46 USC 8104(a) and could you read that to us, doctor?

A You want the 8104(a) read?

Q Right.

A An owner, charterer, managing operator, master, individual in charge, or other person having authority may permit an officer to take charge of the deck watch of a vessel when leaving or immediately after leaving port only if the officer has been off duty for at least six hours within the twelve hours immediately before the time of leaving.

[954]

Q Did we ask you to, in your research into the documents that we'd given you, to determine whether or not the mates had six hours rest within

the last twelve hours prior to the vessel leaving the Port of Valdez on the fateful voyage.

A No, you didn't ask me to do that.

Q What did we ask you to do?

A You asked me to evaluate whether or not the mates had at least six hours off duty during the twelve hours immediately prior to the vessel leaving port.

Q Okay, I misspoke myself and used the word rest; right?

A That's correct.

Q And you won't accept that?

A No, I will not.

Q Because that isn't what the statute says?

A That's correct.

Q So the question is, duty or off duty, not whether they have rest or anything else?

A Off duty is the term.

Q All right, and we did ask you to determine whether or not these mates fell – on which side of the line these mates fell; right?

A Yes.

Q And did you make a determination as to whether any of them had six hours off before the 12, that's 2112 p.m. on the date of sailing, March 23, 1989?

[955]

A Yes, I made that determination.

Q What was your determination?

A My determination was neither the chief mate nor the second mate nor the third mate had received six hours off duty in the twelve hours immediately prior to leaving the port.

Q What documents did you derive that opinion?

A The primary documents for me were their depositions. In addition, however, because there were some questions regarding specific times not asked in the depositions, I looked at their NTSB testimonies.

Q And did we then together make up a board to show all of this?

A We did.

MR. GERRY: Whether or not we can get this big monster in here, I don't know. We're going to try. I told them I didn't know if this would work.

MR. TODEY: I feel just like Vanna White.

THE COURT: You don't look like her.

MR. GERRY: Stipulated, Your Honor. We all agree to that. I think that's about the best we can do with that.

THE COURT: Lynch, come over here.

MR. LYNCH: Thank you, Your Honor.

MR. GERRY: Can you all see this?

BY MR. GERRY:

Q Now, doctor, you determined from the record that the vessel

[956]

arrived in port at 2335 on the 22nd?

A Yes.

Q And left at 9:12 or 2112 on the 23rd; right?

A Yes.

Q And that it ran aground at about nine minutes after midnight on the 24th?

A Yes.

Q So what we're going to talk about is the period from midnight on the 22nd to midnight on the 23rd; all right?

A Okay.

Q Now, the – could you tell me what the different colors are when we use them on the mates?

A Well, duty is defined by green and red, and I can tell you the difference in a moment, but for now, that's duty. Off duty is defined by white and yellow times.

Q What is the difference between the green on duty and the red on duty?

A The portion of the record that applies to 8104(a), federal statute is the period from 2112, or the time that the Exxon Valdez leaves Valdez dock backwards twelve hours. So from 9:12 in the morning, until 9:12 in the evening is the relevant twelve hour period. To highlight that, the duty periods there have been identified in red, and the rest – or excuse me, the off duty in yellow.

Q So the time that we're really – really interested in in

[957]

the first place is from 9:12 to 2112; right?

A Yes.

Q Now, the depositional testimony of the chief mate had him working from 11 to 1300, and all this used to be red; right?

A Yes.

Q After his testimony this morning, because he reminded us he'd had lunch, we took a half hour off; right?

A That's correct.

Q Then his testimony was that from 1550 to 2000 he stood watch, and then was on the bridge to 2145; right?

A Yes.

Q And if we count backwards, his time on duty is one, two, three, four, five, six, seven hours? Is that it?

A It might be just a little more than seven, but yes, during the relevant twelve hour period.

Q And therefore –

A 6.5.

Q Somebody stole a half hour off of it. The statute requires six hours off before the sailing; right, before leaving port?

A Six hours off duty, yes.

Q Was he off duty the requisite number of hours so that he could have taken the con on sailing from the port?

A He was on duty 6.5 hours, twelve minus 6.5 leaves 5.5. The statute says at least six hours.

Q Let's go to Mr. LeCain. He stood watch and stated that he

[958]

was off at 4:30, he rested this period. At 9:30 he gets up and reads and he works in the steward's department, he's still off work; right? And then at noon he goes to work?

A Well, the work in the steward's department at 9:30 didn't specify time, so I didn't count that as part of the duty time, although to the extent that he worked there, that is duty.

Q And he erased charts, is that part of his duty?

A Yes.

Q We didn't count that against him?

A It was not counted, no.

Q He then went to work at noon, and according to his testimony, worked till five?

A Yes.

Q He worked again from 6 to 6:15, :30, 6:30?

A Yes, again on the charts and navigation equipment is my recollection.

Q Then everybody was called out?

A To let go.

Q And he worked then on up until 10:30?

A Yes.

Q Did he have the requisite six hours rest in the twelve hours?

A No.

Q How about Mr. Cousins? Mr. Cousins was on watch from 8 to 12; right?

[959]

A Yes.

Q Only three of those count against him on the six hour rule?

A Yes.

Q He went to lunch and then did he do something else?

A Yes, he testified that he performed a salinity test and did some paperwork in his stateroom.

Q So now, at various places in his depo, he – did he testify to different amounts of paperwork?

A Yes, he did. He indicated at one point in it was a half hour, and at another point it was 15 minutes.

Q So we gave him the least of that?

A 15, yes.

Q And the salinity test was something that he did for the benefit of the vessel, not for the benefit of himself; right?

A Yes.

Q Part of his duty?

A Yes.

Q All right. Then he turned to – to relieve the chief mate?

A Yes, he relieved the chief mate for supper, for the chief mate's supper.

Q And did he say when he went back to his room, then?

A Well, he was in the cargo control room for some minutes after that, and – but there was some time off suggested in the record before 1800.

[960]

Q Then you heard Mr. Kunkel testify that he called him at 1800 to come down and go to work; right?

A Yes, Mr. Kunkel testified he called him for topping off around 1800.

Q All right. And this gives him 12 minutes to shower and get there; right, that we didn't count, although it's red?

A Yes.

Q And one, two, three, four, five, six, seven and a half; is that correct?

A I'm reluctant to say with you standing in the way, Mr. Gerry.

Q I'm sorry.

A Yes. That's correct.

Q So when Mr. Cousins went on watch at – when the vessel sailed, had Mr. Cousins had the required six hours sleep in the twelve hours before sailing?

A I don't know what sleep he had.

Q I mean had he been off duty. I'm sorry, had he been off duty for six hours in the twelve before sailing?

A No, he had not.

Q And he, in fact, had been off duty only four and a half hours?

A Yes, that's correct.

Q Then, however, after that, he continued on until the vessel ran aground; right?

[961]

A Yes.

Q And that's another three hours?

A Yes.

Q So what was his total time at work or on duty during the time he first started here at 8:00 until the vessel ran aground at nine minutes after midnight?

A About 11 and a half hours.

Q Out of 16?

A Out of 16.

Q So in 16 hours he had 11 and a half hours on and about five off, four and a half off?

A Yes.

MR. LYNCH: Thank you, Your Honor.

BY MR. GERRY:

Q Without overtime record or some record being kept of the mate's time on duty, outside their watch hours, was there any way that Mr. Kunkel, for example, or the master of the Exxon Valdez could keep track of whether or not his mates were in violation of the 8104? I made another mistake; didn't I? Could we have this on?

Now, the mates themselves don't violate the statute; is that correct?

A Statute applies to the owner, charter, managing operator, master, individual in charge.

Q Okay. So that would be the company or the persons they've

[962]

delegated, the master and the first mate, the chief mate, right?

A I would read it as the company and the master. Whether the chief mate qualifies as the individual in charge – I heard the chief mate testify that it is the master who is ultimately in charge.

Q In any event, without any overtime rules or other records, or other records of time off duty or on duty, whichever way they wanted to keep them, would there be any way for that person to have an accurate count of his mates and whether or not they were legal to sail?

A No.

Q If the vessel had remained there at the dock for another hour, then the chief mate would have been legal to sail, take the watch; right?

A It would have been close to it. Probably, yes.

Q If they'd remained – but he – now, did your search of the records reveal whether or not the mates knew about the statute?

A My search did indicate that both the second and third mates were not aware of the statute and could not tell what it referred or what it was.

Q To the extent that the mates were fatigued – let's turn our attention now to Third Mate Cousins.

Did you come to any opinion or conclusion as to whether or

[963]

not Mr. Cousins, at the time of the grounding, was suffering from fatigue or –

A I did.

Q – was fatigued, however you put it?

A I did.

Q And what was your opinion or conclusion?

A My conclusion was that Mr. Cousins suffered from performance impairing fatigue that led to mistakes that led to the grounding.

Q And what items did you take into consideration that would lead up to this? What do you think caused this fatigue?

A Well, to make this kind of an assessment, I needed first to establish what the context was in which Mr. Cousins was performing his duties, and by that, I mean, could we rule out other explanations for why he didn't do some of the things he should have and did other things. And it was clear from the record that Mr. Cousins, at least there was no evidence in the record that he was impaired from drugs or alcohol.

Moreover, he testified in his deposition that he understood his task. He had helped the captain formulate what their – that critical 15 minutes would involve in terms of the vessel. He knew what he was supposed to do, turn abeam of Busby Island light. He thought it was a straightforward maneuver, he didn't think it was beyond his skills,

both his – both the master and the other mates had confidence in him as he had in himself that

[964]

he could do it. So there was every indication in the record that this was not something that was outside at least his perceived range of ability, and hence he accepted it as part of what he could do. So I couldn't explain it away from the standpoint that, well, he didn't really understand or he just was confused about it.

I then looked at to what extent his own statements about the fact that he wasn't fatigued may have played a role in it, but as I've already said, an individual has a very hard time assessing how fatigued they are. This happens especially if you're chronically fatigued, working 12 hour days, for example. It's not that you never know whether you're fatigued but you don't know at the beginning sometimes of a task and if you're a professional, in quotes, and you take your job seriously and you're dedicated to your job and you take the view that you can do it no matter what, that clouds to some extent your ability to know how tired you may be at a given time for a critical task.

I then looked at his records during the day to understand how much fatigue he may have had present. And it was clear that not only did he not have the hours that would qualify his vessel or his company vis-a-vis the federal statute, 8104(a), but that it was likely from his 12 hour work days that he was suffering some cumulative or chronic sleep debt. Finally, I noted that Mr. Cousins testified that in his

[965]

deposition, that he extended his watch into that of the second mate's. This is critical. The critical time prior to that grounding, that 15 minutes prior to nine minutes after midnight, was technically the time the second mate should have been on watch. But because the second mate was tired. Mr. Cousins made the decision to tell the second mate to take his time coming up. And made the decision that he would call him later on. And as we heard Captain Kunkel testify to this morning, he was unaware of that arrangement, and the master, I think, was not entirely aware.

Captain Hazelwood's deposition indicates that he had been told that Cousins was going to allow Mr. LeCain to come up later, but he testified here in this courtroom that when – when Mr. Cousins called him from the bridge moments before that grounding, one of the things he asked him was, was the second mate up yet. So that it appeared that both the master and the chief mate were unaware of an arrangement arbitrarily made by the third mate and second mate regarding something that was very important.

Now, the reason it's important is usually the third mate finishes his watch at ten minutes to midnight, about the time he took that vessel alone on the bridge. That's when he gets ready for bed. And as he testified to the night before, he was asleep by 1:00. So that typically – that's the wind down time and that's the time when biologically, your brain, even –

[966]

whether or not you have a sleep debt you're carrying, is preparing you for sleep.

Most of us go through that every night in a ritual before bed. That's a time when you can have performance impairment from just working that close to a normal sleep time. So the combination of those things led me to conclude that fatigue was definitely present.

Q Was there any record of Mr. Cousins drinking coffee or anything to help him with his sleep problem?

A The record indicated that Mr. Cousins indicated in the record that he typically drank 16 cups of coffee a day. Now, there was not actual depositions material that I saw that talked about how much coffee he had the day of the grounding. And coffee's a double edged sword. It can help you be more alert, but drinking large amounts of it can disturb sleep. And hence, it can actually contribute to a sleep debt problem.

Q And 16 cups of coffee per day, is there any measure of that against caffeine addiction?

A Well, in my report I mention that 16 cups of coffee a day is approximately four times what the Diagnostic and Statistical Manual of the American Psychiatric Association indicates is addiction. I actually meant, and I want to correct the record, intoxication, but roughly a cup of coffee is a hundred to a hundred fifty milligrams of caffeine. I'm talking about caffeinated coffee. Let's split the difference and say 125

[967]

milligrams to a cup. 16 cups of coffee, then, is 2000 milligrams of caffeine a day. At dosages as low as 250 milligrams, one-eighth that you can have

insomnia and disturbed sleep, and there's scientific data for that.

So that – let's assume – we know there are individual differences. Some people can tolerate more of it, metabolize it more quickly with their liver. Let's split the difference. If he's sensitive or very sensitive, if it's eight times of what would be required, it's roughly four times.

Q What kinds of errors do you commonly find made by fatigued persons?

A The errors from being fatigued in the scientific studies that have been done, there are a variety of them, but the primary types of errors are what are referred to as errors of omission or lapses.

Q And in study what happened in the early morning hours of – or the late hours of 3/23 and the early hours of 3/24, how would you characterize the errors that were made by Mr. Cousins?

A I paid especially close attention to this issue of what his errors were, because for me, the most salient point about whether this is fatigue is the nature of his performance in that critical 15 minutes, and I would characterize those errors as fatigue errors.

Q And what were those errors?

[968]

A Well, he had what he described as a fairly straightforward task. It was, first of all, a task that involved attention, monitoring. Why – in general, that is referred to as vigilance. He had to be vigilant and he had to be vigilant to the Busby Island light, that's where he was supposed to turn. He had to be

vigilant to Bligh Reef, specifically the Bligh Reef buoy because that's what shows up on radar and that's what the eye can see from the vessel. He had to be vigilant as he heard Captain Kunkel say to the helmsman, to ensure that whatever commands he gave the helmsman, that the helmsman enacted those commands, and he had to be vigilant regarding the rudder angle indicator to make sure that even if the helmsman enacted those orders, that the vessel engaged correctly along the line of those orders.

Q And did he, from the record that you've seen and read and heard here in court, was he vigilant?

A No, he was not.

Q What about his time sense, is that a problem with fatigue people?

A Yes, it is one of the things you see in very tired people, is these lapses involve not responding or not responding in a timely manner. Your response is delayed and you can measure them on many kinds of tests. Well, in a task like this where you have only so many minutes to make your turn, any delay in making that, for whatever reason, is going to produce a

[969]

potential of putting the vessel on the reef, so that the lapses led to delays. He lost track of time, and hence, the vessel collided with the reef.

Q Now, did you find any place where Captain Hazelwood, before the left the bridge at 2353 gave Mr. Cousins any particular course to steer?

A Well, my understanding from the depositional record, what I recall is that he, the master, gave Mr.

Cousins the order that when he was abeam of Busby Island, to move it back into the shipping lanes. So I don't recall a specific course, degrees being given.

Q Now, when – you've said before that Mr. Cousins appeared to be able to navigate okay?

A Yes.

Q What happens to a fatigued person when he's given a task

without the task being fully explained to him, what he should do? What does he do then?

A Well, there's a tendency when you're very tired, and we see this in experiments to fall back on an old strategy. It's called perseveration. And it's referred to often time as a failure to be creative. You go back to what worked last time for you. In Mr. Cousin's case, he was a navigator who often worked on the charts doing fixes, and I think what happened here was he was tired, and even though he – he knew, he just had to look to see Busby Island light, he went back to doing

[970]

fixes on the chart and went back into the chart room, and during critical minutes leading up to that grounding.

Q In your opinion, then, was that error caused by fatigue?

A Yes.

Q Were all the errors of which you spoke caused by fatigue?

A Yes.

Q And in your opinion, then, was the wreck of the Exxon Valdez at nine minutes after midnight on the morning of 3/24, was that caused at least by fatigue?

A Yes.

Q And was that fatigue induced by the company, in part?

A I think company policies and practices led directly to fatigue.

* * *

[977]

Q Okay. Did you understand from the testimony that you reviewed that he had slept from approximately 1:00 to about 7:20 in the morning on the night of March 22nd or the morning of March 23rd?

A Yes, that's what he reported.

Q And did you understand that he had a nap in the afternoon of about three and a half hours?

[978]

A That's what he reported.

Q So that's about ten hours of sleep in the preceding 16?

A Approximately.

* * *

[992]

Q Doctor, does it matter whether sleep is lost aboard a ship or ashore as to whether or not there is a build up of sleep debt?

A No. Sleep is a great leveler, Mr. Gerry, king or pauper, shore or landlubber or seaman, it's – you lose sleep, it will show up in performance and alertness.

Q When you were quoted in the Boston Globe, had you done any research into the Exxon Valdez?

A No, other than the fact that as someone who is asked to teach the NTSB periodically regarding not specific accident investigations, but in general how to evaluate performance in an accident and to help with their research, I gather government reports. Not just from them, federal highway and many agencies. So my laboratory maintains reports and their report of the Exxon Valdez was one that we had.

Q When you talked about in your report you talked about the ten hours in the 16 hours prior to the grounding. And here you talk about 11. What changed between the time of your report and the time here that made you change that hourly result?

A Well, Mr. Kunkel's testimony – I'm sorry, Captain Kunkel's testimony this morning that indicated contrary to Mr. Cousins' deposition, that Mr. Cousins was called for topping off at six

[993]

p.m. not seven p.m., and topping off went for an hour and a half approximately, ending at 24 minutes after seven, and that another mate was involved in it, was Mr. Cousins. That's an additional hour.

Q So with the topping off ending at 24 minutes after seven, did you believe that Mr. Kunkel's testimony was more believable and what you should use?

A Well, I did to the extent that that was also consistent with what he said two months after the grounding at the NTSB testimony.

Q You've been asked about this nap that was reported by Mr. Cousins in the afternoon. Did you consider that at the time you gave your opinion?

A I did.

Q And did you see anything peculiar about that nap?

A Well, again, the fact that he had some sleep, frankly, I'd rather make sure seamen get that sleep in the afternoon than not, so it is consistent with certainly the things I've recommended about napping, but Mr. Cousins called that nap a catnap. Now, later in his deposition, he just said nap, but he distinctly the first time called that a catnap. In 18 years of researching napping and writing the first definitive text on it and looking at more than three now people regarding naps, never one time have I or my associates ever heard an individual call a three and a half hour sleep a catnap. People consistently

[994]

use that to define a sleep of 10, 15, 20, 30, maybe 60 minutes but not three and a half hours. That led me that possibly he really didn't know. He wasn't trying to deceive. He may not have been aware as to whether that sleep was – had continuity, was deep or not. Could very well have been fragmented, loose and involved much wakefulness.

Q This report, DX4409, where you determined that persons could get by with sixty to seventy percent of sleep need, for how long a period of time could they do that?

A Well, at the time we were doing that and the military field studies that have been done, people can get by on that that way for about three, four, five, maybe seven days. Now, we have to be careful here, Mr. Gerry. Get by to me means they don't shoot their commanders in a military operation, they still shoot at the enemy. But eventually, protocol breaks down.

What the field studies show is that at that level soldiers begin to refuse taking orders and they'll stop cleaning weapons and they engage in other manners that indicate they're becoming militarily ineffective, so what you mean by they can continue depends very much on your criteria.

Q And in judging Mr. Cousins' performance in the 15 minutes prior to the grounding of the Exxon Valdez on Bligh Reef, have you heard anything to change your opinion from the fact that Mr. Cousins was fatigued at that time?

A No, I have not.

* * *

[996]

DIRECT EXAMINATION OF JAMES SHAW (by
video)

BY VIDEO EXAMINER:

Q Are you employed at the present time, Mr. Shaw?

A No, I'm not.

Q By whom were you last employed?

A Exxon Shipping Company.

Q And when did that employment cease?

A December the 7th of '90.

Q All right. How long had you been employed by them?

A 13 years and some months.

Q You do have a seaman's card?

A I had one, yes, somewhere.

Q A seaman's document I guess call it?

A That's correct.

* * *

[1000]

Q The first time you met Hazelwood was on the North Slope?

A To the best of my recollection, it was.

Q When did you next run into him?

A On – I may have run into him on several other – numerous other locations, because we did meetings and stuff ashore. I probably had met him on some of those but when you say the next time or the very next time, I can't really give you an idea. I happened to observe him, I guess, this would be aboard the Exxon Yorktown some latter years, probably around '83, '84 time frame.

[1001]

Q And was he sailing as master of the Yorktown at that time?

A Yes, he was.

Q Now, were you in the capacity of port steward then?

A Yes, I was.

Q Did you have occasion to discuss matters with him while he was on the Yorktown and you were port steward?

A Yes, I did.

Q And what can you tell me about his demeanor and his character, as far as you saw it at that time?

A His demeanor and character was, to the best of my ability, that he was capable of handling and making decisions of everything he was doing. He seemed perfectly fine to me.

Q Okay. Did you smell alcohol on his breath?

A First occasion, no, I didn't.

Q What about the second occasion?

A Yes, I did.

Q And was that prior to the time that Mr. Hazelwood went for rehabilitation?

A No, it wasn't.

Q Okay, it was after he had – you understood he had been to rehabilitation?

A Yes, it was.

Q When he came back, did you find out at some time that he had gone for rehabilitation?

A Yes, I did.

[1002]

Q How did you find that out, sir?

A Through a conversation with port captain Bill Sheehy.

Q And that's S-h-e-e –

A – h-y.

Q h-y, and that was after he'd come back from – from rehab or had gone through rehab?

A That's correct.

Q Okay. The – and prior to having that conversation with Captain Sheehy, you had been aware that Captain Hazelwood had been drinking at the time?

A Yes, I was.

Q That conversation took place in Captain Sheehy's Baytown office, is that right?

A That's correct.

Q What did – what did you learn there about his alcohol treatment, if anything?

A I really didn't learn anything about his alcohol treatment. The way that I found out where he was in a conversation that being in the capacity – the position of port steward I would always frequent the vessels and I just was aware – I wasn't aware of where he was. It was a concern for where he was that asked Captain Sheehy where was Joe. I hadn't seen him lately. And he mentioned to me that he had been in one of the treatment facilities.

Q And did – were you told whether he'd gone in there

[1003]

voluntarily or was coerced into going or –

A No, I was not. I did not know.

Q After having that conversation with Captain Sheehy, did you then have occasion to meet Mr. Hazelwood again?

A Yes, I did.

Q When was that?

A Probably a month or two after this conversation. I'm not exactly sure when this was, it was probably in '84, again, after he had come back from –

Q '84, '85, somewhere in that time?

A Somewhere around that time, yes, probably '84.

Q And what was his position at the time you met him again?

A He was the captain.

Q Of what vessel?

A The Exxon Yorktown.

Q And where did you meet him?

A In Baytown.

Q Aboard the vessel?

A That's correct.

Q And had you boarded the vessel in your official capacity to take care of the problems, any problems they might have?

A Yes, I did.

Q And did you speak to Joe Hazelwood at that time in your official capacity?

A Yes, I did.

[1004]

Q Did you smell anything at that time?

A No, I didn't. He was fine.

Q Was that his first trip on the Baytown, as far as you know?

A That's correct.

Q All right. And then the vessel went out. What was its turn-around time?

A It varied. On some occasions it could be six to seven days, some occasions would be 14 days and back in Baytown.

Q Did you have occasion to go aboard the vessel a second time when it returned to Baytown?

A Yes, I did.

Q And did you again meet with Mr. Hazelwood?

A Yes, I did.

Q What did you notice at that time?

A I got the distinct odor of alcohol on his breath.

Q Could you identify what kind of alcohol from the odor?

A I would say it was a bourbon. Could be scotch or bourbon or whatever.

Q Did you come to the opinion or conclusion that it was bourbon or some alcohol like that rather than something like Moussy Beer?

A I really didn't dwell on, you know, I just got the distinct odor of alcohol on his breath and I didn't even dwell or ponder on trying to render an opinion what it was.

Q And when – in point of time, where was that, how long

[1005]

after you'd had the discussion with Captain Sheehy about his rehabilitation did you notice that?

A It was really recent after that. I guess somewhere in the period of maybe a month or two.

Q Okay. And at that time, when you – when you noticed that, did you report that to anybody?

A Yes, I did.

Q How long had the vessel been in at the time you met with the captain on that occasion?

A I was at the dock before the – before the vessel finished tying up, so it was coming in as I was at the dock.

Q Okay, so had Captain Hazelwood had any opportunity to go ashore and get a drink?

A To the best of my knowledge, no.

Q Did you go aboard the vessel as soon as the vessel came in?

A Yes, I did.

Q And did you see Captain Hazelwood very shortly thereafter?

A Yes, I did.

Q Then did you report that incident to anyone?

A Yes, I did.

Q To whom?

A I talked to Ms. Case, Kimberly Case on the phone about it briefly and –

Q Didn't you – before you talked to Ms. Case, didn't you

[1006]

report it to Captain Sheehy?

A I had not finished. I talked to Ms. Case about this and I then talked to Captain Sheehy.

Q You talked to Kimberly Case first?

A That's correct.

Q And then you reported the incident to Captain Sheehy?

A That's correct.

Q And did you think it important to report that Hazelwood was still drinking even though he'd gone through rehabilitation?

A Yes, I thought it was important.

Q Let me ask you this. Was there any other reason that you reported it?

A I really liked Joe as a person and I – I didn't want what I felt anything to happen to Joe in a manner of being terminated from the company. I knew Captain Sheehy really well. I felt for sure that in talking to Captain Sheehy, that he would get a handle on it if there was a problem.

Q You had a good feeling for Exxon?

A Yes, I do.

Q You found them to be a reasonable employer?

A Yes, I did.

Q Okay.

A And do.

Q They promoted you to a pretty good position?

A Fairly, yes.

[1007]

Q Do you have any reason to want to hurt the company in any way?

A None whatsoever.

Q And you like Joe Hazelwood?

A Yes, I do.

Q Do you have any reason to want to hurt him in any way?

A None whatsoever.

Q Okay. Was anything done about that first incident when you smelled alcohol on Hazelwood's breath and reported it to Sheehy? Was any action taken by the company, to your knowledge?

A Other than Captain Sheehy going down and coming back and stating to me that he had met with Joe and Joe denied it, to the best of my ability, I am not sure if anything else was done or not. I don't know.

Q Okay. Well, when he came back and reported to you that he had talked to Hazelwood and Hazelwood had denied drinking, did you then do anything else about the incident?

A Yes, I did.

Q What did you do?

A Because I had mentioned this to Joe – or to Captain Sheehy, I went to the vessel and I contacted Captain Hazelwood and I told him that it was I that had told Captain Sheehy what I felt I smelled on his

breath. I did this because I like Captain Hazelwood. I did not want him to feel that it came

[1008]

from anyone else. I told him that if there was a problem, I hoped he would correct it, because personally I thought that he was a fine person and one of the better captains that we had in the fleet.

Q And after this first incident that you reported to Sheehy, Captain Sheehy, was there a second incident?

A Yes, there was.

Q And how long ago was that, the next trip or the trip after or when?

A It was the next trip.

Q And did you board the vessel again?

A Yes, I did.

Q And did you talk to Hazelwood?

A I met him in the passage area.

Q Did you smell anything about him?

A Yes, I did.

Q What?

A Distinct odor of alcohol again.

Q And did you report that to anyone?

A No, I didn't.

Q Did you call Kimberly Case?

A We talked about it, yes.

Q Who is Kimberly Case?

A She's the port steward at that time on the west coast.

Q Did she have the whole west coast, then, as port steward?

[1009]

A That's correct.

Q All right. Had she – did you know her to be a friend of Joe Hazelwood's?

A Yes, I did.

Q Was she, to your knowledge – what was her relationship to Joe Hazelwood?

A In the past she had been a friend of Captain Hazelwood's, yes.

Q Why did you tell her, I'm sorry, not report.

A During the course of conversation, if we have a problem, not really a problem, if something should happen on either one of the coasts that either she feels I may be capable of handling better than she can, or if there's a problem with someone that I may be closer to than she is closer to, or she is closer to a person than I am, and if we have better knowledge we would converse. It was a intramutual respect that we had for each other and the people aboard the vessel.

I talked to Kimberly because I wanted to see if maybe she would have a better idea of what manner in which we could approach this problem than probably I had done before.

Q What was her reply to you?

A Well, what she said was something to the effect that he's a big boy now and he can handle himself.

Q And did you report this second incident to Captain Sheehy?

A No, I didn't.

[1010]

Q In your discussion with Kimberly Case, did she tell you whether or not she was aware that Captain Hazelwood had been through rehabilitation?

A Yes, she was aware of it.

Q On that second occasion, was there – was there any way that Captain Hazelwood could have gotten ashore and had that drink before you met him?

A This may have possible because I really didn't see him immediately after getting aboard the vessel. I went through the galley and I had a few things to do there, so it could have been possible, yes.

Q Was there a third occasion when you went aboard the Yorktown and –

A Yes, there was.

Q Did anyone go aboard with you?

VIDEO EXAMINER: I'm going to object to the form and ask to clarify. As I understand the witness' testimony, this would be the fourth time?

VIDEO EXAMINER: Yeah. The first time –

VIDEO EXAMINER: Correct. So –

VIDEO EXAMINER: This would be the fourth time.

VIDEO EXAMINER: So we don't get any confusion.

VIDEO EXAMINER: That's fine. I appreciate that.

BY VIDEO EXAMINER:

Q This would be after the first two times that you smelled

[1011]

alcohol. So I'm talking about the third incident but the fourth time when you went aboard when he was on the Yorktown? A Now what was the question again?

Q Was anybody with you that fourth time when you went aboard?

A When I went aboard the vessel, I had an assistant that would do several things with me. This person was Sam Pierpoint. Ellen Share was also in the company at that time. She had something to do with safety. She may have gone aboard with me at that time. Frank Pichalsa, works for Ellis Mitchell may have been – may have gone aboard with me also.

Q Can I ask you to do something for me, Mr. Shaw. When you say "she may have", it doesn't really give us your best recollection. Is your best recollection that she went aboard with you on that occasion?

A I think she did, yes.

Q All right. And who else did you mention, I'm sorry I interrupted you.

A Frank Pichalsa with Ellis Mitchell. Sam Pierpoint, who was on – he was temporary, well, he wasn't a permanent assigned employee, he was a contract employee with the company.

Q On that occasion, did you go to see Mr. Hazelwood?

A Yes, I did.

Q Could you see him?

A Not then. The door was locked on this occasion.

Q Was he aboard?

[1012]

A To the best of my knowledge, he was. I don't know because the room was locked, I wasn't aware.

Q Did you find out why the room was locked?

A Well, the personnel aboard the vessel were making remarks to the point that there was a female companion or something in the room with him, and they were having a party and Joe was busy.

Q Okay, then did you finally see him that day?

A Yes, I did.

Q All right, and at that time, did you smell anything on his breath?

A Yes, I did.

Q What?

A Here again, I got the distinct odor of alcohol.

Q And were you close enough to him at that?

A Yes, I was.

Q To make that judgment did you decide right then and there what it was?

A Yes, I did.

Q And you decided it was alcohol?

A Yes.

Q Did you decide it was alcohol?

A Yes, I did.

Q Where did that occur?

A This was on the ladder coming down from his room to the

[1013]

mess area.

Q Did you discuss this with Ellen Share?

A We had a conversation about it, yes.

Q And so that's the fourth time you were aboard and the third incident. Was there a fourth incident when you were aboard the Yorktown?

A When you say "incident", yes, I went aboard the vessel each time it was in. As far as Hazelwood, himself, yes, there was another occasion.

Q And did that involve a chef aboard?

A Yes, it did.

Q What was his name?

A Jesse Watts. He was a temporary capacity, he wasn't sailing on the ship. He was in a step-up position.

Q Tell us about that incident.

A This was in the late evening. The vessel had docked I guess somewhere in the afternoon. Jesse had relieved Warren Adams in Tampa Bay or Fort Lauderdale or somewhere. He sailed back. He was being relieved that evening to go to paid leave. His relief had shown up sometime in the afternoon. We were receiving the stores and myself and Sam Pierpoint were in the lower storage area of the steward department putting stores away, and Jesse

came back and he made the statement to me that he had gone ashore and picked up a couple bottles of booze for he and Captain Hazelwood and they were going to have a drink

[1014]

and wanted to know if I wanted to have a drink with them.

Q Did you tell him anything about Captain Hazelwood's rehab?

A I told him that if I ever heard that he had brought a bottle back aboard the vessel again, that he would never sail in that capacity as chef again, and I mentioned to him that I didn't think that he was doing the best thing in bringing booze back for the captain aboard the vessel.

Q Did you report that incident to anybody in the company?

A Leslie Pennington.

Q What was her position?

A When you say "reported", it wasn't really a report, Leslie Pennington was the – she worked in personnel doing assignments, headquarters downtown. What I stated to her was that we should make every effort not to sail Jesse Watts with Captain Hazelwood on any other vessels in the future.

Q Did you tell her why?

A To the best of my knowledge, I think I did, yes. She was the only person that I talked to in that type of capacity.

Q Was anybody present during your conversation with Jesse Watts do you remember?

A Sam Pierpoint.

Q Anybody else?

A Frank Pichalsa probably. Here again, I don't want to definitely say he was, I can't say that he was not, but he may have been there.

[1015]

Q Have you ever been aboard the Exxon Valdez?

A Yes, I have.

Q Were you aboard there in 1987 or '88?

A Yes, I was.

Q And when was it that you were aboard?

A I was aboard there I guess it was early 1987 and then again in 1988.

Q All right.

A Should I continue?

Q Yeah, go ahead.

A It was during the time that we were demanning the department. We were removing the mess/utility and we were – what we were basically doing was taking three positions and doing some of the duties with two personnel that three people were doing it in the past.

Q Who is the fleet chef aboard at that time?

A On the first location, if I'm not mistaken, it may have been Randy Rockel. On the second occasion it was Joe DeOliveira. That's D-e-O-l-e-v-e-r-i-a [sic].

Q And did you have any discussion with DeOliveira about Hazelwood?

A I didn't have a conversation with him, a discussion.

Q A conversation?

A It was a remark I had with him, yes.

Q What was that?

[1016]

A That he had had a drink with Joe the night prior in his room aboard the vessel.

Q Exxon had a policy about people drinking aboard; didn't they?

A Yes, they did.

Q In your observation, was that policy applied evenly to everybody so if there was any drinking, automatically the person was fired, or was it applied unevenly?

A To the best of my ability it was applied evenly to everyone.

Q When you reported Hazelwood's conduct to Sheehy, was he fired?

A No, he wasn't.

* * *

[1028]

DIRECT EXAMINATION OF ANDRE MARTINEAU
(by video)

BY VIDEO EXAMINER:

Q Captain Martineau, for the record would you state your full name please?

A Andre Philip Martineau.

Q By whom are you currently employed, sir?

[1029]

A Exxon Shipping Company.

* * *

[1048]

Q At this time what was your understanding as to Captain Hazelwood's ranking amongst the other Exxon Shipping Company masters?

MR. FLANAGAN: Did you have any understanding of the rankings?

A No, I didn't. I thought he was on the top or amongst the top, anyway.

Q But you didn't have any specific understanding as to where he actually ranked?

A No, I had no idea.

Q I may have asked you this question in regards to this time frame before. If I did I apologize. At the time that you were

[1049]

speaking to Joe Hazelwood about his transfer to the west coast fleet, had you heard any rumors that he had drank alcohol aboard vessels, that he drank alcohol aboard vessels?

A I may have heard rumors, but I don't recall. I don't know.

Q Do you recall asking Captain Sheehy at some point in time prior to Captain Hazelwood's transfer to the Exxon Valdez whether Captain Hazelwood was drinking again?

A No, I don't recall that.

Q If Captain Sheehy testified at his deposition that you made that inquiry, would you have reason to dispute that?

A No.

Q After you spoke with either Leitzell or Sheehy, what is the next step you took in having Captain Hazelwood transferred to the west coast fleet?

A I think I went to see Harvey Borgen and asked him if he would approve that.

Q What position did Harvey Borgen hold at that time?

A He was fleet manager of the west coast.

Q Do you recall what Mr. Borgen told you?

A The first time I went in he said, let me think about it.

Maybe a week had gone by, I think, and we needed to do something, and I asked him again, and he said, yeah, okay. Something like that. That's all I recall. I don't recall specific conversation that he had with me or I had with him, but the general sense of the conversation was that he approved

[1050]

it.

Q Do you recall whether Harvey Borgen made any inquiries in regards to Captain Hazelwood?

A If he did, I wasn't privy to that.

Q You don't know what Harvey Borgen did between the first conversation with him and the subsequent

conversation with him when he approved the transfer in regards to –

A No, I don't know what he did.

Q Just so I understand the nature of your conversation with Harvey Borgen, the initial conversation, when you went in to speak with him were you recommending that Joe Hazelwood be transferred to the Valdez?

A Yeah, that was in the form of a recommendation.

Q Prior to this time did anyone speak with you about making periodic visits with Captain Hazelwood when he was appointed to the Exxon Valdez, to see how he was doing as the captain?

A No. No.

Q Okay.

Now, at that time –

UNIDENTIFIED SPEAKER: Go ahead.

Q At that time no one had indicated to you that Captain Hazelwood had been through alcohol rehab?

A No.

Q Okay.

A I believe – I may have heard, possibly have heard [1051]

something to the effect that through rumor, don't know who told it to me, that Hazelwood, Joe Hazelwood may have had a problem with – with drinking or alcohol.

Q Do you recall anything more specific than that? Do you recall the scope of the problem that he may have had?

A No. It was just through the rumor mill in the fleet that I had picked something up like that.

Q Do you recall when you heard this, initially?

A It – it was before the transfer.

Q Did you do anything to try to – prior to recommending the transfer of Captain Hazelwood to the Exxon Valdez, did you do anything to try to confirm or disprove the rumor that you had heard?

A I – I may have. As you said, Sheehy said I did or something like that, so it probably did take place.

Q Since your memory has been refreshed, let me ask you: Did it cause you any concern that you had heard these rumors about an individual that you were now recommending be assigned as a master of the newest and biggest vessel in the fleet?

A Well, first they were rumors. I didn't give any credence to rumors.

Q Did you do anything at all to investigate the rumors at any time?

A I don't think I did, no.

Q While you were port captain and after the decision had been

[1052]

made to transfer Captain Hazelwood to the Exxon Valdez, were you involved in any discussions with anyone regarding setting up a monitoring program to monitor Captain Hazelwood's activities as master on the Exxon Valdez?

A No.

Q Going back to Captain Hazelwood being transferred initially to the Exxon Valdez, I believe you said there was a short period of time during which you were still the port captain and Captain Hazelwood was serving as the master of the Exxon Valdez?

A No, I don't think he was assigned to the ship or served on board the vessel while I was port captain. He may have, you'd have the records which testify to that.

Q At some point in time, did you become aware that – let me begin again.

At some point in time did you become aware as to whether or not there was a monitoring system in place to check in with Captain Hazelwood to see how he was performing on the Exxon Valdez, a system over and above what was applicable to the other masters within the fleet?

A No.

Q Prior to being assigned to the Exxon North Slope at the end of your tenure as port captain, did anyone speak with you regarding you performing some monitoring duties of Captain Hazelwood over and above the typical monitoring that would be

[1053]

done for captains assigned to a vessel?

A No. There wasn't any monitoring that I – that I know of.

Q At the time that you were assigned to the Exxon North Slope, at that time had anyone ever told you

that Captain Hazelwood had been through alcohol rehabilitation?

A No, I didn't – I didn't hear anything about that.

* * *

[1066]

Q Why do you believe it's prudent seamanship for the master to be on the bridge in the area north of Cape Hinchinbrook and south of Potato Point?

A Well, it's – it's an area of great concern to environmentalists and other regulatory bodies. It had been customary that, in my training and coming up through the ranks there, that the master remained on the bridge in pilotage waters. And I was still under the impression, or considered Prince William Sound in my view to be pilotage waters.

Q Prior to March of 1989, had you heard any rumors as to whether or not Captain Hazelwood would remain on the bridge of his vessel when the vessel was within these areas that you considered to be pilotage waters?

A I had heard rumors that he didn't remain on the bridge the whole time.

Q From whom had you heard those rumors?

A I don't remember.

Q Had you heard those rumors on more than one occasion?

A Possibly, yes.

Q Do you recall when you would have first heard those rumors?

A Year? Or –

Q If you can. However you can – focus it.

A It was certainly after I got on the North Slope that I had

[1067]

heard it.

Q Did you have an understanding as to whether or not that was a current practice? At the time that you heard the rumors, was it your understanding that that was a current practice of Captain Hazelwood?

A Whether it was a practice or whether it had happened occasionally, I don't know. All I heard was that sometimes Joe doesn't stay up on the bridge the whole time.

Q Did you report this rumor to anyone?

A No.

Q Do you believe that it is prudent seamanship for a master holding a pilotage endorsement to be on the bridge of his vessel when transiting Prince William Sound area during ice conditions?

A Yes.

Q Are you aware of any reports or communications which a

captain has to complete or send when outbound from Port of Valdez which would require the captain to leave the bridge of the vessel while still in the Prince William Sound area north of Bligh Island?

A No.

* * *

[1070]

A Yes.

Q Would you agree with the statement that as a master of the vessel, you would have more knowledge regarding the surrounding conditions and other than approaching traffic, other obstacles in the area than what the Vessel Traffic Service would have as you're navigating through the Prince William Sound area?

A Yes.

Q And from your testimony, I gather you did not outside of the narrows, certainly you did not rely on the Vessel Traffic Service to provide you with any information regarding the position of your vessel in relation to the surrounding land masses or reefs?

A I never relied on them for that information, no.

Q So do you know of any Exxon master who was disciplined for violating alcohol policies, any time in the 1980s prior to the grounding of the Exxon Valdez?

A No.

Q Now, did Exxon Shipping Company management, did they encourage officers to report violations of alcohol policy?

A Not to my knowledge.

Q At any time before the grounding of the Exxon Valdez, are you aware of the policy or procedure that Exxon Shipping

[1071]

Company had to monitor a master's use of alcohol?

A No.

Q At the point in time when you became aware, heard information that Hazelwood may have a drinking problem – all right. Did you report that to anyone?

A No.

Q Did you take any action predicated on receipt of that information, that Hazelwood may have a drinking problem?

A Well, during lunch recess my memory was refreshed that apparently I did call Bill Sheehy and ask him about whether Hazelwood was in fact, I guess, okay to come out here and be assigned to the vessel.

Q Did you ask Sheehy specifically about whether Hazelwood had an alcohol problem?

A No, I don't believe I – I think I just referred to a rumor, if I – if I – yeah.

Q Did you ever act upon, any way that you know of, the information you had that Hazelwood may have an alcohol problem?

A No.

Q Okay. It's true, is it not, that you realized it could be a dangerous situation to assign a master to a vessel the size of the Exxon Valdez where that master may have an alcohol problem? Is that a fair statement?

A Absolutely. Yes. I – I – what I heard was rumor. I'm – I'm not going to operate on rumor. I think that as my

[1072]

memory was refreshed at lunchtime, I – I think I called Captain Sheehy and asked him if – if there was any validation to this rumor or I don't know what I asked him to be honest with you, but at any rate, I think things were the signal was given to me that everything was okay.

Q Did he tell you that Hazelwood had been through alcohol rehabilitation?

A I don't recall that at all, no.

Q Okay. Had he told you that Hazelwood had been to alcohol rehabilitation in 1985, would you have done anything differently with respect to transferring Hazelwood to the Exxon Valdez?

A Oh, I don't think I can. I mean, I – I think that that's in the other people above me, in management who had – who had knowledge of this. They were in control. I mean, I just made a recommendation to Harvey Borgen as to who should be – who might be assigned to the vessel. I mean, the final decision was their or his, not mine.

Q Okay, I realize it was Mr. Borgen's decision. Did you tell Mr. Borgen about the conversation you had with Sheehy and that there was reference to the issue of Hazelwood using alcohol?

A I – I don't recall that conversation at all.

Q Is other than Captain Sheehy, did you ever discuss in connection with the transfer, the subject of Hazelwood and alcohol with anyone?

[1073]

A I don't believe I did, no.

Q You said you heard rumors about Hazelwood maybe drinking. Other than calling Captain Sheehy

did you do anything to investigate or inquire as to the veracity of the rumors about Hazelwood and drinking?

A No, I didn't.

Q I take it you wanted to put an appropriate person in the position of master of the Exxon Valdez; right?

A That's correct.

Q Okay. And you certainly weren't going to put in your judgment someone who presented a risk to the vessel and the cargo of that ship; right?

A That's correct.

Q Okay. And you knew, did you not, that if you put a master on that vessel who had an alcohol problem, that you may be risking a serious catastrophe?

A First of all I didn't know – if I knew for sure he had an alcohol problem he wouldn't have been even a consideration in my mind, all right? Like I said, people that knew he had a problem and knew about his rehab really had the final decision. Mine was merely a recommendation.

Q Well, why did you recommend someone who you had information, rumor about, that they may have used or may have an alcohol problem?

A Because I didn't consider the rumor to be valid, number

[1074]

one. It was just a rumor. Number two, as I explained before, Joe Hazelwood, in my view, was an excellent seaman, a skilled ship handler. He had unlimited pilotage, been sailing as master for X

number of years, he was qualified and capable for that assignment.

Q Mr. Martineau, what did you do to determine whether or not the rumor about Hazelwood having alcohol problems was valid or not?

A Nothing.

Q Now, you mentioned a moment before we broke, you were talking about in your judgment Hazelwood was a capable master, I'm paraphrasing, you said something to that effect?

A Yes. Yes.

Q You told us this morning that at the time you recommended the transfer, you assumed that Hazelwood was in the top of the rankings?

A That's correct.

Q I want to show you the rankings here for a minute. Can you see where Captain Hazelwood ranks 25th out of 34?

A Uh-huh.

Q That in 1987 at the time you recommended his transfer, is it true that you were under the mistaken impression that he was ranked high?

A That's true.

* * *

[1080]

Q Now, what sort of practices – you said that Mr. Iarossi was under the mistaken assumption that a number of masters were doing the same thing that Hazelwood did.

A Right.

Q Okay. And what sort of things did Mr. Iarossi believe that other masters were doing that Hazelwood had done?

A Again, I can't recall. My impression was this, that – that other masters were not on the bridge, other masters were load programming up and in congested or waters where dangers were known to be. Other masters were, in his opinion, running the bridge watch too loosely, were not complying with company policy with regard to the bridge and navigational manual. Just in general, that sort of thing.

Q What do you mean when you say load programming up?

A Well, it's the same thing as – as on a steam ship we go from maneuvering speed to full sea speed. It sort of impedes the – the engines from being answered quickly. However on a diesel ship you may have an override, an emergency override, so it can be over – it can override it very quickly.

Q Okay. And is it your understanding that is what the Exxon Valdez was doing at the time of the grounding, it was load programming up?

A That's what I heard.

Q Okay. And do you believe that to be a prudent practice in the area of Prince William Sound between the cape and Potato

[1081]

Point?

A If you have clear fairways with no obstruction, I – I don't see where that would be a problem.

Q Is it prudent if you're out of the shipping lanes?

A I would say no.

Q Showing you what's been marked at least for the time being as Martineau Exhibit No. 4, that is a memo from Mr. Klepper to Mr. Borgen dated November 11 of 1985 where I see you're copied on this memo?

A Uh-huh.

Q Okay. And just again so we have our point of reference clear: At this point in time you were a port captain on the west coast?

A Yes.

Q And were those concerns of yours prior to the grounding of the Valdez, the fatigue of officers and long work hours?

A Yes. Yes.

Q And those are items which potentially can jeopardize the safe operation of a vessel, if you have fatigued officers?

A Yes.

Q At any time before the grounding of the Exxon Valdez, did you ever report or tell anyone in Exxon management about your concerns regarding fatigue of officers and long work hours?

A I remember at a conference masters conference where we were at a certain section with, I don't know, some doctor, whether

[1082]

Dr. Montgomery or some doctor, that I expressed my concerns and feelings toward the fatigue factor, yes.

Q And to your knowledge, did Exxon management do anything based on what you told them?

A I don't – I don't recall anything coming about after that discussion.

Q What did you tell Dr. Montgomery?

A Again, I – I don't recall the exact conversation, but the gist of it was that that fatigue was debilitating, both health-wise and as far as alertness, and ability to think quickly and crisply, if you will.

Q And that conversation occurred approximately when? Do you have a general idea?

A It – it – between '87 and '89, I know that.

Q Prior to the grounding, do you know whether Exxon Shipping Company management considered adding an additional loading mate at Valdez?

A No.

Q You mean meaning you don't know one way or another?

A I don't know one way or another.

* * *

[1086]

Q Okay. The occasions during the three weeks in January, 1989 when you went out to dinner and Captain Hazelwood was present in your group, do you have a recollection of seeing Captain Hazelwood drink alcohol with dinner?

A No.

Q Do you have a recollection of seeing Captain Hazelwood drink alcohol at any time during those three weeks?

A No, he never – he never drank.

Q Okay. Do you recall whether other people in the group, whether you witnessed other people in the group drinking alcohol with dinner?

A Yes.

Q Did you drink alcohol with dinner?

A Yes.

Q Do you have a specific recollection that someone within the

[1087]

group did not drink alcohol?

A Joe Hazelwood.

* * *

[1090]

DIRECT EXAMINATION OF CAPTAIN MICHAEL
STALZER

BY MR. O'NEILL:

* * *

[1091]

You're a ship captain?

A I'm retired from Exxon.

Q You're retired?

A Yes.

Q You were a ship captain for many years, isn't is that correct?

A Yes.

Q And just so we know why you're here, you were at the time of the grounding of the Exxon Valdez the other captain of the Valdez?

A Yes, I was assigned to the Exxon Valdez.

Q So that Captain Hazelwood had the duty half of the time and you had the duty half of the time?

[1092]

A That's correct.

Q And for what years were you the – did you share duties with Captain Hazelwood on the Valdez?

A Captain Hazelwood was assigned there I believe in late July of 1987. From that time until the grounding.

Q And during that entire period of time, you were the also the master of the Valdez?

A When I was on board, yes, sir.

Q And Exxon Corporation or Exxon Shipping Company, is that the only shipping company you've ever worked for?

A Or division of Exxon. It was Exxon company USA marine department initially when I went to work with Exxon in 1973, and I continued working with Exxon until earlier this year, retirement from Sea River in the division of Exxon.

Q You said Sea River?

A Exxon Shipping Company has a new name, Sea River.

Q When did it change its name to Sea River maritime?

A I think in the fall of last year.

Q Is the Exxon Valdez – is it still called the Valdez?

A No, the Sea River Mediterranean.

Q What's it called Mediterranean?

A Well, it – it was – yeah. The Mediterranean. I don't know if it's the S/R or the Sea River Mediterranean, but it's the Mediterranean.

Q And the Valdez, the Exxon Valdez was named either the S/R

[1093]

Mediterranean or the Sea River Mediterranean after the grounding?

A No, after the grounding it was named the Exxon Mediterranean when it sailed from San Diego in – in '90, and then I think they changed the name here last year but I haven't followed exactly what they changed it to.

Q Now, you became a master in 1979?

A I received my – I sat for and passed and received my masters license in 1979.

Q And when did you begin to serve as a master?

A 1981, it was my first tour as captain.

Q Would it be fair to say, sir, that prior to the grounding, you had heard rumors about Captain Hazelwood and drinking?

A Yes.

Q And would it be fair as to say, sir, that you heard those rumors from other officers?

A I had heard rumors all through my years from the middle of 1970s up till in the '80s of Captain

Hazelwood. Rumors go around and around the fleet, so I have heard rumors.

Q And you did hear the rumors from other officers, ship officers?

A Yes, sir.

Q And on one occasion in May of 1988, indeed, you had a couple of drinks with Captain Hazelwood?

A Yes, sir.

[1094]

Q And that would be Captain Hazelwood was flying in to Portland in May of 1988?

A He was coming up to relieve me, that's correct, in Portland.

Q And the vessel was in Portland for repairs in dry-dock?

A It was up in dry dock out of the water, that's correct.

Q Had you picked Captain Hazelwood up at the gate?

A Yes. I met him at the gate, at the airport.

Q On the way back to picking up his luggage, Captain Hazelwood suggested to you that you have a drink while waiting for the luggage, and he had a couple of vodkas, two vodkas?

A As I recollect, that's correct.

Q And you had a beer?

A That's correct.

Q And then you went down to the shipyard?

A Yes. We went to the shipyard.

Q And you met with shipyard personnel?

A It was the afternoon meeting going on and I introduced him to the ship super and the others that were involved in the repair work of the ship.

Q And you went on board?

A As I recall, about five or 5:30 we went on board to come over and check the contents of the safe, and we left the ship about six or 6:30.

Q Then you went to dinner that evening?

[1095]

A Yes, the chief mate picked us up, and I think we picked up Captain Hazelwood about – I want to say seven or maybe it was 7:30 and went to dinner that night.

Q Who was the chief mate?

A George Dowdle.

Q And you did you split a bottle of wine or drink wine with dinner?

A I believe we did at dinner.

Q At that time were you aware that Captain Hazelwood had been through some kind of rehabilitation program?

A I had heard rumors to that effect.

Q Did you ever check up on the rumors?

A No.

Q So at the time that Captain Hazelwood had these two vodkas and you had wine with dinner, you had

in fact heard rumors that Captain Hazelwood had been through a rehabilitation program?

A Yes.

* * *

[1100]

Q Are you aware at all as we sit here today, of how Captain Hazelwood was ranked in the formal ranking processes within the fleet in the years 1987 and 1986?

A Not specifically. I did see a designated document that had rankings in that time frame.

Q Would it be fair so say that from an Exxon Shipping Company document, you're aware of the fact that in 1986 he ranked 35 out of 37?

A Could I see the document, please?

Q In your stack, it's Exhibit 104: Exhibit 104 has been admitted and Exhibit 104 is upside down.

You've seen these kinds of documents before, haven't you?

A Only as designated documents.

Q Are aware that this comes from Exxon Shipping Company?

A Yes.

Q Using this document, can you tell me how Captain Hazelwood ranked in 1986?

A If I read it correctly, he was 35 out of 37.

Q And how did he rank in 1987?

A He was 24 out of 29.

* * *

[1111]

It had been reported to you that the other captain of the Valdez, Captain Hazelwood, left the bridge on occasion after coming in by Cape Hinchinbrook, hadn't it?

A No, that's not – not correct.

Q That was never reported to you?

A No, not that Captain Hazelwood. I made the assumption that it was Captain Hazelwood, that he was the other master on board.

Q Tell us about the incident and then I'll sit down.

A Okay. Only – on a previous voyage inbound after clearing the Hinchinbrook entrance, I think it was the second mate, LeCain, said you're going to do down, and I said no, and he mumbled something the other captain. I don't know that he was referring specifically to Captain Hazelwood although Captain Hazelwood was the other assigned master at the time. And that I don't know what he was going down for or how long or for what reason.

Q Mr. LeCain sailed with Captain Hazelwood, didn't he?

A I think he did, yes.

* * *

[1145]

Q Sir, I pulled up on the screen Exhibit 3685, which was the minutes of a seat committee meeting dated 7 February, 1989 and I'm interested in a couple of things about it. The first thing is this signature here which appears to be the signature of Mr. Glowacki. Is that his signature?

A Yes, that's what appears, yes.

[1146]

Q Are aware that he went into Valdez with Captain Hazelwood the afternoon before the fateful voyage?

A Yes.

Q So he was at this safety committee meeting?

A He was.

Q And in the document, you talk about the so called four-hour, rule, is that right, right about here (indicating)?

A Right. If that's the Coast Guard was changing the rules and in the summer of '88 become effective and that they stated that you are not to consume alcohol within four hours of going upon a watch, correct. That was part of that change.

Q Would you consume – as a prudent seaman would you consume alcohol within four hours of going on watch?

A The regulations changed and prohibited it in 1988.

Q After 1988, as a prudent seaman would you consider consuming alcohol within four hours of going on watch?

A No, the – correct. I would not consider it prudent. The rule was you couldn't have alcohol within four hours of going on a watch or on your normal – in the normal duties.

Q Now, as the captain of a vessel, would you consider it prudent captainmanship to consume alcohol in front of crew members within four hours of

an assuming your duties on a vessel? Is that a good example?

A No, you shouldn't do that.

Q We were talking about or you and Mr. Neal were talking

[1047]

about he gave you a number of assumptions. The sum and substance of the assumptions was – of which was, if Mr. Cousins would have made the turn when he was told to make the turn he wouldn't have entered the red zone. Do you recall that line of questions?

A Yes.

Q Is that a fair summary of what you talked about?

A Correct. If he started the turn abeam of Busby, he wouldn't have entered the red zone, the red sector.

Q Would it be fair to say if there would have been four eyes on the bridge instead of two that you would have greatly reduced the opportunity for error?

A By four eyes you mean another officer?

Q That's a correct statement.

A Yes, had there about been another officer have prevent a one-man navigation error.

Q With regard to entering the red zone that appears to be a one man navigation error?

A Yes, it does.

Q And the purpose of having two officers, a purpose of having two officers on the bridge is to prevent exactly that kind of error, isn't it?

A Part of it, yes.

Q You talked a little bit about the principle of safety and safety being paramount. Is the four-hour rule a safety-ironed

[1148]

rule?

A Identify a regulation.

Q Is it a safety, on the other hand, regulation?

A Yes.

Q Is the so-called six on, six off requirement in section 8104 of the code a safety rule or regulation in?

MR. NEAL: Your Honor, I thought we had an understanding on this. I object. I don't get a chance to get back up, and I didn't go into this at all.

MR. O'NEILL: I'll move on.

BY MR. O'NEILL:

Q With regard to the Exxon alcohol policy, you were asked the question did Exxon have an alcohol policy and you answered it two fold. You said it prohibited intoxicant use and possession aboard the vessel and it referred to alcoholism as a treatable disease.

A The policy recognizes treatable, and there was a program for treatment.

Q Would it be fair to say that it is not a safe practice and it is not prudent seamanship to drink and drive on the seas, is it?

A Correct.

* * *

[1150]

DIRECT EXAMINATION OF CAPTAIN MICHAEL
CLARK

BY MR. MONTAGUE:

Q Good morning, Mr. Clark?

A Morning.

Q Captain Clark, excuse me.

Could you tell the jury a little bit about yourself?

A My name is Mike Clark. I'm 46 years old. I live in New Hampshire. I'm married. I have a 12 year old daughter and a seven year old son.

Q Are you presently employed?

A No.

Q Are you retired?

A Yes.

Q Could you tell us the last position you held prior to retiring?

A I was master of the tanker Brooks Range.

Q And by whom were you employed?

A Interocean Management Corporation.

Q What is the Brooks Range?

A The Brooks Range is a crude oil carrier strictly for hauling North Slope crude for – out of Valdez to west coast

and central American ports.

* * *

[1159]

Q And as Mr. Stalzer just said, the master or the captain is in charge of the vessel?

A Yes.

Q And responsible for it?

A Yes.

Q All right. What are the duties of this – of a master or a captain who's in charge of a vessel? What are their main duties and responsibilities?

A Well, to encapsulate, its – you're responsible for the safety of the ship, the safety of the crew and the safety of the cargo. And – to break it down even further, maybe at sea for the safe passage of the vessel from port to port or any functions you're performing at sea and in port, safe navigation of the vessel in any in port moments and any port operations

[1160]

you're going to have. Essentially that the vessel is properly manned and operated at all times.

Q Now, you mentioned bolting – I think you used the phrase in port and at sea?

A Yes.

Q What do you mean by in port?

A In port is to me means from arrival to departure.

Q Okay. Now, let's take the Port of Valdez. Is that what it's called, the Port of Valdez?

A Yes.

Q When do you arrive in the Port of Valdez?

A Cape Hinchinbrook.

Q So once you arrive at Cape Hinchinbrook until you arrive at the Alyeska terminal, you're in the Port of Valdez?

A Yes.

Q And when did do you depart the Port of Valdez?

A When you take departure of Cape Hinchinbrook outbound.

Q So you're in the Port of Valdez from the reverse, from the time you leave the terminal, Alyeska terminal, until you've passed the point at Cape Hinchinbrook; is that correct?

A Yes.

Q And what do you mean, at sea?

A At sea is from when you take departure until you take arrival in another port.

Q Now, you mentioned the safety of the vessel in port and at

[1161]

sea. And I take it those are navigational duties?

A Yes.

Q Now, are there also administrative duties that a master or captain has?

A Oh, yes.

Q And what are they? Without going into great detail, but what are they?

A Oh, well, all the logbook entries and paperwork relating to cargo and the operation of the vessel, daily messages. There's a lot of paperwork.

Q Captain, which is more important, safety or paperwork?

A Safety.

Q Is that paramount?

A Yes.

Q Now, you've heard Mr. Neal talk about the safety being so important to Exxon. Is that a novel idea at sea?

A No.

Q That's standard, isn't it?

A Yes.

Q Now, let's talk a little bit about navigating the vessel. How do you navigate one of these vessels?

A With – always safety in mind.

Q And let's talk about navigating the vessel in port, either arriving in port or departing port, okay? That would be from the – in this case from the Alyeska terminal to Cape

[1162]

Hinchinbrook.

What are your duties as the master?

A As master from arriving – when arrive in port, you con the vessel, you – physically direct the movements of the vessel from the –

Q Where do you do that from?

A On that diagram they had from the very front of the bridge it has all your instrumentation right across the front of the bridge so you can see the speed log and the rudder indicator and the – the gyro

heading and your fathometer and you're standing the helmsman right behind you and the radar right beside you and you direct the movement of the vessels from there. The third mate is on the bridge with you or junior mate, usually the second or third mate and he constantly fixes the position of the vessel.

Q Could you tell us what you mean, fixes the position of the vessel?

A That means he takes fixes and puts down marks on the chart as to exactly where you are.

Q And is that his main job, when he's on the bridge as watch officer in port?

A When you're conning, I'd say that's his main job, yes.

Q When the second or third mate is on the bridge with the master, is that main job of the second or third mate is to take fixes and chart them?

[1163]

A Yes.

Q And that's what he's trained to do?

A Yes.

Q Is there any teamwork between the junior officer, the second or third mate and the master?

A Oh, yes. It's a team.

Q Can you explain how that works?

A Well, communication going on if I need an a particular distance or a particular course or anything like that I'll inquire of them, or if he's got

anything he needs to know from me he'll be asking me. It is a team.

Q And at all times – strike that.

What is your practice about where you are at all times entering or leaving the port?

A On the bridge.

Q Okay. Is that a unique practice of yours?

A No.

Q Is that standard operating procedure throughout the maritime industry?

A Every ship I've ever been on, yes.

Q How would you compare hazards of navigation while going in and out of port versus the open sea?

A Well, they're greatly increased.

Q Where?

A In port.

[1164]

Q They're more in port?

A Yes.

Q Okay. And is that the reason for the needing the time while you're transiting in or out of port?

A Yes.

Q Now, we heard some talk and testimony about a state pilot coming on board the Exxon – any ship coming in at Rocky Point, and then until the – until reaching the Port of Valdez and then from the – from the Alyeska terminal out to Rocky Point there would be a state pilot. Correct?

A Yes.

Q Does the master's job change in any way when the state pilot comes on board?

A Yes. He's not physically conning the vessel any more.

Q Is he – does that give him a chance to leave the bridge and go do something else he wants to do?

A No, absolutely not.

Q What's his job, when the state pilot is on the bridge?

A To oversee what the pilot is doing.

Q And he's to stay on the bridge?

A Yes.

Q Well, the master's cabin traditionally is right below the bridge; is that right?

A Usually, yes.

Q And what would be wrong with the master just going down

[1165]

into his cabin, it's only a little bit away; a short time away?

A Oh, yes.

Q Well, what would be wrong with that?

A Well, first of all you'd have to be called so you have communication involved, and if he's not there, I can't see what's going on, if there's a – something happens and he needs to be called to the bridge, he's got to be advised of what is wrong. Then if he gets up there, if something has happened, he can't – he's

got to try to correct it. It isn't something he can prevent from happening, if he saw it happening. It's – the risk is too great for him to be off the bridge, it's – he just can't delegate that to the pilots, can't do that.

Q You said something interesting. If the captain's not on the bridge, then he can't prevent a mishap. Is that correct?

A That's true.

Q He can only try to correct it once it happens?

A Yes.

Q Captain, have you seen a simulation of the voyage of the track of the Exxon Valdez as it left the Alyeska terminal on March 23?

A Yes.

Q And can you compare that with various meetings from the ship to see that that's an accurate course?

A Yes, I looked at it.

Q That is Exhibit 82 and it's pre-admitted.

[1166]

Your Honor, would I would like to do is to – it's relatively short, I'd like to play it from beginning to end for the jury to see and then rewind it and go through it with the captain then.

THE COURT: If you do what you said the first time we're not going to play it twice, stopping it.

MR. MONTAGUE: No, go ahead. You can stop it there.

BY MR. MONTAGUE:

Q Now, Captain, can you stop it a moment?

What is this – what is that little box in the lower right-hand corner?

A This – this box right here (indicating)? That's the time.

Q Okay. And that is coordinated with the voyage, with the line of the voyage?

A Yes.

Q Okay. And that is not maritime, but a.m.-p.m. time, right?

A Yes.

Q And that's – as it shows there, 9:22 p.m.

A Yes.

Q Now, can we run this until approximately 2100.30, which would be 9:30?

Okay. Now, I – I want you to assume for purposes of this question that Captain Hazelwood about that point leaves the bridge, okay? And goes below without telling the pilot that he's going below, okay? Is that proper seamanship to do that,

[1167]

for a master?

A No.

Q Let's go now and, if you would, run it until 20 – is 11:05. I want you to assume again, Captain Clark, that at this point, 11:05, Captain Hazelwood is called – or is called sometime before then to come to the bridge because the state pilot, Pilot Murphy, is

departing and Captain Hazelwood then reappears on the bridge.

For that period of time, from approximately 9:30 until 11:05 at night, Captain Hazelwood's off the bridge. Would you assume that?

A Yes.

Q While the state pilot is on the bridge.

Do you have an opinion as to the judgment exercised by Captain Hazelwood staying off the bridge for that long?

A Yes.

Q What is that opinion?

A It was poor judgment.

Q Is that the kind of judgment that you would expect a captain of Captain Hazelwood's experience, and as Mr. Lynch said in his opening, almost legendary reputation for good seamanship, is that the kind of judgment you would expect a captain such as that to exercise?

A No, I wouldn't.

[1168]

Q Could you explain why not?

A Because it's a disregard of his primary duty to be on the bridge, take the ship out of port.

Q Now, are there some jobs or duties of a master or captain that just can't be delegated to someone else?

A Yes.

Q And what are those jobs?

A Taking a ship in and out of port.

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 if 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

[1169]

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.

Q Whose job is that?

A The master's.

Q In port?

A In port.

Q Now, could we run this to 11:45? Okay, that's fine.

Now, is that the point that the master – the pilot gets off of the vessel?

A Yes.

Q Rocky Point? Excuse me?

A Yes.

Q And tell me, which – is this Rocky Point?

[1170]

A No, the one next to it.

Q This (indicating)?

A Yes.

Q And there's a boat there to pick the pilot up?

A Yes.

Q And now the pilot is off the – the vessel and who takes the con?

A The master.

Q Can he delegate that?

A No.

Q And when taking the con, does that include giving rudder orders?

A Yes.

Q Now, you testified a minute ago that to give a – the conning the vessel not only includes giving a rudder order but to see that it's carried out?

A Yes.

Q And to see that it has the effect, the desired effect?

A Yes.

Q And then to give any counter rudder that's necessary to put it on course?

A Yes.

Q Can a master do that if he's not on the bridge?

A No.

Q Now, you heard the testimony in this case that Captain

[1171]

Hazelwood told Cousins to turn abeam Busby light, abeam Busby light?

A Yes.

Q And bring the vessel back into the traffic lane?

A Yes.

Q And then Mr. – Captain Hazelwood left the bridge?

A Yes.

Q Do you have an opinion as to Captain Hazelwood's judgment in taking that course of leaving the bridge at that time?

A Yeah. It was a blatant disregard of his duties.

Q Is that the kind of judgment that you would expect a captain of Captain Hazelwood's experience and reputation to exercise?

A No.

Q Now, let's go to – down to 1 – to 11:30, and almost 11:31.

Okay, you there? All right. We're about a minute off. Go another minute. That's fine.

Now, at that time, Captain Hazelwood advises the VTC that he's going to move – that he's going to move out of the lanes, okay? And let's now go to – I'm sorry. He advises the VTC that he's altering his course to 200 degrees. And at a speed of – well, he reduces his speed to below 12 knots. Now, let's keep that on until 11:40.

What is happening now, Captain, as this is running?

[1172]

A He's crossing the separation zone.

Q And this is at the course 200?

A That's about going on 180 now, I think.

Q Okay.

A They should be starting right there.

Q Okay. Now, in changing a course from 200 to 180, is it general practice that that should be reported to the VTC?

A If it's going to take you out of the lanes, yes.

Q Well, the 200 would take you out of the lanes, wouldn't it, eventually?

A Eventually, yes.

Q But is it good seamanship practice when you're changing a course by 20 degrees to report that to the VTC?

A If it's going to change the point considerably where you're going to leave the lanes, yes.

Q And would that, would that change from 200 to 180, would that change the point considerably?

A Yes.

Q All right. Now, let's go for another three minutes.

Okay. Now, at this point I want you to assume that the vessel is put in autogyro, autopilot?

A Yes.

Q You ever put a vessel in autopilot either while you're crossing over the TSS lanes or departing from them or out of them?

[1173]

A No, never.

Q And do you have an opinion as to whether or not that's a prudent practice?

A It's not a prudent practice.

Q Why is that?

A Because in confined waters like that you want to be able to turn the wheel right away, without having to go through steps of pushing buttons and what

have you. It's just not a prudent practice, good seamanship.

Q Does it take so long to push the button?

A No. Just a second. But it's a step and it can always be messed up, misunderstood. It's just not good practice.

Q Do you have an opinion as to the judgment exercised by Captain Hazelwood to order the vessel, the Exxon Valdez being put in autogyro at that position at that time?

A Yes, it was poor judgment.

Q Is that the kind of judgment would you expect a captain of Captain Hazelwood's experience and reputation to exercise?

A No.

Q Now – okay. Let's keep going till we get to – down to Busby Island light. – Actually, if we could stop it at – that's fine. That's fine there.

Let's – without backing this up, at 11:52, Captain Hazelwood orders that the engine be put in load program up. Do you know what that is?

[1174]

A Yes.

Q Did you have that on your vessel?

A No.

Q But you know what it is?

A Yes.

Q And what is it?

A It's on there. Diesel engine. It was a slow increase, it was 40 minutes or so to bring it from maneuvering speed up to full sea speed.

Q So when that order was given, the vessel was probably somewhere about here, two minutes earlier, something like that?

A Yes.

Q And do you have an opinion as to whether that was a – what kind of exercise of judgment that was by Captain Hazelwood to put the vessel in load program up on a dark night leaving the TSS in icy waters?

A It was poor judgment.

Q And why?

A He's coming down, he's knowing he's going to be in ice close to land, he's got a narrow window between the ice and the reef, and if anything goes wrong you're going to wind up in the ice anyway, and as to be – to have speed on the vessel, in ice, is not a good thing to do.

Q By the way, on a dark night – and this was described as a dark night with about eight to ten miles visibility. On such a

[1175]

night, can you see the ice?

A No.

Q And can you see ice on the radar?

A Yes, you can see it on the radar.

Q What you see on the radar, does that tell you the size of the ice?

A No.

Q Putting the program in – the vessel in load program up at that point in time, is that the kind of judgment you would expect a captain of Captain Hazelwood's experience and reputation for good seamanship to exercise?

A No.

Q Can we go, for a minute, Exhibit 85, the board with the overlay.

While that's being done, Captain, let me divert a minute. Let's assume you're on the bridge with a third mate and you give the order to the third mate when you're abeam Busby light, turn ten degrees right, whatever the – ten degrees rudder right, whatever. Is that a simple command to exercise? Is that a simple command to be followed?

A Yes.

Q Now, exposure in the same situation, the captain says, go to when we get abeam Busby light, turn back into the separation lanes or into the TSS lanes.

Is that just as simple a maneuver to make?

[1176]

A No, it's very vague.

Q Can you explain the difficulty that such a – that such a particular command has for someone else to follow?

A Well, it's like I said. It's vague. Could mean anywhere in there. And if he's talking about the window, then it's – the third mate's got to actually con the ship through the window of the ice and the reef.

Q Well, would you have to chart a course to make a turn to follow a command like that? Do you just turn the wheel?

A I don't know about chart it, but you have to know where you're going.

Q I'm not talking about you, I'm not talking about Captain Hazelwood. Captain Hazelwood as a captain, give a command to a third mate, When you get abeam Busby Island light, turn back into the lanes. What would a third mate have to do before he could –

A He might have to chart a course, yes.

Q And that would take time?

A Little bit.

Q Now, Captain, this – do you recall hearing testimony that Captain Hazelwood and Third Mate Cousins were looking in the radar or discussing the ice for a period of time before Captain Hazelwood went below?

A Yes.

Q Okay. I'm going to represent to you that this is the

[1177]

version – this is the leading edge of the ice as Captain Hazelwood said he perceived it?

A Yes.

Q And this is the leading edge of the ice as Third Mate Cousins says – testified or will testify that he perceived it. I can say that because it's a deposition.

Is there a significant difference between those two?

A Yes.

Q And could you explain what's significant about it?

A The third mate's is much closer to the reef.

Q And in order to avoid the ice and avoid the reef there's a very small – what do you call it, a window?

A Yes.

Q And have you figured out what the width of that window was?

A It's less than a mile.

Q And by going – was it prudent to be going 11 or 12 miles per hour to make it through that window?

A Knots?

Q Okay.

A Not in my estimation, no.

Q And why not?

A Because they're close to the ice.

Q And well, that's apparent. What about the fact that you have less time to react?

A Yes, absolutely. Just – having an narrow window and being

[1178]

that close between the ice and the reef, it would not be prudent to have much weight on it.

Q By the way, how could the captain and the third mate be discussing the ice and have such a disparity in where the leading edge of the ice is?

MR. CHALOS: I object to that question, Your Honor. The third mate, Mr. Cousins, who will testify explains it precisely.

MR. MONTAGUE: Well, I'll rephrase the question.

THE COURT: I will allow you to examine this witness on that subject.

MR. MONTAGUE: Okay.

BY MR. MONTAGUE:

Q What does it suggest to you, Captain Clark, that the after – after supposedly having a conversation they come away with such different leading edges of the ice?

A That they weren't in agreement as to their thinking as to where the leading edge of the ice were.

Q Does it at all suggest to you that they weren't communicating very well with each other?

A Yes.

Q Now, let's take Captain Hazelwood's leading edge of the ice, okay? And while I don't have the chart on this board of the voyage, but am I correct that he said that he wanted to be one mile from Busby light and one mile from the leading edge of

[1179]

his ice and that he was going due south. So he was coming down this way; is that correct, right about here he would pass

through those (indicating)?

A Yes, something like that.

Q Okay.

Did you make a calculation that if Captain Hazelwood had stayed on the 200 course rather than divert due south to 180, whether or not he would have safely cleared the leading edge of the ice as he perceived it?

A Yes, I did.

Q And what was your conclusion?

A That it would have cleared the ice.

Q And did you determine whether he had stayed on that course whether he also would have cleared Bligh Reef?

A Yes, he wrote "have".

Q And what was your conclusion? I'm sorry?

A He would have cleared Bligh Reef.

Q And given that, did you form an opinion as to his judgment in diverting further out of the lines by going 180 when he would have safely stayed in the 200 course?

A Yes. Like if the ice was strong it wouldn't be wise to go over that far, nor prudent.

Q By increasing down to 180, did it increase the risks?

A Yes, it got them closer to the reef and land.

Q And is that the kind of judgment you would expect to be

[1180]

exercised by a captain with Captain Hazelwood's experience and reputation?

A No.

Q Okay. Now, let's talk about paperwork for a minute, okay?

Are cargo figures and going cargo calculations the type of calculations that are sufficiently important to warrant a master to leave the bridge while leaving port?

A No, absolutely not.

Q And do you have an opinion as to the judgment of Captain Hazelwood in using that as a reason for leaving the bridge while leaving port?

A Yes, it was poor judgment.

Q Okay. And is that the kind of judgment that you would expect from a captain of Captain Hazelwood's ability and experience?

A No.

Q Now, Captain Hazelwood also testified that the reason he left the bridge after he gave Mr. Cousins the order to turn when abeam of Busby light – Busby Island light, he said – and I'll read this verbatim: I had some calculations I was working on, that I had gotten some weather update and there was a storm brewing in the Aleutians. It was heading toward Prince William Sound and I wanted to make sure either we got out and passed in front of the storm enabling us to make a tide window or an area that we were shooting for in Long Beach; or, in the converse,

[1181]

I'd have to stay in Prince William Sound.

That's what he said.

Is that a basis for leaving the bridge while conning the vessel, exiting the Port of Valdez through Prince William Sound?

A No, it's not. It's primarily duty is get it out of port safely.

Q Well, he was concerned about the weather and the safety of the vessel. Is that a valid concern?

A He's got to get out of port first. That's his primarily job, is getting it out of port.

Q Could you explain that a little more?

A Well, it's the very basic thing, was that – that is, his primary job is to safely navigate the vessel out of port.

Q And then worry about the weather?

A And then worry about the weather.

Q Are these vessels pretty weather sturdy?

A Absolutely.

Q Are they built to take storms?

A Oh, yes.

Q You were even in an earthquake in one of these, weren't you?

A Yes.

Q And what happened?

A We had quite a bit of damage from – electrical damage.

[1182]

All the electrical equipment was shaken up.

Q How did the ship weather the storm? The earthquake? How did the ship weather the earthquake and the seas?

A There were no seas. It was flat calm.

Q Could the – if the – what if the weather – if the charting of the weather or calculating the weather was important? Could that be done on the bridge?

A Yes.

Q Was there any reason that had to be done in a cabin?

A No.

Q And did you form an opinion as to whether it was what kind of judgment it was for Captain Hazelwood to determine that he could leave the bridge after giving an order while outside of the traffic lanes at night trying to divert ice for Mr. Cousins to get back in the lanes, why he could leave the bridge in order to do these calculations in his office or his cabin?

A Yes, it was poor judgment.

Q That the kind of judgment that you would expect to be exercised by a captain of Captain Hazelwood's experience and reputation?

A No.

Q Now, you recall the testimony that Captain Hazelwood left the bridge approximately two minutes before the turn was to be made after he spoke to Third Mate Cousins?

A Yes.

[1183]

Q If – let's assume that there really was something that caused Captain Hazelwood – that he had to leave the bridge. Was there an alternate course of action he could have taken that would have been more responsible?

A He could have turned just before he came abeam of Busby light.

Q In other words, turn and then, if he had to leave, leave after the turn was made?

A Yeah. There's no reason why he had to be there, wait until the ship was abeam of Busby.

Q Would that have caused any further risk to the vessel, if he had turned two minutes earlier?

A No.

Q Now, do you recall the testimony that Mr. Cousins called Captain Hazelwood and told him that he'd started the turn?

A Yes, I do.

Q And did he tell him anything else, you recall?

A Yes, in Cousins deposition he said he was going to get into the ice.

Q Cousins said he was going to get into the ice?

A Yes.

Q And did the captain come up to the bridge at that time?

A No, he did not.

Q Do you have an opinion as to the – apart from the fact that he left the bridge already, apart from that do you have an

[1184]

opinion as to the exercise of Captain Hazelwood's judgment of not coming up to the bridge at that time?

A Yes. I'd say it's extremely poor judgment. If third mate called me up and told me he was going to get into ice – not that I'd be off the bridge any way, but I would have flown up to the bridge.

Q Why is that?

A ASAP. Because he told me was going to get in the ice. That's a danger.

Q And Captain Hazelwood didn't do that?

A No, he didn't.

Q Okay. He stayed in his cabin?

A Yes, he did.

Q Is that the kind of judgment you would expect the captain of Captain Hazelwood's experience and reputation to exercise?

A No.

Q Now, let's go back again to that moment of when Captain Hazelwood left the bridge after telling Cousins to turn abeam Busby light, about two minutes hence.

After Captain Hazelwood left the bridge did Cousins have other things that he has to do besides just stand there and wait to turn it abeam Busby light?

A Yeah, he's got to do both jobs now, con the ship and keep a record of its position.

Q All right. Would you sort of explain again what that is?

[1185]

A The master cons the ship from the front of bridge where he's got the instrumentation. He can watch and be right there beside the helmsman and the radar. And the third mate keeps a running track of the position of the vessel going from fixing it to putting it on a chart.

Q And it's the latter job that the third mate is used to doing; is that correct?

A Yes.

Q And now he's got to do both?

A Yes.

Q Were you – have you looked at the course recorder from the Exxon Valdez on the night of the 23rd and the morning of the 24th of March?

A Yes.

Q And can you tell from that course recorder when the turn was made?

A Yes.

Q And do you recall when that is, or do you have to look? Should I show you?

A Looked like about two minutes past midnight.

Q Now, when – you heard Captain Stalzer's testimony?

A Yes, I did.

Q So I won't belabor it, but when it a turn is made, there's a simple way to – a foolproof way to check whether or not it is carried out; isn't that correct?

A Yes.

[1186]

Q And what is that?

A Well, you mean you're talking about the rudder, right?

Q Yes. Well, when the wheel is turned, if the order is given to turn the wheel X degrees, there's a real easy way to make sure that the rudder responded, isn't there?

A Yes, to look at the rudder angle indicator.

Q Is the rudder angle indicator driven by the turn of the helm or is it driven by the actual movement of the rudder?

A The actual movement of the rudder.

Q So if the angle indicator moves, that means the rudder moved?

A Yes.

Q Is that the standard way of determining, checking whether or not a – a turn has been effected?

A It's a way of telling the rudder has moved to where you want it, but you still got to watch to make sure that that amount is rudder is having a desired effect.

Q And that varies on the speed you're going and the load that you're carrying?

A Yes.

Q Whose job is it to do that?

A The master's.

Q Is there any way a master can do that when he's in his cabin?

[1187]

A No.

Q We've heard an awful lot about Watch Condition C and Watch Condition D and how Exxon has it in their navigation and bridge manual. Have you heard that testimony?

A Yes.

Q Apart from the fact that they have it written down in their bridge manual, is that what they have written there, is that unique?

A No. It's common practice on every ship I've ever been on.

Q So that that's just putting down what everybody knows or the proper ways to con a vessel when you're going in and out of port?

A Yes.

Q And under various conditions?

A Yes.

Q Not something Exxon made up, not novel?

A No, it's not novel.

Q Now, let's talk for a minute about the Coast Guard. I –

THE COURT: Sounds like you're changing subjects. We'll take our second break. Ladies and

gentlemen of the jury, please don't discuss this matter. We'll resume in 15 minutes.

(Jury out at 12:00 noon.)

(Recess).

(Jury in at 12:16.)

BY MR. MONTAGUE:

[1188]

Q Captain Clark, I just want to revisit two things very briefly to make sure it's clear.

With respect to the weather report and making weather calculations as to when a storm might be raged?

A Yes.

Q Could that have been done as well on the deck – on the bridge as in Captain Hazelwood's cabin?

A Yes.

Q There was no need for him to be in his cabin to make those calculations?

A No.

Q Secondly, someone suggested, and I've been using the word in port and out of port. Have you understood that to mean going from Cape Hinchinbrook into the Alyeska terminal and vice versa?

A Yes.

Q Now, I'd like to ask you some questions about the VTC.

Have you in your 13 years ever relied on the Coast Guard to monitor or track where you are?

A No, never.

Q And is there a reason for that?

A Yes.

Q Could you tell us –

A Because I'm the master of the vessel, I know where I am. I don't want them telling me where I am, I'd rather rely on my

[1189]

own information.

Q Is your information as good as theirs, with respect to your vessel?

A It would be better.

* * *

[1193]

Q You've given a series of opinions about the conduct and judgment exercised and performed by Captain Hazelwood that evening?

A Yes.

Q Now, I want you to take that conduct as a course of conduct rather than – we've looked at each one alternate a time. I want you to look at it all together and tell us, tell the jury if you have formed an opinion as to whether Captain Hazelwood was a competent captain on that voyage from the time the vessel

[1194]

left the Alyeska terminal until it grounded on Bligh Reef? Have you formed an opinion as to that?

A Yes.

Q And what is your opinion?

A It was incompetent.

Q Okay. And do you have an opinion as to whether Captain Hazelwood's conduct as a whole, his course of conduct on that voyage, was consistent with a captain – with the conduct you would expect of a captain with his experience and with, as Mr. Lynch said, an almost legendary reputation for seamanship?

A Yes, I have.

Q And what is your opinion?

A It was not consistent.

Q Do you have an opinion on the claim that the third mate, Mr. Cousins, was left on the bridge alone with the helmsman, just simply messed up, a simple term, and thus caused the wreck?

A Do I have an opinion?

Q Yes.

A Yes. That's not true.

Q What caused the wreck, in your opinion, Captain?

A Captain Hazelwood not being on the bridge to direct the vessel's movements.

* * *

[1224]

Q Well, you made a judgment that Captain Hazelwood was in blatant disregard of his duties before you even knew what Captain Hazelwood had to say, you say you based that on the assumed facts. What were those assumed facts that you use?

A Well, I base my decision that he walked off the bridge and – and a –

Q That's enough?

A In a – coming down on ice in a dark night with a loaded tanker with a narrow window. I mean, what else can I say?

* * *

[1322]

DIRECT EXAMINATION OF MARK J. DELOZIER
(Read)

BY MR. COHEN:

* * *

[1323]

Q And until October of '89 were you in the Coast Guard?

A I was still in the Coast Guard in October of '89.

Q And then you moved over to Alyeska and left the Coast Guard?

A I detached from the Coast Guard August 15th, '89, went on terminal leave and then physically retired from the Coast Guard November 1st, '89. Began employment with a contractor, an electrical contractor in Valdez in September of '89, and then began work in October of '89 with Alyeska.

Q Now, how long had you been in the Coast Guard before you went to work with Alyeska – for Alyeska?

A 20 years and ten months. 20 years and 11 months.

Q And when you left the Coast Guard, your rank was chief warrant officer?

[1324]

A CWO3.

Q And what does O3 mean?

A There's four grade levels for warrant officers. W-1, W-2, W-3 and W-4, and I was a three. The highest you can go is four.

Q So you were next to the highest?

A Yes.

* * *

[1326]

Q Now, can you tell us, in your approach to the vessel, did you observe any oil in the water?

A Yes, I did.

Q And can you describe the thickness of the oil?

A It was quite thick. I think I estimated it in previous testimony 12 to 18 inches.

Q Did you notice any bubbling of the oil?

A Yes.

Q Now, what about oil vapors? Did you detect any oil vapors

[1327]

as you approached the vessel?

A Yes.

Q And when did you first detect the vapors?

A I believe it was probably – probably before I actually saw the oil.

Q Can you describe the intensity of the odor?

A It was very strong.

Q Did you have any concern that there was any danger of fire?

A Yes, I did.

Q And did you have any other concerns along those lines?

Mr. Carey asks, along the lines of what?

Well, like explosion. Did you have any concerns there might be an explosion?

A Yes.

Q Now, where was it in your approach to the vessel that you saw ice for the first time, generally?

A It was towards the southern end of the entrance of Tatitlek Narrows. The operator of boat that we were on observed it on the radar. We slowed down and the deckhand stuck her head out the window to try to spot the ice and we steered around it. There was one or two blips on the radar.

[1328]

When we passed one of them, it was about four foot in diameter.

Q You actually visually saw that, or was that on the radar you're judging from?

A The operator of the vessel spotted some blips on the radar. I did not look at them on the radar. We slowed down and when we passed one of them I visually saw one of them.

Q Now, when you arrived to the Exxon Valdez which side did you board her on? Do you recall?

A On the starboard side.

Q And all three – who went aboard?

A All three of us.

Q And could you describe where you went after you got aboard the vessel?

A We went up to the wheelhouse.

Q All three of you?

A Yes.

Q When you got to the wheelhouse, who did you observe in the wheelhouse?

A Well, there was Captain Hazelwood.

Q And where was he located?

A He was on the port, port side of the wheelhouse forward, and there was someone else up on the center line or on the starboard side, and I don't recall who that was now.

Q Now, is there anyone else or just those two that you recall?

A As we immediately arrived, that's all I believe I remember.

Q Now, when you say Captain Hazelwood, can you describe his position that he was in; that is, was he standing up, was he sitting down? Can you describe his position?

A He was standing up on the port side forward, up against the

[1329]

glass, kind of leaning over on the windowsill; and as we came up from the rear behind the chart table and around the corner, he turned around and motioned to us. We went over and began to talk to him.

Q Now, did all three of you go over there at one time or did you go over individually?

A We were in a group. We all traveled over at the same time.

Q And who spoke to him first?

A Commander Falkenstein.

Q Did you hear any of the conversation?

A Yes.

Q What was said?

A I don't recall.

Q How long did Commander Falkenstein talk with him initially in this conversation we're referring to?

A Five to ten minutes.

Q And then what happened? Did you talk to the captain then?

A Just briefly.

Q Can you describe what your conversation with the captain was about?

A I don't recall.

Q When you were having this conversation with the captain, did you detect any alcohol?

A I detected an odor of alcohol.

Q At what point did you detect the odor of alcohol – and

[1330]

that is, when you're going up and you're going to talk with him, and I want to know when in the sequence of your talking with him did – did you detect it?

A As the discussion was taking place with Commander Falkenstein and Dan Lawn, we were all kind of huddled around Captain Hazelwood; and during that conversation is when I detected an odor of alcohol. As far as the exact moment or minutes after we arrived, I'm not sure.

Q Now, can you describe the distance you were from Captain Hazelwood when you first detected this odor?

A It varied. Anywhere between two foot from the front of his face to four foot from the front of his face.

Q Can you describe the intensity of the odor?

A I felt it was quite strong.

Q Did you reach any conclusions when you detected it?

A Yes.

Q What conclusion did you reach?

A That I should pursue the matter.

Q Did you – while you were talking to Captain Hazelwood, did he do anything with his hands or anything at all which you felt he was doing to prevent you from detecting the odor?

A I concluded that, because of the way that he was standing and the way that his arm was placed, like this (indicating), that he may have been trying to attempt to hide any odor, but that was my conclusion. That was my assumption.

[1331]

Q Now, you just said he did something like this. Can you describe for the record what did he do with his hand when you said “like this” so we have it on the record?

A He was crouched at the windowsill. Not crouched. He was standing at the windowsill, and he was leaning on the windowsill and he was propping his head up (indicating).

Q With his hand like you have it right now?

A With his hand. And at times he was like this (indicating).

Q Well, let the record show, when you said at times like this, that he put his hand in like a fist-type under his lips. Is that what you’re saying?

A Well, you can go ahead and describe it. This is about what I think he did (indicating). He was doing this.

Q He put his hand actually over his lip, his fingers?

A To my recollection, yes.

Q Mr. Carey, the record should show that the witness has said his hand, his chin cupped in his hand up to before and during some of the time that you’ve asked questions, and I’m not sure the record – what you’re talking about, Mr. Blank.

Mr. Burns, the record should also show that he had his hand directly over his lips at some time.

Now, after you had this conversation with Captain Hazelwood, what did you do next?

A As we backed off from the conversation, Commander Falkenstein and myself, we walked out to the starboard bridge

[1332]

to decide what we were going to do; and as we were walking out to the bridge wing, I mentioned to Falkenstein, I asked him if he had smelled the odor, and he said yes, he did. And I said, well, we need to do something about that; and he said, what do you suggest? I don't remember his exact words, but it was something of that nature.

And I said, we need to call back to the base and have someone come in and begin some testing. I said we're bound by – I said, we have these new regulations coming in place. I said this is one thing that we will have to look into, and we need to do it rapidly for the longer we wait, the longer we may not be able to get an accurate test.

Q Now, what did you do after this conversation with Commander Falkenstein?

A We went back to the wheelhouse and talked some more with Captain Hazelwood. We questioned him on the – no, I'm sorry. Back up.

While we were out on the bridge wing we made an attempt to call the marine safety office. We made contact with them and we advised them that we would make an attempt to call the CO by way of telephone. We went back inside and had some more discussions, brief discussions with Captain Hazelwood, and he directed us to the radio officer.

I think he summoned the radio officer, and we went down below and he fixed us up with a telephone.

[1333]

Q And who made the telephone call from the ship?

A Commander Falkenstein.

Q Did you hear what Commander Falkenstein said on the telephone?

A Yes.

Q Let me just back up a minute. When you were up on the bridge, initially on your arrival, did you detect any concentration of fumes on the bridge?

A Yes.

Q Did you detect them in the wheelhouse where Captain Hazelwood was?

A Yes.

Q Did you at any time observe Captain Hazelwood smoking?

A Yes.

Q Did you have any conversation with Captain Hazelwood in connection with that?

A Yes.

Q And can you describe the conversation you had with him?

A It wasn't – it wasn't conversation. It was – at one point in time I walked up to the wheelhouse and Captain Hazelwood was there and he was smoking. The fumes had registered on my mind previous to that. I politely walked over to Joe – Captain Hazelwood, I'm sorry. And trying not to be belligerent or forceful or anything like that, I mentioned to him that it might be a good ideas to stop smoking, that there

[1334]

were fumes that were presented.

Q And what was his reply?

A I don't recall if there was a reply, but he did put his cigarette out.

* * *

[1338]

Q Now, based on your interview with Cousins, did he tell you that the master gave him in effect an approximate position to turn as opposed to a precise position?

A During the interview, it was my interpretation of the interview, that the point in which he needed to turn was an approximate.

Q Now, after the ten degree right rudder, did Cousins ever indicate to you that he telephoned the captain prior to the 20 degree?

A No, he didn't.

* * *

[1340]

Q Did you query Cousins at this time concerning where Captain Hazelwood told him the turn was to be made which you previously referred to?

A Yes, I did.

Q And how did you ask the question to him, do you recall and how did you phrase the question to him?

A I believe the question that I instructed him was where is

the point where he was instructed to begin his turn.

Q And that was the question you asked him and how did he respond to your question? What did he say?

A He indicated this mark right here which is the 38 fathom mark.

Q Now, before you describe it any further, you say he indicated. Tell me how he did this. You asked him the question. What physically did he do?

A I asked him the question, he and I were both leaning over the chart. I believe he took a pencil in his hand, and I believe he pointed to the position that he was referring to.

Q Now, where did he point the pencil to – when you describe that?

A There is a 38 fathom mark which is on a course of approximately 180 which is due south of the 2355 position that he had plotted.

[1341]

Q Okay.

A It is approximately three quarters of an inch below that position on the chart.

Q Now, I have your Deposition Exhibit 1624 which bears Plaintiff's Exhibit No. 843, and ask you if you recognize it just as a portion of the chart? Do you recognize the line and circle on there as positions you put on the chart?

A Yes, I do.

Q Now, can you tell us the circle that you have drawn on the chart, is this the same as what you have just testified to orally about where Cousins pointed the pencil to?

A That's correct.

Q Am I correct – and my question to you is, did Cousins ever indicate to you that Hazelwood told him to turn at the 38 fathom mark? Did he say it to you that way or did he just

point the pencil as you previously testified?

A He pointed to the 38 fathom mark and then I questioned, I questioned him and I said, this mark right here? The 38 fathom mark? And he said yes.

* * *

[1348]

Q Do you have any recollection of discussion with Captain Hazelwood beyond what was taped at the end of the interview?

A I don't know when the tape stopped. At the conclusion of the interview with Captain Hazelwood, the interview was complete and then sometime following that interview, during the afternoon hours, is when I meant with Captain Hazelwood while – while he was already in the wheelhouse. I asked him to come over and to describe to me where the point in which he instructed Third Mate Cousins to turn was.

Q Now, did Captain Hazelwood ever indicate to you during the interview or use the phrase in referring to where he instructed Cousins to turn the 38-fathom mark, did he ever indicate to you, say those words verbally when you were discussing where the turn was to be made? Did he say, refer to the 38-fathom?

A During the interview?

Q During the interview.

A Yes.

Q Mr. Burns: Which interview now?

Continuing.

Either one. The one in the stateroom or the one up in the – up looking at the chart.

A Yes, while he was looking at the chart.

[1349]

Q And do you recall the terminology he used?

A 38-fathom mark.

Q And when did he say that in the sequence of your questioning him?

A I asked him to show me on the chart where the point he had instructed the third mate to turn. He came over and he picked up a pencil and circled the 38-fathom mark and I said this? And he said, the 38-fathom mark, this is it. I don't remember the exact words, okay?

* * *

[1356]

Q Was his speech slurred in any way?

A I didn't distinguish anything of that nature.

* * *

[1376]

Q On the morning of March 24th, 1989, when you and Lieutenant Commander Falkenstein went out to the vessel, were you acting as representatives of the Coast Guard?

A Yeah. Certainly.

Q Now, did you at any time on March 24th, after you got to the vessel, ever recommend to Lieutenant Commander Falkenstein that Captain Hazelwood be relieved of his duties because you believed that he was impaired?

[1377]

A No.

Q Mr. Delozier, on the morning of March 24th, 1989, when you had the opportunity to observe Captain Hazelwood, did you see – did you observe other than the smell of alcohol, any signs of impairment?

A No.

Q On March 24th, 1989 in your observations of Captain

Hazelwood, did you observe any signs of intoxication other than the smell of alcohol?

A No.

* * *

[1378]

DIRECT EXAMINATION OF SCOTT CONNOR
(video)

BY PLAINTIFF EXAMINER:

Q I ask you state your name, please, sir?

A Scott M. Connor.

Q And how are you employed, Mr. Connor?

A I am a chief health services technician with the U.S. Coast Guard.

Q Where are you assigned?

A Currently assigned to Cleveland, Ohio.

Q How long have you been assigned to Cleveland?

A I have been in Cleveland now for two years, four months.

Q How long have you been in the service of the United States Coast Guard?

A Been in the United States Coast Guard 17 years.

Q How long have you been a chief health services technician?

A For two years, five months.

Q Two years.

Well, let me go back to the time of the Exxon Valdez grounding in March of 1989. What was your position at that time?

A My position at that time was – I was a first class petty

[1379]

officer, health services technician. I was the Coast Guard's medical liaison at Elmendorf Air Force Base in Anchorage. I was responsible for the well-being of

–

* * *

[1409]

Q You testified about the bottle of Jack Daniels that you saw on the shelf in the captain's quarters. Where was this shelf?

A It was on the forward bulkhead.

Q Okay. Was that where the desk was as well?

A The desk was located forward, forward port quadrant of the room. You split the room in fours, it would be forward port. Right there

(Noise in video.)

Q Okay. And this was in the where was the shelf again? I'm sorry.

A It was along the forward bulkhead.

Q Okay. Is that where the couch was?

A Yes, sir.

Q It was a shelf above the couch?

[1410]

A Yes. It was not – wasn't a shelf. – It was a shelf but I think we've got two different interpretations here. It was built into the structure of the ship. It was not a free hung wall shelf. The bulkhead went up, went in and continued up.

So that would provide a horizontal surface that I am stating to be a shelf. Was a cabinet, I can't recall? Was it a heat register, I can not recall. But it was not part of the steel superstructure that directly led to the outdoors.

Q Okay. How high up was this what you're calling a shelf?

A Four foot.

Q Do you recall what else was on this shelf?

A There were – there were the additional tox kits that I – that had been brought to me. They were separate from the desk.

Q Okay.

How long was the shelf?

A Oh, it was the length of the room. I – no. I'm not sure if it went the full length of the room or if it stopped and there's where the couch started. I can't – I can't specifically recall.

Q Would you have an estimate in feet of how long the shelf was?

A Four, five, six.

Q Okay. When you first came in the room – well, let me withdraw that. When did you first notice this bottle of Jack Daniels?

[1411]

A When I walked into the room.

Q Okay. At that time was there anything else on the shelf?

A I don't recall.

Q Where did the bottle sit in relation to the shelf? Was it in the middle, was it off to one side?

A It was off to the – facing the shelf. It was off to the right side.

Q Was it in the corner on the right side?

A I don't know, sir. I mean, at this point it could have been a lava lamp, but for some reason I just recall seeing a bottle of Jack Daniels sitting there. You know, I hope I just don't have this superimposed with some other event in my life.

Q What makes you think it was a Jack Daniels bottle?

A Because it had a black label.

Q Were you able to read the printing on the label?

A I don't recall if I specifically did.

Q Okay. You said it was open because you could see that it was torn, the paper seal had been torn?

A Because it had less than – it was less than full.

Q Okay. Do you recall – say it was less than full?

A No, sir, I don't recall what the volume was.

Q How big of a bottle was this?

A No idea. It was more than an airplane nip and it was not a half gal on.

Q You said you saw and you thought, damn that was trouble.

[1412]

Why did you think that?

A There is a ship on the rocks and oil is bubbling out of the side, and I'm brought into the captain's quarters and there's a bottle whiskey, bourbon on the shelf.

Q You also said you saw some empty beer cans in the trash?

A Yes, sir.

Q Can you describe the beer cans at all?

A Open, empty – I think I know what kind they were.

Q What kind do you think they were?

A I'm also positive, but I'm not a hundred percent sure.

Q So what kind do you think they were?

A I think it was Meisterbrau. I think I just recall Jesus, what's he drinking that crap for (indicating).

Q Do you recall having that thought when you saw the bottles?

A The cans.

Q The cans, excuse me.

A That it was cheap beer, yes, sir.

Q Do you recall how many cans were in the trash?

A No, sir. I didn't do a count.

Q Now, you said you were throwing things in this trash can?

A Yes, sir.

Q So were you pretty close to these cans?

A Oh, yes.

Q Was your view of these cans obstructed in any way?

A No, sir.

[1413]

Q Where was this trash can located?

A Well, the desk was here and the trash can was – it was not alongside of the desk, it was sort of off and up against the – the wall that – the bookcase heat register, whatever that was, it was up against there because I could stand there and just throw the stuff right now. And I don't recall moving the trash can myself.

Q Were you throwing things on top of the trash on top of the beer cans?

A Oh, yes, sir.

Q And by the time you were done throwing things in the trash can were the beer cans covered?

A Absolutely no idea.

Q Okay. How close were you to the Jack Daniels bottle when you first saw it?

A Ten feet.

Q At any time during your time in the room did you get any closer to the Jack Daniels bottle?

A I can't recall.

Q Did you just look at the bottle, the one time, the initial time you saw it or did you look at it a couple of times?

A No, I – all I can recall is when I walked in I saw it, went Jesus, and, you know, went on my – you know, to do my thing.

* * *

[1557]

DIRECT EXAMINATION OF LEE RAYMOND
(video)

BY VIDEO EXAMINER:

* * *

What is your position today?

A Today I'm president and director of Exxon Corporation.

[1558]

Q And at the time of the grounding of the Exxon Valdez on Good Friday of 1989, what was your position?

A The same as it is today.

* * *

[1562]

Q The top of the page, Mr. Brinkley asked the question, first, let's deal with this. Was it a good policy to leave a man with a substantial record of alcohol abuse in command of a tanker loaded with oil. And your answer was, no, it was not a good policy. Do you see that?

A Yes, I do.

Q Was the question asked and did you give the answer?

A Pardon?

Q Was that question in fact asked and did you in fact give that answer?

A I think that – I think that, as I recall, at the time that question was asked, and that was the answer I gave.

Q And at the time you gave it, you believed it to be true?

A At the time I gave it, given the information I had available to me at that time, I thought it to be true.

Q In the – Mr. Brinkley asked how did it happen. And you

[1563]

give a lengthy answer, and in the answer there is the statement made that Captain Hazelwood came forth and said he had a drinking problem. Do you see that?

A Yes, I do.

Q Did Captain Hazelwood self identify, do you know?

A I do not personally know by my own knowledge.

Q Do you know if at or about the time Captain Hazelwood went into treatment he was under investigation with regard to drinking?

A I do not know.

Q At the time you appeared on This Week with David Brinkley, would it be fair to say that you believed that returning Captain Hazelwood to duty as the master of a vessel was an error in judgment?

A No, I don't believe that's what I said. I said if there was an error in judgment. I don't think I made a conclusion at that time that they in fact had made an error in judgment.

Q Mr. Raymond, would you read the answer from, well, I think there are two or three points here, David, down to the bottom of the answer.

A Well, I think there are two or three points here, David. My English wasn't very good. I think that they are important to try and to put the whole thing in perspective. The early – as I understand it, in going back and trying to find out exactly what happened, as you can expect in the last several

[1564]

days, there have been a lot of questions like this. Captain Hazelwood came forth and said he had a drinking problem and asked that he be treated for that. Under our company policy, I'm sure under a lot of company policies these days recognizing the societal impact of alcoholism, we all try and encourage people if they have a problem to come

forth so they will be treated. In so doing he went and was treated, and we were told or the shipping company was told that he had had the treatment and was returned to duty.

If there was an error in judgment, in my view, it was at that point. The people in the shipping company, of course, are the people who really make the judgments about the qualifications of people who operate tankers. Then that's where that judgment should be. Only they can really judge how good these people are. But I'm afraid in hindsight they were probably put in the position of making a broader judgment, a societal judgment, which in hindsight shouldn't have been made. And that is when someone comes – should be out of alcohol or rehabilitation, he obviously is still a risk. That we all know percentage wise, and there is a risk that he will not recover, and under pressure certain things can happen. I would guess that that's what happened here.

* * *

[1564]

Q Let's have the question completely clear. If Captain Hazelwood was drinking at all after his rehabilitation, did Exxon Corporation, including Exxon USA, have a policy with

[1565]

regard to that?

A Well, let me be clear I understand. You mean at any time during a 24-hour day, whether he was on or off, anywhere.

Q After rehabilitation?

A If a person, him or her, had any alcohol, anywhere?

Q That's right?

A Did we have a policy on that?

Q That's right.

A Not to my knowledge.

Q In one of the statements that was made to the congressional committees by Mr. Rawls, he referred to Captain Hazelwood was the most closely monitored man in Exxon. Do you recall that, or words to that event?

A Yes, I do.

Q Do you know how Captain Hazelwood was monitored?

A Only by what the shipping company has said after the fact, so to speak.

Q Who in the shipping company?

A Who in the shipping company what?

Q Said about him being monitored?

A I believe the source of Hazelwood, the source of the statement in the shipping company about Hazelwood being highly monitored, or monitored frequently, or most monitored, or however you want to phrase it, the source of that was Frank Iarossi.

[1566]

Q Do you know if in fact he was monitored, or do you know?

A My understanding is that in fact he was monitored consistent with the statement that Iarossi had made.

* * *

[1568]

Q Have you caused anyone to be fired as a result of the Valdez incident?

A Are you – me personally?

Q Yes, sir?

A No, sir, I have not.

Q Let me ask the general question. Has Exxon Corporation, its division, Exxon USA and/or Exxon Shipping Company caused anybody to be fired as a result of the Valdez incident?

A Well, I believe Mr. Hazelwood was terminated and some others have been reassigned.

Q Who was reassigned as a result of the Valdez incident?

A I believe Mr. Cousins was reassigned.

Q Anybody other than Hazelwood or Cousins – did anyone other than Hazelwood or Cousins have any adverse personnel action taken with regard to the Valdez incident?

A Not to my knowledge.

Q Are there risks associated with the transit, the transportation of oil from the Valdez terminal?

A There are risks associated with everything.

Q Would it be fair to say that a way to manage those risks is to take care in the selection and the evaluation of the masters

[1569]

of the vessels that you use to transport the oil?

A That's one of several ways to try the and deal with risks.

Q The selection of the master and the evaluation of a master that is in charge of a vessel that takes oil from the Valdez terminal, is a matter of some significance, isn't it?

A Yes, it is.

Q And in light of what you know today, was Captain Hazelwood, in March of 1989, qualified professionally, emotionally and physically to master a vessel from the Valdez terminal?

A Well, I think the point was made earlier today when you referenced the interview that I had on the David Brinkley show, is that the judgment as to who should be ship captains or tank truck drivers or any of those who run control houses and refineries, that's not an area of my expertise, that's delegated into the organization.

Q So as you sit here today, three-and-a-half years after the incident, as the president of Exxon Corporation, you have no judgment as to whether Captain Hazelwood was qualified or not to master the Valdez?

A Based on the information available to me in the ordinary course of business, I do not have a judgment.

* * *

[1571]

DIRECT EXAMINATION OF LAWRENCE G.
RAWL

BY MR. O'NEILL:

Q Sir, we've got to quit meeting like this.

In March of 1989, what was your position?

A I was the – can you hear me all right? I was the chairman, chief executive of the Exxon Corporation.

* * *

[1578]

This is from your testimony to the House of Representatives on April 6th, 1989, isn't it?

A Yes, that's what it says.

Q And your testimony at that point in time with regard to the issue we were just talking about is, the other point in that argument is, if as an employee you do not tell your supervisor that you have a drinking or a drug problem, and do not come in for rehabilitation, then when we find out we are going to fire you. This is a pretty serious thing.

Is that a statement you made to the Congress back on 4/6 of

[1579]

'89?

A I'm sure it is if this is a congressional record.

Q It is.

A Yes, I did make that. I made it with, watching Mr. Raymond's testimony on the TV monitor, within the first two or three weeks of that Spill, and some of

the important information didn't come out for over a year. I made a number of statements, and based on information that I've subsequently found out was incorrect, so I'll just state right now that I was wrong.

Q Testimony before the Congress of the United States, at least for most of us, is an important event in our lives, is that a correct statement?

A That's correct for me, too. Yes, very important.

Q And at the time you testified before the Congress of the United States you were testifying on behalf of Exxon Corporation, that's a correct statement?

A Yes, sir.

Q With regard to the Valdez incident?

A Yes, sir.

Q After having been advised by your best people with regard to what your testimony was going to be on April 6th, 1989?

A Correct, and I told the truth totally, but I had bad dope, basically.

Q Now, in – with regard to the reinstatement of Captain

[1580]

Hazelwood as a ship captain back in 1985, would it be fair to say that the man should not have been put back on the bridge after his treatment?

A I'm not in a position to say that, no.

Q Have you ever said that?

A Yes, I said that.

Q Who did you say it to?

A I said it to the Congress of the United States immediately post of the spill because I understood at the time, based on a Coast Guard press release which predated my testimony to the Congress of the United States, that there was irrefutable proof by the Coast Guard due to a blood alcohol and drug test that Captain Hazelwood's blood level exceeded that allowed by the Coast Guard regulations to be the captain on the ship. Based on that, based on a lot of information that I got out of the press, which was – of course I knew before, I have known since that you can't always believe everything you read or see, but under the stress of the situation, we had a horrible accident, tragedy, and we felt very badly about it. We had a lot of other things we needed to do. As I said earlier, I said some things, that if I had more time to get information, I wouldn't have said those things.

Q And you also made the statement or a similar statement on Face the Nation, do you recall that?

A I'm sure the thrust of it is probably the same at the time.

[1581]

Q Let's take a look at you on Face the Nation with the Court's permission.

(Videotape Played)

BY MR. O'NEILL:

Q Would it be fair to say, sir, that alcoholism is a disease that you never get over, as you understand it?

A I've read that and heard it, but I don't know whether that's fair to say or not.

Q Did you say it to the House of Representatives?

A I probably did. I'm not sure of course that I've determined since that Captain Hazelwood is actually an alcoholic.

Q That's from your lawyers, isn't it?

A No. In fact, you'll find my lawyers regret that frequently they tell me things they told me I should have listened too and didn't, but in any event, that's not from the lawyers.

Q Would it be fair to say that when somebody undergoes alcohol treatment, they have to be watched closely on follow up, a better plan, and it can be done within the same policy, is to not give the person that job back but to give them a less stressful job, give them a way to recover and continue to work but certainly not as a captain of a ship or airplane pilot or someone in the control room of a refinery or chemical plant or jobs of that nature. Is that a fair statement?

A If I may, I'll answer it by explaining a little bit more

[1582]

about how Exxon monitors employees, if you'd let me mention this to the jury.

Q My question was, was that a fair statement.

A I don't know whether it's fair or not.

Q Have you ever made that statement?

A I'm sure I did during that period I mentioned to you.

Q Would you go to page 85 of Exhibit 711?

A Yes, I'm on it, thank you.

Q Now, do you see the last full paragraph on the page?

A Yes, I do.

MR. LYNCH: I think you're on 19.

MR. O'NEILL: I'm sorry, is it page 19? Page 79 of the testimony, but page 19 of the exhibit on the bottom.

MR. LYNCH: Okay.

THE WITNESS: Page 19.

MR. LYNCH: No, 79.

BY MR. O'NEILL:

Q Numbered 79 at the top of the page?

A Okay. I was on 85. I'm there.

Q Is that a statement you made to the House of Representatives of the United States of America?

A I'm sure it is, but do you want me to read the whole thing?

Q Read it out loud.

A Mr. Coble: I was a little late in getting here and you may

[1583]

have already covered this. If so, I apologize for repeating it but I want to shift gears to the captain, and I want to recall –

Q Sir, I'm interested in the full paragraph that begins, "The facts are, though, that in terms of an alcoholic"?

A I'm sorry. The facts are, though, that in that in terms of an alcoholic, it's a disease that you never get over, as I understand it. They have to be watched closely on follow up. A better plan – and it can be done within the same policy –

is to not give the person that job back, but give them a less stressful back job, give them a way to recover, and continue to work, but certainly not as a captain of a ship or airplane pilot, so forth, that's what you read to me.

Q Yes, it is.

Putting Captain Hazelwood back on the ship was a judgment that was made at the operating level, is that a correct statement?

A Yes.

Q Would it be fair to say that it was a bad judgment on a going-in basis?

A That sounds like something else I probably said in one of these things. Once again, I had information that was incorrect.

Q Let's see what you said.

A What page is that?

[1584]

Q I'm going to just show it to you.

(Videotape Played)

BY MR. O'NEILL:

Q Is that you? That was you?

A Looked a lot like me.

Q Yeah, it did. And you described it as a bad judgment in a lot of people's eyes on a going-in basis, yours being one of them, is that a correct statement?

A That's what I said.

Q Would it be fair to say, in addition, that it was a gross error?

A It was an error.

Q How about a gross error?

A My view at the time, I said it was an error. I don't know the word you use, but I tried to explain that I was wrong in all those statements.

Q There are a lot of them, aren't there?

A They certainly were, and they were all made within a couple weeks of that spill before I had any indication that – some of the things that I thought were facts were not, or certainly some of the tests I thought were valid were flawed, and that's about all I can tell you.

Q Let's see if we can explore the expression gross error for a minute.

(Videotape Played)

[1585]

BY MR. O'NEILL:

Q Your expression was "gross error". That was your expression?

A My definition of gross, of course, may be different than yours, but that's the word I used.

Q Let me offer a proposition to you. The proposition is the first drink the captain had after he had been rehabilitated was a basis for dismissal. That's the proposition. Do you agree with that proposition?

A Of course in the context of being on the job, or on the ship, that was basically what my intention was there.

Q Would you go to Exhibit 182, please. It's the Fortune Magazine article?

A 182?

Q Yes, sir.

A When you get to magazine articles that's a little different than going to the Federal Register where you have an opportunity to read it before they print it. This magazine article was a result of three people interviewing me over about two or three hours, and they took little snippets out of it and they put things in it and they didn't – a lot of them are not quotes. That was their interpretation of what I was saying at the time, you've seen that before and I've seen it before, but I'm here, I'm at this point.

Q And I want to go to the Fortune Magazine article, and I'm

[1586]

going to read the last paragraph and you can follow along and let's see if I can get it right.

A Page 3?

Q It's on the page with – this paragraph here.

A This last page 1?

Q Yeah.

A Thank you.

Q And this article purports to be an interview with you, isn't that right?

A There was an interview. Now, whether I said these words or not is something else.

Q We'll read the paragraph and then if you want to deny it you can deny it?

A No, the thrust of this paragraph is, I've read it, is what I generally said. I don't know whether I've used those words, go back in genesis, but there is no question there was bad judgment involved, and even putting a person with a critical skill back in that kind of work. I said that. Something like that. And whether or not these are my words are something else.

Q Now let's go to the first page of the article, and the paragraph in the bottom right-hand corner reads: Well, take the case of the captain of the ship. We can certainly minimize this type of thing from happening again. We've had a policy on alcohol abuse since 1977. The first drink the captain had

[1587]

after he had been rehabilitated was the basis for dismissal. Someone in management should have been notified and our policy would not have permitted this man back on the ship. Captain Joseph Hazelwood entered an Exxon drying out program in 1985.

Do you see that paragraph?

A This is the same 182?

Q Yes. Yes, sir. Bottom right-hand corner?

A Yeah, I see it.

Q Did you make those statements to the reporters from Fortune Magazine?

A I think in the context of drinking on the job, that policy was pretty clear. In the context of someone social drinking, not overdoing it, what we judge on in our company, and have forever, is employees are sort of continuously rated as to performance. I think everyone here that has a job and has a boss, you got the same kind of a thing. You just continuously make sure that people are capable of doing their job. If they are incapable or don't do it very well, you look for reasons they didn't do it. Now, as I understand it, that was the basis upon which Captain Hazelwood went back on the ship. After he got out of rehabilitation, he had taken the 90 day leave of absence. He came back to work. They put him on a ship, several ships transiting between the east coast of the U.S. and the gulf coast of the U.S. sometimes more than one stop, I presume. Monitored him closely then and continued to monitor

[1588]

him as to his job performance, and his job performance was satisfactory, and then they put him on this run from San Francisco, or thereabouts, to Valdez, and to my knowledge, to this day, he's been a satisfactory performer. In terms of the – I've learned a lot of things since then that says he wasn't drunk at that time.

Q Your next to the last sentence was, and to my knowledge to this day he has been a satisfactory performer. You just said that a minute ago?

A That's correct.

Q You fired him, didn't you?

A For breaking a couple of rules, yes. I was talking about in terms of the alcohol thing.

Q Well, let's talk for a minute. You testified before the Congress of the United States, before the House of Representatives, that Exxon had no reports of Captain Hazelwood drinking after his rehabilitation. Do you recall that testimony?

A I recall that, yes.

Q If there were reports of his drinking after rehabilitation, what should have been done?

A I don't know that there were. It's difficult for me to sit here and not being privy to all the information that management of Exxon Shipping Company had, and for to you give me hypothetical situations and me guess what the right answer is.

[1589]

I'm having trouble with that frankly, but I'm sure that's not your intention but that's the way it's coming across, and –

Q Sir, I'm trying to be fair, and I haven't cut you off and I'm not going to cut you off.

A No, I'm not concerned about that treatment.

Q Would it be fair to say that Captain Hazelwood's impairment created the spill to begin with and also created a situation where the master could have brought another officer to the bridge but he didn't?

A It's my understanding he wasn't impaired.

Q Did you make this statement to the Senate of the United States?

Let's take a look at Exhibit 71, page 49.

THE COURT: Does he have that one or are you calling it up?

THE WITNESS: You want me to look at it.

BY MR. O'NEILL:

Q We can put it up on the screen if you want to do it quicker.

A Which paragraph are you talking about.

Q Let me assume it. It's the one beginning now. Now, the same impairment apparently that created the spill to begin with, created a situation where the master could have brought another officer to the bridge.

Do you see that?

[1590]

A Yes, yes, I do.

Q I want to talk a little bit about this statement. The captain subsequently left the bridge and tests made sometime after the grounding showed the captain's alcohol level was above the limits set by the Coast Guard. That is clear. Did you make that statement to the Senate?

A Yes, I did. Or to the House or both, I'm not sure which.

Q Had you also made that statement to Exxon's employees in an employee information circular at or after the time of the grounding?

A I may have. I made it everywhere – apparently, I said everybody that would listen to me, I said that was true.

Q We can agree as we stand here right now though that at a minimum Captain Hazelwood was terminated because he wasn't on the bridge and he consumed alcohol within four hours of boarding the ship?

A That's my understanding, yes.

* * *

[1609]

DIRECT EXAMINATION OF JERRY ASPLAND
(video)

BY VIDEO EXAMINER:

Q Good morning, Mr. Aspland?

A Good morning.

Q Could you start by telling us your current – how you're currently employed?

A Yes. I am president of ARCO Marine, Incorporated.

Q How long have you held that position?

A I've got this job in December 1st, 1985. Excuse me, September 1st, 1985.

* * *

[1612]

Q Did ARCO Marine, when you were manager of the marine operations, have any policy with respect to alcoholism or substance abuse of its employees?

A Yes.

Q What was that policy?

A We had an employee assistance program in which people could volunteer if they had an abuse problem

to go to assist them in helping them get over this abuse problem.

Q You were president or manager, rather, of ARCO Marine operations. Do you recall any circumstances where you had, under your authority, a captain who had a history of alcohol abuse?

A We had a number of cases of all kinds of employees in which we referred to the employee – the employee program. We had a captain who went into the program.

Q While you were manager?

A Yes.

Q How do you know that he went in the program?

A I know because, as part of his rehabilitation, or assistance to help himself, he volunteered himself to do that.

Q Was this employee relieved or put on a leave of absence, or his position reduced in any fashion so that he was not piloting a vessel while he was receiving help for his alcohol problem?

A This person was relieved of their duties.

Q Who made the decision to do that?

[1613]

A Captain Charles Lynch, then president of ARCO Marine.

Q Were you involved at all in that decision making process?

A Yes, I was.

Q Did you concur in relieving the captain of his duties?

A Yes, I did.

Q Why was that?

A Because I felt at the time that the captain needed assistance for his illness and that it would be in everyone's best interest that he not sail as master for the time being.

Q Did there come a point in time when the captain was put back on normal duty?

A Yes, there was.

Q Were you involved at all, Mr. Aspland, in the decision with respect to whether or not that captain should be put back on active duty?

A He never left active duty.

Q Maybe I'm using the terminology wrong, but you mentioned that he was relieved of duty as being a captain or pilot, is that correct?

A That's correct.

Q And he – at some point resumed his capacity as a pilot or captain; is that correct?

A That's correct.

Q Were you involved in the decision to allow him to do so?

A Yes, I was.

[1614]

Q And how did you reach the decision that it was now prudent for him to do so?

A Reviewing his performance and discussing with the medical department, we determined that this person was capable of resuming their duties.

Q Reviewing his performance. You're talking about in the program he was in, the assistance program?

A No. This captain was assigned as chief officer.

Q So in other words, you were able to observe his performance as chief officer, and that was part of the decision-making that caused you to conclude it was now prudent for him to go back to captain?

A That's correct.

Q Did ARCO Marine institute any follow-up procedures after the captain had been put back in his position as captain, to determine whether or not his alcohol problem was recurring?

A Yes, we did.

Q Can you describe that procedure for us, please?

A In this case our procedure was to closely monitor this captain's behavior, and review his performance as a captain as he finished his tours.

Q Let me ask you a few questions about that answer.

When you say "closely monitor this captain", how did you accomplish that?

A Through face to face discussions, through discussions with

[1615]

those aboard the vessels.

Q Did you yourself have discussions with persons on the vessels with respect to the captain?

A Yes, I did.

Q What – can you describe for us what form these discussions generally would take?

A They would generally center around how the vessel was run, what the behavior of the captain was, how people were performing their responsibilities under him.

Q Did you generally try to do this after each tour, or how often?

A There was no set time that we did it.

Q Did you do it more than once?

A Yes, we did.

Q Do you know how many times you did it before you stopped?

A Never stopped.

Q You've been monitoring his performance in this regard ever since this incident arose?

VIDEO ATTORNEY: When you say this incident arose, you mean ever since he returned to his position as master of the vessel?

Q Yes.

A Yes, the master is no longer employed. We continually monitored until he left, and he left last year.

VIDEO ATTORNEY: What he wants to know is what was the

[1616]

period of time from the time he went back as a master until the time he went back in terms of years or months?

A Approximately he returned to be master in 1986 and he finished last year.

Q Was he fired by the company?

A No, sir.

* * *

[1619]

DIRECT EXAMINATION OF FRANK IAROSI
(video)

BY VIDEO EXAMINER:

* * *

[1621]

Q What was the last position you held with Exxon?

A I was president of Exxon Shipping Company. As I recall that position began in April of 1982.

Q So in April of 1982 you became the general manager of Exxon USA's marine department?

A Yes.

Q And then in July of 1982 you became president of now activated Exxon Shipping Company?

A Yes, sir.

Q And am I correct that that was the marine department of Exxon USA became Exxon Shipping Company?

A Yes.

Q Was one of the reasons that Exxon Shipping corporation was activated was due to tax benefits to Exxon Corporation?

A Yeah, there were a number of factors, I would say both tangible and intangible. Tangible benefits was that it changed the legal structure of the marine transportation activity – U.S. flag marine transportation activities of Exxon. The intangible benefits were that it allowed us to move from a, what I would say a cost center focus to a P&L center focus, profit and loss center focus, and allowed the people within the shipping company to exercise more latitude and direction in

[1622]

optimizing the marine transportation for Exxon USA.

Q Mr. Iarossi, while you were president of Exxon Shipping – strike that.

Prior to Exxon Shipping being activated, was the primary purpose of the marine department of Exxon USA to transport petroleum products for Exxon USA?

A Yes.

Q And after Exxon Shipping Company was activated, did that remain the main purpose of Exxon Shipping Company?

A The main purpose, yes.

Q Other than board of directors being established for Exxon Shipping Company, was the executive structure of Exxon Shipping Company the same as its predecessor, the marine department of Exxon USA?

A I believe the basic management structure of the shipping company in its day-to-day operations was essentially the same as the marine department.

Q Is it correct that prior to 1989 none of Exxon's alcohol policies made any provision for ensuring that employees in safety sensitive positions were evaluated or monitored after treatment?

A The written policy itself I do not believe had any stated provisions.

Q And a tanker master, a tanker captain would be a safety sensitive position, is that correct?

A Yes.

[1623]

Q Now, Exxon Shipping Company is in the business of transporting crude oil by sea?

A Crude oil, yes.

Q And other substances?

A Yes.

Q Substances which Exxon Shipping and Exxon USA were aware created a danger to the environment if released?

A We understood the nature of crude oil, yes.

Q Exxon Shipping and Exxon USA were aware that a master of a tanker where the master had an alcohol abuse problem was a potential for a disaster to the environment?

A We understood the risks in the business, yes. We understood the responsibilities, yes.

Q Now, in 1985 Joseph Hazelwood was a master employed by Exxon, is that correct?

A Yes.

Q He voluntarily went for alcohol abuse treatment in 1985?

A Yes, we learned that subsequently.

Q Could you tell us how you learned of it?

A The then employee relations manager, may have been human resources manager, I don't recall when we changed the title of that department, but he informed me that he had wanted to talk to Hazelwood about some matter, and he was not able to because he was told that Hazelwood was under going treatment in Long

[1624]

Island. It was in-patient treatment. And that was some time in late May when he told me that.

Q Do you recall who that was?

A Ben Graves, G-R-A-V-E-S.

Q Did Mr. Graves tell you for what reason Mr. Hazelwood was an in-patient?

A I think he did. I believe he told me that it was alcohol treatment center.

Q Am I correct that when Mr. Hazelwood returned from his alcohol treatment and reported back to Exxon Shipping for duty, you personally did not want him returned to his position as a tanker master, is that correct?

A My first reaction was that we should not return him to his vessel.

Q And the reason being?

A I felt that – I guess I was really angry with the guy. But I felt that that was not the appropriate thing to do. My first reaction.

Q And were one of your concerns safety?

A Yes.

Q Am I correct that in fact Mr. Hazelwood, or Captain Hazelwood, was returned to his position as a tanker master?

A Yeah, subsequent to my initial reaction. Ben Graves and I had a long discussion about what the policy provided in terms of employee rights, what the risks were in either returning him

[1625]

or not returning him, and in particular the need within the shipping company since we do not have continuous access to people like masters – the overwhelming need to encourage voluntary identification. And the risks that we would incur, if we denied Captain Hazelwood his job back, what that would do as far as the whole future identification program.

And I think we both knew that there were risks on both sides. There was no easy answer. If we did not accord Captain Hazelwood his rights around the policy – in fact, I remember Ben Graves saying to me while we had this discussion, he said Frank, you know what will happen if we do not give Joe his job back. I said yes, that will be the last time we have anybody volunteer for rehabilitation. And clearly after reviewing all the facts and the risks on both sides, I agreed that we would return Joe back to the fleet, but we would have to monitor his performance quite closely, but even before we sent him to a ship

to make sure we were comfortable with his disposition, and also during the subsequent periods following his return to the ship.

Q Now, you stated that you weighed the risks of returning him versus the risks of not returning him?

A I viewed it as a question that had no correct answer. We had risks on both sides.

Q Now, what were the risks of returning him?

A We had to make sure that he in fact was remaining clean or

[1626]

not using alcohol.

Q And the risks of his using alcohol were what? What were the risks if he continued to use alcohol?

A Well, the risks if he continued to use alcohol was that it brought in the question whether he could discharge his responsibilities.

Q And it brought in the question of safety of the vessel?

A Yes.

* * *

not using alcohol.

Q And the risks of his using alcohol were what? What were the risks if he continued to use alcohol?

A Well, the risks if he continued to use alcohol was that it brought in the question whether he could discharge his responsibilities.

Q And it brought in the question of safety of the vessel?

A Yes.

Q And the risks of not returning him were that it would be a signal to others who might have a problem not to seek help on their own; is that correct?

A We didn't know how many future Hazelwoods there would be, and our concern was that if we backed away from the policy, we would never see self identification of any of the potential other risks that might be out there.

Q Did you know how many other Hazelwoods you had at that time?

A No. We had discussions about whether we knew or had any reason to believe we had others. We recognized right away it was kind of a useless question, because we didn't know about Hazelwood before the event either as managers. So we recognized the fact that we could not identify risks, didn't mean that they didn't exist.

Q Again, you're using the pronoun we. Who did that include?

A Myself, Ben Graves, John Tompkins, who was a ship group

[1627]

manager, Paul Revere, who was the operations vice president.

* * *

[1628]

Q Do you know whether or not Captain Hazelwood was in fact evaluated by the Exxon USA medical department after Captain

[1629]

Hazelwood returned from his alcohol rehabilitation treatment?

A I don't know what review was carried out.

Q From the time Captain Hazelwood returned, which was some time in 1985?

A Yes, August, I believe.

Q From the time he returned, and up to the time of the Exxon Valdez grounding and oil spill, did you, as president of Exxon Shipping Company, receive any report from the Exxon USA medical department evaluating Captain Hazelwood's condition?

A I personally did not.

Q Are you aware of anyone within Exxon Shipping Company who received such a report?

A It would have probably gone to the E HAP coordinator, which would have been Ben Graves.

Q So you personally, as president of Exxon Shipping, never received a report from the Exxon USA medical department relating to Captain Hazelwood?

A No.

Q Is that correct?

A That's correct. No, I did not.

Q Apart from receiving a report, did you personally have any discussions with Exxon USA's medical department relating to Mr. Hazelwood, Captain Hazelwood, from the time he returned from his rehabilitation until the time of the grounding and the oil spill of the Exxon Valdez?

[1630]

A About Captain Hazelwood in particular?

Q About Captain Hazelwood?

A No.

Q Subsequent to the grounding and oil spill from the Exxon Valdez you had a discussion with a medical director of Exxon USA?

A Yes.

Q Did that discussion relate in any way to Captain Hazelwood, specifically?

A No.

Q Did that discussion relate to Captain Hazelwood's condition as of March 23 or 24 of 1989?

A No.

Q Am I correct that was the first time you had had discussions with Exxon USA's medical department about a alcohol policy?

A In that relationship, yes. How it went to other companies, how it compared to other companies.

Q Had you had prior discussions with the Exxon USA medical department in any way as it related to the alcohol policy?

A No.

Q After Captain Hazelwood returned from his alcohol abuse rehabilitation treatment in 1985, were you aware of whether he met with the Exxon USA medical department?

A I don't know that he met with the medical department.

[1631]

Q In the alcohol policy of Exxon Shipping, was there any provision for how a crew member could report or should report a master who is drinking on duty?

A I don't believe there was.

Q Was there any kind of a hot line that was available to a crew member to somebody off of the ship?

A No, I believe they all knew the office numbers, but there was no specific hot line for that particular

—

Q Is it correct that a master of a ship participates in the ranking of the deck officers?

A Yes.

Q And how about the ranking of the crew members, the non-officer crew members?

A Probably the deck department member, but I don't believe he takes part in the engine department.

Q Did you ever receive a report from Mr. Graves, a written report, allegations?

A Yeah, he gave me a two-page — sent me a two-page memo very late in May, and then he asked for a meeting to discuss it further, and we had that meeting within a couple days of receiving his memo.

* * *

[1639]

Q Did Harvey Borgen personally monitor Hazelwood?

A Yes.

Q And did Dwight Koops personally monitor Hazelwood?

A Yes.

Q Did you meet at all with either Captain Sheehy or Captain Martineau or Paul Myers with respect to Hazelwood?

A No.

Q Now, to your knowledge what training did any of those gentlemen have with respect to monitoring a person who had been

[1640]

rehabilitated from alcohol abuse?

A Formal training I do not know.

Q Do you know whether or not they received training from any other health care professional?

A Dwight Koops confided early on that he had past experience with a member of his family who was an alcoholic. Now, whether he had formal training to help out in that circumstance, I do not know.

Q Were these gentlemen who monitored Captain Hazelwood, were they instructed to report anything to the Exxon USA medical department?

A I do not know. They were to report anything they knew to me. But I do not know if they had instructions from medical department.

Q Did you instruct them to report anything to the medical department?

A No.

Q The only reporting they did was to you?

A Yes. That I know of, yes.

Q And did you have any discussion – I think we went through this, but in this context did you have any discussions with the Exxon USA medical department with respect to the monitoring by these gentlemen of Captain Hazelwood?

A No.

Q Am I also correct that there was no one on board the Exxon

[1641]

Valdez who was instructed to monitor Captain Hazelwood while he was away from port?

A No.

Q Is it your testimony today that neither Mr. Koops, nor Captain Sheehy nor Mr. Borgen nor Mr. Myers nor Captain Martineau ever advised you that they knew that Hazelwood, Captain Hazelwood, was drinking alcohol after his rehabilitation?

A I was never advised by anyone.

Q Did those gentlemen ever advised you that it was reports to them by others that Captain Hazelwood had been drinking on board?

A No. They never advised me of anything other than positive situation, that there was no signs is what they reported.

Q Captain Hazelwood was terminated by Exxon Shipping; is that correct?

A Yes.

Q Whose decision was that?

A Mine.

Q Mark as exhibit –

VIDEO ATTORNEY: 26792.

Q – 26892 a one-page document on Exxon Shipping Company letterhead dated March 30th, 1989 entitled for immediate release, Exxon Shipping terminates captain of Exxon Valdez. And is this a press release issued by Exxon Shipping Company?

[1642]

A Yes.

Q And are you the author of this press release?

A No.

Q Was it prepared by – by whom was it prepared?

A I don't know. It originated in Houston, but I do not know by whom.

Q It states that –

A I did approve it, by the way.

Q You saw it and approved it?

A Yes.

Q So I take it that all matters attributed to you were accurate as far as you were concerned?

A I didn't object to the wording.

Q This states that he was terminated because he violated company policy concerning alcohol?

A That's what it says.

Q Is that correct?

A No.

Q That's not correct?

A No.

Q But you approved this?

A Yes.

Q Why was he terminated?

A When I arrived in Valdez Friday night I spoke, before I went to the press conference, I had an opportunity to meet with

[1643]

Captain Deppe and Paul Myers. At that time for the first time they told me that Captain Hazelwood was not on the bridge at the time of the accident. That was in direct violation to our company policy. At that point I ordered that Captain Hazelwood be relieved of his duties on the ship, that Captain Deppe take over as master of the Exxon Valdez. That Bob Nicholas go to the ship and accompany Captain Hazelwood back to Valdez because I wanted to interview him myself to determine whether he had any defense for not being on the bridge. That was just a courtesy prior to dismissing him. I never did get the opportunity to meet with him.

Q Did anyone on behalf of Exxon meet with Captain Hazelwood?

A Attorneys did, yes.

Q Why did you approve this press release assaying he was terminated because he violated company policy concerning alcohol when your testimony today is that he was terminated for not being on the bridge at the time of the accident as violating company policy?

A I was shown the press release in the middle of the control room on Tuesday morning, and my comment was, well, it's as good as any, go ahead.

Q Are you aware that this was a statement that would receive a great deal of publicity nationwide?

A I was aware of the fact that it was day five of which I had probably an hour or two sleep each day. At this particular

[1644]

point in time this was the least of my problems.

Q What you're saying is that you were harried at this time, correct?

A Yes, and of all the things I needed to do at that point in time, at the time this was the least important to worry about how we got this wording right.

Q Prior to preparing this press release were you advised of whether or not Hazelwood had a defense as to why he was not on the bridge at the time of the accident?

A I had subsequently learned that other members of the crew confirmed that was not on the bridge. The first word I heard about it was Hazelwood's words to Myers. I subsequently heard from the investigators and other crew members confirmed that.

Q What were Hazelwood's words to Myer?

A That he was – as Myer relayed them to me, Myers told me that Hazelwood told him that it was all his fault that he was not on the bridge, and that he was in his cabin at the time of the incident.

Q Did Mr. Myers record that statement on paper?

A It was a telephone conversation from Paul Myers to Hazelwood on the ship. I subsequently learned from counsel that Captain Hazelwood also told counsel that he was not on the bridge.

Q Did Myers write you a memorandum of that conversation?

A No.

[1645]

Q You say that that statement was subsequently confirmed by in the crew?

A My understanding was yes.

Q When an employee or officer is terminated, is it the normal process to have some document placed in the file, in the personnel file of that –

A Yes.

Q – terminated officer?

A Yes. Usually there is a personnel board that meets before I make my recommendation.

Q That was not done in the case of Captain Hazelwood?

A No, and I don't think there is any procedure that requires that, but usually that's what we do.

* * *

[1647]

Q From the time that Captain Hazelwood went through his

[1648]

program to the time of the incident, did you yourself ever meet with Captain Hazelwood and ask him about his fitness for duty?

A I met with him on probably two and perhaps three occasions, all during the time of the ship group managers meetings.

Q Did you ask him whether he was drinking?

A Directly, no.

Q Would it be fair to say that to your knowledge there is not a single piece of paper in the files of Exxon Shipping Company that reflect the monitoring activity?

A If there is I don't know of any.

Q Would it be fair to say that to your knowledge there are no reports that were generated by Exxon Shipping Company to Exxon USA that reflect the monitoring?

A To my knowledge there are none.

Q So we have no paper trail at all with regard to what monitoring occurred?

A That's true.

Q From 1983 through the time of the incident, is there any paper in Exxon Shipping Company, any pieces of paper that you're aware of, that are evaluations of Captain Hazelwood? What paper is there from '83 to the time of the incident?

A There should be performance appraisals by the ship group managers, assuming they were done on a two-year cycle.

Q At the time you made the decision to reinstate Captain

Hazelwood to duty, you didn't know yourself what the events

[1649]

were that led to his disclosure that he underwent treatment?

A I do not know the specific sequence of events that led to Graves' knowledge, and I don't know what the medical department knew of him.

Q And that was the state of your knowledge with regard to his disclosure at the time you decided to reinstate him to duty?

A At the time he came through the second phase of his rehabilitation and was reinstated. I did not reinstate him.

Q Who reinstated him?

A It probably was the employee relations department.

Q Of Exxon Shipping corporation?

A Yes.

Q Did you get a chop on that?

A No, I found out he was back in the fleet about four weeks after he was back on duty.

Q Were you disturbed about that?

A Yes.

Q What did you do about it?

A I asked what steps we had taken before sending him back. I was told that he had been ordered to Houston where he met with John Tompkins and Bill Sheehy, and it was their decision that he had met

the terms of the rehabilitation program, and in their view he was ready to go back to sea. I do not know what other steps they took, whether or not they had reviewed that with Ben Graves, but I found out about it by chance about four weeks after he was on board.

Q What did you do when you found out about the fact four

[1650]

weeks after that he was on board?

A I tried to find out who had – what the procedure was to get him on board and what the procedure was to then monitor him from then on. What procedures had been developed by Tompkins and later by Koops, and what steps that had they taken before returning him back to the fleet.

Q And with regard to his assignment to the Valdez, who made that decision?

A That was made between Harvey Borgen and Dwight Koops. I also found out about that after the fact.

Q Were you upset about that?

A Yes.

Q Why?

A Because I didn't understand – I knew that Dwight Koops was keeping a very close eye on him, and I didn't understand why we would want to change his assignment. Harvey explained to me all of his reasons, including – we started out by saying there was an opening on the Valdez because the prior master, I think his name was Bill Greig had left to become a San Francisco pilot. That there was

a meeting of the port captains to determine who should fill that that spot, that their recommendation was the spot be filled by Hazelwood, that the division was reviewed by Koops and later Harvey Borgen. That

[1651]

the decisions to move Hazelwood to the Valdez were based on the fact, one, Hazelwood had more big ship experience going in and out of Valdez than any master we had. He was the first master in the entire fleet to receive his Prince William Sound pilotage certificate. That, and this is Borgen telling me, that Dwight Koops had told him, Borgen, that Joe was absolutely clean, and that there was no sign that the rehabilitation was being violated in any way.

Based on all of those, it was the recommendation of the two port captains that Hazelwood be transferred, and both Dwight and Harvey concurred with that and saw no need to tell me about it.

Q Did you have concern about the fact that Captain Hazelwood had had a history of some problem with alcohol?

A Well, that was the basis for my questioning Harvey in the first place.

Q Why would you be concerned about this assignment for Captain Hazelwood in light of his past problem with alcohol? It's an obvious question, but it's a question.

A Well, I just felt that we needed to exercise special care in where we put Joe, and to make sure that the monitoring process continued. I had confident that Dwight Koops had the situation well in hand, and I

just wanted to make sure that Harvey knew he had to pick up that responsibility.

* * *

[1657]

Q Did you commit publicly at the press conference to be the one to first tell the public what went wrong?

A To the extent we found out, yes.

Q And did you believe that your commitment to the people at the press conference was to tell them the truth about what went wrong?

A To the extent we knew, yes.

Q And on March 30th you approved press release 2679 – which is Exhibit 26792. Would you read that?

A Yes.

Q Would you read it out loud for us?

A Exxon Shipping Company announced today that it has terminated the employment of Captain Joseph J. Hazelwood. The termination following announcement by government investigators that this employee had failed the blood alcohol test administered on the Exxon Valdez last Friday morning. Frank Iarossi, press of Exxon Shipping Company, said the decision to terminate the employee was made because he violated company policy concerning alcohol. We are all extremely disappointed and outraged that an officer in such a critical position would have jeopardized his ship, crew and the environment in such action. Our policy in this area are very clear as Iarossi explained.

* * *

[1659]

Q Now, from the date you found out about Captain Hazelwood and his treatment program to the date of the accident, is it fair to say that you never talked to Exxon USA medical about that subject?

A To my recollection I do not recall any conversations with the Exxon USA medical department.

Q And you had never seen his medical files?

A No. The medical files are confidential.

Q And you had never talked to him directly about any problems he may have had with regard to alcohol?

A Captain Hazelwood?

[1660]

Q That's right.

A I asked him how he was doing, how things were going, questions like that, but I never asked about. I never mentioned alcohol.

Q And you never looked into yourself the subject of recidivism rates for people that had alcohol problems?

A No.

Q And you never verified in any detail the extent of the monitoring that was going on with regard to Captain Hazelwood?

A I, on a number of occasions, asked Dwight Koops how Joe was going, and what he was seeing. I asked

Harvey Borgen on at least two occasions that I remember, three, three that I clearly remember discussing the subject with.

Q Did you ever ask him how long they monitored him?

A Yes.

Q What did they say?

A They said that they were attempting to get to Joe whenever they were able to, whenever he was in port.

Q Did you ever get a list of the dates that they monitored him?

A No.

Q Now, in the middle of 1985 with knowledge that Captain Hazelwood had some kind of alcohol problem, did you conduct any independent investigation to determine whether any employees of the company may have observed Captain Hazelwood consuming

[1661]

alcoholic beverages?

A No.

Q So as far as you were concerned the subject of any further investigation was over at that time, mid 1985?

A At the time that Graves spoke to Hazelwood, Hazelwood admitted that he had been drinking. There wasn't any need to go back for another investigation.

Q Was there any characterization put on this admission, that is, how much, or how long or where?

A I don't recall.

Q Was that admission to Mr. Graves reduced to writing, to your knowledge?

A If it was it would have been in the report, that memo report of late May. I don't know of any other place that would have been.

Q Now, at the time you returned Captain Hazelwood to service as a master, were there other options available to you, such as a desk job?

A The issue was if Captain Hazelwood requested his job back, would we be obligated to give it to him. The answer was yes. If Captain Hazelwood asked for a desk job, we would have given him a desk job.

Q So as far as you know in this three or three-and-a-half year time period, the only one who talked to any crew members was Mr. Koops, and that would have been in the 1987 to 1989

[1662]

time frame?

VIDEO ATTORNEY: I think it would have been in the 1985 to 1987.

A No, it was 1985 to 1987. And, you know, I don't know who the others did. Koops is the only one who told me that he did.

Q During this period of time to your knowledge, there was no testing for Captain Hazelwood, is that correct?

A There was no alcohol blood testing for anybody.

Q These four people who were charged by you with observing Captain Hazelwood, to your knowledge

they have no training in observing somebody in this condition, isn't that correct?

A Training, no, and I think I also in my answer told you that Dwight Koops told me that because of his certain family circumstances, he had a lot of knowledge about dealing with an alcoholic and spent some of his life having to deal with it.

So he explained to me that he knew and understood the circumstances because of certain circumstances in his family.

Q Did you have personnel in your human resources department or in the Exxon USA human resources department to – were able by professional training to do a monitoring program of this kind?

A I don't know.

Q Did you ever make such an inquiry?

A I did not ask.

Q You talked at some length yesterday about the investigation

[1663]

you did in 1985 regarding Mr. Hazelwood being in an alcohol rehabilitation, and I want to ask you some follow up questions. Why did you want to monitor Captain Hazelwood after he came out of alcohol rehabilitation, sir?

A To ensure that the effects of the rehabilitation and the intent of the rehabilitation was in fact being followed through. I wanted to make sure that the rehabilitation was effective.

Q Were you concerned about potential risks if in fact the rehabilitation wasn't effective?

A The one time we really addressed the term risks, although we didn't define what risks were, we considered risks on both sides of the question of whether we lived up to his employee rights under the alcohol policy, or whether we denied him those rights under the policy, and we decided there were risks on both sides. There was no easy answer. That's the only time I recall, in my own mind risks.

Q What were the identified risks on the other side of the issue?

A That we didn't sit down and draw up any risks. I think the risk of having a master on board who was in any way using alcohol, we didn't sit down and define what the risks were.

Q And that risk that you just articulated could have posed a risk potentially of a collision, correct?

A It could have posed a lot of risks. Collision, yes.

[1664]

Q Grounding is another risk it could have posed?

A Yes.

Q It could have imposed or posed a risk of loss of judgment on the part of the captain if he was in fact impaired, is that correct?

A We did not sit down and enumerate risks.

Q As you sit here today, and as former president of Exxon Shipping Corporation, do you believe that those were risks that were –

A I think you could categorize them all in one phrase, and that is a risk that the captain did not discharge his duty as he should have.

Q Did you make any attempt to institute a program of random urinalysis with regard to the monitoring of Captain Hazelwood?

A No.

Q Did you institute any attempt to have Captain Hazelwood, after he was back on the ship, after alcohol rehabilitation, submit to either breathalyzer or blood alcohol tests?

A No.

Q Was it anything you even discussed, sir?

A I don't think it was in our right to expect that.

Q And what do you base that on, sir?

A I think there are certain prohibitions on what a company can impose on the privacy of an individual, of its employees. It was just not part what we did.

[1665]

Q So it's not something you even discussed?

A No, we didn't even discuss it.

Q And it's not something that entered into your calculus when you were talking about the monitoring program?

A No.

Q And you mentioned yesterday that Mr. Hazelwood was only monitored in court. When you were setting up this monitoring program, did it ever occur to you that Captain Hazelwood might try to hide alcohol use?

A We never discussed it.

Q I'm asking, notwithstanding the fact that you didn't discuss it, did it ever occur to you as the person who helped set up the monitoring program, that Captain Hazelwood –

A I was not the person who set up the monitoring program, I ordered the monitoring program be established.

Q The person who ordered that the monitoring program be established, did it ever occur to you that Captain Hazelwood might try to hide alcohol use to avoid detection?

A I stated that Captain Hazelwood's – Captain Hazelwood needed to be monitored. I did not place any bounds on it. I did not have any preconceived notion of what those boundaries were.

Q Is it fair to say that other than the conversations that you detailed to us, you did not supervise the monitoring?

A I was not a supervisor, I was a president of the company.

* * *

[1666]

DIRECT EXAMINATION OF WILLIAM DUNCAN
(video)

BY VIDEO EXAMINER:

Q Sir, would you please state your full name for the record?

A William George Duncan.

Q Where do you presently reside, sir?

A 15118 Morning Pine Lane, M-o-r-n-i-n-g P-i-n-e L-a-n-e, Houston, Texas 77068.

Q Are you presently in the employ of Exxon Shipping Company?

A Yes, I am.

Q What is your present position, sir?

A Marine advisor.

Q How long have you been employed by Exxon Shipping Company?

A Since 1983.

* * *

[1676]

Q Are you familiar with a regulation that requires six hours of off duty in any 12 hours prior to taking charge of the navigational watch?

A I've read it. It was only since I came to Exxon Shipping Company.

Q Was there any procedure established within Exxon Shipping Company to make sure that was followed?

A I personally don't know if any, but that's part of the codes of the Federal Register, one of the duties of the masters is to do that, yeah.

Q But you're not aware of any procedure that was established by Exxon Shipping internally to come comply with that?

A I'm not aware of any.

Q Hazelwood leaving the bridge was in violation of the watch type that was present?

A That's correct.

Q And you would believe, wouldn't you, that his leaving the

[1677]

bridge at least was a contributing cause to this accident?

A Yes.

* * *

[1683]

Q I believe you stated earlier that watch type C was in effect when the ship ran aground?

A Correct.

Q And watch type C requires two officers to be on the deck?

A Correct, on the bridge.

Q On the bridge?

A Correct.

Q And there were not, is that correct?

A That's correct.

Q Why under watch type C do you have two officers on the bridge?

A Well, the primary reason for that is to guard against a one man error, so you have an opportunity to double-check, and also depends on the extent of – in this particular case where the ship was navigating through ice, there was some unusual circumstances which required the attention of more than one individual.

Q I'm sorry. One of the reasons is to guard against one man error. Is that what you said?

A Yes.

[1684]

Q And the one man you're referring to is the watch officer?

A Yes.

Q If you only have one –

A It's a double check.

Q Just to make sure, for example, there would be something else there to make sure that the rudder was moving?

A I wouldn't necessarily say that that would be a specific – maybe checking on a vessel position, maybe a number of different things to double-check on.

Q But that would be one?

A Could be one, could be one.

Q And Exhibit 27206, and again, I'll just show you my copy to make this easier for you. This is the document that you wrote to Mr. Woody, or at least you signed that went to Mr. Woody?

A Yes.

Q And I believe you testified twice that watch type C was in effect, correct?

A Yes.

Q And that's the position that Exxon Shipping Company indicated to Mr. Woody?

A Yes, leaving the terminal, yes.

Q Right. Well, it was in watch type C at the time of grounding?

A Yeah. But leaving the terminal it had already been set watch type C.

[1685]

Q But at the time it ran aground it was in watch C?

A Yes.

Q What's con mean?

A Con?

Q Yes, con.

A Whoever is in charge of navigating the vessel.

Q When Captain Hazelwood left the bridge did he give the con to Greg Cousins?

A As I understand, Captain Hazelwood gave instructions to Mr. Cousins, and he assumed the con.

Q Cousins did?

A Yes.

Q So Cousins was the watch officer?

A Yes.

Q At the time of the grounding?

A Yes.

Q As soon as Hazelwood left the bridge?

A Yes.

Q When Captain Hazelwood left the bridge, he violated Exxon Shipping Company policy?

A Yes, sir.

Q The master is – let me ask you. Is a master supposed to be on the bridge when the ship – his vessel is coming near hazards to navigation?

A Depends on what you define by coming near.

[1686]

Q How about going down the – in Prince William Sound past Bligh Reef?

A That's open ocean – sorry, open waters.

Q So you don't believe the master has to be on the bridge?

A Yes, the transit down would still require watch condition C, but there may be a situation that in the open waters of Prince William Sound south of Bligh Reef he may have a head call, or whatever. He can leave for a few minutes.

Q South of Bligh Reef?

A Yes, sir.

Q But not going past Bligh Reef?

A I would say that would be an area where, in confines, that's correct.

Q So between Rocky Point and until you pass Bligh Reef, the master should be on the bridge?

A In ideal situations, yes.

Q And Captain Hazelwood leaving the bridge between Rocky Point and Bligh Reef was a violation of Exxon Shipping Company policy?

A Correct.

Q And it was improper in your opinion?

A Yes.

* * *

[1690]

DIRECT EXAMINATION OF NATHAN CARR
(read)

BY MS. WAGNER:

* * *

[1692]

Q How long were you on the Exxon Valdez?

A I was there from the maiden voyage, whatever that, December 6, of '86, I believe, until March of 1989.

Q Do you remember when in March of '89 you left the Valdez?

A Not specifically, no. I got relieved off that ship the week before the fateful voyage.

Q Are you aware of a requirement that when leaving a port a person should only be allowed deck watch if the individual had been off at least six hours within the preceding 12-hour period?

A Yes, I believe there was something along those lines, yes.

Q Did you see that implemented by the company during your time?

A No.

Q Do you have any idea if there was a procedure established to make sure that that requirement was upheld?

A Not to my knowledge, no.

[1693]

Q Were you aware of any instances where an individual was allowed to be on the deck standing watch without having been off duty at least six hours within the preceding 12 hours?

A Sure.

Q Was that a common occurrence?

A Yes.

Q Was that necessitated by anything in particular that you were aware of?

A Well, it was necessitated by the fact that you had to sail the ship, and if you had been pumping cargo all day and you were on watch, you went on watch.

Q Was there any effort made by the company to allow those people who were scheduled to stand watch duties to not be involved in loading the cargo and having duties during the day?

A No, that – no, no.

Q You could not do that?

A Couldn't do that.

Q Why couldn't you do that?

A Because you had to go in and stand your watch. You had to relieve the guy that was there, and you had to go and stand your watch. You had your hours to work and you did them. That's all.

Q Do you have any personal knowledge of Captain Hazelwood ever drinking alcohol on board a vessel?

A Yes.

Q Okay. Could you tell me about – first, let me ask you where that knowledge comes from?

A Well, we'll get right to the meat of it. The good captain and I had a beer or two in the Portland shipyard one time.

Q When was this?

A When we were in the yard? '88.

Q And this was on board the vessel?

[1694]

A Uh-huh.

Q Yes?

A Yes.

Q Do you recall how much Captain Hazelwood had to drink on that occasion?

A A beer or two.

Q And it was beer that he was drinking?

A Yes.

Q Where did the beer come from?

A It was mine.

* * *

[1695]

Q Was that the only occasion on board the vessel was where you had a drink with Captain Hazelwood?

A Yes.

Q Had you heard anything that he had had alcohol in his quarters?

A Yeah. You hear things, you know, but that's rumors.

Q Sure, and I understand that they are rumors, but I would like to at least hear about what rumors you heard about Captain Hazelwood having alcohol in his quarters. First, let me ask you, where did you hear these rumors? What people or persons?

[1696]

A I don't recall.

Q What was the substance of the rumor?

A Well, a rumor might be going around that the old man had a drink.

Q This would be during a voyage that someone might say that Captain Hazelwood had had a drink?

A Yes.

Q And you mentioned that you had some drinks with Captain Hazelwood in Long Beach?

A Yes.

Q Was that on more than one occasion?

A I believe it might have been one or two occasions over the years, yeah.

Q Was this at a bar that was in town?

A Yes, Yankee Whaler, ports of call, nice place.

Q The times that you drank with Captain Hazelwood, would he – do you recall what he was drinking?

A No.

Q Did he have more than one drink?

A He might have. You know, I wasn't paying any attention, you're not paying attention, no big deal.

Q When was it that you would have had these drinks with Captain Hazelwood in Long Beach?

A Sometime during those years.

Q Sometime between '88 and '89 probably?

[1697]

A '87, I believe, to '89, that two-year period.

Q Anybody else with you during the occasions that you drank with Captain Hazelwood in Long Beach?

A Well, probably, yes. There is crew members around sitting over there, sitting over there.

* * *

[1706]

THE CLERK: Thank you.

DIRECT EXAMINATION OF KATHERINE HAVEN
(read)

BY MS. WAGNER:

Q Would you state your full name for the record, ma'am?

A Katherine Rose Haven.

Q May I ask your date of birth?

A May 29th, 1961.

Q What is your current occupation?

A I'm a marine engineer.

Q And did you go to sea before you went to California Maritime Academy?

A Not deep sea, no.

Q And after going to the California Maritime Academy, will you tell me your employment experience?

[1707]

A I was hired by Exxon. I sailed exclusively for Exxon. I quit Exxon in April of last year. I worked on a fishing vessel in Alaska for one month, and I most recently worked on a U.S. flag ship out of the east coast operated by International Maritime Carriers, which I signed off of on April 3rd of this month.

Q Showing you what has been marked as Exhibit 2, it is a copy of your license. Look at it, please. It shows you hold a second assistant engineers license, steam and motor?

A Yes.

Q And then you were recruited and hired by Exxon, you say in 1986. Do you recall approximately what month that was?

A Summer, summertime.

Q In the summer of '86. Will you tell me, as your recollection directs you, the vessels that you served on for Exxon?

A The Exxon Lexington, the Exxon Boston, the Exxon Princeton, the Exxon Valdez, the Exxon Baltimore, the Exxon New Orleans, and the Exxon Jamestown.

Q Were there any regularly held meetings that you were aware of where Exxon's policies about the use of controlled substance, including alcohol, were discussed?

A No.

Q Were you ever instructed by any Exxon supervisory personnel on what the policy of the Exxon Shipping Company was relative

[1708]

to the use of controlled substances, including alcohol?

A No, no.

Q Were you ever made aware, ma'am, or were you ever involved in the searching of any Exxon vessel you served on for contraband or for controlled substances, including alcohol?

A No.

Q Were you every made aware that your room had been – ever been searched for controlled substances?

A No.

Q Apart from receiving the material in the mail relative to the Exxon Company's policy on the possession of and use of, including alcohol, do you recall any other instruction, meetings that you had with any Exxon company officials, either aboard or ashore on that subject?

A No.

Q What date did you join the Exxon Valdez? September you said?

A September of '87.

Q Were you on her continuously? Tell me about your service on board that vessel.

A I was on, let's see, I was on her continuously, I think, except for a week, for a week they sent me as

an oiler for the Exxon Baltimore and then I came back to the Valdez.

Q Ms. Haven, in the time that you spent on board the Exxon Valdez, did you ever see any liquor on the vessel?

[1709]

A Yes.

Q Tell me about the occasions you saw liquor aboard the vessel.

A I don't remember a specific occasion.

Q Did you ever bring liquor aboard a vessel?

A No.

Q Do you use liquor?

A In my daily life?

Q Yes. Do you drink?

A Yes.

Q Did you ever drink aboard the vessel?

A Yes.

Q Now in response to my earlier questions that I passed on, you indicated that you have seen liquor on board the Exxon vessels that you have served on. Let us go right through the vessels and you tell me what you recall.

When you first served on the Lexington, did you observe liquor on that vessel?

A I don't remember.

Q How about on the Boston?

A I don't remember.

Q How about on the Princeton?

A I don't remember.

Q And on the Valdez?

A Yes.

[1710]

Q Tell us what you recall about the liquor aboard the Valdez?

A It was there. I don't know, I never saw anybody bring it on board or induce it. I don't know whose it was.

Q Where was it? Where did you see it?

A In different people's rooms.

Q I see. When you say different people, more than one occasion and more than one room?

A Yes.

Q Can you remember any specifically where you saw the liquor, Ms. Haven?

A In, let's see, one, two, three, at least three different rooms.

Q Can you tell me in whose quarters you saw that liquor?

A The first assistant, the second assistant and the captain's.

Q Approximately when did you see the first assistant's with liquor in his room?

A I don't know exactly, I just know there were parties.

Q There were parties?

A Yes.

Q Did you see them drinking?

A Yes.

Q On board while at sea?

A Yes.

Q You said you saw it in the chief engineers room, that's Mr.

[1711]

Glowacki?

A No, I didn't see –

Q I thought you said the first –

A The first, the second and the captain.

Q And the captain, all right. The second – the first assistant was Mr. Jones?

A Yes, on that particular trip.

Q And the second was?

A Graham Oldham.

Q Oldham. When did you see liquor in the master's room, Joe Hazelwood?

A Previous trips.

Q On previous trips?

A Yes.

Q Did you see Captain Hazelwood consume alcohol on previous trips?

A Yes.

Q On board the vessel?

A Yes.

Q While at sea?

A Yes.

Q Now, can you be more specific on any of the occasions? You said parties. Were there ever any parties on board that you observed on the Valdez?

A Yes. I can't be specific.

[1712]

Q Well, generally?

A Generally, yes.

Q And who was attendees at these parties?

A Most of the people on the ship. I don't know exactly.

Q Can you be more specific, if you can. If you can't, I understand, but more specific in time and place?

A No, I have no specific memory.

Q All right, do you have any recollection what kind of liquor it was you witnessed the shipmaster or Captain Hazelwood –

A Various types.

Q At various times, I take it?

A Yes.

* * *

[1791]

DIRECT EXAMINATION OF DR. DAVID SMITH

[1792]

BY MR. MONTAGUE:

* * *

[1792]

Q Thank you. And could you tell us now what your current present – your current professional positions are?

A I am the medical director of the Haight Ashbury free clinics in San Francisco which is a community-based health care and drug abuse treatment facility. I am research director at Merritt-Peralta chemical dependency recovery hospital and I am an associate clinical processor of occupational medicine and [1793]

clinical toxicology at UC San Francisco.

* * *

[1810]

Q I'm sorry, five or ten percent. In the cases that included both alcohol testing and drug abuse testing, were you required as a medical review officer to reach a conclusion as to the reliability of the chain of custody leading up to the actual testing?

A Yes.

Q And have you done that in this case?

A Yes.

Q And what is your conclusion?

A In my opinion, this chain of custody is intact. All procedures were properly followed. There was no, what we call a fatal flaw, which would be a reason to reject a specimen, and this is a reliable specimen that can be acted upon.

Q Is the fact that the seals around the tube were intact on the Hazelwood tubes, does that have a significance to you in reaching your result?

[1811]

A Yes. The most critical element is that the integrity of the specimen must be intact. There can be other issues, but these relative evaluations of chain of custody are considered relatively minor in relationship to what we call fatal flaw.

If the integrity of the specimen is intact, the evidence seal is intact, it's properly initialed, then this meets the chain of custody standards and is a specimen that I not only do, but must judge reliable. If I rejected this specimen, I would be medically negligent and subject to legal action.

Q Have you ever heard of the term no test report?

A Yes.

Q What is that?

A What happens is that the laboratory received a specimen and determines that there has been a fatal flaw, the evidence seal has been violated, the integrity of the specimen has been invaded, and again that's the seal over the tube that has the blood in it. That's the critical one. That, because the integrity of the specimen has been violated, there is the potential for tampering and they no test it, and what is reported to the medical review officer, depending on the reporting procedures. In the companies that I work with, no test is reported to the medical review officer, and we take clinical action. For example, we may increase the frequency of testing, have the individuals see the employee

counselor, something of this nature, because it's usually the employee

[1812]

that tampers with the specimen, but I cannot act on a no test by any procedure. I can have a clinical response to a no test, but not a legal or regulatory response.

Q Okay. And if there was any evidence of tampering at all with the seal around the tube, would you expect to receive a no test from the laboratory?

A Yes. The lab is required to no test the specimen, and then whatever reporting requirements are in effect, the regulations vary depending on the different specimens being tested. They're much stricter, for example, with the illicit drugs.

Q Okay. Now, there's been talk about red stoppers and gray stoppers, and the difference between what is supposed to be put in those tubes.

A Yes.

Q Am I correct one has serum and – the red stopper is supposed to have serum in it, and the gray stopper blood, whole blood?

A What happens is that in the gray stoppered tubes, they have a preservative and anticoagulant that prevents the blood from clotting. The red stoppered tube does not have the preservative and anticoagulant, and therefore it can clot, which is the red – the clot of the blood separates from the serum, and the serum is clear.

In general, the test is serum for the banned drugs, and they test the whole blood for alcohol. And the standards that

[1813]

are reported are whole blood standards. For example, if in the state of Alaska your drunk driving level is .08 or .10, then that is a whole blood standard.

The technician knows when they pick up the gray stoppered tube and look in it that it's whole blood and it hasn't separated into the clot with serum. The serum is a straw-colored liquid that's easily discernible when you pick up the tube.

Q And in fact, the difference between the serum and the whole blood is easily discernible. Is that another safeguard as far as you're concerned, that these tests were done?

A In a NIDA lab, skilled lab, they have done thousands of these specimens. They know what is appropriate procedure. And laboratory – if a technician picks up what's supposed to be a whole blood sample, they're going to see that is, in fact, serum, and then whatever reporting procedures are implemented would be implemented.

Q Now, I handed you earlier exhibit – was it 3797, I believe?

A Yes.

Q And that is the CompuChem test results?

A Yes.

Q Do you have – do you have an understanding of what time the blood samples were taken from Captain Hazelwood?

A Yes.

[1814]

Q And on what date?

A 10:50 a.m., March 24th, 1989?

Q Now, what does that – what does the test report from CompuChem show as to the blood alcohol concentration of Captain Hazelwood's, and the blood sample taken 10:50 a.m. on March 24, 1989?

A .061 percent.

Q May I borrow that, please, since we don't have a spare one, so I can put it on the machine?

Dr. Smith, I'm showing the first page of 3797. Is that the report that you were referring to?

A Yes.

Q Okay. And that is the report for Captain Hazelwood?

A Yes.

Q All right. Now, I would like to call your attention to the part under – where it says ethanol, parenthesis WV and then blood .061 percent. Do you see that?

A Yes.

Q Could you tell us what that represents – strike that. Let me ask you another question.

Does that indicate that at the time the – this blood

sample was drawn, there was alcohol in the blood of Captain Hazelwood?

A Yes.

Q Okay. And what does that number at that point .061

[1815]

percent, mean?

A .061 percent weight by volume is the standard way a laboratory reports a specimen to, in this case, for purposes of our discussion, to the clinician, myself in this context, or whoever they report it to.

Q Okay. Now, this blood was, the blood sample was drawn at 10:50 a.m., and were you asked to make a determination as to what Captain Hazelwood's blood alcohol concentration was at a time earlier than 10:50 a.m. on March 24th, 1989?

A Yes.

Q And can you tell us what method or technique you use to do that?

A The method that I used is a technique called retrograde extrapolation, which is a standard clinical technique that is acceptable, for instance, particularly in terms of calculating what the level of blood alcohol is at some time prior to when the specimen was analyzed. The technique of retrograde extrapolation is part of our training as a medical review officer and is generally accepted by laboratories and clinics to answer certain questions that might be posed, whether it be in a company situation, which is where I work mostly, or a drunk driving situation. Things of that nature.

Q Okay. And that's an accepted method, methodology?

A Yes.

Q Okay. Now, were you asked to form an opinion as to what

[1816]

Captain Hazelwood's blood alcohol concentration was at or about the time of the grounding of the Exxon Valdez on – around midnight? I don't know whether it's midnight the 23rd or midnight the 24th, the evening, morning, midnight between the 23rd and the 24th?

A Yes.

Q Okay. And did you make any such calculation?

A Yes.

Q Could you just tell us the result of that calculation?

A Using the method of retrograde extrapolation and taking into consideration the variables that we were trained to include, my professional opinion is that his blood alcohol at the time of the grounding was .226.

Q That's 226 percent?

A Yes.

Q Okay.

A .226 percent weight by volume.

Q And did we ask you also to make a similar calculation for – for an earlier time?

A Yes.

Q And what time – and actually you selected the time?

A One hour earlier.

Q Okay. That would be 11:00 p.m.?

A Yes.

[1817]

Q On the 23rd of March?

A Yes.

Q Okay. And did you make such a calculation?

A Yes.

Q What was the result?

A Using the same method, taking into consideration the same variables, my opinion, my professional opinion is that the blood alcohol at the 11:00 p.m. area was approximately .241.

Q Okay. Now, could you tell us the significance of those numbers?

A Again, you have certain standards. For example, in the transportation industry for individuals that transport commercial vessels, other than recreational vehicles, recreational vessels, the acceptable level is .04, so this would be approximately six times the acceptable .04 level. Drunk driving in different states, it might be either .08 or .10, but this would be two-and-a-half times the drunk driving level.

Q Okay. To reach those numbers you used this retrograde extrapolation technique?

A Yes.

Q And can that – you’ve gone back approximately 11 or 12 hours; isn’t that correct?

A Yes.

Q And is it possible – is it proper to use that retrograde extrapolation technique to go back so far?

[1818]

A Yes. You have to assume a number of variables, which I will present the variables that we assume in using retrograde extrapolation.

First of all, when alcohol gets into the body, it’s absorbed into the gastrointestinal tract, into the blood stream, and then into, after an equilibrium throughout the body, it’s absorbed into the brain. The brain is the target organ, because that’s the organ that produces the intoxication and impairment.

Blood is the closest approximation that we can have of the brain level. So the focus is on blood, and in this case for each ounce of alcohol that the individual drinks, we use an average of .03 up. This absorption rate is influenced by a variety of factors. For example, if there’s no food in the stomach – the stomach empties in about an hour – if there is food in the stomach, it might take up to four hours. So one of the key assumptions is that you have to select a time in which you believe all the alcohol has been absorbed from the stomach into the blood stream.

Retrograde extrapolation is a valid technique only when you’re on the descending curve of the metabolism of alcohol. Alcohol elimination, and the way had alcohol is eliminated is it passes through the liver and the liver enzymes break it down and then it is excreted. And alcohol metabolism is a

steady state elimination with the average elimination rate

[1819]

being .015.

So in retrograde extrapolation we are trained and use an elimination of .015 on the descending curve. Therefore if I can have the screen, I can show how I made the calculation.

MR. MONTAGUE: Okay. Can we put the flag screen up and the stylus.

BY MR. MONTAGUE:

Q Before you do that, I would like to just ask you one question, though. You said you used the term, in order to do the retrograde extrapolation, you have to be on the down curve?

A Yes.

Q Does that mean that you can only go back up to the – up to the – you can only go back to the time where the alcohol level has already peaked?

A Yes.

Q You can't go past the peak time? Is that what you're saying?

A Correct. You have to make an assumption, and you can entertain different scenarios and assumptions, but when you're asked to render a professional opinion, you must select a particular assumption in order to give a response. And the assumption would be at the time you believe that all of the alcohol is absorbed into – from the stomach into the blood stream and you're on the descending curve of the elimination rate.

[1820]

Q Okay. Now, could you show the jury how you reach – how you reached the numbers .226 percent at midnight and .241 percent at 11:00 from the .061 percent that came out of the blood samples taken at 10:50 that following morning? Could you do that on the screen?

A Yes. Again, what you do is you take the hours times the elimination rate. You come up with a figure. And then you add the known level that you have from the test result, in this case .061. So if you have an 11 hour retrograde extrapolation, which is the first question that I was asked, it would be 11 times .015, equals 165. You add .061 and you come up with .226.

Q And that's the number for midnight?

A That's the 11 hour –

Q Okay. That's the midnight number?

A That is correct.

Q Okay. Now, could you do the same calculation for 11:00? A In the 11:00 it would be 12 times .015 equals 180. Add the .061, and you get a .241 at the 12 hour rate, which is the 11:00 p.m. time period.

Q Okay. And that's – those – that's the mathematical calculations of how you reached those figures?

A Yes.

MR. MONTAGUE: Could we get a printout of that, please?

[1821]

BY MR. MONTAGUE:

Q Now, in picking the 11:00 figure did you make any assumptions?

A Yes. As I've indicated, you need to make a – an assumption that best fits your perception of the information that you're provided. And the key assumption here is that you must assume that all of the alcohol has been absorbed from the stomach and that you're on the descending limb of the elimination curve. I made the assumption that all of the alcohol had been absorbed by 11:00 p.m. and that he was on the descending limb of the elimination curve.

Q Okay. And are you – by the way, is there any margin of error for those calculations?

A Yes. There is substantial biological variability in elimination rates, producing a substantial range. However, the figure of .015 is accepted and is part of our training, and the error rate would be plus or minus ten percent, so that with great reliability I can say this figure plus or minus ten percent in the sense that a majority of individuals will have an elimination rate, absorption rate, all the other variables that you have to consider, and that we're required to consider as part of our training and education in this area, so that a majority of individuals, the vast majority of individuals, would be within plus or minus ten percent of this figure.

There's a few that will scatter out on either side, either

[1822]

be higher or lower, but given the assumptions and the elimination rates and understanding of biological

variables in absorption and metabolism, I believe this is a reliable figure plus or minus ten percent.

Q Okay. Now, let's get back to the original figure of .061. Did you – excuse me.

Did you see any other tests from any other labs that confirm that number for you?

MR. SANDERS: Your Honor, we're going to object to the other tests. No foundation.

MR. MONTAGUE: This is something relied on as an accurate period of time or I'll establish. I'm not offering it into evidence.

THE COURT: I'll allow you to proceed.

BY MR. MONTAGUE:

Q Are there any other tests that you viewed?

A Other lab –

Q Yes.

A Yes. The standard procedure, particularly if there's appeal or some forensic issue.

MR. SANDERS: I'll object to this as being non-responsive, Your Honor.

THE COURT: Try the question again.

BY MR. MONTAGUE:

[1823]

Q Was there any other test results from another lab upon which you relied?

A Yes.

Q And what was that lab report?

A Center for Human Toxicology.

Q Do you recall what the result was that they had from their blood test?

A .06.

Q Okay. And was that consistent with what the CompuChem test was?

A Yes. The verifying lab, Center for Human Toxicology verified the CompuChem lab.

Q Okay. Now, Doctor, I want to ask you some questions strictly from a – I hope I'm using the right word – physiological point of view.

A Yes.

Q A medical point of view?

A Yes.

Q If a person has a blood alcohol concentration of, let's take the higher number, the 11:00, .241, do you have an opinion, again from a physiological point of view, as to whether that blood alcohol concentration would have impaired that person's cognitive functions?

A Yes.

Q Now that I've asked the question, can you tell the jury what cognitive functions are?

[1824]

A Cognitive functions are the higher cerebral cortex functions that involve judgment analysis, ability to react to new situations.

Q Okay. Now, at that same level, the blood alcohol concentration of 0.241, is it possible, again from a physiologic point of view, that a person's motor controls would not be affected?

A Yes. An individual can have substantial tolerance to the motor effects of alcohol, but not the cognitive effects, and I would like to diagram this to better explain my presentation.

Q Okay. Before that's removed, has that been printed out? Okay.

A This is the blood which is the specimen that you're measuring with a blood alcohol concentration. As you have increasing blood alcohol, you will have increasing impairment because the brain is affected differently by an increasing blood alcohol. We call this progressive CNS depression.

At the lower levels, the higher thinking levels of the brain, this is a schematic representation of the brain. This is the cerebral cortex, which is the higher levels. Then this is the mid-brain which deals with more basic vegetative functions, and the spinal cord which deals with reflex action and the cerebellum that deals with coordination. So the initial impact of alcohol is on the cerebral cortex, or the higher thinking centers.

[1825]

As the blood alcohol level goes up, you then have progressive CNS depression of the mid-brain, which can produce a variety of different responses. It can produce, for example, a sensation of the vomiting center in the mid-brain, and the individual will vomit. This is actually a protective mechanism of the brain to rid the body of the toxic alcohol. You can produce motor impairment so that you can have an individual that has tolerance, impairment of cognitive function, which involves the judgment and the ability to analyze, without impairment of motor coordination.

There is substantial tolerance to this motor impairment. The tolerance is determined by genetic factors. There are certain individuals that have a past or family history of alcoholism that have what we call an inborn tolerance. They will take more of the drug without having impairment, and that will be demonstrated with the first drink.

Then there is pharmacological tolerance, which the individual repeatedly administers higher doses of the drug. There is a neuroadaptation that occurs in the brain and the body, and this is called pharmacological tolerance meaning that it requires more of a drug to achieve the same effect.

And finally there is behavioral tolerance, which is the experienced drinker, who will learn to moderate their behavior in part to escape detection so that they may be able to walk and function in a motor fashion at a level that to the

[1826]

inexperienced drinker would produce great motor impairment. However, this tolerance does not occur to the cognitive or judgmental areas, and of course, if the blood alcohol goes high enough, you can actually die of acute alcohol poisoning. This is why we call it progressive CNS depression, of which the effects of the alcohol start at the higher centers. As blood alcohol goes up, the CNS depression goes down through the higher centers, down through the mid-brain and impairment goes up.

Q Doctor, during that discourse, you used the word sometimes drug instead of alcohol. Were you referring to the same, are they interchangeable?

A Alcohol is a drug.

* * *

[1834]

Q Let's fill in another time here. Let's fill in the time that the United States Coast Guard came on-board, and just to make it easy for me at least, let's say it was 3:45 approximately. And if you take that as seven hours, seven times .015, plus .061 comes up to .166. Does that sound right to you?

A Yes.

* * *

[1837]

Q Dr. Smith, we're going to leave it to the jury to determine from the testimony of Captain Hazelwood and the other information exactly whether he falls within one of your exceptions or not, but let me ask you specifically. Let's just

[1838]

assume a normal person, a normal person at .166 this morning of March the 24th, 1989, would be exhibiting those characteristics that you listed in your chapter in the book for the range of .100 to .199, correct?

A Yes.

Q And then at this level, that hypothetical normal person would be exhibiting nausea and vomiting, diplopia; is that right? Did I say it right?

A Yes.

Q Is that blurred or double vision?

A Blurred and double, same thing.

Q Both?

A Yeah.

Q As well as marked ataxia at this level?

A Yes.

Q Stumbling and staggering?

A Yes.

Q Now, you understand based on your review of the testimony that when the Coast Guard came aboard at this time that they were investigating the grounding? You understand that, do you not?

A Yes.

Q And you also understand that they had the power and the duty to remove Captain Hazelwood from the command of that ship if they saw grounds for it? You understand that?

[1839]

A Yes.

Q And you also know that when they made the decision they made not to remove him, they also were putting their lives or safety on the line when they did that. You understand that?

A I have no opinion on that.

Q Well, you do understand that they're more than casual observers there at 3:30 or 3:45 in the morning?

A My understanding, based on my review of the record, is that they have the authority to remove him. Why they didn't, I have no opinion on that. It's outside of my area of expertise.

* * *

[1872]

DIRECT EXAMINATION OF CHARLES HUNTER
MONTGOMERY

BY MR. O'NEILL:

Q Sir, we've never met. My name is Brian O'Neill and I represent the fisherman and the Natives who are plaintiffs in this case. Just so we know who you are, you're the one that did the fitness determination for Captain Hazelwood in 1985, isn't that correct?

A I was involved in that decision, yes.

Q From '60 to – 1960 to 1992, you were employed by Exxon Corporation?

A That is correct.

Q And you were in the medical department of Exxon U.S.A.

A That's correct.

Q And would it be fair to say that Exxon Shipping Company didn't have its own medical department so Exxon Shipping Company had to use the medical department at Exxon U.S.A.

A I think that's basically correct.

* * *

[1879]

Q In 1985 with regard to Captain Hazelwood's medical records, let's take a specific example, would it be fair to say that Captain Hazelwood's medical records in 1985 were 12 years out of date?

A I don't know whether they were – you could say they were out of date. There had been no entries into his medical record in 12 years.

Q Thank you, sir. Now at the time someone, let's take a hypothetical, someone coming back from treatment, from alcohol treatment, was there a specific written policy at Exxon Corporation or Exxon U.S.A. or Exxon Shipping Company that

[1880]

required you to bring the individual in and talk to him about it?

A No.

Q Was there a specific written policy that required you to bring the individual in and examine him?

A No.

Q Was there a specific individual – was there a specific policy that required the medical department to play a role in, for example, whether he would be reassigned to a safety sensitive position?

A No.

Q What is a safety sensitive position?

A Well, in my opinion many of the positions, most of the positions really within Exxon, were safety sensitive.

Q Is a tanker captain a safety sensitive position?

A Yes, in my opinion.

Q But a tanker captain, the fellow who is in charge of a 125 million dollar supertanker has a lot of responsibility, doesn't he?

A Yes, sir.

Q Now, some time in 1985, someone from Exxon Shipping Company asked you for a clarification with

regard to Hazelwood's need for treatment, that's a correct statement isn't it?

A That's correct.

Q And at some point in time you got what we referred to as the IDR, which is in front of you as Exhibit 10. Not in the volume, it's a clean sheet of paper up there.

A Correct.

Q You've seen the IDR before?

[1881]

A Yes, I have.

Q You saw it in 1985?

A Yes, I did.

Q And you studied it before your deposition?

A Yes.

Q And you studied it before coming in here today?

A Yes.

Q I want to go over the IDR if we could. Up on the top – this is an Exxon form, isn't it an Exxon Shipping Company form.

A Yes, sir.

Q And up on the top there's a check mark there that says Mr. Hazelwood was in a sea going position?

A Yes, it did.

Q Is that what it indicates? And then your initials are on the bottom of the IDR?

A That is correct.

Q And you got this IDR in May of 1985?

A That's correct.

Q And you read it?

A Yes.

Q And you called or have a faint recollection of calling a Doctor Vallury?

A That is correct.

Q And you had or may have had a five-minute telephone

[1882]

conversation with Doctor Vallury –

A That is correct.

Q – in May of 1985. And your recollection with regard to the telephone conversation is faint?

A The details of the call are faint, let's put it that way. I could not give any quotations from what I heard.

Q Now, with regard to the Vallury conversation, would it be fair to say that you didn't document it?

A Well, as you said, my initials are at the bottom of the sheet. I did not make a specific documentation, I must admit.

Q In point of fact, I think, I'm not arguing that you didn't call him or not his, phone call is on the bottom?

A Right.

Q My point is, with regard to what you and he talked about, there's no memo for the file?

A That is correct. We've been unable to find any memos.

Q And you've looked?

A And we've looked.

Q With regard to a specific written fitness for duty determination, we can't find a memo or a fitness for duty determination either, can we, a written one?

A Not within the medical department.

Q So we have in the medical department the IDR, and a conversation with Doctor Vallury, and on the basis of the IDR and the one five-minute phone call for Doctor Vallury, you made

[1883]

a fitness determination?

A Let me rephrase that, if I may. Doctor Vallury made the fitness determination. I tended to agree with it, accepted it, but I felt it was his determination. I had not seen Hazelwood, I had not talked to Captain Hazelwood, I had to rely on his individual physician who had been treating him for at least a month, we know, in the hospital.

Q We'll talk about that.

A Okay.

Q But in point of fact, you had one five-minute phone call, and this piece of paper, and at least with regard to Exxon was concerned, you made the fitness determination. You were the person in Exxon to clear the fitness determination?

A That would be true.

Q And you're a medical doctor?

A That's right.

Q Now, let's talk for a minute about what the IDR told you about Captain Hazelwood. It told you that at some point in time he had or was going to have individual psychotherapy treatment?

A Right.

Q And he had or was going to have group therapy treatment?

A Uh-huh.

Q That's a correct statement?

A That's right.

[1884]

Q And he had or was going to have marital therapy. That's a correct statement?

A Right.

Q And there was a prescription for AA, Alcoholics Anonymous, that's a correct statement?

A That's correct.

Q And he was to either attend in the future or had attended lectures, seminars, workshops pertaining to alcoholism?

A Right.

Q You see that? And there was a diagnosis on it from the DSM that was 300.40 and 300.52, do you see that on the form?

A That's correct.

Q And the first is for dysthymia?

A That's right.

Q And with regard to dysthymia, that's a form of depression?

A It's a subtle mild depression, it's on a wave, comes and goes.

Q Comes and goes, but lasts a lifetime, doesn't it?

A It lasts pretty much a lifetime.

Q And episodic alcohol abuse is the only one –

A That's correct.

Q That's a correct statement. And on the bottom of the form you were advised Mr. Hazelwood will complete our 28 day program, do you see that?

A Yes.

[1885]

Q Are you aware of the fact that at least in the alcohol rehabilitation business a 28 day program is a term of art? There is such a thing as a 28 day program and people who are in the business refer to it as that?

A Yes, I would say that's correct.

Q And it's an alcohol rehabilitation program, isn't it.

A That's correct.

Q And it was recommended given the nature of his job that after discharge Mr. Hazelwood be given leave of absence to get involved with AA, and aftercare. And that recommendation was made on the IDR and –

A That's correct.

Q And you reviewed that recommendation?

A That's right.

Q And he was in fact given a 90-day leave of absence, that's a correct statement?

A To the best of my knowledge, that's correct.

Q And he wasn't paid during that leave of absence?

A I don't know.

Q Okay. Now, let's talk about the things that you may or may not have done with regard to the fitness for duty determination. Did you look at his job evaluations?

A No, they were not available to me.

Q Did you have an updated medical file on Captain Hazelwood?

A As I've indicated earlier, there had not been an entry in

[1886]

the file in 12 years.

Q Did you talk to Captain Hazelwood?

A No, I didn't.

Q Did you evaluate Captain Hazelwood?

A No, sir.

Q Did you allow for or direct an examination of Captain Hazelwood?

A Say that again.

Q Did you say to a bunch your colleagues or to an outside person, let's get an independent evaluation of Captain Hazelwood?

A No, I did not.

Q And indeed up to the time of your deposition, you'd never even met Captain Hazelwood?

A Not to my knowledge. I might have visited with him in a group meeting when captains might have come to Houston and I might have been invited, but I do not recall having met him.

Q Now, at the same time that the individual disability report was in your office, we have what we refer to as the Graves' report over at Exxon Shipping Company and you're aware of that, aren't you?

A I'm aware of it now. I was not aware of it at that time.

Q Okay. I understand that, and I'm not trying to trick you. My question was, that is over in your office, this is over at the shipping company?

[1887]

A Okay.

Q That's a fair statement, isn't it, you're aware of that?

A That would be true.

Q And in the Graves' report, there is a report that Mr. Hazelwood occasionally drank aboard ship and that he came back to the ship from port drunk on several occasions?

A That's what the exhibit says.

Q Would it be fair to say that in 1985, if you had known about the Graves' report, you would have had further misgivings with regard to Captain Hazelwood's fitness for duty determination?

MR. NEAL: Objection to the form of the question, Your Honor, further misgiving.

THE COURT: Change the wording around a little bit.

BY MR. O'NEILL:

Q Would you have – would it be fair to say you would have been concerned, more concerned about Captain Hazelwood's fitness duty determination, it was a relevant piece of information?

A Yes.

Q And putting the two together may very well have resulted in a different fitness determination?

A I guess that's possible.

Q In 1985 if an employee at Exxon Corporation was caught as opposed to self identifying with regard to alcohol, that was

[1888]

grounds for termination, wasn't it?

A I believe that's correct. I think the wording of the policy was that it was grounds for discipline up to and including termination.

Q But the policy draws a distinction between those who self identify, that come in and say, I have a problem, and those whom the company goes to and says, either we're investigating you or you have a problem, there's a distinction between the two?

A Right the distinction was there.

Q Did I state the distinction fairly?

A I think so.

Q Thank you. Now let's talk a little bit about Alcoholics Anonymous. In 1985, you knew that

alcoholism was a disease, a continuing disease that like dysthymia, may last a lifetime?

A Yeah, may.

Q And you'd read literature, while you hadn't had any specialized training, you had read the literature, you were a medical doctor and you kept yourself up to date?

A Certainly tried to.

Q And you were aware of Alcoholics Anonymous?

A Yes.

Q And its successes with regard to the treatment of alcoholics?

A Yes.

[1889]

Q And that those who attended Alcoholics Anonymous had a better chance of success than those who didn't?

A Yes.

Q And that Alcoholics Anonymous believed that people who have the problem of alcoholism or the disease of alcoholism should go to Alcoholics Anonymous for life?

A By large that's the belief of the organization.

Q And they shouldn't drink?

A They shouldn't drink.

Q And that family support was important to recovery?

A That's correct.

Q And at the time you made the fitness for duty determination, you knew it had recommended that Captain Hazelwood participate in Alcoholics Anonymous?

A That's right.

Q And you did not discuss with anybody at Exxon Shipping Company the recommendation that he participate in Alcoholics Anonymous?

A No, that would not be correct. I think I did.

Q Let me ask it this way. You didn't think that if Captain Hazelwood stopped going to AA that would have any impact whether or not he remained fit for duty?

A I don't recall saying that, but, actually I supported strongly the recommendation that he be given the leave of absence to attend AA I thought was my testimony.

[1890]

Q Okay. Let's go to page 447 of your deposition transcript.

Beginning at line 12, the question was: I'm sorry, you didn't think that if Captain Hazelwood stopped going to AA that that would have an impact on whether or not he remained fit for duty.

And your answer was: At that point in 1985 I didn't. That was not really the custom that was taking place nor that was carried out. Do you see that?

A Yes. I don't think that I felt that his continued attending AA was a criteria on which he would be judged as to whether he was fit for duty.

Q It was even worse than that, wasn't it. In point of fact, you knew in 1985 that because Captain Hazelwood was being reassigned to sea duty, that he couldn't attend AA?

A That was the reason I was supporting the leave of absence, was to allow him to opportunity to get an enhancement to the program he had received while in the hospital.

Q So he could go to AA for 90 days and then return to sea and not go to AA?

A Well –

Q Is that a correct statement?

A He would have had – he has leaves of absence, or leaves – paid leave I guess what I mean to say, after between sea duty. There might have been occasions when he arrived in port where he might have been able to attended AA, I do not know for

[1891]

sure. It would have depended on the port perhaps.

Q Have you ever made the statement that the nature of the occupation does not allow for AA? You made that statement in your deposition?

A I think that's in the deposition, yes.

Q That was a statement you made, the nature of the occupation does not allow for AA?

A If I may?

Q Did you make the statement?

A Yes, I made the statement.

Q And you knew that AA was part of his treatment plan?

A That's right.

Q And you knew that AA recommended that people go on a lifetime basis?

A That's correct.

Q And you knew that AA was part of recovery?

A That is correct.

Q Did you make any provision with Exxon Shipping Company to insure that Captain Hazelwood attended aftercare, other than the 90 day leave of absence?

A No, not other than the 90 day leave of absence.

Q Did you make any provision with Exxon Shipping Company to meet with Captain Hazelwood face-to-face and talk about his recovery, his AA, his aftercare?

A No, sir.

[1892]

Q That was what you did some years earlier when you had an employee that had a drinking problem, isn't it?

A That was done at that time at the request of management that I do so. I had no such request in this case.

Q It wasn't your problem, it wasn't your watch?

MR. NEAL: Objection, argumentative.

THE COURT: Sustained.

MR. O'NEILL: I will move on.

BY MR. O'NEILL:

Q Now would it be fair to say that in 1985 there was no good reason that you could think of not to give him a shoreside assignment so he'd have the opportunity to go to AA, isn't that right. You could not think of a good reason not to give him a shore side assignment? You want me to re-ask it so there aren't two negatives?

A Re-ask it so I don't get those nots in there.

Q Let me re-ask it.

Have you ever said, quote, there was no good reason not to give him a shoreside assignment.

MR. NEAL: What page.

THE WITNESS: I would say he could have been given a shoreside assignment, let's put it that way.

BY MR. O'NEILL:

Q Would you go to page 461 of your deposition transcript, and we'll go to line 24, and I'll read the question and answer,

[1893]

and if you could follow me and make sure I read the question and answer correctly.

A Wait a minute.

Q 461. It's in volume two. You got two volumes up here.

A Yeah.

Q Line 24 question, by Mr. Nolting: As you sit here today can you think of any good reason why Joe Hazelwood was not given a shoreside assignment in 1985 when he returned to work?

Your answer was: I don't know. You see that?

A Yes.

Q Now, after May of 1985, you had no discussions with anyone concerning drinking reports?

A You mean referable to Captain Hazelwood?

Q Yes, sir.

A I don't recall any.

Q The medical department in fact had the power to yank somebody off of a ship, didn't they?

A I'm sure we had the authority, but whenever I had asked, you know, literally, but whenever I had suggested or recommended that someone be taken off the ship, they took – they were off the ship.

Q After you made the fitness determination in May of 1985, did you take any other further action with respect to Captain Hazelwood or this particular claim or situation?

A I don't recall that I did. And shortly thereafter,
[1894]

probably early '86, actually, I no longer had direct responsibility for the shipping company, Doctor Nealy then took it on.

Q Okay, and would it be fair to say that other than the one conversation with Doctor Vallury that we talked about, you had no further conversations with Doctor Vallury?

A It's possible. I only recall the one.

Q And you were not aware of yourself with regard to Captain Hazelwood, the installation of any

monitoring program, no one talked to you about it at that time?

A You mean referable to Hazelwood.

Q Hazelwood?

A No, I did not recall any.

Q And you didn't have any conversations from May of '85 thereon with regard to Exxon Shipping Company with regard to monitoring Hazelwood?

A I do not recall any.

Q And from May of '85 thereon until – was it Doctor Nealy took over in '86?

A I think it was early '86, I could be off a little.

Q Nobody from Exxon Shipping Company came to you with any reports of or rumors of Captain Hazelwood drinking?

A I do not recall any at all, no.

Q Now if there had been reports of drinking, such as ordering beer over a walkie-talkie, or that he was allegedly drunk or

[1895]

that he was loud or abusive and that had been reported to you, at a minimum you would have brought him in and evaluated him, is that a correct statement?

MR. NEAL: I'll object to that, Your Honor. If he's asking a hypothetical I object to mischaracterizing the record. He's not –

MR. O'NEILL: If that resolves, the objection I will ask the hypothetical.

BY MR. O'NEILL:

Q Let's assume hypothetically that a port steward comes in and reports he's fallen off the wagon, he's drinking again, the cure didn't take, because of what the port steward says are drinking incidents. At a minimum hypothetically, you'd bring the man in and interview him and possibly evaluate him, wouldn't you?

A That's a possibility. Another possibility, under those circumstances, would be my judgment as to the nature of what I had heard. You made it sound fairly severe. If that was the case I think I would have gone back to someone in management who was aware of the problem, and called it to their attention, what I had heard.

Q How about calling the man in and talking to him and just getting his side of the story?

A That's a possibility I could have done.

[1896]

Q That's a decent thing to do?

A That's a decent thing to do. One of those two would probably have happened. But if I brought him in and it was as severe as you claim, I think I still would have wanted to talk to someone in management who was aware that this problem occurred.

Q The rumors may indicate a serious problem?

A That's correct.

Q Let's assume we had a second hypothetical situation in which a port steward comes in and says, I was on a launch with him, I was on a launch with him, and he was loud and abusive and smelled of alcohol, so now we have cumulative, a second situation, problem's more serious, isn't it?

A Yes, and I think the answer would probably be pretty much the same as on the first instance.

Q And let's throw a third instance on top of that to where you get a report that, A, management knows he's drinking again, and, B, he orders beer over a walkie-talkie from a company ship.

MR. NEAL: Objection unless it's a hypothetical.

MR. O'NEILL: Hypothetical.

THE WITNESS: I think in that instance we're talking about a violation of company policy and I would probably have called it to management's attention that I felt there had been a violation of company policy.

* * *

[1901]

A I, as best I can recall, remind you nine years later, and four years before this even came up, I think an individual in that section probably –

Q Excuse me, let me put this up on the screen because this is only part of it, except for a little card. Would you flash that up here okay. Now –

A This form, as I say, came into shipping and then it's sent to medical. The medical department received the form on May the 14th, 1985, and following that stamp it was sent to me for review.

After that I believe that a woman by the name of Gabby Guerra, as best I can recall, was the one who called and asked me if I would call and talk to Doctor Vallury. I'm busy and that wasn't the prime thing one likes to have to do on the spur of the moment. I said, fine, I will, but I have some concern, because actually this form has more detail completed on it than I generally got on this type of form. And she explained to me

[1902]

that there was a special reason they had that I needed to make this call to Doctor Vallury.

If you look at the form it says, the beginning date of Captain Hazelwood's disability was April the first, which was the date he went in the hospital.

Q Okay.

A The form was completed on April the 16th at a time when he was still in the hospital. I was receiving the form a month later. I do not know why it was such a delay, I cannot answer that. The problem they had in that disability section revolved around the fit for duty status. The form indicates that Captain Hazelwood was not fit for duty. Well, obviously, on April the 16th he was not fit for duty, he was in the hospital. Okay.

There is a benefit plan arrangement with regard to leaves of absence, that one really cannot grant a leave of absence unless one is not disabled, or in other words is not – is fit for duty, so that this question needed to be resolved before they could grant the leave of absence.

Myself or anyone that I know of, at least in the shipping company, took no exception to the leave of

absence because they needed to clarify this issue. They also wanted to know how he was doing, if I could get the information. So I placed a call to Doctor Vallury.

Q While we were on that, let me see if I can – you've got

[1903]

this form in front of you, right?

A Right.

Q And it's received on May the 14th?

A Right.

Q The date of the form is May 1?

A The date of the form is May 1. Where do you see that?

Q The date that he's entering the hospital.

A April 1.

Q I'm sorry. And he's to be there, you can tell by the writing, for 28 days, is that correct?

A That's correct.

Q The date that Doctor Vallury signed this form is April 16th?

A That's correct.

Q So when he signs this form and presumably sends it to Exxon Shipping Company, Captain Hazelwood is in the middle of his South Oak stay, is that correct?

A That would be correct.

Q However, by the time you get it on May 14, presumably he has completed that stay of 28 days?

A That's correct.

Q All right. Now, you're asked to call Doctor Vallury. You have this form in front of you. What do you do?

A I call Doctor Vallury and talk to him. I can't – you know, it's been a long time, but the gist of the conversation,

[1904]

the best I can recall it, is that he indicates that Captain Hazelwood had done well in the program, that he had entered it voluntarily of his own free will, that he had participated well in the program, he felt his outlook or his prognosis, if you want, was good, but that because of the nature of his job, meaning that he could not get to AA meetings, not attend the things that – the aftercare program that he wanted him to attend, that he had recommended that he take the leave of absence.

Q Now, at that time did he say – did he tell you that he was fit for sea duty?

A At that time we discussed the fit for duty, and he indicated to me that he was fit for duty. And I in turn then called back, I assume Gabby Guerra, as I'm not sure which person it might have been, and advised them that on the basis of that, that I agreed with that determination and that I recommended that he get the leave – they grant the leave of absence. And I remember this better than average, I guess, because when I did get to them, and I'm not sure of the exact time, how long it took to do this, but I think it was the latter part of May, when I got back to them.

Q To “them” you mean back to Exxon Shipping, Ms. Guerra?

A Back to Exxon Shipping. They’d already granted the leave of absence which sort of hacked me a little bit, which is why I remember this call as well as I do.

[1905]

Q All right. So then Doctor Vallury called you, as I understand it, he says Captain Hazelwood is fit for duty?

A That’s right.

Q But I recommend that he be given a leave of absence so that he can have the AA and aftercare, is that correct?

A That’s correct.

Q All right. Did you understand that AA and aftercare was a condition to be fit for duty, or he was fit for duty but it was a recommendation that he continue that?

A I thought he was fit for duty and that it was a recommendation that he be given this leave of absence so that he could stay shoreside and get that AA and other aftercare.

Q Now, Doctor Montgomery, Mr. O’Neill kept saying you determined that he was fit for duty, that’s that a fair statement, or did Doctor Vallury determine – his physician determine that he was fit for duty?

A His physician determined he was fit for duty, and I accepted that as adequate for Exxon’s purposes to allow him to be declared fit for duty.

Q All right. And then you called Ms. Guerra of Exxon Shipping Company and told her that you – in effect, that his doctor says he's fit for duty his doctor recommends this leave of absence and you endorse that?

A That's right.

Q Doctor, Mr. O'Neill said that pulled up an Exhibit 160.

* * *

[1906] Q Doctor, Exxon Shipping Company employees, I suppose like all employees, are entitled to have their own doctor, correct?

A Encouraged.

Q Encouraged to have their own doctor. And the medical department is there for – to aid, but not as a substitute for

[1907]

their own doctors?

A That is correct.

Q All right. Is there anything – if a person – if an Exxon Shipping Company employee had some kind of medical problem and went to his doctor and then his doctor – you talked to his doctor and his personal doctor said he's fit for duty, would you be inclined to accept that?

A Yes, I would. Unless I saw some reason to really take exception to it. That was generally the accepted program.

* * *

[1909]

DIRECT EXAMINATION OF KENNETH D.
GOULD

BY VIDEO EXAMINER:

Q You've stated your full name for the record already. It's Doctor Kenneth G. Gould, Junior?

A Correct.

Q Could you tell us where you presently reside?

A I currently reside in Houston, Texas.

Q Are you currently employed by Exxon Corporation?

A No. I'm employed by Exxon Company USA, which is a company of the Exxon Corporation.

Q In what capacity are you employed by Exxon Company USA?

A My current title is director of health services.

Q How long have you held that position?

A Since December 1st, 1985.

* * *

[1912]

Q Let me step back for a moment. What were the general ways that the medical department in 1985 may have learned about an employee coming out of a rehabilitation program for alcohol?

A I may have been confused earlier when I answered with regard to the three days that I said I thought the department might have learned about it when they went in. And because I'm not usually used to hearing about it at that point, but when they come out, and I may have misspoke in that regard –

but I think we said that the employee would tell us, we would get a note from the doctor or we might hear about it from management.

Q Are you referring now – you say – are you saying that that’s the way you might learn about – are you saying that those are the three ways that the medical department might typically learn about an employee emerging from an alcohol rehabilitation program?

A Yes.

Q Are you saying that it’s very possible that the medical department would not even learn about the fact that an employee had been admitted himself to a rehabilitation program until after he completed the program?

A Yes, and I’m not excluding the fact that we might not have learned about it at all.

Q Now, assuming an employee has been admitted to an alcohol

[1913]

rehabilitation program and has now emerged from the rehabilitation program and has been absent from work during that period of time and is returning to his place of employment, what procedure would the medical department undertake at that time?

A 1985?

Q Yes.

A The procedure is as previously described, when somebody is absent from work, his supervisor will send or give the absent employee the form for the absent employee to sign the release and for the doctor then to complete it and send it back. I told

you about the ways we would learn about it. There's no other mysterious way I would know about it.

Q Would the medical department, in the instance of an employee who had undergone rehabilitation for alcohol, have conducted its own examination to ascertain whether that employee had successfully completed his alcohol rehabilitation before allowing him to return to his job in 1985?

A I think that the forms that we get are subscribed to by the physician, an M.D. Our general process, whether it's related to alcohol or a hernia or something else, is to take the word of the physician and his description of fitness to work. The one major exception to that is when we have someone who has seen a chiropractor, we may in fact refer people who have been treated by chiropractors for another opinion by a physician

[1914]

with an estimate of potential disability.

Q In 1985?

A Right.

Q Was it necessary that – that there be a determination of fitness for work before an employee who had undergone alcohol rehabilitation could return to his job?

A Not if the physician said he was fit to return to his position. You got to remember, we have five doctors essentially, reviewing all the absences for the company of 20,000-plus people. And we cannot see everybody who comes back for something.

Now, if management decides that they want to have that person further evaluated, they may

contact the medical department and say, Please evaluate so and so for his fitness to work.

Q My question was literally, was there no requirement that the medical department itself make a determination of fitness before an employee who had been rehabilitated for alcoholism could return to his job?

A Not that I'm aware of.

Q One should look at that answer in the light of the fact that where we found out about it, through the process of an individual disability report or ER-5, that we would have on record a physician's signature which the physician said he was fit to return to work or not fit to return to work. And if the

[1915]

physician said that he was not fit to return to work and he shows up to work, then we might get involved.

Is that a clarification which helps?

A I suppose.

Q My question is, then –

A But see, management would know that at that time because they would have had their part of the form which the physician would say he's fit to work or not fit to work.

Q Where the medical department had received notice of an employee's determination of his fitness to return to work in the instance of his having completed alcohol rehabilitation, would the medical department ever speak to that employee's private physician about his determination?

A Unless there was some unusual facet, probably not.

Q My question is, simply, did the medical department

independently have a requirement about the level of detail that it would have wanted to receive or needed to receive in terms of that determination of fitness for work by that employee's private physician?

A I think practicing law or medicine or driving a bus or whatever you're doing, there's a certain degree of judgment which enters the picture. And if one lays down restrictive criteria or instructive criteria, one frequently misses the essence of the problem.

We try to stay alert to unusual situations, but there were

[1916]

no jot-and-tittle requirements on each and every person who comes back to work.

Again, I reiterate that if there was some unusual facet mentioned in the diagnosis or in the information we were given, we may or we may not choose to try to get in touch with a physician or get in touch with the employee and to clarify that depending on the judgment of the individual reviewing health practitioner.

Q In 1985 did the medical department consider that it was important in terms of successful rehabilitation of alcoholism employees that they receive counseling after their return to employment?

A I think as a general rule we would have felt that

counseling would be wise after such a visit, but then you have to describe what you mean by counseling. In a certain celebrated case I recall that, you know, what is usually – what was usually the recommendation of – of rehabilitation programs was that someone participate after that rehabilitation in a 90-and-90, which is 90 visits to Alcoholics Anonymous chapter in the next 90 days in order to solidify the gains made with regard to the individual's thinking during the rehabilitation process.

I don't think anybody considered even in 1985 the rehabilitation was complete, complete when you stop the hospitalization or the outpatient phase of the rehabilitation

[1917]

treatment, that this was an ongoing life situation in which one needed to continue to strengthen one's resolve not to return to the bottle or the pills.

Q Did the medical department in 1985 have any system in place to determine for itself that an employee who had undergone alcohol rehabilitation on an outpatient basis had followed his program before returning to work?

A No. I don't know how you can determine that today.

Q Doctor Gould, after reassignment of an employee who had completed alcohol rehabilitation, did anyone within the medical department have a responsibility to monitor that employee to detect relapse, possible signs of relapse? And I'm talking about the period 1985 to 1988.

A No.

Q Do you have an understanding about whether or not anyone else within the Exxon organization other than the medical department had such a responsibility – and again, I'm referring to that period of time, 1985 to 1988?

A It is the responsibility of the first-line supervisor to determine the fitness of his employees to do the job that they're supposed to be doing. In the sense that he's with them and he's observing them. If he has a problem, he's supposed to get in touch with the medical department, or with his supervisor in order to determine if any other procedure needs to be followed.

[1918]

Q With regard to that situation, is it important in your opinion that the supervisor have knowledge that the employee that he is monitoring is a rehabilitated alcoholic?

A I think it would be useful if the first-line supervisor knew that somebody had been to rehabilitation, that he then was able to have that information in order to attempt to understand what action his employee was taking.

Q In terms of the medical department evaluating an employee who had returned to the job but undergone alcohol rehabilitation, is it correct based on your testimony that the medical department was essentially relying on the non-medical supervisors to alert it to the problem concerning use of alcoholism – alcohol?

A I believe this was the tact that management had decided to take.

Q In the period between 1985 and prior to the time of the spill, did the medical department have any policy or requirement that an employee who had undergone rehabilitation for alcohol be abstinent and refrain totally from use of alcohol when he returned to his position?

A No.

Q Did the medical department in this same time period, between 1985 and up until the time of the spill, have any requirement of its own that an employee who had undergone rehabilitation for alcoholism attend Alcoholics Anonymous or

[1919]

similar meetings before being returned to his job?

A No.

Q Do you have an opinion about whether or not an alcoholic can suffer a loss of cognitive efficiency, but at the same time not exhibit any overt signs of gross motor impairment?

A Yes. I have an opinion.

Q Would you please explain it?

A I believe it can happen. I also believe that the other half of that is true, that you can suffer motor inabilities and not be able to show any cognitive difficulties. And I don't know which one is dominant in an individual – given individual, because of the variation within individuals.

Q Doctor, do you have an opinion about whether or not the greater number of drinks that a rehabilitated alcoholic consumes following rehabilitation, the greater likelihood of relapse?

A I know about the arguments that have gone on in some of the literature with regard to this kind of thinking. There are some folks, some experts who believe that any amount of alcohol, in fact, indicates a relapse and others who feel that after rehabilitation is complete, that some small amount of alcohol can be periodically drunk by someone who's previously been designated as an alcoholic. I don't know what the long-term outcome of these academic deliberations will be, but it seems to me that from the standpoint of operational

[1920]

efficiency within the corporate setting, that abstinence is to be desired.

Q Could you tell me what role, if any, the medical department played in the development of the alcohol and drug policy that came into effect in 1985?

A We were asked our opinion on various parts of the proposed policy and provided that opinion. Principally through the manager of the human resources department.

Q Do you recall the opinions that you offered at that time in terms of the development of the policy?

A Without having my notes in front of me I'm really unable to state with clarity the individual comments that I offered.

Q Do you have any recollection about whether or not your opinion was solicited with regard to institution of an aftercare or follow-up program for rehabilitated alcoholics who have been returned to the job?

A I don't believe in 1987 that our concept of aftercare within the medical department was well enough developed for us to have provided any particular input with that – with regard to that subject.

* * *

[1930]

Q Do you have an understanding about whether or not the 1987 alcohol and drug policy prohibited testing of employees who are rehabilitated alcoholics and had returned to their positions?

A Doesn't say anything about that.

Q Is it correct, then, that because the policy, in your opinion – that because the policy is silent with regard to testing after rehabilitation, that it was permissible under the policy?

A I don't think the policy, in my own view, does not prohibit testing of somebody in a rehabilitation program, but it also doesn't speak to it.

Q Let me refer you to document number 18, which should be a memorandum dated October 5th, 1988, from J.C. Bowen to a number of individuals, attaching the then-latest revision of the drug and alcohol use package.

A Uh-huh.

Q You're noted as being a recipient on that document?

A That's right.

Q Do you recall receiving this?

A Yes, indeed.

Q In terms of your understanding today about the treatment of alcoholism, how important is, in your opinion, is aftercare follow-up in terms of a successful recovery process?

A From alcohol?

[1931]

Q Yes.

A I think it's exceedingly important. I think that's one of the things we learned in the middle '80s. We learned a lesson and we brought it.

Q Did you testify earlier today about a conversation with Mr. Iarossi after the oil spill?

A That's correct.

Q What did the discussion concern?

A I can't remember the details of the discussion, but I can remember that Captain Hazelwood entered into the discussion.

Q Do you recall whether or not you discussed with Mr. Iarossi, after the time of the spill, whether or not the alcohol and drug policy in effect at the time of the spill had mandated that an employee who had undergone rehabilitation for alcoholism be returned to the exact position that employee had held before rehabilitation?

A I don't think I ever had that conversation.

Q Did Mr. Iarossi, if you recall as part of these discussions, ever express concern to you that Exxon Shipping Company had believed that the medical department was in some fashion conducting continuous monitoring of employees who had been

returned to employment after undergoing alcohol rehabilitation?

A No.

Q Do you recall having any discussion with anyone in

[1932]

management in either Exxon Company USA or Exxon Shipping Company concerning that last topic?

A In the medical department? I think there probably were some discussions around that issue with others.

Q Do you recall what their reaction may have been after you shared information about the fact that the medical department does not undertake to perform continuous monitoring of employees that are returned to their positions after alcohol rehabilitation?

A Well, I think that the general appreciation was that they knew that we were not, but they were just verifying with us that we were not and in fact that was a management responsibility.

* * *

[1938]

DIRECT EXAMINATION OF WRENDELL NEALY
(Video)

BY VIDEO EXAMINER:

Q Good morning, Dr. Nealy.

A Good morning.

Q Can you state your name for the record and home residence for the record, please?

[1939]

A Wrendell Nealy, Senior. Home address is 795 Leeward Drive, Baton Rouge, Louisiana, 70808.

Q Why don't we first review your educational background, starting with college, please. Please tell me the college you attended, the years that you attended and your major.

A The first B.S. degree in 19- – well, I began school at LSU, Louisiana State University in 1951 through about the middle of '54 and came back to LSU in '58 through '60 and got a B.S. degree.

Then proceeded to LSU Medical School in New Orleans, got my M.D. degree in 1963. And you want to go further than that?

Q Can you please describe briefly your educational history since UCSF?

A In 1980 – 1980, I joined Exxon Company USA as a plant physician at Baton Rouge refinery. One to two years later was promoted to medical director of that refinery.

Q Did you, in your family practice or in your practice prior to 1980, did you have any experience treating an alcoholic?

A Well, yes, I did. I was the medical director for a treatment center in Salem, Oregon, rehabilitation center. I forget the name of the center, but I held that position as apart-time job probably, I would guess, three years. Other than that, treating alcoholics in my practice.

Q Did you at Dammash and then at the rehabilitation center in Oregon, come to any conclusions with respect to the rate of

[1940]

recidivism of alcoholics?

A Only that it was high.

Q At that time what was your position with Exxon?

A When I went to Houston in 1986 I was associate – assistant medical director of Exxon Company USA and I remained that title through until I resigned, so that was my primary title. I was also medical director for Exxon Shipping Company at that time, and that was more a contact for Exxon Shipping on medical issues.

Q In 1986 when you went to Houston, did you take over Dr. Montgomery's duties and responsibilities?

A With regard to?

Q To the role of contact for refining and shipping.

A Yes, and then I – and initially I reported to him. At some point in time that reporting relation changed where I reported directly to Dr. Gould. I don't remember exactly when that was. Certainly by the time I was – by the time I was full-time contact for Exxon Shipping Company, my recollection is that that reporting relationship changed to Dr. Gould.

Q Upon discharge of your patients at Dallas and at the Salem center, and I'm talking about your patients who were inpatients with respect to alcoholism, did you recommend or recommend that they remain abstinent thereafter?

A Certainly.

Q Why did you make that recommendation? As a preliminary

[1941]

question, and I say abstinent as opposed to would it be sufficient that they just drank in moderation thereafter as opposed to remaining abstinent?

A No.

Q Why should they not drink in moderation?

A Even – well, we say in general that an alcoholic or substance abuser is not ever cured, that they're always in recovery, those words taken broadly to mean that one can be cured of all the medical symptomatology, all the affects and effects of alcoholism, but never escapes the susceptibility, unique susceptibility to the addictive substance again.

Is that clear enough?

* * *

[1946]

Q Did you have an understanding as to which rehabbed alcoholics, what categories of rehabbed alcoholics were referred to medical subsequent to rehab?

A No.

Q Who at Exxon Shipping, and I'm referring from, let's say 1984 to 1989, made this determination, that is, to refer the rehabbed alcoholic to medical for re-evaluation?

A I don't know. I mean I don't know that they did.

Q Have you ever seen a rehabbed alcoholic referred to you by Exxon Shipping – again, in the time period '84 to the grounding in '89?

A I don't believe.

Q You don't believe you –

A That I have ever seen an alcoholic who had been rehabbed returning. I don't believe that I had seen him on their return from rehabilitation; that's the context in which I view this.

Q Earlier you testified that you were responsible for determining fitness for duty?

A When asked by management.

Q When you got to headquarters, that was approximately 1985?

A No, that was August of '86.

Q '86. Did you, in fact, make a strong recommendation to get

[1947]

an aftercare or follow-up program so that you'd give employees more help in remaining abstinent in 1986 or thereafter?

A To my boss, Dr. Gould, on the way to the cafeteria I remember saying one of my goals is to get an aftercare program started. And he said, what do you mean by this. And I said, some kind of program so that people returning from rehab centers would be followed up; there would be some structured follow-up, and suggested that probably the EHAP counselor would be the people to do that.

Q What, if anything, did Dr. Gould say to you or suggest to you?

A My recollection then was he said that's not our job, we're not – that's not the medical department's job. That's about as strongly as it was presented and as far as it went.

Q Did he indicate to you why it was not medical department's job?

A I don't recall. I think the brunt of that, the gist of what his opposition was that medical department can't be checking into everybody to find out what kind of therapy they're in, and if they're going to their AA meetings or if they're going to groups; and, you know, relatively the policeman function. That's a line management function, more or less.

Q Did you disagree with Dr. Gould?

A Yes, I disagree and did disagree that, but I don't recall

[1948]

that I disagreed with him verbally or certainly wrote no memo to the effect. It was my feeling that there was a need to put together a program to more closely follow and give added motivation and support to people in recovery.

Q Why did you feel there was that need?

A Well, almost – all the treatment centers that I had been connected with very closely – here in Baton Rouge, for example – have an aftercare policy, and some range from six months to two years in which they have regular groups that meet and people at discharge are required to sign up for that program, and that helps them maintain their sobriety.

However, there is no – there's no way to check to see and there's nobody checking to see that people comply with those programs. And to my – in my view, since the cost of the inpatient therapy covers the cost of the outpatient follow-up, they get no more

money whether the follow-up is completed or not, and so nobody has much of a motivation to go back.

It's left up – it's provided, the employee can do it or not, and I thought we needed something a little more structured so that –

Q By something “more structured”, do you mean that attendance would be required or mandated by the employer?

A Right.

Q And that there would be some sort of, if you want to call it, police function, to –

[1949]

A Right.

Q – understand that an employee did or did not attend?

A Yeah, bring a note from the AA meeting that he did attend, for example, if he was recommended to have 90 days and 90 visits, he had to produce some kind of documentation that he could. It's not very practical, but I was trying to work with some way to achieve some sort of order and structure to that.

Q Have you ever met Joseph Hazelwood?

A Not to my knowledge.

Q Prior to the grounding, had you ever heard of Joseph Hazelwood?

A No, I don't think so.

Q Subsequent to the grounding, did you have conversations with other doctors at Exxon USA's medical unit with respect to Joseph Hazelwood?

A Yes.

Q Who did you speak to?

A Spoke with Dr. Montgomery and probably – I can't think of any of the doctors specifically excluded. Surely Dr. Douglas and Dr. Montgomery, and probably Dr. Gould, but I can't – I don't remember the – it would have been infrequent, but it would have been possible that Dr. Gould was in the conversations.

Q Did Dr. Douglas have knowledge of Joseph Hazelwood's rehabilitation prior to the grounding?

[1950]

A No, not – well, I don't know if he did or not.

Q Did you ever learn that he did?

A No.

Q Okay. Is it your testimony that Dr. Montgomery told you and Dr. Douglas at the same time in the same room that he had knowledge of Joseph Hazelwood's rehabilitation prior to the grounding?

A Yeah. That's what I think I said.

Q In the course of this conversation with Dr. Montgomery about the rehab program, did he mention the fact to the best of your recollection that it was alcohol rehabilitation?

A Yes.

Q Have you ever consulted with any Exxon manager with respect to the monitoring of a rehabilitated Exxon Shipping Company employee?

COLLOQUY: Prior to 1989.

Q Prior to 1989.

A No, not that I recall.

Q Did Exxon USA's medical department provide any information, hold any seminars, hold discussions with respect to how a manager should supervise an employee of Exxon Shipping Company that had been rehabilitated?

A Not that I'm aware.

Q Do you agree with the statement that post-rehabilitation testing aids successful rehabilitation?

A Yes.

[1951]

Q Are there schools of thought that say that part of any rehabilitation can be – making that particular person a social drinker rather than a person who drinks to excess?

A I've never heard of any rehabilitation program's goals that would make them a social drinker.

Q Maybe I phrased that wrong. In the other schools of thought that you spoke about, is there a view that you can take an alcoholic and they can drink again and they can do it in a moderate way where they become social drinkers and not necessarily alcoholics?

A I don't know that there's not some people that hold that view. I've never heard it. I would disagree with it. You know, you don't ever – having been an alcoholic, you don't ever go back – we can cure pretty much the pathology and a lot of the social ills and the financial problem, we get that all straight and we can even get to the point, in my view, in my belief, that the person never wants a drink any more; but I don't believe that you ever overcome the

susceptibility to, if you do have a drink, to the high risk of getting the full-blown addiction back again.

Q You're not suggesting that someone who has been through

[1952]

alcohol rehab cannot ever become a social drinker?

A I am suggesting that. I don't believe that's really so—

Q Are you suggesting that someone who's been through alcoholic rehab cannot stop and have one or two drinks?

A Excuse me.

Q That's what I'm talking about, social drinkers.

A That's not entirely true, what I said. When you limit it to people that have been through rehab in my view, there are people who have been through rehab who are not alcoholics. I believe that a person who is a full blown alcoholic cannot go back to being a social drinker.

Q I see. So you're making a distinction —

A Between rehab and alcoholism.

Q If you had known that Captain Hazelwood had been in rehabilitation and heard subsequent to his return as a captain that he had been drinking, what would you have done?

A Nothing.

Q Why do you say that?

A I would have no responsibility to do anything. I would base that on similar kinds of things that I had

heard about other people, and I don't have any responsibility to do anything in that – in that area.

Q So did you mean by "I", you personally or did you mean your department or did you mean both?

A I mean in general that's not my job. It's not covered in my job description at all. When asked to evaluate someone, I do that, and otherwise we have no call in-people for – or responsibility stated to do anything.

[1953]

Q Okay, and whose job would that have been at the time?

A Whose responsibility would it have been? My – I'm not sure, but I would assume that, my assumption has always been it was his supervisor's job.

Q Do you recall any written procedure that defined the responsibility for either monitoring or reacting or responding in the event that someone back from rehabilitation began drinking again in the mid-'80s, while you were at Exxon, from 1985 on?

A The short answer is no. There was some policy that we had in Baton Rouge at the Exxon refinery that described a supervisor's responsibility if he perceived someone at work who seemed to be behaviorally impaired. Other than that very narrow instance, I don't recall.

Q Did you ever discuss Captain Hazelwood with Dr. Montgomery?

A Yes.

Q And could you tell me the nature of those discussions?

A Dr. Montgomery mentioned to me that – that Joe Hazelwood had been into a treatment facility.

Q Was there more than one conversation?

A I'm sure there was more than one. Surely two or three times the subject came up.

The only thing that I recall Dr. Montgomery's discussion or comments about was the fact that he didn't see in the medical chart a release, a fit for duty release. That was a concern

[1954]

and he was somewhat concerned about that because he – he recalled that, and by – not specifically, but by general process, he would have gotten or assured himself that there was a release for return to duty before Captain Hazelwood had returned to duty, and that's the gist and sum and substance of it.

Q Is there a form that Exxon medical used that you would – would be the equipment what you just referred to was fit for duty release or determination?

A Well, there are many forms, probably much more than Exxon, Exxon USA or Exxon Shipping would use. There are many forms and releases to duty come in many shapes and forms from the treating physician, usually on their own forms rather than Exxon's, all of which are usually acceptable; something to wit, saying, that they are released fit for duty or they're not released fit for duty, and if they're released with or without restrictions. That's what I recall.

Q Now, this is something that would be an Exxon-generated document or form?

A No. These would almost always come to the medical department from outside the medical department and from outside the company.

Q Is Exhibit 66142 such a form?

A I think it is.

Q Did this document – strike that.

[1955]

This document was in the medical file kept on Captain Hazelwood, correct?

A Yes.

Q This document has been referred to as an IDR. Does that term mean anything to you?

A Yes.

Q What does it stand for?

A Individual Disability Report.

Q If Dr. Montgomery had already consulted the medical file prior to this conversation with you, could you then conclude that he did not believe that Exhibit 66142 was a fitness for duty release form?

A Well, I believe his concern was not over whether this document was a release fit for duty, but whether he had – he had given something to Exxon Shipping Company or reviewing this document had been written something himself saying fit for duty.

Q Would it have been normal procedure in the medical department for an Exxon doctor to have done that; in other words, to have written something himself with respect to fitness for duty in the time frame we're talking about?

COLLOQUY: The question is –

Q In the time frame we're talking about.

A It carries all kind of answers to that. It would have been very normal for an Exxon doctor. Sometimes people return

[1956]

for – from lack of fitness for duty back to duty with no consultation at all with the medical department or any Exxon physician, although it – a document like this coming into the medical department would usually flow to the doctor that's the contact for that function; Dr. Montgomery in this case. It would be certainly normal for him to either communicate with shipping verbally, depending on the nature of the question from the shipping company, or to make some mark on the form itself if he had any question about the physician's – the treating physician's fitness for duty release.

If he had any question of that, it would be totally normal for him to clarify that question and make some note of it.

Q And in that context, to the best of your recollection, what was Dr. Montgomery's concern with respect to Captain Hazelwood?

A That he hadn't made a clearer note in saying, I have called the treating physician and I release this patient fit for duty.

Q Did he express any concern that – as to whether or not there had been a determination of release for fitness for duty?

A I don't believe that was his concern. It was just the – the documentation of that.

* * *

[1967]

DIRECT EXAMINATION OF MICHAEL EMEL
(read)

BY MR. COHEN:

Q Would you state and spell your name for the record?

A My name is Michael M. Emel, E-m-e-l.

Q And where is your home?

A 3626 211th Place, Northeast, Redmond, Washington, 98053.

Q Now, what's the first vessel you ever worked at?

A First vessel was the Galveston.

Q So you never worked for any other vessels for any other companies other than Exxon?

A Before I got hired with Exxon, I was a chief engineer on a private yacht.

Q In 1982, then, was the first time you went to work for Exxon, is that right, on the Galveston?

A Right. That would be on the discharge slip, would be the specific date.

Q Now, did you ever see anyone drinking on an Exxon vessel ever?

A Yes.

* * *

[1969]

Q Now, the last time we spoke here before the break, we were talking about drinking on board, and you said that you have on occasions had a drink. Now, did that ever happen when you were

[1970]

in Valdez?

A Yes.

Q On the vessels in Valdez?

A Yes.

Q Did you ever bring any alcohol on board the vessel from the Port of Valdez?

A Never.

Q You know of anyone whoever has?

A No.

Q So when you brought something aboard, it was in San Francisco, say?

A Yes.

Q Now, I think we established previously that you started sailing with Captain Hazelwood on the Valdez, let's just call it January of 1989. Do you recall an incident following that time that you went to see Captain Hazelwood about a pay voucher?

A Yes.

Q And where did you see him?

A In his office.

Q Was there anyone else, anybody else there?

A No.

Q What was the question about the pay voucher?

A I was asking to get a draw on a check to probably go to shore or something, an advancement.

[1971]

Q And do you remember the time of day?

A Probably it was in the evening – no, it very possibly could have been around noon or something. If I knew I was going to go to shore that afternoon or evening or something, I would probably try to get it taken care of before I left. So it would probably be around noon or something, afternoon maybe.

Q Now, do you recall during the course of that meeting concluding that Captain Hazelwood had been drinking?

A I can't conclude that.

Q I'm not asking you if you can conclude it now, I'm asking you if you at any time or at the time, at the time concluded that Captain Hazelwood had been drinking?

A I may have thought that he had been drinking.

Q You did think he had been drinking at the time, didn't you?

A Yes.

Q Mr. Emel, on what did you base that conclusion at that time?

A His mannerisms.

Q Could you be more specific, what mannerisms?

A His movement.

Q What kind of movement?

A It just seemed slow.

Q Did his ability to walk seem impaired?

Mr. Thomas: Well, I object to the extent it assumes, assumes the witness saw the captain walking.

[1972]

Mr. Sherman: You can answer the question?

A He walked a little different, not a lot of bounce in his steps, so to speak.

Q Was your conclusion based in part on his speech?

A No, just on the way he moved.

Q Now, without wanting to put words in your mouth, would it be fair to say that at the time you concluded that he just looked like he'd been drinking?

A Yes.

Q Has your conclusion changed since then?

A No.

Q So you still think, as we sit here today, back then he looked like he'd been drinking?

A Yeah.

Q Now, what is the Westar Terminal?

A That's a terminal down in San Francisco where the motor launch comes out and ferries you from the ship to the shore.

Q Is the launch operated by Westar?

A Yes.

Q It's not an Exxon operation, then, as far as you know?

A As far as I know, no.

Q Now, when entering the Westar Terminal at any time prior to getting in the launch, is there any security, are there any security measures in effect in terms of searches or looking for

[1973]

contraband?

A No.

Q To your knowledge were there any such security measures during the time that you sailed on the Valdez starting in January of 1989?

A No.

Q Were there any security checks or searches in place at the Valdez terminal that people had to pass through on returning to the vessel?

A Yes.

Q Do you know why there was such a system in Valdez, but not in San Francisco?

A No.

Q You know whether or not there is such a security system in place in San Francisco now?

A I have no idea.

Q In regard to the Valdez run on which you served, on those occasions in which you brought alcohol on board, where did you bring it on board?

A It would be San Francisco.

Q In all occasions?

A Yes, if I was in that port.

Q Sure. You don't recall bringing any alcohol anywhere else; in any other port, in other words?

A If the ship went to, say, maybe Long Beach or something like that, or possibly there.

[1974]

Q Would it be accurate to say that between the time you signed on the Valdez in January of 1989 and the time of the grounding, that you consumed roughly a gallon of alcohol?

A Yes.

Q Would you at any time share any of that alcohol with anybody?

A No.

Q And in the same time frame on how many separate occasions did you bring alcohol on board the vessel?

A Maybe twice.

Q Half a gallon at a time?

A Yes.

Q Now, just a couple more questions, Mr. Emel. The alcohol that you drank on board the Exxon Valdez, was that vodka?

A Yes.

Q Anything but vodka?

A No.

* * *

Q Do you ever recall anytime anyone ever getting fired for drinking that worked for Exxon?

A Yes.

Q Who?

A I can't recollect any names but I know that there were

[1975]

people that were fired.

Q Any vessels that you were on?

A Yes.

Q Can you think of the vessel?

A Exxon Princeton.

Q Roughly when was that?

A I would have to look at my discharge slips to see when I was on the vessel, but there was an individual on that ship that was fired, taken off in cuffs for drinking and marijuana.

Q Do you remember where this happened?

A He was taken off in New York, I believe. He was an oiler.

Q You say he was caught with marijuana and with alcohol?

A Yes.

Q Who took him off in cuffs?

A The authorities, the Coast Guard, I believe, Exxon – I don't know who. I wasn't –

Q Do you recall any other situation where someone was fired for drinking?

A I heard of occasions of people being fired for drinking.

Q What did you hear of?

A I heard that a man got fired because of drinking.

Q Just once or more than once?

A A couple of times, different people maybe in the same incident or other people, maybe three different occasions where I've heard that people were – that as public knowledge

[1976]

through the ESA and through Exxon.

* * *

[1977]

Q Let me back up a little bit, Mr. Emel. I want to refer again to the time you went to Captain Hazelwood's quarters in regard to the pay voucher question. After reaching the conclusion about which you've testified already, did you report that to any other person employed by or associated with Exxon?

A No.

Q Did you ever subsequent to that time have any discussions with Exxon management about that issue?

A No. One thing, when I observed the captain, I'm no expect

* * *

[1978]

DIRECT EXAMINATION OF WILLIAM
MASCIARELLI (read)

BY MS. WAGNER:

* * *

[1979]

Q Now, from 1981 to the present, can you run through your employment?

A Exxon Shipping Company until – I have to get the right date. I guess October 10th of 1990.

Q Are you employed by Exxon today?

A No, I'm not.

* * *

[1980] Q You sailed with Captain Hazelwood?

A I sailed with Captain Hazelwood.

Q Is that the only time you sailed with Hazelwood?

A No, I was with him for I think about three days in San Francisco. We have to look at the discharges, but –

Q What year?

A Just a month before the Valdez went aground, so January of 1989.

Q You say you were with him for three days. Was that in port?

A It was in port. I was the third mate on the Valdez for – I think about a month and then was transferred from the Valdez to the Exxon Baton Rouge and Greg Cousins came on board to relieve me on the Valdez, and it was Captain Hazelwood came on the ship after the Valdez had arrived in San Francisco and I was with him – it might have been only been two days. It might have been three days before I was transferred also in San Francisco to the Baton Rouge.

Q Do you remember what month that was?

A I can tell you the exact date if you want.

Q Mr. Gerry: January 20 to February 20?

A Well, the date I got off the Valdez was February 20th. Captain Hazelwood, I don't know when Captain Hazelwood joined. It might have been February 18th or 19th. So we had two days together.

[1981]

Q So it was in February?

A In San Francisco in February, yeah.

Q Did you have occasion to see has during that three-day period?

A I did. I did. I saw him every day.

Q More than one time a day?

A Yes.

Q Did you see him aboard the vessel or ashore or both?

A Only aboard the vessel.

Q Did you see him in his cabin?

A No, I didn't. Well, not that I remember. I remember specifically seeing him at dinner, on the bridge, in the officer's lounge. I don't know if he was in his cabin.

Q Was there any time during this period that you made a judgment that he was impaired, Hazelwood?

A Well, Captain Hazelwood was ashore for part of the time and had come back to the ship. It seemed to me that he had been drinking. I don't know about impaired; I never saw him his work, so –

Q Maybe it's, what –

A So I didn't have any standard to say was he impaired to walk down the corridor or to drive a car or to pilot a ship.

Q When you made the judgment, you said it seemed to you that he had been drinking. What factors were involved that you reached that conclusion?

[1982]

A Gee, I'm trying to picture him. He looked like somebody who had been drinking.

Q Did you ever, during this three-day period, see any alcohol or beer aboard the vessel?

A Well, I did. And that was the only – that – and that was the one time I had alcohol myself on the ship. Captain Hazelwood offered me a glass of wine and I took it and drank a glass of wine with him.

Q And what were the circumstance of this offering you a glass of wine, where did it take place?

A We were in the chart room. In the back of the bridge. I should say the ship was at anchor, there was nothing going on on the ship at that time.

Q You were at anchor outside San Francisco or in San Francisco Bay?

A In San Francisco Bay.

Q When you went in the chart room, were you in there by yourself with Hazelwood?

A Yes.

Q Did Hazelwood have a bottle of wine there in the chart room so that he could offer you a drink?

A I don't remember if he had two glasses of wine that he had brought up, say, to the bridge, or

whether he had two empty glasses and a bottle. I don't remember.

Q Did you accept?

[1983]

A I did.

Q And did you have just the one drink with him?

A I did.

Q How long did that session take place roughly, a few minutes or –

A It could have been a half hour. We were just talking and –

Q Now, did Hazelwood have more than one glass of wine during that half-hour period?

A He didn't.

Q Did you, other than this wine during the three-day period see any beer or any alcohol aboard the vessel?

A I didn't.

Q When Hazelwood offered you this glass of wine, did he indicate to you what were the circumstances of why he was doing this, just to be social or for what?

A He didn't indicate, but Captain Hazelwood and I liked one another very much, and from my point of view it might have just been a friendly gesture.

Q Was there any indication to you when he offered this to you that he had been drinking before this?

A Not at all.

* * *

[1991]

Q Let me talk about fatigue a little bit. In your opinion, was fatigue among deck crew a problem on Exxon oil tankers?

A What do you mean by “deck crew”?

Q Let me first limit it to deck officers.

A Yes.

Q Was fatigue, in your opinion, a problem with regard to deck officers?

A Yes.

Q Just for clarity, when we talk about deck and crew – when we talk about deck crew and deck officers, the deck officers would be who, the first, second and third mates?

A Chief mate, second mate, third mate.

Q The deck crew would be constituted as who?

A The six A-B's.

Q In your opinion, did deck officers experience fatigue from overwork?

A In some circumstances yes. In other circumstances – well, always from overwork, yes.

Q When you say that you feel fatigue among deck officer crew [sic] was a problem, in what way was it a problem?

A Well, that led to lower – I don't know how to say it. Lessened people's ability to work safely, I guess is the thing to say.

[1992]

Q In your view was it primarily a safety issue?

A Yes.

Q You may have answered this: Was it your testimony that you don't recall the autopilot ever being utilized in Prince William Sound when you were on board?

A That's correct.

Q But based on your experience in transiting Prince William Sound, the Exxon vessels involved in those transits utilized the vessel traffic center on the VTS?

A I don't know what you mean by "utilized".

Q Did they rely on them to get information?

A The only information we had relied on them for was ice conditions.

Q Was there ever any time that an Exxon vessel relied on the vessel traffic center for information about where they were in the Sound?

A Never.

Q Let's factor in your observation yesterday that Kagan needed supervision and your observation that in the normal course of your changeover with Cousins, you would have told Cousins that, can you still imagine Cousins, had he done things properly, would not have picked up on the fact that Kagan failed to make a course change in six minutes?

A I'll tell you that I can imagine the circumstances. Kagan and Greg hadn't been together very long at that point, as far as I can tell. And let me say that I'm not simply trying to

[1993]

defend a fellow third mate; I can imagine the fact that the concern with the ice was so overwhelming

that he would not have checked that rudder angle indicator.

Now, in my trips into and out of, and I did a lot of trips in the two months prior to the grounding on both the Valdez and the Baton Rouge, the captain was the guy who watched the ice and I got to do everything else, which included looking at that rudder angle indicator. The third mate's job is to do that when the captain is taking care of conning the ship or making sure the ship isn't running into anything.

When the captain or pilot is not on board and the third mate has to do everything else, it's very conceivable to me that that is one of the things that the third mate wouldn't follow-up on.

Q Are you saying Cousins had too much to do on board the bridge that night?

A Yes, yes.

Q One of the reasons, let's assume that he did not realize – let's assume first of all that the course command that he gave was not carried out by Kagan and let's assume he didn't pick up – pick that up for six minutes. What I asked him, I think, was is one of the reasons he didn't pick it up because he was too busy with other tasks?

A I believe that's the case.

Q And is the reason that he was too busy with other tasks

[1994]

because Captain Hazelwood was not on the bridge?

Do you remember the question now or do you want it read back again?

A Well, I think you're asking was the reason that I think the third mate was overworked the fact that the captain was not on the bridge. I can only say that, if I had been on the bridge in those circumstances, and I was five or six times in the two months prior, with that much ice, if my captain had left the bridge because he – in both cases with two captains, they had been looking at the radar while I did everything else. If the captain had not been on the bridge, I would have felt overwhelmed.

Q Under those circumstances as you understand them?

A Yes.

Q Based on your experience as a third mate, and based on the knowledge that you have of the facts and circumstances that took place that night, could fatigue have been a factor in Cousin's performance?

A I can imagine that it would have been, yes. Might have been.

* * *

[1995]

port when he was standing watch?

A No, I never did.

Q Did you ever drink ashore with Hazelwood?

A Never did.

Q Did you ever see him drinking ashore?

A No.

Q And the only time you drank with him was the one you have testified to, the wine?

A Yes.

Q Did you ever hear from the other officers or crew members any rumors or any statements concerning Hazelwood being impaired?

A Never.

Q Did you have any knowledge when you spent those three days with him that Hazelwood had been in a rehab program?

A No.

Q What is Exxon's policy, as you understand it, concerning drinking on board?

A That there is none.

Q Would you mind reading that again, I think the accent is on the last word?

A That there is none.

* * *

[1998]

DIRECT EXAMINATION OF HENDRIK VAN
HEMMEN

BY MR. MONTAGUE:

* * *

Q Could you tell the jury a little bit about your employment?

A I work for Martin Ottaway and Van Hemmen. I'm an engineer and our firm deals with marine transportation problems.

Q Could you be more explicit as to what your firm does?

A Yes, we're a marine consulting firm. We work for underwriters and for attorneys, for ships owners and

for investors, and we get engaged to analyze problems in marine transportation. They could be collisions or they could be groundings. They could be structural failures. They could be problems relating to the operation of ships.

* * *

[2016]

Q Mr. Van Hemmen, again, referring to the movement depicted on the simulation, in your opinion, were there any risks, were there any risks in maneuvering the vessel as it was shown on that simulation?

A Yes, sir.

Q And what kind of risks, in your opinion, were there?

A Well, at that stage the situation was stable prior to the

[2017]

maneuvering, and when the maneuvering started the maneuvering of the vessel basically caused it to grind on the reef and the grinding on the reef caused additional damage to the ship and therefore additional pollution, or it could have, in an extreme case, caused the ship to fracture and the fracturing could result in the ship breaking apart, capsizing or whatever takes place, and also the ship could actually come free, it could work its way free from the reef, and the ship could actually sink or capsize.

Q And is that a something that should – are those risks that should be considered at the time those maneuvers were taken?

A Yes, sir.

Q And were those possibilities of things that could really happen?

A They were all possibilities. Especially because the damage situation was not all that clear at that stage, so you start to take an action after that. You don't have that much information. You take an action basically shooting in the dark.

Q May I have Elmo? I'd like to show you, Mr. Van Hemmen, some testimony given in this court room by Captain Hazelwood. And I'd like you to – can you see that okay?

A Yes, sir.

Q Can you see, this is at page 633 of the trial transcript. Captain Hazelwood was asked the following questions and gives

[2018]

the following answers. What would you have done if you wanted to get her off the reef. And the answer, if I wanted to attempt to get off, I could have pushed two buttons and gone sea speed full astern in about two minutes. You didn't do that. No.

Do you have any opinion about that statement by Captain Hazelwood?

A Yes, sir.

Q Could you tell us what your opinion is?

A Well, the two things that are not entirely realistic, first of all, the vessel at this stage, the stage that you were stopped was pointing towards a channel, she was not pointing towards a reef, she was pointing to its channel. And also at that stage Captain Hazelwood must have thought that he was hung up somewhere further out because he had damage so

far out, all the way to the last cargo tank. To back her up he would go backwards and he would have worked his way backwards through the entire reef before he could get to the water, go to the reef turn-around, get back to deep water so it was quite a lengthy course to take.

The other thing that I find is not entirely realistic is that Captain Hazelwood states that he could have gone sea speed full astern in about two minutes. When the ship is aground, when a commercial ship or tanker like that is aground it is impossible for the propeller to come up to full revolutions.

[2019]

It's like taking your car, putting it in drive, putting foot on the brake and the other foot hit the throttle. If the you hit the throttle engine speed up but never to full speed, and that's the same thing with the tanker, you can't get to full speed. Full maneuver is about the max you can get without getting overload or overheating conditions, and you can push a little bit beyond that but to get full speed is it's just not possible.

Q So could you tell us in your opinion based on what you said, is the statement, I could have pushed two buttons and gone sea speed full astern in about two minutes, is that a correct or an incorrect statement?

A That's incorrect, technically incorrect.

Q Now, you have – based on the simulation and the movement of the vessel at 55 rpm and side to side, did that cause any stresses on the vessel?

A Yes, sir.

Q And could you explain what they are?

A They're – well, it's – if you just go ahead, just push ahead against the rock – say, this is a rock and the ship is around the rock, and you just push, you're just pushing, you can bring up as much propeller rpm as the ship can bring. It doesn't bother it too much. It's a very long ship, as you can see over there, and you see – take this reef, it's like a wrench and that causes the grinding motion, which can put a lot

[2020]

of stress on the vessel.

Q And what kind of stress on the frame of the vessel?

A On the structure of the vessel, stress on the steel. The ship's built out of steel, and the steel could break away and fracture and bend distort it.

Q Now, you heard – have you read the communications between Captain Hazelwood and the VTS after the grounding?

A Yes, sir.

Q And you're familiar with those communications where he referred to extracting the vessel from the rock?

A Yes, sir.

Q Okay. I want to ask you if the actions which Captain Hazelwood took, as depicted on that simulator, are they inconsistent with trying to get the vessel off the rock?

A They –

Q Do you understand that question?

A There's two sides to that question. Maybe if you could restate it, maybe I can give a clearer answer to it.

Q All right. If Captain Hazelwood – the movements that the ship took as shown on the simulation, is that inconsistent with telling – with trying to get the vessel off of Bligh Reef?

A No. If you look at what actually exists, that is the course of quarter to VTS transcript where Captain Hazelwood says, I'm trying to get it off. That type of maneuvering could be – somebody would make would try to get the vessel off, not

[2021]

realizing what the actual risk of doing that is.

Q Well, could you explain how that would get the vessel off the reef?

A Well, it was pointing in the direction of the channel, and

the moving back and forth that sawing back and forth is not an uncommon way of getting ships off obstructions.

* * *

[2045]

DIRECT EXAMINATION OF DANIEL JOHN PAUL,
JR.

BY MR. O'NEILL:

Q Sir, we've never met before, my name is Brian O'Neill, and I represent fisherman and Natives who are the plaintiffs in this case against Exxon Corporation. You work for Exxon Shipping Company?

A I worked for the shipping company in that period, yes.

Q Do you work for Exxon now?

A Yes, I do.

Q What do you do now?

A I'm with Sea River Maritime now.

Q Sea River Maritime is what Exxon Shipping Company is now called?

A That's correct, yes, sir.

[2046]

Q And let's just sort of put you in a couple of jobs in context so we know what role you have to play in this case. Let's take 1985. What was your job in 1985?

A I was fleet services manager for Exxon Shipping.

Q And at some point in time did your job position change?

A Yes, it did.

Q And it changed to director of the human resources department?

A Human resources manager, yes.

Q What is a human resources manager?

A I was responsible for manning the ocean ships for benefits and compensation, training, labor relations and some administrative duties.

Q And that was from 1986 until when?

A Until 1990.

Q Did that include responsibility with regard to alcohol policy and those kind of things?

A Yes, it did.

Q For the shipping company?

A For the shipping company, yes.

Q Now, I put in front – I've put in front of you the tools of the trade, which are some exhibits and a deposition transcript, and that's the big stack over there is your deposition transcript, three volumes. So if you want to use any of the tools of the trade that you've got up there you just

[2047]

tell me and we'll go ahead and dig them out for you. Okay?

A All right.

Q The first thing I want to talk about are two exhibits that should be in that stack up there. One of them is plaintiffs' exhibit number 1024 and the next one is plaintiffs' exhibit number 154. And they both have to do with the rating of masters and they look, so you can pull them out of the stack, like this. You got them?

A Yes, I have them.

Q And what is Exhibit 104?

A 104 is a 1987 rank list for ocean fleet officers.

Q And that includes masters or ship captains?

A Yes, it does.

Q And what is exhibit 154?

A It's a seriatim rating summary of Joseph Hazelwood.

Q And would it be fair to say that using these two documents one could put together, these two Exxon documents, one could put together where Captain Hazelwood ranked vis-a-vis other masters in the fleet from 1981 to 1988? Is that a fair statement?

A Yes, it is.

Q And we've attempted to put these two documents in a graphic form. So we have nowhere to put it on the chart. Idiot lines there.

THE COURT: See if you can make it work

BY MR. O'NEILL:

[2048]

Q And does this chart fairly reflect where his rankings were from '81 to '87?

A Not exactly, no.

Q What are we missing?

A I think the 1981 data on Exhibit 154 is 25 of 39.

Q Oh, so it should be this green bar should be down here a little bit farther?

A That's correct. And another problem is 1987. This exhibit says 24 of 29.

Q 1987. 24 of 29? So this should go down to here. Like that?

A Yes.

Q And then this is 24 of 29 so we ought to cut it off right about here?

A That would make it consistent with this exhibit, yes.

Q Okay. Would it be fair to say that he generally ranked in the bottom half?

A Yes, it would during that time period.

* * *

[2049]

Q Okay. At some point in time – would it be fair to say that if someone in management gets a tip that a master of a vessel is drinking aboard a company vessel, that that is something that management cannot afford to take lightly?

A That's a fair statement, yes.

Q And if a fleet manager gets a rumor or a tip that one of his masters is drinking, that it would be a prudent thing to do to investigate that rumor?

A That's correct.

Q That's just common sense and sound business practice?

A It's prudent, yes, uh-huh.

Q And would it be fair to say that you can think of no circumstances in your judgment that would excuse a fleet manager who has received some sort of rumor regarding one of his masters drinking, you can't think of a circumstance that would excuse him from conducting an investigation, can you?

[2050]

A I think that's what my deposition said, yes, that's correct.

Q But the matter of a ship master, because of his responsibility, using alcohol is a serious topic, isn't it?

A It certainly is, yes.

Q Now, at some point in time you became aware of the Graves' report, and I'm going to put it up here. I assume that when you became aware of it it wasn't in this heavy form. But at some point in time you became aware of the Graves' report?

A Yes, I did.

Q And about when was that?

A It was some time the late spring, early summer of 1985.

Q And you had learned that Captain Hazelwood had consumed alcohol prior to the date of the Graves' report?

A Yes.

Q And when you became aware of the Graves' report and the substance of the Graves' report, that was in about 1986, is

that about right?

MR. LYNCH: I think he just answered the summer of '85

BY MR. O'NEILL:

Q The summer of '85?

A Yes.

Q In the summer of '85 when you became aware of the Graves' report, the thought crossed your mind with regard to Captain

[2051]

Hazelwood that he was able, Captain Hazelwood was able to allude monitoring, didn't it?

A I'm sorry, ask that again.

Q Let me try again. When you saw the Graves' report, you became aware of, or at that point in time knew that Captain Hazelwood specifically and – you had had prior dealings with Captain Hazelwood, was able to avoid monitoring for alcohol use?

A It appeared that that was the case, yes.

Q And that was the thought you had at that point in time?

A I don't recall today whether I had that thought then or not.

Q It's apparent, isn't it?

A It's not apparent, no.

Q At some point in time did you form a conclusion in your own mind some time after 1985, did you form a conclusion that Captain Hazelwood had lied to you about his drinking?

A No, I didn't.

Q You didn't?

A No.

Q Let's go to your deposition transcript and little go to page 614, lines one through five. And why don't you just read that to yourself and refresh your recollection go back to –

A I see the answer.

Q Okay. At some point in time you formed a conclusion in

[2052]

your own mind that Captain Hazelwood had been less than truthful with you in the past about his drinking, is that a fair statement?

A I said that in my deposition, I did.

Q Okay.

A Upon further reflection the time period was not clear.

Q So at the time of your deposition you told the examiner, my partner Mr. Nolting that you formed the conclusion that Captain Hazelwood had lied to you about drinking in the past, and today you have a different version?

A I have a different reflection of that because the time period that we're talking about here was not clear.

Q Would it be fair to say that when you read Mr. Graves' report that you knew that Captain Hazelwood had alluded your particular personal efforts to monitor him?

A It was not clear to me when he reported that he was drinking.

Q At your deposition?

A He might have been drinking after the time I was monitoring him, he may have been drinking before. It wasn't clear.

Q I'm going to ask one more question and I'm going to move on to a new subject. Would it be fair to say that at your deposition you testified that Captain

Hazelwood, in your view when you saw the Graves' report, you formed the conclusion that Captain Hazelwood had alluded your prior efforts to monitor

[2053]

him?

A Yes.

Q Thank you. And let's talk for a minute about what documents the company had at about this point in time. We know we have the Graves' report. You're aware of the existence of the Graves' report because you reviewed it in the summer of '85?

A I was in a meeting when it was discussed.

Q And we have what everybody refers to as the IDR, which is Exhibit 20 – this version of it is Exhibit 208 and the IDR is Exhibit 10. And you're aware of the existence of the IDR in the company files?

MR. LYNCH: This question is as of today?

MR. O'NEILL: Yes.

THE WITNESS: I'm sorry, repeat the question.

BY MR. O'NEILL:

Q You're aware of that existence back in 1985 at some point in the company files. You didn't know in '85, but now you know it was in the company files?

A That's correct, yes.

Q Third time is the charm.

A Got you.

Q And there's one other document I want to ask you about and I have it up there. And it's in the form of

a document that's got a seal on the front of it, NTSB seal and it's Exhibit 745.

[2054]

A Yes, I see it.

Q And this is a document which we got from the National Transportation Safety Board, and the page, the first page after the certificate from the transportation safety board is a letter that you wrote to a Dr. Birky in August of 1989, enclosing a benefit record sickness report of Joseph Hazelwood, do you see that?

A Yes, I do.

Q And the next page is the benefit record sickness report. Do you see that?

A Yes.

Q Let me see if I can actually – let's switch back and see if I can pull this up.

I'm going to put it up on the T.V. screen and see if we can get a good look at you. Now where did this benefit record sickness report come from?

A I believe it came from our benefits administrator file.

Q And in the upper left hand corner there is an entry that says has Joseph Hazelwood, and it has got a diagnosis ALC treatment, do you see that?

A Yes.

Q And then right over here it has got an entry 4/16/85, hos through 4/29, then LOA for group, something else, marilax therapy, AA lectures, et cetera, do you see that?

A I see something like that, yeah, it's hard to read it.

[2055]

Q Do you know what LOA means?

A Leave of absence.

Q How about marilax, do you know what that is?

A I have no idea.

Q Oh, the marital, marital therapy, I'm sorry. What a dummy, Jesus. Okay, marital therapy. So would it be fair to say that this entry, 4/16/85, hospital, through 4/29, then leave of absence group, whatever the next word is, marital therapy, that was in the Exxon Shipping Company files in the benefits

—

A That is my understanding.

Q Did you actually have somebody pull this file out of the benefits department so you can send it over to the national safety transportation board?

A Yes.

Q At the time we now have three documents that we've seen from the records of the company, we have the Graves' report, we have Exhibit 10, which is the IDR and we have this document that we just talked about. With regard to Captain Hazelwood and his treatment, are these the only three documents you know of that come out of the company files with regard to his treatment?

A That's all I'm aware of, yes.

Q And at some point in time you did some kind of a search so that you could respond to the National Transportation Safety Board?

[2056]

A Yes.

Q And would it be fair to say that in doing your search, you turned up no documents in the Exxon Shipping Company files, or for that case in any Exxon Corporation files that formally reflected a determination that he was fit for duty?

A I believe I was responding to a specific request here from Admiral – or from Mr. Birky.

Q Let me ask another question, then. Do you know of any documents that formally reflect a fitness for duty determination?

A I'm not – I don't recall any, no.

Q And do you know any documents that formally reflect any monitoring of Captain Hazelwood after 1985?

A The documents?

Q Yes, sir.

A I'm not aware of any.

Q And?

A Can I add to that statement?

Q Sure.

A Other than the general performance evaluations of any of our employees.

Q So we have the performance evaluations in the file, too?

A Yes.

Q And in 1986, the year after treatment, Captain Hazelwood's performance was such that he was ranked 35 out of 37 masters,

[2057]

isn't that correct? You want to check?

A In 1986?

Q Yes, sir.

A 35 of 37, that's correct.

Q So with regard to the issue of what we have in the files that concern Captain Hazelwood, drinking, alcoholism, treatment, that core set of facts, we've covered the universe of documents?

A We may have.

Q That you know of?

A The ones I'm aware of.

Q Thank you, sir.

A Could I add another –

Q Sure.

A – to my statement. Other than the underlying evaluations, of course, on Captain Hazelwood.

Q And the performance evaluations don't talk one way or the other about alcoholism, recovery, AA, treatment, return to fitness, fitness for duty, do they what?

MR. CHALOS: Your Honor, I move to strike any reference to alcoholism. There's been no records and there's been no testimony of that.

THE COURT: I'm not going to strike the reference. We've had testimony on that subject and

the jury will have to decide what the issues are and what the answers are. I will

[2058]

decide what the issues are the jury will decide what the facts are.

THE WITNESS: Could you repeat the question, please

BY MR. O'NEILL:

Q Other than the document, the performance evaluations don't address this subject, do they?

A They address the employee's performance on the job, and part of his performance on the job is being able to perform the job in a fit manner.

Q Is there anything on any of the performance evaluations that says, I talked to the captain about his recovery, treatment, problems with alcohol, I followed up with them about any of those things, is there anything in any of those documents in that tone or tenor that you're aware of?

A Not that I'm aware of.

Q As the human resources manager of Exxon Shipping, and now what is –

A Sea River Maritime.

Q – you have a responsibility for issues dealing with the subject of alcoholism, don't you?

A I'm not currently the human resources manager.

Q When you were?

A When I was, yes, I had that responsibility.

Q Had you realized that people who have a problem with alcohol in the workplace don't always fit the stereotype of a

[2059]

skid row bumb or falling down drunk, that's a correct statement?

A I'm aware of that statement.

Q And indeed such stereotypes really don't help our solutions with those problems a heck of a lot, do they?

A No, they don't.

Q And your understanding of the disease of alcoholism is that you're always recovering and you must abstain from alcohol use?

A That's my understanding of alcoholism, yes.

Q Now would it be fair to say that Exxon medical department, in your view, was responsible for determining whether Captain Hazelwood successfully completed his alcoholism rehabilitation?

A Yes, we rely, when there's a question of – from the benefits group. If there's a question about the individual doctor's concern or, you know, diagnosis, then we refer that to the medical department and rely ultimately on their judgment.

Q And at no time after Captain Hazelwood left alcohol rehabilitation did you, as the human resources manager, ask him whether he completed any aftercare program?

A That's correct.

Q And as the human resources manager of Exxon Shipping Company and prior to the grounding,

you're not aware of anyone from Exxon Shipping Company who spoke to the medical department about what type of aftercare Captain Hazelwood should have?

A I'm not aware of any, no.

[2060]

Q And at no time, in fact at no time prior to the grounding did you know whether Captain Hazelwood was in any kind of aftercare program at all?

A Yes.

Q But you had heard at some point in time a rumor about AA, that he might have attended AA?

A I might have.

Q So that was something you had in your mind prior to this grounding that this captain might be going to AA?

A I believe that's correct, yeah.

Q And would it be fair to say that you never discussed with Captain Hazelwood whether he was attending AA on a regular basis?

A No, I never discussed that with him.

Q In fact, you never discussed the subject of AA with Captain Hazelwood at all, did you?

A No, I didn't.

Q At some point in time after leaving alcohol rehabilitation Captain Hazelwood was assigned to the Exxon Yorktown, is that a correct statement?

A Yes.

Q Was it your understanding that the fleet manager that Captain Hazelwood worked for was responsible for monitoring his performance and abstinence?

A For his performance, and he monitors the abstinence of

[2061]

everybody that's working on board a ship while they're working on the ship.

Q While they were he working on the ship?

A Yes.

Q That's a qualification to the answer you gave in your deposition, isn't it?

A I don't recall exactly what I said in the deposition.

Q Would you go to page 164 of your deposition transcript. Go to page 163, I'm sorry, sir. Line 16 to line 20, and I'll read the question and answer, and if you could follow along and make sure that I get it right.

And the question was referring to Captain Hazelwood and the question was: Were you aware of his monitoring while he was on the job.

Answer: I was aware that the fleet manager that he worked for was responsible for monitoring his performance and abstinence. Do you see that?

A Yes, I do.

Q Did I read the question and answer fairly?

A You did.

Q I think I said the same thing. And a recovering alcoholic is supposed to be abstinent in your view?

A The question was aware of his monitoring while he was on the job, and that's the way I answered the question.

Q Would it be fair to say that you assume that the medical

[2062]

department evaluated Joe Hazelwood after his rehabilitation program?

A I assumed that, I think, yes.

Q And in fact you assumed that was the normal procedure, didn't you?

A Where it was requested by our people it was, yes.

Q Now you were the human resources manager from '86 to '87?

A Yes, during that period of time, from fall of '86.

Q And Dwight Koops was in what position during that period of time?

A '86 to '87?

Q Yes, sir.

A Dwight would have been the gulf coast fleet manager at that time.

Q And that's where Captain Hazelwood was?

A Yes, I believe – I believe he was in that for part of '87.

Q And at that point in time you were the director of human resources for Exxon Shipping Company?

A Human resources manager.

Q I keep on getting that wrong, don't I? Is that a promotion or a demotion?

A I have no idea.

Q And would it be fair to say that you don't recall ever discussing Captain Hazelwood's alcohol rehabilitation with Dwight Koops?

[2063]

A True.

Q And you never discussed monitoring Captain Hazelwood's drinking with Dwight Koops?

A That's correct.

Q Did you ever tell Dwight Koops about your concerns about the problems in monitoring Captain Hazelwood at all?

A Not that I recall.

Q Did the Exxon Shipping Company officers who reassigned Captain Hazelwood to the Exxon Valdez in 1987 consult with you about that reassignment?

A Not that I recall, no.

Q Do you recall if they consulted the medical department about that reassignment?

A I don't know.

Q Now, there was one instance in which you did get involved in monitoring Captain Hazelwood?

A Yes, uh-huh.

Q And that was at the 1988 fleet conference?

A Fleet officer conference, yes, I was asked to monitor him.

Q And that was by Mr. Iarossi, and he asked you and Harvey Borgen to monitor him just at the fleet conference?

A We were attending the fleet conference together, yes.

Q And did you tell Mr. Borgen that you had had reservations about your ability to successfully monitor Captain Hazelwood at or about this 1988 fleet conference time? Do you understand

[2064]

the question?

A I'm not sure that I do.

Q Are there too many words in that question?

A I'm not sure of the time frame you're talking about.

Q You and Borgen are going to monitor Hazelwood pursuant to this conference in 1988?

A Yes.

Q Did you tell Harvey, I tried to monitor this guy before, I had problems, it didn't work out, or words to that effect?

A No, I don't believe I did, huh-uh.

Q Now, how long was this fleet conference?

A About a week.

Q And other than this request from Iarossi and this one week fleet conference, that's the sum and substance of your knowledge with regard to monitoring Captain Hazelwood?

A I did on my own without mentioning it to anybody monitor him in the 1987 officer conference as well, which I attended, also held in Houston, about a week long conference, and because of the

knowledge I had, I did observe him more carefully and was aware of his past problem.

Q And you weren't monitoring him for mild depression, were you, you were monitoring for alcohol use?

A That's correct, uh-huh.

Q And that was sort of done on your own?

A Yes.

[2065]

Q Nobody asked you to do it?

A No.

Q It was common sense because we had a potential problem here?

A I just felt that it would be prudent for me to do it.

Q Because a drinking ship captain is a dangerous thing, isn't that right?

A Can be.

Q Now, let me ask a little bit, as the human resources manager, you never told anyone that Captain Hazelwood – up to the time of the grounding, you never told Captain Hazelwood – you never told anyone that Captain Hazelwood had alluded your attempts to monitor his use of alcohol, did you?

A Well, I wasn't sure that he alluded my attempts.

Q You had concerns, didn't you?

A I had concerns.

Q And after Captain Hazelwood returned from alcohol rehabilitation you never asked him if he had resumed drinking, did you?

A No, just observed when I could.

Q You didn't go in and say, Joe how's your recovery doing, how's AA, how's aftercare, have you resumed drinking, you didn't do that, did you?

A No, I sure didn't.

Q And indeed, you're not aware of anyone from Exxon who asked

[2066]

Captain Hazelwood, after he got out of rehabilitation, whether he had resumed drinking?

A I'm not aware of anyone, no.

* * *

[2080]

Q Did you have to take into account the rehabilitation act in your staffing of Exxon Shipping Company ships?

A Yes, we did.

Q And how did that act affect treatment of people who had a history of alcohol treatment?

A Well, it required you not to discriminate against those people and to keep their problems confidential.

* * *

[2107]

Q I wonder if you would read the first paragraph for the record down to the sub part two there.

A The potential danger to employees and facilities resulting from the use of drugs or alcohol in the workplace has become a

[2108]

major concern of companies. Exxon Corporation, including Exxon Shipping Company, is one of the many employers that have programs to deal with this potential problem. Within the shipping company, this program has two basic concepts. One company sponsored medical support available on a confidential basis for individuals who request help in combating drug or alcohol dependency. And two, workplace guidelines which permit on the job – prohibit, excuse me, workplace guidelines which prohibit on the job possession or use of drugs or alcohol.

Q Maybe that's where your notice problem came up. You said permit and you meant prohibit. The prohibition that you had on the job, possession of alcohol and drugs, how far did that go back?

A Oh, it went back well before I ever joined the shipping company.

Q Was there any doubt about the fact that all the employees had been notified of that fact?

A No doubt at all.

Q Let me show you Exhibit 9113, ask you if you can identify that for the record?

A Yes, I can.

Q What is it?

A It's a list of posted offenses that are on each of the ships.

[2109]

MR. LYNCH: Offer 9113, Your Honor, that's defendants.

(Exhibit 9113 offered).

MR. O'NEILL: No objection.

THE COURT: Defendants 9113 is admitted

(Exhibit 9113 received)

BY MR. LYNCH:

Q And would you read item 14 of DX9113?

A Introduction, possession or use on the property of the company of intoxicating liquors or habit forming drugs.

Q Is it prohibited?

A It is an offense for which members of the unlicensed personnel may be discharged without further notice.

Q Did this prohibition also apply to officers and mates?

A Yes, it did.

Q That prohibition that Exxon had, was that something that was required by law, by the Coast Guard.

A No this was a company policy.

Q Was it something that was uniform in other U.S. flag competitors of Exxon Shipping Company?

A No, we were the exception.

Q When you say that, what do you mean?

A Most other companies allowed social drinking on board their ships.

* * *

[2111]

Q Now, those – that program included a provision which I'm pointing to, let me highlight it, no employee – woops, no wonder you can't see it there. Suffering from alcoholism or drug dependency will jeopardize his or her job security if help is requested or if an individual enrolls to rehabilitation

[2112]

program prior to being involved in an incident which violates company policy.

I'd like to ask you about that aspect of the program. First of all, from the standpoint of the safety credo, running the safest company in its industry?

A Uh-huh.

Q – was it your view that this provision contributed to the safe operation –

A Yes.

Q – of Exxon Shipping Company?

A Yes, it did.

Q And how did it do that?

A Well, it provided an employee help to solve a problem before it resulted in an incident on board the ship, safety incident.

Q By promising, or at least giving assurance that an individual could get his job back, did you recognize that there would be people coming back to Exxon ships who, if they took advantage of this provision, had been through rehabilitation for an alcohol problem?

A Yes, we did.

Q And did you consider that allowing those people back on the ship was nevertheless consistent with safety?

A Yes, we did.

Q How did you draw that conclusion?

[2113]

A Assuming they successfully completed the program they would come back as a better employee and not have the problem, have it put behind them or under control, and from that standpoint they would be a safer employee than they been – had they continued to drink or have the abuse problem on board the vessel.

Q Did you recognize however that there was some chance that there might be a relapse?

A Some chance, yes.

Q And how did you – what about the risk of relapse, how did you reconcile that with your safety credo?

A Well, the risk of relapse would be less after treatment than the risk of an accident caused by drinking if a person never went to seek help to begin with.

* * *

[2123]

Q And would, with Mr. O'Neill's permission, I'll lead into this. There were written guidelines prepared and given to supervisors?

A Yes.

Q And those guidelines related in part to the supervisors role in monitoring for alcohol?

A Yes.

Q And could you just give in a summary what the guidelines that you gave to your managers were with regard to what the supervisors role was?

A They were to look for unsatisfactory performance of the employees on the job as an indication of non-compliance.

Q Did the policy have a reason for focusing on job performance as opposed to calling people and asking them about their personal habits at home?

A Yes. There was – some of the limitations we had imposed on us we mentioned earlier, but our interest was trying to provide a safe workplace and that involved contacting the employee at work.

Q There were those guidelines developed?

A In Exxon USA.

Q By whom?

A By the employee relations department.

Q And was that staff larger than your own staff?

A Yes.

[2124]

Q And they engaged in a study to develop what the appropriate guidelines would be to implement this policy?

A Yes.

Q Now, under this policy what was the responsibility of Exxon Shipping Company people in the case of an employee who took advantage of the opportunity to return to his job after alcohol

rehabilitation, what was the company supposed to do in that case, carry out the policy?

A We were supposed to evaluate the employee's performance on the job.

Q And what about relapse, what about the risk that, you know, you'd have Mr. O'Neill talk to you about, you know, the person whose got an alcohol problem is not necessarily a falling down drunk. Was there any step taken to watch out for that risk of relapse?

A Well, we monitor the employees performance.

Q And in that monitoring did you just monitor that look at

that employee the same as any other employee?

A If we knew he had come back from rehab we would look more carefully for signs of drugs and alcohol abuse.

Q Were your people trained to do that?

A Yes, they were.

Q Where did they get that training?

A In 1984, in one of the fleet officer conferences that we had almost yearly, we did offer a drug awareness training

[2125]

program to better familiarize our officers of what to look for drug and alcohol abuse in the workplace, and we also had training in 1987 with the implementation of this policy.

* * *

[2133]

Q You talk about industrial due process and the legal framework of industrial due process. Industrial due process does not keep you from firing a drinking alcoholic in a safety sensitive position, does it?

A If he's not performing his job duties, it does not prohibit you from firing them.

Q And indeed in the '85/'86 time frame, you fired people for violating the alcohol policy, isn't that a correct statement?

A That's true.

Q And the Americans with Disabilities Act, on a variety of occasions, didn't keep you from firing him, did it?

A That's true.

Q The rehabilitation act – I'm sorry. The rehabilitation act doesn't keep you from firing them, does it?

[2134]

A They were not handicapped.

Q You talked for a minute about the six on/six off rule. Do you recall that?

A Yes.

Q That is an important safety requirement, isn't it?

A It's a Coast Guard regulation that was implemented presumably for safety, yes.

Q It goes into the early part of the century, isn't that correct?

A I don't know how far back it goes.

Q And would it be fair to say that in Exxon Corporation, Exxon Shipping Company, in 1988, 1989, there was no way the company could monitor through recordkeeping the work hours of the deck mates?

A That's correct, yes. We didn't see a need to do that.

Q You talked a little bit about fatigue. And fatigue is a problem with regard to ocean going vessel, isn't it?

A It is a potential concern. I wouldn't call it a problem.

Q More than a potential concern, what was the theme of the 1988 fleet officer conference?

A Future manning was one of the themes. Safety was another. There were a number of themes to that conference.

Q How about fatigue at sea, was that a theme?

A I don't recall that.

Q Have you had a fleet officer conference where the theme

[2135]

was – a theme was fatigue at sea?

A We had, in 1988, we had a professional topic that dealt with fatigue. That was not a theme of the conference trying to educate our supervisors about how to identify fatigue and how to manage it.

Q You talked a little bit about the straight salary system and you talked a little bit about Captain Hazelwood and Captain Hazelwood's ratings. And in both of these the subject of management came up

and that he was a poor manager. Under Mr. Iarossi's vision of the Exxon Shipping Company, Mr. Iarossi implemented a number of management initiatives. The purpose of which was to turn the captains from driving the vessels into the managers of the vessel's business units, isn't that a correct statement?

A I wouldn't characterize it that way, no.

Q Did he ever do that? Did you ever read his speech on that topic? Do you recall that speech?

A Surrendering Memory.

Q Do you recall that speech?

A I do.

Q That's one of the things he talked about in that speech, isn't it?

A It is not turning them from – he was turning – he was adding to their professional responsibility.

Q He was adding to their professional responsibilities so

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that they would assume responsibility for the management of the ship essentially as a business entity?

A Right, but not to the degradation of their professional responsibilities.

Q It was a way to enhance their professional esteem so they were in essence a professional manager and a seagoing captain?

A They were a supervisor of the unit.