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Attorneys for Defendant
Exxon Corporation (D-1)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re)	NO. A89-095 Civil
)	(Consolidated)
THE EXXON VALDEZ)	
)	ANSWER OF DEFENDANT D-1 TO COMPLAINT FOR DAMAGES, FILED NOVEMBER 3, 1989 BY P-278
This Document Relates to Action No.:	
A89-446	

Exxon Corporation, for convenience identified in this answer as "Exxon," as its answer to the complaint herein admits, denies and alleges as follows:

As to each and every allegation denied herein for lack of information or belief, alleges that it is without knowledge or information sufficient categorically to admit or deny the said allegation at this time, wherefore it denies each said allegation using the phrase "denies for lack of information and belief."

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Defense To First Cause of Action

1. Denies each and every allegation of paragraph 1, except admits that this action arises from the grounding of the EXXON VALDEZ, and the subsequent discharge of crude oil into the waters of Prince William Sound.

2. Denies for lack of information and belief the allegations of paragraph 2.

3. Denies the allegations of paragraph 3, except admits that plaintiff seeks relief pursuant to the statutes alleged but denies that plaintiff is entitled to any relief under said statutes or otherwise.

4-5. Answering the allegations of paragraphs 4 through 5, admits that the Court has jurisdiction to decide plaintiff's claims, and that venue is proper in this District, but denies that plaintiff has any claim under the statutory and common law provisions alleged; and admits that this defendant was and is doing business in this district.

6. Denies for lack of information and belief the allegations of paragraph 6.

7. Denies each and every allegation of paragraph 7, except admits that Exxon is a corporation organized under the laws of the State of New Jersey with its principal place of

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business at 1251 Avenue of the Americas, New York, NY 10020, and that the principal business of Exxon is energy, involving exploration for and production of crude oil, natural gas and petroleum products; that Exxon was owner of the crude oil cargo on board the EXXON VALDEZ on March 24, 1989, some of which was discharged into the waters of Prince William Sound; that Exxon Shipping Company ("Exxon Shipping") is a Delaware corporation with its executive office in Houston, Texas; that Exxon owns all of the stock of Exxon Shipping Company; and that Exxon Shipping is the registered owner and operator of the vessel EXXON VALDEZ.

8. Denies each and every allegation of paragraph 8, except admits that Alyeska Pipeline Service Company ("Alyeska") is a Delaware corporation with its principal place of business in Alaska; that Alyeska is owned by Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, B.P. Pipelines (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation and Unocal Pipeline Company; and that Alyeska operates the Trans-Alaska Pipeline System.

9. Admits the allegations of paragraph 9.

10. Denies each and every allegation of paragraph 10, except admits that the EXXON VALDEZ is approximately 987 feet long and weighs approximately 211,000 deadweight tons; that it left the Valdez terminal at approximately 9:15 p.m. on March 23, 1989, bound for Long Beach, California; that it carried approximately 1.2 million barrels of crude oil from Alaska's

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North Slope; and that from the time it left the terminal until the vessel passed through the Valdez Narrows, the EXXON VALDEZ was operated under the direction of William Edward Murphy, a state-licensed marine pilot.

11. Denies each and every allegation of paragraph 11, except admits that Captain Joeph Hazelwood was the Master of the EXXON VALDEZ; that his duties as Master were within the scope of his employment by Exxon Shipping; and that he was on the bridge when the harbor pilot disembarked.

12. Denies each and every allegation of paragraph 12, except admits that public records purport to show that Captain Hazelwood had been convicted of driving while under the influence of alcohol.

13. Denies each and every allegation of paragraph 13.

14-16. Denies for lack of information and belief the allegations of paragraph 14 through 16, except admits that the EXXON VALDEZ left the normal southbound shipping lane because informed of the presence of ice and went across the northbound shipping lane and out of the vessel traffic lanes; that Captain Hazelwood instructed Third Mate Cousins to start turning back into the vessel traffic lanes when the vessel was abeam of Busby Island Light; that had the EXXON VALDEZ commenced its turn back into the vessel traffic lanes abeam of Busby Island Light, it could have easily cleared Bligh Reef; that Captain Hazelwood left

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the bridge and went to his cabin some time after 11:50 p.m.; that Third Mate Cousins and Helmsman Robert Kagan remained on the bridge; that the duties of Cousins as Third Mate and Kagan as Helmsman were within the scope of their employment by Exxon Shipping Company; that there was a delay in bringing the vessel back into the vessel traffic lane; that Bligh Reef is a navigational hazard depicted on charts which were aboard the EXXON VALDEZ; that the EXXON VALDEZ struck Bligh Reef shortly after midnight on March 24, 1989; that the grounding punctured eight of the vessel's cargo tanks and three water ballast tanks; and that approximately 258,000 barrels of oil were discharged into the waters of Prince William Sound.

17. Denies each and every allegation of paragraph 17.

18. Denies the allegations of paragraph 18 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to other defendants.

19. Denies each and every allegation of paragraph 19, except admits that eight cargo tanks and three water ballast tanks were punctured by the grounding of the vessel; that approximately 258,000 barrels of oil were discharged into the waters of Prince William Sound; that oil has been deposited onto beaches, shorelines and islands of portions of Prince William Sound and of the Gulf of Alaska, that some commercial fisheries have been closed or restricted, and that certain fishermen have suffered economic losses.

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20. Denies for lack of information and belief the allegations of paragraph 20.

21. Denies the allegations of paragraph 21 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to other defendants.

22. Denies each and every allegation of paragraph 22, except admits that Exxon Shipping Company is the registered owner and operator of the EXXON VALDEZ.

23. Admits the allegations of paragraph 23.

24. Denies the allegations of paragraph 24, except admits that approximately 258,000 barrels of oil were discharged into the waters of Prince William Sound; that certain birds and animals have been killed or injured; and that some commercial fisheries have been closed.

25-26. Denies for lack of information and belief the allegations of paragraphs 25 through 26, except admits that any damages plaintiff may have suffered were not the result of an act of war.

27. Denies the allegations of paragraph 27 except admit that 43 U.S.C. §1653(c), to the extent applicable, may impose strict liability on certain persons for certain damages.

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Defense to Second Cause of Action

28. Answering paragraph 28, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 27 hereof, as if set out in full.

29. Denies the allegations of paragraph 29, except admits that the owners of Alyeska are parties to the Agreement and Grant of Right of Way for Trans Alaska Pipeline.

30-33. Denies the allegations of paragraphs 30 through 33 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others, except admits that any damages plaintiff may have suffered were not the result of an act of war.

Defense to Third Cause of Action

34. Answering paragraph 34, realleges and incorporates herein by reference each and every admission, denial, and allegation contained in paragraphs 1 through 33 hereof, as if set out in full.

35-37. Denies each and every allegation of paragraphs 35 through 37.

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Defense to Fourth Cause of Action

38. Answering paragraph 38, realleges and incorporates herein by reference each and every admission, denial, and allegation contained in paragraphs 1 through 37 hereof, as if set out in full.

39-43. Denies the allegations of paragraphs 39 through 43 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

Defense to Fifth Cause of Action

44. Answering paragraph 44, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 43 hereof, as if set out in full.

45-47. Denies the allegations of paragraphs 45 through 47 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others, except admits that the crude oil discharged from the EXXON VALDEZ was "oil" within the meaning of A.S. 46.03.826(4)(B) and (5); that the State of Alaska restricted some fishing after the oil spill; that Exxon is a "person" within the meaning of A.S. 46.03.900(17); and that Exxon was the owner of the crude oil cargo of the EXXON VALDEZ, some of which was discharged into the waters of Prince William Sound.

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Defense to Sixth Cause of Action

48. Answering paragraph 48, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 47 hereof, as if set out in full.

49-50. Denies the allegations of paragraphs 49 through 50 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

Defense to Seventh Cause of Action

51. Answering paragraph 51, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 50 hereof, as if set out in full.

52-53. Denies the allegations of paragraphs 52 through 53 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

Defense to Eighth Cause of Action

54. Answering paragraph 54, realleges and incorporates herein by reference each and every admission, denial

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and allegation contained in paragraphs 1 through 53 hereof, as if set out in full.

55-56. Denies the allegations of paragraphs 55 through 56 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

Defense to Ninth Cause of Action

57. Answering paragraph 57, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 56 hereof, as if set out in full.

58-59. Denies the allegations of paragraphs 58 through 59 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

Defense to Tenth Cause of Action

60. Answering paragraph 60, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 59 hereof, as if set out in full.

61-63. Denies the allegations of paragraphs 61 through 63 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

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Defense to Eleventh Cause of Action

64. Answering paragraph 64, realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraphs 1 through 63 hereof, as if set out in full.

65-71. Denies the allegations of paragraphs 65 through 71 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

Defense to Twelfth Cause of Action

72. Answering paragraph 72, realleges and incorporates herein by reference each and every admission, denial and allegation conained in paragraphs 1 through 71 hereof, as if set out in full.

73-74. Denies the allegations of paragraphs 73 through 74 as they pertain to Exxon, and denies said allegations for lack of information and belief as they pertain to others.

General Denial

75. Denies each and every other allegation in plaintiff's complaint that was not specifically admitted herein.

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Affirmative and Other Defenses

76. The complaint, and each count thereof, fails to state claims upon which relief can be granted.

77. Exxon is informed and believes that plaintiff lacks standing to claim or recover some damages claimed.

78. Independent of any legal obligation to do so, Exxon Shipping and Exxon have paid and are continuing to pay claims for economic loss allegedly caused by the oil spill, and have incurred and will continue to incur other expenses in connection with the oil spill. Exxon is entitled to a setoff in the full amount of all such payments in the event that plaintiff's claims encompass such expenditures.

79. Certain persons were able to avoid or mitigate damage from the interruption of fishery and other activities, because they were engaged or employed in connection with activities related to containment and clean up of the oil released from the EXXON VALDEZ. Payments received by such persons are a set off against losses, if any, resulting from the interruption of fishery and other activities.

80. To the extent that persons able to mitigate damages failed to do so, defendants cannot be held liable for avoidable losses.

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81. Plaintiff's claims for punitive damages are unconstitutional under the United States Constitution, including, without limitation, Article I, Section 8; Amendment V; and Amendment XIV; and the Alaska Constitution, including, without limitation, Article I, Section 7 and Article I, Section 12.

82. Plaintiff's claims sound in maritime tort and are subject to applicable admiralty restrictions, including without limitation restrictions on recovery of damages for remote economic loss unaccompanied by physical injury to person or property.

83. Numerous persons and entities have filed lawsuits against Exxon relating to the oil spill, some of whom purport to represent the plaintiff in this action. In the event of any judgment or judgments in such other lawsuits against Exxon and in favor of persons whose claims are encompassed in this action, such judgment or judgments will be res judicata as to claims of plaintiff herein.

84. Numerous persons and entities have filed other lawsuits against Exxon and various other defendants, and to the extent there is a recovery in said other lawsuits encompassing claims made by plaintiff herein, recovery on the claims herein is barred to the extent that it would represent a multiple recovery for the same injury.

85. Some or all of plaintiff's claims for damages may be barred or reduced by the doctrines of comparative negligence or comparative fault.

86. The amount of liability, if any, for the acts alleged is controlled by statute, including, without limitation, 43 U.S.C. § 1653(c) and AS 09.17.010, .060 and .080(d).

87. If punitive damages were to be awarded or civil or criminal penalties assessed in any other proceeding against Exxon relating to the oil spill, such award bars imposition of punitive damages in this action.

88. Some or all of plaintiff's claims, including claims for punitive damages, are preempted by the comprehensive scheme of federal statutes and regulations, including criminal and civil penalties, sanctions and remedies relevant to the oil spill, and its scheme relevant to the protection of subsistence interests.

89. Plaintiff's claims for punitive damages are precluded by the Alaska common law and statutory scheme for civil and criminal penalties.

90. Plaintiff's claims for compensatory relief under state law are preempted by federal statutory and common law schemes for compensatory relief.

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91. Certain claims asserted by plaintiff are not ripe for adjudication.

92. Those portions of AS 46.03 that were enacted after the oil spill constitute an unlawful bill of attainder violative of Article I, Section 10 of the United States Constitution and Article I, Section 15 of the Alaska Constitution, and if applied to Exxon would also violate the due process clauses and the contract clauses of the United States and Alaska Constitutions.

93. Certain theories of relief may not be maintained because these theories are based upon the exercise by Exxon of federal and state constitutional rights to petition the federal and state governments with respect to the passage and enforcement of laws.

94. Defendants have acted pursuant to government approval, and supervision, and have no liability for any acts undertaken or omissions made with such approval, direction, or supervision.

Prayer

WHEREFORE, Exxon prays for judgment as follows:

1. That plaintiff take nothing and be granted no relief, legal or equitable;

2. That Exxon be awarded its costs in this action, including a reasonable attorney fee; and

3. For such other and further relief as the Court deems just and proper.

DATED: December 8, 1989

CHARLES W. BENDER
O'MELVENY & MYERS

By _____
William M. Bankston
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Attorneys for Defendant
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Attorneys for defendant
Exxon Shipping Company (D-2)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: Case No. A89-446 Civil

D-2'S ANSWER TO P-278'S COMPLAINT DATED NOVEMBER 3, 1989

Defendant Exxon Shipping Company ("Exxon Shipping") answers plaintiff's complaint as follows:

ALLEGED NATURE OF ACTION

1. Answering paragraph 1, Exxon Shipping admits that plaintiff purports to bring a civil action as set forth in paragraph 1 of the complaint. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 1 insofar as they

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apply to Exxon Shipping and Exxon Corporation ("Exxon Corp."). Insofar as the allegations in paragraph 1 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 1.

2. Answering paragraph 2, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 2.

JURISDICTION AND VENUE

3. Answering paragraph 3, Exxon Shipping admits that plaintiff alleges that its civil action arises from the discharge of oil from the EXXON VALDEZ, and that the EXXON VALDEZ is a vessel engaged in the transportation of oil loaded at the terminal facilities of the Trans-Alaska Pipeline System ("TAPS") to a port under the jurisdiction of the United States. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 3.

4. Answering paragraph 4, Exxon Shipping admits the allegations in paragraph 4.

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5. Answering paragraph 5, Exxon Shipping admits that this action may be brought in this judicial district pursuant to 28 U.S.C. Sections 1391(b). Exxon Shipping also admits that Exxon Shipping and Exxon Corp. were and are doing business in this district. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 and, on that basis, denies them.

PARTIES

6. Answering paragraph 6, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 6.

7. Answering paragraph 7, Exxon Shipping admits that Exxon Corp. is a New Jersey corporation, with its principal place of business in New York, New York. Exxon Shipping admits that the principal business of Exxon Corp. is energy, involving exploration for and production of crude oil, natural gas and petroleum products. Exxon Shipping further admits that Exxon Corp. was the owner of the crude oil cargo on board the EXXON VALDEZ on March 24, 1989, some of which was discharged into the waters of Prince William Sound. Exxon Shipping admits that it is a

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wholly-owned domestic maritime subsidiary of defendant Exxon Corp., separately incorporated in Delaware, and has its principal place of business in Houston, Texas. Exxon Shipping further admits that it is the owner and operator of the EXXON VALDEZ and that it controlled the crude oil cargo aboard the EXXON VALDEZ on March 24, 1989 just prior to the spill. Exxon Shipping further admits that plaintiff purports to define Exxon Shipping and Exxon Corp. as "Exxon" and "Exxon defendants." Except as expressly admitted, Exxon Shipping denies that any subsequent use of those terms is necessarily accurate or appropriate and further denies the remaining allegations in paragraph 7.

8. Answering paragraph 8, Exxon Shipping admits that Alyeska Pipeline Service Company ("Alyeska") is a Delaware corporation with its principal place of business in Alaska and is owned by seven companies, which are permittees under the Agreement and Grant of Right-of-Way for the Trans-Alaska Pipeline System ("TAPS"). Exxon Shipping admits that Alyeska operates TAPS, including the terminal at Valdez, Alaska. Exxon Shipping admits that Alyeska has formulated an oil spill contingency plan and has certain responsibilities pursuant thereto. Except as expressly

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admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and, on that basis, denies them.

9. Answering paragraph 9, Exxon Shipping admits the allegations in paragraph 9.

ALLEGED FACTUAL BACKGROUND

10. Answering paragraph 10, Exxon Shipping admits that on Thursday evening, March 23, 1989, the EXXON VALDEZ, a 987-foot tanker weighing approximately 211,000 deadweight tons, left the Port of Valdez, Alaska, the southern terminal of TAPS, bound for Long Beach, California. Exxon Shipping admits that the EXXON VALDEZ carried approximately 1.2 million barrels of North Slope crude oil that had been loaded at the TAPS facility by Alyeska. Exxon Shipping admits that the EXXON VALDEZ passed through the harbor and Valdez Narrows under the direction of a state-licensed marine pilot. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 10.

11. Answering paragraph 11, Exxon Shipping admits that Captain Joseph J. Hazelwood was employed by Exxon Shipping as the Master of the EXXON VALDEZ and that his duties as Master were within the scope of his employment by Exxon Shipping. Exxon Shipping further admits that Captain Hazelwood was on the bridge

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of the vessel when the harbor pilot disembarked in the Valdez Arm at approximately 11:30 p.m., Thursday evening, March 23, 1989. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 11.

12. Answering paragraph 12, Exxon Shipping admits that public records purport to show that Captain Hazelwood has been convicted of driving while under the influence of alcohol. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 12.

13. Answering paragraph 13, Exxon Shipping denies the allegations in paragraph 13.

14. Answering paragraph 14, Exxon Shipping admits that Captain Hazelwood left the bridge after the harbor pilot disembarked, leaving Gregory Cousins, the Third Mate, and Robert Kagan, the helmsman, on the bridge. Exxon Shipping admits that it employs Messrs. Cousins and Kagan, and that Mr. Cousins' duties as Third Mate of the EXXON VALDEZ and Mr. Kagan's duties as her helmsman were within the scope of their employment by Exxon Shipping. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 14.

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15. Answering paragraph 15, Exxon Shipping admits that the EXXON VALDEZ left the normal southbound shipping lane because informed of the presence of ice and went across the northbound shipping land into the vicinity of Bligh Reef, which is depicted on charts. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 15.

16. Answering paragraph 16, Exxon Shipping admits that the EXXON VALDEZ struck Bligh Reef, which punctured eight of her cargo tanks and damaged a portion of her hull. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 16.

17. Answering paragraph 17, Exxon Shipping denies the allegations in paragraph 17.

18. Answering paragraph 18, Exxon Shipping admits that Alyeska has formulated an oil spill contingency plan and has certain responsibilities in connection therewith. Exxon Shipping further admits that it was prepared to respond in the event of an oil spill. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 18 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraph 18 apply to other parties, Exxon Shipping lacks

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knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 18.

19. Answering paragraph 19, Exxon Shipping admits that the grounding punctured eight of the EXXON VALDEZ's cargo tanks and discharged approximately 258,000 barrels of crude oil into Prince William Sound. Exxon Shipping further admits that the crude oil has spread from Prince William Sound to some portions of the Kenai Peninsula, the Alaska Peninsula, Cook Inlet and Kodiak. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 and, on that basis, denies them.

ALLEGED DAMAGES

20. Answering paragraph 20, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 20.

ALLEGED PUNITIVE DAMAGES

21. Answering paragraph 21, Exxon Shipping denies the allegations in paragraph 20 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in

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paragraph 20 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraph 21.

FIRST CAUSE OF ACTION

22. Answering paragraph 22, Exxon Shipping admits that it is the owner and operator of the EXXON VALDEZ. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 22.

23. Answering paragraph 23, Exxon Shipping admits the allegations in paragraph 23.

24. Answering paragraph 24, Exxon Shipping admits that the oil that was discharged from the EXXON VALDEZ affected certain birds and animals and that some commercial fisheries have been closed or restricted. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24 and, on that basis, denies them.

25. Answering paragraph 25, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 and, on that basis, denies them.

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26. Answering paragraph 26, Exxon Shipping admits that the Valdez oil spill was not caused by an act of war. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 and, on that basis, denies them.

27. Answering paragraph 27, insofar as the allegations apply to Exxon Shipping and Exxon Corp., Exxon Shipping admits that 43 U.S.C. §1653(c), if applicable, may impose strict liability for certain damages resulting from the discharge of oil from the EXXON VALDEZ. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 and, on that basis, denies them.

SECOND CAUSE OF ACTION

28. Answering paragraph 28, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 27 as though set forth in full at this place.

29-33. Answering paragraph 29 through 33, Exxon Shipping alleges that no answer to the allegations in paragraphs 29 through 33 is required and, if an answer were required, Exxon Shipping

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lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 29 through 33.

THIRD CAUSE OF ACTION

34. Answering paragraph 34, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 33 as though set forth in full at this place.

35-37. Answering paragraphs 35 through 37, Exxon Shipping denies the allegations in paragraphs 35 through 37.

FOURTH CAUSE OF ACTION

38. Answering paragraph 38, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 37 as though set forth in full at this place.

39-43. Answering paragraphs 39 through 43, Exxon Shipping denies the allegations in paragraphs 39 through 43 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 39 through 43 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 39 through 43 and, on that basis, denies them.

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FIFTH CAUSE OF ACTION

44. Answering paragraph 44, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 43 as though set forth in full at this place.

45. Answering paragraph 45, Exxon Shipping admits that "hazardous substance" as defined by AS 46.03.826(4)(B) includes oil and that North Slope crude oil was released into Prince William Sound as a result of the spill. Exxon Shipping admits that Exxon Corp. and Exxon Shipping are "persons" as defined in AS 46.03.900(17). Exxon Shipping admits that Exxon Corp. was the owner of the oil discharged from the EXXON VALDEZ and that Exxon Shipping had control over the crude oil cargo of the EXXON VALDEZ just prior to the spill. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45 and, on that basis, denies them.

46. Answering paragraph 46, Exxon Shipping admits that the State of Alaska has restricted some fishing after the oil spill. Except as expressly admitted, Exxon Shipping denies the allegations in paragraph 46.

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47. Answering paragraph 47, Exxon Shipping admits that AS 46.03.822, if applicable and if not preempted, may impose strict liability for certain damages. Except as expressly admitted, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies them.

SIXTH CAUSE OF ACTION

48. Answering paragraph 48, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 47 as though set forth in full at this place.

49-50. Answering paragraphs 49 and 50, Exxon Shipping denies the allegations in paragraphs 49 and 50 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 49 and 50 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies them.

SEVENTH CAUSE OF ACTION

51. Answering paragraph 51, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 50 as though set forth in full at this place.

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52-53. Answering paragraphs 52 and 53, Exxon Shipping denies the allegations in paragraphs 52 and 53 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 52 and 53 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 52 and 53.

EIGHTH CAUSE OF ACTION

54. Answering paragraph 54, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 53 as though set forth in full at this place.

55-56. Answering paragraphs 55 and 56, Exxon Shipping denies the allegations in paragraphs 55 and 56 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 55 and 56 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 55 and 56.

NINTH CAUSE OF ACTION

57. Answering paragraph 57, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 56 as though set forth in full at this place.

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58-59. Answering paragraphs 58 and 59, Exxon Shipping denies the allegations in paragraphs 58 and 59 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 58 and 59 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 58 and 59.

TENTH CAUSE OF ACTION

60. Answering paragraph 60, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 59 as though set forth in full at this place.

61-63. Answering paragraphs 61 through 63, Exxon Shipping denies the allegations in paragraphs 61 through 63 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 61 through 63 apply to other defendants, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 61 through 63.

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ELEVENTH CAUSE OF ACTION

64. Answering paragraph 64, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 63 as though set forth in full at this place.

65-71. Answering paragraphs 65 through 71, Exxon Shipping denies the allegations in paragraphs 65 through 71 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 65 through 71 apply to other parties, Exxon Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 65 through 71.

TWELFTH CAUSE OF ACTION

72. Answering paragraph 72, Exxon Shipping adopts and incorporates by this reference its response to paragraphs 1 through 71 as though set forth in full at this place.

73-74. Answering paragraphs 73 and 74, Exxon Shipping denies the allegations in paragraphs 73 and 74 insofar as they apply to Exxon Shipping and Exxon Corp. Insofar as the allegations in paragraphs 73 and 74 apply to other parties, Exxon

Shipping lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, on that basis, denies the allegations in paragraphs 73 and 74.

RELIEF SOUGHT

75. Answering plaintiff's prayer for relief, Exxon Shipping denies plaintiff's entitlement to the relief it seeks.

GENERAL DENIAL

76. Exxon Shipping denies each and every other allegation in plaintiff's complaint that was not specifically admitted.

AFFIRMATIVE AND OTHER DEFENSES

1. Independent of any legal obligation to do so, Exxon Shipping and Exxon Corp. have paid and continue to pay many claims for economic loss allegedly caused by the oil spill, and incurred and continue to incur other expenses in connection with the oil spill. Exxon Shipping is entitled to a set-off in the full amount of all such payments in the event plaintiff's claims encompass such expenditures.

2. Numerous persons and entities have filed lawsuits relating to the oil spill, some of whom purport to represent the plaintiffs in this action. In the event of any recovery in such

other lawsuits by persons whose claims therein are encompassed by plaintiff's claims in this action, Exxon Shipping is entitled herein to a set-off in the full amount of such payments.

3. Some or all of plaintiff's claims for damages may be barred or reduced by the doctrine of comparative negligence or comparative fault.

4. Exxon Shipping is entitled to a set-off to the extent of any failure of plaintiff properly to mitigate damages.

5. Unless otherwise agreed, Exxon Shipping is entitled to a set-off in the amount of any payment received by plaintiff as a result of the oil spill, the containment or clean up of the oil released from the EXXON VALDEZ, or other activities or matters related to the oil spill.

6. Each of plaintiff's theories of recovery fails to state a claim upon which relief can be granted.

7. Claims by some persons or entities who may be represented by plaintiff have been settled and released, or in the alternative, payments received by such persons or entities operate as an accord and satisfaction of all plaintiff's claims against Exxon Shipping.

8. Exxon Shipping has acted pursuant to government approval, direction, and supervision, and has no liability to plaintiffs for any acts undertaken or omissions with such approval, direction, or supervision.

9. The amount of any liability for the acts alleged is controlled by statute including, without limitation, 43 U.S.C. § 1653(c), and AS 09.17.010, .060 and .080(d).

10. Plaintiff's claims are barred to the extent they would represent recovery by two or more persons or entities for part or all of the same economic loss, and thus would represent a multiple recovery for the same injury.

11. Plaintiff lacks standing to assert certain theories of recovery or to claim or recover damages based on the allegations of the complaint.

12. Plaintiff's claims are based on an alleged maritime tort and therefore are subject to applicable admiralty restrictions, including without limitation, restrictions on granting of injunctive relief and on damages for remote economic loss unaccompanied by physical injury to person or property.

13. Plaintiff's claims for punitive damages are unconstitutional under the United States Constitution including, without limitation, Article 1, Section 8; Amendment V; and

Amendment XIV; and the Alaska Constitution including, without limitation, Article I, Section 7; and Article I, Section 12.

14. If punitive damages were to be awarded or civil or criminal penalties assessed in any other proceeding against Exxon Shipping relating to the oil spill, such award bars imposition of punitive damages in this action.

15. Certain claims asserted by plaintiff are not ripe for adjudication.

16. Plaintiff fails to satisfy the requirements for injunctive relief they seek.

17. Plaintiff's claims for punitive damages are precluded by the Alaska common law and statutory scheme for civil and criminal penalties relevant to the oil spill.

18. Those portions of AS 46.03 that were enacted after the oil spill constitute an unlawful bill of attainder violative of Article 1, Section 10 of the United States Constitution, and Article I, Section 15 of the Alaska Constitution, and if applied to Exxon Shipping would also violate the due process clauses and contract clauses of the United States and Alaska Constitutions.

19. Some or all of plaintiff's claims, including claims for punitive damages, are preempted by the comprehensive system of federal statutes, regulations and common law, including

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criminal and civil penalties, sanctions and remedies relevant to the oil spill, and its scheme relevant to the protection of subsistence interests.

20. The damages alleged, if any, were caused, in part, by the actions of others not joined as defendants herein as to whom a right of contribution or indemnity should exist as to Exxon Shipping. Exxon Shipping may seek leave of Court to join such additional persons as third party defendants on the basis of further discovery.

21. Certain theories of relief may not be maintained because those theories are based upon the exercise of the state and federal constitutional rights to petition the state and federal governments with respect to the passage and enforcement of laws.

22. Numerous persons and entities have filed lawsuits against Exxon Shipping relating to the oil spill, some of whom purport to represent the plaintiff in this action. In the event of any judgment or judgments in such other lawsuits against Exxon Shipping and in favor of persons whose claims are encompassed by plaintiff's claims in this action, such judgment or judgments will be res judicata as to plaintiff's claims herein.

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WHEREFORE, defendant Exxon Shipping prays for judgment against plaintiff as follows:

1. That plaintiff take nothing by its complaint and be granted no relief, legal or equitable;

2. That the complaint be dismissed with prejudice;

3. That Exxon Shipping be awarded its costs in this action, including attorney's fees; and

4. That the court award Exxon Shipping such other and further relief as it may deem just and proper.

DATED at Anchorage, Alaska this 8th day of December, 1989.

BOGLE & GATES
Attorneys for Defendant
Exxon Shipping Company (D-2)

By: Douglas J. Serdahely
Douglas J. Serdahely
Richard M. Clinton

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

PRE-TRIAL ORDER NO. 8

Further Amendment to
Pre-Trial Order No. 4

Motions for Class Certification. Concurrent herewith the court has approved the stipulation of the parties regarding the schedule for disposition of motions for class certification. The court expects that the parties will abide by that schedule; which is to say, the court does not expect to be called upon to grant continuances as to the compliance dates agreed upon for the development and submission of these motions.

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Organization of Plaintiffs. By Pre-Trial Order No. 7, which made certain amendments to Pre-Trial Order No. 4, the court expressed its primary reservation concerning the proposed organization of plaintiffs' counsel. At an informal status conference held on December 6, 1989, the court received additional input from plaintiffs' counsel on this subject.

The plaintiffs, in particular, are desirous of seeing the plan for the organization of counsel in this case finalized. Although such a structure was not plaintiffs' choice, it appears that plaintiffs' counsel are not unwilling to accommodate the court's concern that the plaintiffs' proposal was top-heavy. Accordingly, the court proposes to interview candidates for plaintiffs' lead counsel. Proposals from persons who desire to assume this position and responsibility shall be presented to the court under seal on or before 4:30 p.m. on December 11, 1989. The court will schedule interviews as soon as possible and will endeavor to rule on the acceptability of "Consolidated Plaintiff Proposed Pretrial Order for the Organization of Plaintiffs' Counsel" by December 23, 1989.

Rule 12 Motions. In written submissions made by defendants in connection with the parties' efforts to agree upon a schedule for the consideration of motions to certify class actions, defendants have urged that they be permitted to go forward with motions pursuant to Rule 12, Federal Rules of Civil Procedure. Plaintiffs have opposed this proposition, contending

generally that such motions would undermine the organizational strategy for this case and specifically contending that it is improper for the court to consider such motions while the motions to certify are pending.

The latter contention is without merit. Kim v. Commandant, Defense Language Institute, Foreign Language Center, 772 F.2d 521, 524 (9th Cir. 1985). As a general proposition, the court is desirous of having this case proceed in an organized, orderly fashion--that is, pursuant to an agreed-upon plan. Nevertheless, Rule 12 motions must necessarily be at or near the top of any list of first priority items in any logical proposal for the development of the case. Accordingly, leave to file Rule 12 motions is granted. Defendants are cautioned, however, that the court will consider as premature any motion which presents issues which would cause the court to convert the Rule 12 motion to a Rule 56 motion.

Status Conferences. It has been informally proposed to the court that regular status conferences would be beneficial to the court and counsel. The court is quite willing to be available on a regular basis for informal status conferences so that all concerned may review the progress of this case, and hopefully so that scheduling problems can be anticipated and dealt with at an early time and, where possible, with the least formality appropriate to a just resolution of any particular problem. Accordingly, a status conference is scheduled for January 8,

1990, at 4:00 p.m. AST. The conference will be conducted in chambers. The court expects liaison counsel to be present. Any other counsel who so desire may participate in the conference by conference telephone call to 907-271-5621.[1] The court will address the frequency with which such conferences should be held at the first status conference.

DATED at Anchorage, Alaska, this 8 day of December, 1989.

United States District Judge

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[1] Responsibility for arranging this call in on counsel. Please do not put the call through before 4:00 p.m.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: All cases

AFFIDAVIT OF SERVICE

On the 11th day of December, 1989, service of Pre-Trial Order No. 8, Further Amendment to Pre-Trial Order No. 4, has been made upon all counsel of record based upon the court's master service list of November 28th, 1989.

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In Re the EXXON VALDEZ	No. A-89-095 Civil (Consolidated)
This Document Relates to: All Cases	

Filed on behalf of P1, P3, P8-P12, P13-15, P16-18, P19, P21, P22, P24-28, P30-39, P40-41, P42, P43-44, P46-55, P65-67, P73, P74-76, P77, P78-80, P81-94, P95, P96, P97-111, P112, P113, P118-138, P139-144, P145, P146-147, P165-166, P167, P168, P170-188, P189, P195-196, P202-206, P225, P246-247, P267, and P277.

CONSOLIDATED PLAINTIFFS' MEMORANDUM REGARDING DISPUTED PROVISIONS IN THE PROPOSED PRETRIAL ORDER REGARDING DISCOVERY PROCEDURES AND SCHEDULING

I. Introduction

On November 20, 1989, the parties jointly filed a proposed Pretrial Order Regarding Discovery Procedures and Scheduling (hereinafter "Discovery Plan" or "Plan"). The consolidated plaintiffs submit the following memorandum reflecting their comments on disputed provisions of that Discovery Plan.

II. Disputed Provisions

A. Timing of Discovery and Monitoring by Discovery Master

Although the scheduling provisions of the Plan are self-executing in that counsel and the parties are guided by specific procedures for advancing discovery into successive stages until its completion, the Discovery Plan does not provide a starting date for discovery, an ultimate discovery cut-off date, or a specific completion date for each stage of discovery. In negotiations, the plaintiffs[1] and defendants were unable to agree upon the time for service of first sets of document requests [§V,A,1(a)(i)], first phase interrogatories [§V,B,2(a)(i)], requests for admissions [§V,C(a)(i)], and commencement of depositions [§VI,B,1].

Consolidated plaintiffs submit that all methods of discovery should commence immediately upon entry of an Order approving the proposed Discovery Plan. In addition, to insure that this case continues to move forward at a reasonable pace, the Discovery Plan should include a discovery cut-off date -- consolidated plaintiffs suggest twenty-four (24) months from the date of entry of an Order approving the proposed Discovery Plan.

Moreover, since "small amounts of slippage on numerous dates will inevitably jeopardize the entire calendar for development of the case in other areas" [Order No. 17], consolidated plaintiffs propose a provision charging the Discovery Master with the duty of

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[1] The terms "plaintiffs" and "consolidated plaintiffs" are used interchangeably throughout and include the State of Alaska unless otherwise specified.

monitoring and reporting the progress of discovery to the Court on specified dates (plaintiffs suggest every sixty (60) days). See Manual For Complex Litigation 2d at §20.14. This additional measure, in conjunction with the timing provisions suggested above, should insure that discovery and the overall case development will proceed apace.

B. Coordination of Discovery with Law and Motion Proceedings

There is no question that all parties to this litigation -- as in any litigation -- must cooperate to coordinate discovery with law and motion proceedings to the greatest extent possible. See §II,A. Accordingly, in response to defendants' suggested provisions concerning such coordination, consolidated plaintiffs proposed the following language:

> The parties are specifically directed to consider the impact that law and motion matters may have upon discovery scheduling and attempt to negotiate such issues as they arise.

Defendants, while not objecting to plaintiffs' language, have proposed additional provisions encouraging the deferral of discovery "on matters that may be mooted by determination of such [law] motions." Defendants' suggested language presupposes the future filing of certain law motions and attempts to predict, in advance, the impact such motions may ultimately have on discovery.

Plaintiffs submit that defendants' additional provisions are unduly restrictive and invite misinterpretation. The effect -- if any -- that law motions may have on the scheduling of discovery can only be resolved at the time or after such motions are filed.

Moreover, although the Court has recognized the desirability of planning for "coordination of motion and discovery activity in this court and state court" [Order No. 10], the scope of the proposed Pre-trial Order Regarding Discovery Procedures and Scheduling has been limited, by Court Order, to a "proposed discovery plan, procedures for discovery, and discovery schedule." Pre-trial Order No. 4. It is unrealistic to attempt to predict future motions and their potential impact on all aspects of discovery at this stage of the litigation, especially when discovery proceedings have not even commenced.

C. Inadvertent Production of Privileged Materials

Defendants' draft plan included a provision whereby the inadvertent production of privileged materials would not constitute a waiver of any otherwise valid claim of privilege, provided such claim was promptly asserted upon actual discovery of the inadvertent disclosure. The consolidated plaintiffs recognize that absent some provision protecting against inadvertent disclosures, defendants would insist upon painstaking review for privilege claims of every potentially relevant document prior to their production in response to formal discovery requests. Thus, consolidated plaintiffs have agreed to the inclusion of a provision protecting against the inadvertent production of privileged materials in order to expedite discovery which is anticipated to involve the exchanges of massive amounts of documents. See §II,D.

Notwithstanding this concern, consolidated plaintiffs submit

that a balance must be achieved between the interests of expediting discovery and the parties' ability to utilize discovery information in future proceedings. It is imperative for all parties to have assurances that when discovery -- particularly deposition discovery -- does proceed, the materials relied upon are proper discovery information and not inadvertently produced privileged information. This is of particular concern in light of the Plan's provision against repetitive discovery. See §§II,B and VI,A.

The progress of this case will be virtually crippled if information obtained through discovery must later be expunged or returned to the producing party on privilege grounds. Counsel could be forced to re-notice depositions if portions of previously taken depositions are later eradicated. Likewise, law motions based on information obtained through discovery may be invalidated in whole or in part if the discovery information relied upon was the fruit of inadvertently produced privileged information.

The State of Alaska has suggested that these concerns can be alleviated if a party intending to use or otherwise rely on a discovered document is first obligated to identify such document to the producing party. Not only is it unrealistic and unduly burdensome to request that a non-producing party determine whether a document might be subject to a privilege claim by the producing party, but it is also unreasonably prejudicial to require a party to disclose its intention to use or otherwise rely on a particular document prior to deposing a witness or filing a pleading.

Consolidated plaintiffs contend that a reasonable balance of

these competing interests can be achieved if the parties are required to assert a privilege claim regarding inadvertently produced materials within sixty days (60) of the date of first production. In this manner, the interests of expediting discovery are obtained by allowing the producing party a reasonable grace period after production to review produced materials for potential privilege claims without jeopardizing the progress of the litigation or the rights of the parties' receiving discovery materials.

D. Augmentation of the Discovery Plan

Defendants' draft discovery plan only provided specific procedures for items which that draft plan denominated as constituting first stage discovery. Accordingly, that plan also included a provision for the future development of procedures and schedules for successive stages of discovery.

However, the joint Discovery Plan is self-executing in that specific procedures are established for advancing discovery through successive stages until its completion. Thus, the procedures set forth in the Plan, coupled with the proposed timing provisions set forth herein regarding a discovery commencement date, monitoring by the Discovery Master, and a discovery cut-off date, render any augmentation provision unnecessary. See §III,C. Moreover, to the extent unforeseen exigencies should arise which require augmentation of the Plan's present procedures, express provision is set forth in Section IX ("Additional Discovery Procedures") entitling any party to submit to the Discovery Master proposed additional

rules regarding discovery at any time.

E. Protective Orders Regarding Discovery

1. General Protective Order

Defendants' draft discovery plan contained a "general protective order" which included certain provisions which plaintiffs deem objectionable. See §IV. For example, in pertinent part, this "general protective order" sought to prohibit the dissemination of discovery information "for any business, competitive, personal, publicity, or other purposes." The Code of Professional Responsibility adequately deals with such matters and inclusion of this vague proscription in the Discovery Plan will only engender disputes that might not otherwise arise.

In addition, defendants' "general protective order" required that counsel should "offer only such discovery information on motions or in trial as counsel reasonably and in good faith believes to be relevant to the matter on which they are offered." This restriction is overbroad, unduly burdensome and would only serve to impede counsel's ability to try this case. Furthermore, like the former provision, this vague limitation also encourages disputes since it invites opposing counsel to unfairly challenge an attorney's discretion in handling the litigation.

2. Special Protective Order

Defendants' draft plan also included a "special protective

order" regarding confidential information. While plaintiffs may not dispute the propriety or desirability of a confidentiality order in appropriate circumstances, any protective order must, at a minimum, be drafted within the proscriptions of Rule 26(c).[2] The "special protective order" proposed by defendants does not even meet this fundamental prerequisite.

A reasonable protective order may only secure the confidentiality of trade secrets or other confidential research, development or commercial information, the disclosure of which would cause a cognizable harm sufficient to warrant protection. In addition, a protective order should always be narrowly drawn in consideration of the First Amendment overbreadth doctrine, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889, 892 (E.D. Pa. 1981), and the party seeking such an order bears the burden of showing good cause for its issuance. Reliance Ins. Co. v. Barron's, 428 F. Supp. 200 (S.D.N.Y. 1977); Zenith, 529 F. Supp. at 890.

Contrary to these limitations, defendants' "special protective order" defined confidential information as any information labelled "confidential" by either party, without requiring any showing what-

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[2] Pursuant to Rule 26(c):

> [u]pon motion by a party or by the person from whom discovery is sought and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research , development, or commercial information not be disclosed or be disclosed in a designated way[.]

however to justify the protection thereafter afforded. Such a broadly drafted protective order not only exceeds the bounds of Rule 26(c), but violates First Amendment protections as well. As crafted, defendants' "special protective order" appears to be nothing more than a vehicle for keeping this case out of the public domain.

Plaintiffs submit that the details of properly drawn protective orders deserve independent treatment. To date, all of the parties have not yet exchanged proposals or focused their full attention on this issue. Therefore, while other disputed discovery matters are presently under consideration, consolidated plaintiffs respectfully request that the Court grant the parties additional time to confer for the purpose of working out the details of both a general and special protective order.

F. Scope of Subsequent Sets of Document Requests

The Discovery Plan provides that the parties may serve a comprehensive First Set of Document Requests regarding all matters related to the subject matter of this litigation. See §V,A. As regards the scope of the First Set of Document Requests, the Plan provides that "each side shall make a good faith effort to request all documents which it fairly and reasonably intends to seek during the course of the litigation." §V,A,1(a)(ii). Nevertheless, plaintiffs and defendants recognize that subsequent sets of document requests will undoubtedly be served. See §V,A,1(b).

Consolidated plaintiffs object to the language proposed by

defendants and the State of Alaska to govern the scope of subsequent requests since the proposed provision could be interpreted to preclude otherwise proper discovery.[3] For example, even though plaintiffs shall certainly endeavor to initially request all documents which they then believe are related to the subject matter of the litigation, it is unfair to impose a provision which absolutely will not tolerate inadvertent omissions. Discovery in a complex case such as this must accomodate the attendant realities.

Moreover, even though this provision would apparently permit plaintiffs to later seek information which they in good faith initially believed unnecessary, ancillary and unproductive litigation will nonetheless indubitably arise concerning whether, in fact, good faith was exercised. As a result, in order to avoid these inevitable disputes, plaintiffs could feel compelled to initially seek exhaustive amounts of information irrespective of their true judgment at that time as to its ultimate necessity. Consequently, defendants could be faced with the burden of producing potentially unnecessary documents which plaintiffs would not have sought initially, but for the untoward risk posed by this suggested provision.

As written, several provisions in the Plan afford the pro-

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[3] The proposed language is as follows:

> After the initial set of document requests referred to above, which must be comprehensive, any subsequent sets of document requests served on a party shall attempt to seek only specific information that was not in good faith previously believed to be necessary. The parties shall endeavor to minimize the number of subsequent document requests.

protection sought by virtue of the suggested language. First, the provisions defining the scope of the comprehensive First Set of Document Requests [§V,A,1(a)(ii)] protect all parties, to the extent reasonably possible, from searching files innumberable times. Second, there is a general prohibition against repetitive discovery. §II,B. Finally, the Plan incorporates the "ordinary" limitations governing the scope of discovery as provided for by the Federal Rules of Civil Procedure. §I,B.

G. Costs of Copying Documents Pursuant to Requests for Production

The consolidated plaintiffs[4] and defendants are in disagreement as to which party should bear the costs for copying documents requested pursuant to requests for production of documents. See §V,A,5. It is anticipated that voluminous amounts of documents will be requested in this litigation, and that the majority of these documents will -- by necessity -- be in defendants' possession. An immense financial burden will be placed on plaintiffs should they be required to bear the expense of copying these documents.

Consolidated plaintiffs' draft discovery plan required both sides to maintain a document depository which would house all documents produced by that side pursuant to requests for production. Defendants opposed any provision making the establishment and maintainence of document depositories mandatory and also objected to

[4] The State of Alaska takes no position with respect to costs of copying documents.

any provision allowing for documents to be produced at any locatic other than that selected by the produc ng party. Because of de fendants' objections, consolidated plaintiffs agreed that the cre ation and maintenance of document depositories can be at eacl side's option. See §V,A,8.

Nevertheless, plaintiffs submit that under these circumstances, where defendants are the party opposing the filing of documents in a central depository, it is they who should bear the expense of making copies for other parties. See Manual for Complex Litigation 2d at §21.444. If, at this time, the Court chooses not to require defendants to bear this expense, then consolidated plaintiffs respectfully request in the alternative that the expense of making copies be assessed at the conclusion of this action as a taxable cost to defendants. See 28 U.S.C. §1920(4).

H. Document Requests Directed to Party Deponents[5]

Defendants and the State of Alaska contend that counsel should not be permitted to serve a request for production of documents and tangible things upon a party deponent in light of the procedures established by the parties for responding to document re-

[5] During negotiations, the parties discussed proposed language which would allow any party to the litigation to serve upon another party a subpoena duces tecum with a notice of deposition and inadvertently denominated this area of disagreement as "Subpoena Duces Tecum For Parties". See §VI,E. However, the procedures of Rule 30(b)(5) should apply to any request for production of documents and tangible things directed to a party deponent since subpoenas duces tecum, issued pursuant to Rule 45, are only required when requesting production from a non-party deponent. Consolidated plaintiffs have re-titled this provision accordingly.

quests. See §V,A,2. Plaintiffs submit that allowing the parties to employ the procedures set forth in the Plan for responding to document requests, as well as the procedures set forth in Rule 30(b)(5), is necessary to facilitate discovery. See Notes of Advisory Committee on Rules, Fed.R.Civ.P. Rule 30(b)(5); §VI,E.

In any litigation, parties are permitted to concurrently seek documents for inspection and copying pursuant to Rule 34, and request a party deponent to bring documents to a deposition pursuant to Rule 30(b)(5). See Rule 26(d). Rules 26 through 37 are an integrated mechanism and it has long been recognized that the various discovery devices "may be utilized independently, simultaneously, or progressively, so long as the requirements of the rule or rules invoked are met." Wright and Miller, Federal Practice and Procedure at §2046, citing Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 8 F.R.D. 449, 451 (D.C. Haw. 1948). In the event that any party believes that a discovering party is abusing the procedures permitted by Rule 30(b)(5), such party may apply to the Discovery Master or Court for an appropriate protective order pursuant to Rule 26(c) or Rule 30(d).

Moreover, absent a provision permitting document requests to be directed to party deponents in accordance with Rule 30(b)(5), the progress of depositions -- and hence, the overall case development -- may be unnecessarily impeded. In order to avoid the risk of running afoul of the Plan's proscriptions against repetitive discovery [§II,D] and deposing a witness more than once [§VI,A], the parties may well be deterred from noticing depositions of party

deponents until the completion of mass exchanges of documents. Furthermore, subsequently produced documents could become the basis for routine applications to re-notice previously deposed parties. Worse yet, the Plan's proscriptions against repetitive discovery could conceivably be construed to bar the re-noticing of depositions which would otherwise be proper and necessary under these circumstances.

I. Place of Depositions

1. Party Deponents

During negotiations, plaintiffs proposed that party deponents and Rule 30(b)(6) depositions of parties should be noticed in the forum. Defendants disagreed with this position and persisted in advancing the provision in their draft plan which provided that all witnesses should be deposed at a convenient location near their residence. See §VI,F.

It is within the sound discretion of the court to determine the location for taking depositions where the litigation and the residence of a witness are in different districts. Minnesota Mining and Manuf. Co. v. Dacar Chemical Products Co., 707 F. Supp. 793 (W.D. Pa. 1989). Each case must be considered on its own facts and equities. 4 Moore's Federal Practice §26.70[1.-3].

In Minnesota Mining, District Judge D. Brooks Smith set forth the following policy considerations for determining the appropriate

location of a 30(b)(6) deposition of a party:

> First, as a rule depositions should be taken in the district where the action is being litigated. This not only permits predictability in prospective litigation, it also pragmatically permits the trial court to resolve disputes which may take place during the course of deposition[s] [sic] without undue expenditure of time, both the parties' and the court's. It is a secondary policy that depositions should be taken where the deponent works or resides. Third, when these two rules conflict, the court will consider the nature of the testimony and for which party the testimony will be offered. If plaintiff wishes to depose a liability witness, it should bear the expense of going to the witness. If defendant wishes to establish an affirmative defense by deposing a witness, it should bear the inconvenience of going to the witness. Fourth, the court will examine the nature of the witness himself. As a general rule, status of a witness as a part[y] [sic] tips the balance in favor of requiring him to come to the forum, while non-party witnesses should be deposed "at home."

(Emphasis added). Although the issue in Minnesota Mining involved the location of the depositions of plaintiffs' representatives, Judge Smith also applied these policy considerations in ruling that Rule 30(b)(6) depositions of defendants' representatives take place in the forum. Ashland Oil Spill Litigation (M-14670) (W.D. Pa., April 29, 1989) (Letter Order).

In this case, consideration of these same factors also warrant that party depositions and Rule 30(b)(6) depositions of parties take place in the forum. For example, these proceedings involve multiple parties and complex factual issues which require the taking of a substantial number of depositions. Disputes may arise during the course of depositions which should be resolved by this Court or its appointed Discovery Master in order to promote consistency and judicial economy.

Moreover, a majority of the defendants' officers and employees

who possess relevant knowledge regarding liability and damage issues work and reside in the forum -- as do the plaintiffs. Finally, a preponderence of the evidence, both documentary and physical, is presumably located in the forum.

2. Non-party Deponents

Both consolidated plaintiffs and the State of Alaska agree that the depositions of non-party witnesses should take place in one (1) of three (3) possible geographical regions (namely, the West Coast, the Midwest, and the East Coast); and further, that within each region, depositions should be noticed in certain designated cities. However, plaintiffs and the State of Alaska also agree that depositions may be held in other cities where sufficient witnesses reside to justify holding depositions in that city.[6] As previously stated, defendants proposed that all witnesses should be deposed at a convenient location near their residence.

J. Document Predesignation

Defendants and the State of Alaska take the position that noticing counsel must be required, without exception, to notify opposing counsel and the deponent in advance of a deposition as to

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[6] During negotiations, consolidated plaintiffs and the State of Alaska agreed that: on the West Coast, depositions should be held in Seattle, Los Angeles or Anchorage; on the East Coast, depositions should be held in New York, Philadelphia or Washington, D.C.; and, in the Midwest, depositions should be held in Houston or Chicago. Within a city, it was agreed that depositions should be held at the place designated by noticing counsel, unless otherwise agreed by all attending counsel.

the documents about which the deponent will be examined. Consolidated plaintiffs submit that document predesignation should be optional. See §VI,M.

There is no rule of court requiring predesignation. Rather, predesignation has at times been adopted in complex cases, although not when documents are used for impeachment, reactive cross-examination or other similar purposes. See Manual for Complex Litigation 2d at §21.456.

The parties do not dispute that the underlying rationale for predesignation in complex litigation is to ease the burden on noticing counsel of hauling what could conceivably be volumes of documents to each deposition, including bearing the attendant expense of copying every document for the deponent and all examining counsel. Consolidated plaintiffs also do not dispute that this is a legitimate concern, and permitting noticing counsel to predesignate is an effective means of alleviating this potentially heavy burden.

However, rather than mandating predesignation at all times, consolidated plaintiffs have proposed that the predesignation procedure should be utilized at the option of noticing counsel since the burden and expense of bringing sufficient copies of all documents which counsel anticipate using or referring to during the deposition is upon them. Consolidated plaintiffs submit that this is a more practicable and less extreme procedure than the procedure advocated by defendants and the State of Alaska. Otherwise, mandatory predesignation may frustrate or unfairly thwart counsel's

ability to test a deponent's independent recollection or to examine a deponent for purposes of impeachment. See Manual for Complex Litigation 2d at §41.38.[7]

K. Objections - Continuation of Deposition

Defendants and the State of Alaska have proposed a provision whereby, in the event the Discovery Master is unavailable, or counsel elects not to seek immediate telephone ruling, the parties should be required to continue the deposition "as to matters not in dispute."

Consolidated plaintiffs submit that a provision requiring the deposition to continue "as to matters not in dispute" does not provide adequate safeguards for the parties and violates the protections otherwise afforded by Rule 30(d).[8] Although there may be circumstances when discrete issues are in dispute and postponement of

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[7] If the Court does require mandatory document predesignation, consolidated plaintiffs believe that the Court should not require predesignation where surprise is important for impeachment or similar purposes. See Manual for Complex Litigation 2d at §21.456.

[8] Rule 30(d) provides:

> At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court . . . may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition. . . . Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

their resolution will not affect the parties' ability to continue a deposition as to undisputed matters, there may also be times when the disputed issues impact all aspects of a deposition, such that requiring its continuation would be unduly prejudicial. See §0,2.

At minimum, the Discovery Plan procedures should not deprive the parties of that which they are otherwise entitled to under the Rules of Civil Procedure. Moreover, the provision in Rule 30(d) mandating the award of expenses affords adequate protection against potential abuses.

L. Discovery Master's Compensation

Consolidated plaintiffs' position concerning compensation for the Discovery Master is set forth in the separate filing made in response to Judge Shortell's Pretrial Order No. 5 (A copy of that filing is attached hereto as Exhibit "A").

DATED this 11th day of December, 1989.

Lloyd Benton Miller
SONOSKY, CHAMBERS, SACHSE & MILLER

Liaison Counsel for
Consolidated Plaintiffs

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES
ALL DEFENDANTS' JOINT PROPOSED FORM OF ORDER SUPPLEMENTING JOINT PROPOSED DISCOVERY PLAN OF NOVEMBER 20, 1989

Attached hereto is all defendants' joint proposed order form supplementing the parties' agreed proposed discovery plan previously filed herein on November 20, 1989.

Dated: December 18, 1989. BOGLE & GATES

By _____
Douglas J. Serdahely
Liaison Counsel for Defendants
and Co-Member of Defendants'
Coordinating Committee

Dated: December 18, 1989. BURR, PEASE & KURTZ

By _____
Charles P. Flynn
Co-Member of Defendants'
Coordinating Committee

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: ALL CASES

ORDER APPROVING AND SUPPLEMENTING DISCOVERY PLAN

The Court has considered all papers filed in connection with the Proposed Discovery Plan. Good cause appearing, IT IS HEREBY ORDERED that:

1. The Discovery Plan as submitted by the parties November 20, 1989, a copy of which is attached hereto, is hereby adopted, supplemented as set out herein.

2. Section II(A) is added to the Plan, reading as follows:

A. Coordination of Discovery With Law and Motion Proceedings.

The parties are specifically directed to consider the impact that law and motion matters may have upon discovery scheduling. As various orders in these proceedings and the State Proceedings have indicated, designated counsel for both sides are to negotiate and attempt to develop a coordinated Law and Motion Scheduling Plan. In determining a schedule for legal motions, the parties shall also coordinate discovery scheduling to defer discovery that may be rendered unnecessary or to expedite discovery concerning issues that may lead to legal ruling narrowing or simplifying this litigation.

3) Section II(D)(1) of the Plan shall read as follows:

1. Inadvertent Productions or Disclosures. A party responding to any request for discovery information shall be responsible to make a reasonable and diligent effort to assert any claims of attorney-client privilege, work-product protection or other recognized evidentiary or discovery privilege when responding to any request for discovery information. However, in the interest of expediting discovery in these proceedings and

avoiding unnecessary costs, inadvertent disclosure of privileged information shall not constitute a waiver of any otherwise valid claim of privilege if such claim is asserted within twenty (20) days after the party making the inadvertent disclosure has actual knowledge of the inadvertent disclosure of information claimed to be privileged. Upon assertion of a claim of privilege regarding inadvertent production of a privileged document, any recipient of such document shall either 1) return to the party claiming the privilege all copies of such document, or 2) inform the party claiming the privilege that it disputes the applicability of the claim of privilege. The party claiming the privilege shall apply to the Discovery Master in accordance with the discovery dispute resolution provisions of this Order if it continues to seek return of the privileged material. Prior to a determination of the validity of the claim of privilege by the Discovery Master, the information for which the claim is asserted shall not be disseminated or published in any way.

4. Section IV is added to the Plan, reading as follows:

IV. PROTECTIVE ORDERS REGARDING DISCOVERY MATERIALS.

A. General Protective Order

All documents, discovery responses and other information obtained in response to formal discovery requests in these proceedings or the State Proceedings or through informal discovery exchanges, whether before or after the date of this

Order, shall be used by counsel and the parties only for purposes of trial preparation, pretrial, discovery, trial, settlement, or alternative dispute resolution procedures or other proceedings arising from the subject matter of this proceeding. Discovery information so obtained, whether in the form originally supplied, or in derivative work product materials, shall not be used for any business, competitive, personal, publicity or other purpose. Subject to the foregoing, and unless governed by some further order, documents and other discovery information may be freely exchanged among clients, counsel, and their consultants, may be used in depositions and like proceedings, and may be proffered as evidence to the Court. Such discovery information shall not be otherwise published, disclosed or disseminated. Counsel of record shall notify any and all persons to whom documents or other discovery information is supplied of the provision of this Order restricting use of discovered information for the purposes stated above. Counsel for all parties shall offer only such discovery information in connection with motions or at trial as counsel reasonably and in good faith believes to be relevant to the matter on which they are offered.

B. Special Protective Order for Confidential Material.

1. Designation of Confidential Material.

a. Written Discovery Responses. A party or counsel for any deponent may invoke this Special Protective Order in the case of written discovery by providing discovery information with the legend: "CONFIDENTIAL -- Use of This Information is Restricted to Court Orders in In re Exxon Oil Spill Litigation, 3AN-89-2533 Civil (Superior Court) and In re the Exxon Valdez, A89-095 (U.S. District Court)." This legend shall be placed on the first page of any documents or writing designated as Confidential, and on each subsequent page thereof where protected information appears.

b. Testimonial Discovery Responses. Counsel for any deponent or party may invoke this Special Protective Order for deposition testimony by indicating on the record at the deposition that the testimony of the deponent or that any newly-produced exhibit to his or her testimony is to be treated as Confidential Material. Failure of counsel to designate testimony or exhibits as Confidential Material at the deposition, however, shall not constitute a waiver of the confidentiality of the testimony or exhibits. Within five (5) business days of receipt of the transcript of the deposition, counsel shall be entitled,

by service of written notice on liaison counsel for each side, to designate specific pages and lines of the transcript or the exhibits as Confidential Material.

When material disclosed during a deposition is designated as Confidential Material, the reporter shall mark the cover page of the transcript as well as each page on which testimony designated as Confidential Material appears with the legend: "CONFIDENTIAL - Use of This Information Restricted by Court Orders in In re Exxon Oil Spill Litigation, 3AN-89-2533 Civil (Superior Court) and In re the Exxon Valdez, A89-095 Civil (U.S. District Court)."

c. Vacation of the Designation of Confidential Material. Any disputes as to whether material is appropriately classified as Confidential Material shall be treated as a motion to resolve a discovery dispute, and shall be resolved by the Discovery Master procedures set out in Section VII hereof. Unless and until the producing party withdraws the designation, or unless the Discovery Master or the Court orders otherwise, any discovery material designated as Confidential shall be treated as such.

2. Persons Authorized to Have Access to Confidential Material. Confidential Material shall be kept in confidence by all recipients, and shall not be disclosed to anyone except:

(a) The Court, the State Court, the Discovery Master, or any master, referee, arbitrator or mediator authorized to act in these or the State Proceedings, when disclosed to the foregoing in the manner provided in ¶ 6 of this section.

(b) Counsel.

(c) Experts or other consultants retained by counsel or by any party with respect to preparation of these matters for trial, settlement or alternative dispute resolution proceedings or other resolution of the subject matter of these proceedings.

(d) Court reporters, including their regular staff, only to the extent necessary to perform their duties.

(e) Deponents, provided that if objection is made to disclosure of Confidential Material to a deponent, such Material shall not be shown to the deponent until such objection has been resolved as provided in Section VII hereof.

3. Use of Confidential Materials.

Confidential Material may be used only for purposes of trial preparation, pretrial discovery, trial, settlement, alternative dispute resolution procedures, or other proceedings arising from the subject matter of these proceedings or the State Proceedings.

4. Agreement to Abide by Protective Order.

Before any authorized person other than the Courts the Discovery Master, counsel and their staffs may be given access to Confidential Material, such person must read a copy of this Special Protective Order and:

(a) Acknowledge that the person has read, fully understood, and agreed to abide by the terms and provisions hereof; and

(b) Sign a counterpart of the forms attached hereto as Exhibits A and B confirming his or her agreement to abide by the provisions hereof, which executed counterpart shall be maintained in the files of the counsel providing the materials to such person.

5. Use of Confidential Material in Depositions or Pretrial Proceedings. If Confidential Material is disclosed or used at a deposition or if testimony or other discovery information is designated as Confidential Material at a deposition, only persons authorized to have access to Confidential Material may be present while such materials are discussed.

6. Submission of Confidential Materials to the Court. Prior to the submission of any Confidential Material to the Court, and prior to any disclosure of Confidential Material at any pretrial hearing in this action, counsel preparing to file

or use such Material shall take reasonable steps to afford counsel for the party who first claimed protection the opportunity to object to disclosure of Confidential Material in open court.

If any party files with the Court any pleading, deposition transcript, interrogatory answer, affidavit, motion, brief, or other paper or document that includes Confidential Material, such document shall be filed and maintained under seal and shall not be available for public inspection until the Court otherwise orders.

7. Disposition of Confidential Material. Upon termination of these proceedings as to any party, counsel for such party shall return all Confidential Material to the party by whom such material was first produced, and shall either destroy materials that summarize, excerpt or otherwise record any Confidential Material or shall retain all such derivative Confidential Material as provided in this Order. Counsel for the party as to whom this action is terminated shall be responsible to secure the return or other disposition of any copy of Confidential Material or derivative Confidential Material which such counsel provided to any other person.

8. Further Orders Respecting Confidential Material. The entry of this Special Protective Order is without prejudice to entry of additional orders or modification of this Order as may be appropriate.

5. Section V(A)(1)(a)(i) of the Plan shall read as follows:

(a) First Set of Document Requests.

(i) Timing. Each side may serve first set document requests (which shall be comprehensive) after submission of answers to the First Phase Interrogatories.

6. Section V(A)(1)(b)(ii) of the Plan shall read as follows:

(ii) Scope. After the initial set of document requests referred to above, which must be comprehensive, any subsequent sets of document requests served on a party shall attempt to seek only specific information that was not in good faith previously believed to be necessary. The parties shall endeavor to minimize the number of subsequent document requests.

7. Section V(A)5 of the Plan shall read as follows:

5. Copying of Documents. Upon notification by the requesting party, the producing party shall have the obligation to copy, at the requesting party's expense, documents to be produced pursuant to a request. Unless otherwise agreed, copies of documents shall be made on 8 1/2 x 11 or 8 1/2 x 13 or

8 1/2 x 14 paper and the charge for copying shall not exceed
cents per copy. The requesting party may, at its option a
expense, use optical scanning in addition to or instead
requesting copies at the time of production.

8. Section V(B)(2)(a)(i) shall read as follows:

(i) Timing. Each side may serve First Phas
interrogatories on or after January 15, 1990.

9. Section V(c)(1)(a) of the Plan shall read a
follows:

(a) Timing. Each side may serve recipients fo
admission on or after January 15, 1990.

10. Section VI(B)(1) of the Plan shall read as follows:

1. Commencement of Depositions. The parties shall
commence scheduling of depositions as provided herein on or afte
January 15, 1990.

11. Section VI(E) of the Plan shall read as follows:

E. Subpoena duces tecum for Parties.

Any subpoena duces tecum served upon a party or any
employee of party shall be treated as a document request pursuant
to Rule 34, and shall be coordinated and responded to as provided
in Section V(A) hereof.

12. Section VI(F) of the Plan shall read as follows:

F. Place of Depositions.

Except for good cause shown, all depositions in any one track in any segment will be held in the same region. Depositions will be held in the city most convenient to the witnesses to be examined. On the West Coast, depositions may be held in Anchorage, Seattle or Los Angeles. On the East Coast, depositions may be held in New York, Philadelphia or Washington, D.C. In the Midwest, depositions may be held in Houston, Cleveland, Bartlesville or Dallas. (Depositions may be held in other cities where sufficient witnesses reside in or near such cities to justify holding depositions there.)

At any one city, depositions will be held at the place designated by noticing counsel unless otherwise agreed by all attending counsel.

13. Section VI(M) of the Plan shall read as follows:

M. Document Predesignation.

No later than twenty-five (25) days prior to a deposition date, the party noticing the deposition shall serve on deponent's counsel, defendants' liaison counsel and plaintiffs' liaison counsel a list of all documents (by either document production number or exhibit number for documents previously used in a deposition) which counsel anticipates using or referring to during the deposition. If a document does not have an exhibit number or production number, a copy shall be supplied with the

list. No later than fifteen (15) days prior to a deposition date, all other counsel who intend to conduct any examination of the witness, shall serve on deponent's counsel, defendant's liaison counsel and plaintiffs' liaison counsel a list of any additional documents (by either document production number or exhibit number) which such counsel anticipates using or referring to during the deposition. No later than five (5) days prior to a deposition date, all counsel who intend to conduct any examination of the witness shall serve on deponent's counsel, defendants' liaison counsel and plaintiffs' liaison counsel a list of any additional documents (by either document production number or exhibit number) which such counsel anticipates using or referring to during the deposition. This final designation may include only documents identified in response to the immediately prior designation.

Where the deponent is a non-party to the litigation, counsel designating documents shall be obligated to serve, together with the lists referred to above, hard copies of the designated documents upon the witness or the witness' counsel. The costs of making and serving such copies will be borne by counsel designating the documents.

14. Section VI(O)(2) of the Plan shall read as follows:

2. Continuation of Deposition. Counsel may elect to seek an immediate telephone ruling from the Discovery Master, but, if he is not available, counsel shall be obligated to continue the deposition as to matters not in dispute.

15. Section VIII(c) of the Plan shall read as follows:

C. Compensation.

The Discovery Master shall be compensated at the rate of $____ an hour. The Discovery Master may submit a statement for time spent by him on these proceedings to the Court, the State Court, and to liaison counsel for both sides. Such statement may be submitted monthly or quarterly at the option of the Discovery Master. Plaintiffs shall be responsible to pay one-half of the cost of the Discovery Master's services and defendants shall be responsible to pay one-half of the Discovery Master's services, provided, however, that on any matter decided by him, any side or party may move to have the cost of the Discovery Master's time taxed as a sanction or the Discovery Master may, on his own motion, assess the cost of his time to either side in such proportion as he finds appropriate.

Dated this _____ day of _____, 1989.

_____
H. Russel Holland
United States District Judge

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Attorneys for Environmental Plaintiffs
(P-268 through P-276)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In Re	)	No. A89-095 Civil
	)	(Consolidated)
THE EXXON VALDEZ	)	
	)	
This Document Relates To:	)	
All Cases	)	
	)	

ENVIRONMENTAL PLAINTIFFS' (P-268 THROUGH P-276)
REPLY MEMORANDUM REGARDING DISPUTED
PROVISIONS IN THE PROPOSED DISCOVERY PRETRIAL ORDER

The environmental plaintiffs[1] (P-268 through P-276) respectfully submit this reply memorandum regarding disputed provisions in the proposed discovery pretrial order. We adopt the "Environmental Plaintiffs' Reply Memorandum About Disputed Provisions In The Proposed Discovery Pretrial Order," and the "Environmental Groups' Reply to Defendants' Protective Order Proposal," prepared by the National Wildlife Federation, et al., which are attached as Attachments A and B, and are being filed

[1] Prince William Sound Conservation Alliance, Alaska Center For The Environment, Defenders Of Wildlife, Greenpeace, U.S.A., National Audubon Society, Natural Resources Defense Council, Northern Alaska Environmental Center, Sierra Club and Trustees For Alaska.

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simultaneously in the state court. We also concur with the comments set forth in the "Consolidated Plaintiffs' Reply Memorandum" on those issues. In addition, we add the following observations concerning the defendants' joint proposals for a "general" and a "special" protective order, as set forth in their December 11, 1989 filing.

There is no basis for the defendants' argument that this case needs a strict protective order because such orders have been entered in other complex cases. Unlike those cases, this is not a case where sensitive competitive information such as pricing policies, market strategies, secret patents or formulas are likely to be at issue. Rather, the main issues here are: what caused the spill; what procedures (if any) were in place beforehand to deal with such a spill; what was actually done to try to clean it up; what alternative clean up steps (if any) did Exxon or Alyeska investigate; what is the defendants' assessment of current and future environmental damage; and what are the steps they have studied (if any) to deal with it. None of this information warrants protection from disclosure to competitors or anyone else; indeed, public policy strongly favors disclosure of such information to other oil companies, to responsible government officials, and to the general public, so that this tragedy will never be repeated. (For example, results of tests on ways to clean up oil spills can hardly be confidential "trade secrets" or "formulas.") The so-called

"highly competitive nature of the oil and gas business" (Defs.' Joint Proposals at 22) is irrelevant--this competition does not encompass oil spills.

If the defendants truly have competitively sensitive documents pertaining to this spill--as distinct from documents which simply might cause them embarrassment and draw further public attention to their conduct--the burden should be on them to demonstrate good cause for confidentiality with respect to such documents. Defendants' proposal, however, would place a blanket "gag order" on all discovery in the case. Defs.' Proposal, IV(A). For so-called "sensitive business materials," defendants would give themselves unlimited discretion to bar disclosure altogether to parties, and to prevent disclosure of such documents to deponents (and thereby disrupt depositions) unless plaintiffs obtain court orders to the contrary. Plaintiffs would even need to advise defendants in advance of their intention to submit "confidential materials" to the Court, to give them an opportunity to object! Id., IV(B). Such provisions are not "universal practice," and are unprecedented to our knowledge. It is defendants' procedure--not the absence of it--that would certainly lead to "discovery [becoming] hopelessly bogged down in a series of document-by-document motions." Defs.' Joint Proposals at 22. Moreover, the chimerical "business interests" advanced as justification for the order are wholly unsubstantiated and inadequate to justify it. Equally

unjustified is the defendants' assertion that plaintiffs intend to violate the Code of Professional Responsibility unless this protective order is entered.

For the foregoing reasons, and those set forth in the attachment, the environmental plaintiffs respectfully urge that the defendants' proposed protective order be rejected.

DATED: December 18, 1989

By _____
RANDALL M. WEINER

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

EXXON VALDEZ OIL SPILL LITIGATION	)
This Document Relates to: All Cases Civil	)

Case No. 3 AN-89-2533

ENVIRONMENTAL PLAINTIFFS' REPLY MEMORANDUM ABOUT DISPUTED PROVISIONS IN THE PROPOSED DISCOVERY PRETRIAL ORDER

Presented by: Macon Cowles, Esq.
WILLIAMS, TRINE, GREENSTEIN & GRIFFITH, P.C.
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1625 Massachusetts Avenue, N.W.
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On Behalf of: NATIONAL WILDLIFE FEDERATION, WILDLIFE FEDERATION OF ALASKA, and NATURAL RESOURCES DEFENSE COUNCIL

Date: December 18, 1989

Environmental Plaintiffs support the positions of Consolidated Plaintiffs as set forth in their Reply Memorandum Regarding Disputed Provisions in the Proposed Discovery Pretrial Order. To that extent, we will not make the arguments here that are already before the Court in the pleading of Consolidated Plaintiffs. Here, we address the

ATTACHMENT A

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following issues which are covered in Consolidated Plaintiffs' Reply, but which we believe deserve additional comment: Payment of the costs of the Discovery Master and of copying documents produced during discovery; Document Predesignation, and; the Use of the Subpoena Duces Tecum.

We separately address the issue of public disclosure as against Defendants' desire for secrecy in a pleading filed today entitled "Environmental Plaintiffs' Reply to Defendants' Protective Order Proposal."

PAYMENT OF THE COSTS OF THE DISCOVERY MASTER SHOULD BE MADE BY DEFENDANTS; DEFENDANTS SHOULD ALSO PAY FOR THE COSTS OF DOCUMENTS WHICH THEY PRODUCE AND WHICH THEY REQUEST FROM THE STATE OF ALASKA.

It would be unfair to treat the parties (a) as though this were a seriously contested liability case, or (b) as though they had equal resources. The basic result of this case is not in doubt. Defendants have as much as admitted liability publicly. Responsibility for the oil spill is clear enough to Defendants that they have paid more than 10,000 claims totalling in excess of $160 million. Defendants' conduct of their business in such a way as to inflict this disaster on plaintiffs has given rise to this litigation—unprecedented in size because the environmental damage is without precedent. The costs associated with the Discovery Master are sure to be very large. The necessity of having a Discovery Master was assured when the Exxon Valdez ran aground. And the costs of the Discovery Master, whatever

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they are, should be paid by Defendants as a cost of this litigation as and when those costs arise.

Defendants pump 2,000,000 barrels of North Slope Crude to Valdez and on by tanker to the lower 48 every day. That activity produced the disaster; but it also produces a stream of income so vast that it makes them capable of winning any issue, any battle where the outcome hinges on the payment of substantial amounts of money over time. If North Slope Crude fetches $18 a barrel at current prices, Defendants have at their disposal $36 million per day as gross income from the very activity which put so much life in jeopardy. It helps to place in perspective their payment of $160 million in claims to date—a staggering sum to plaintiffs, but five days' income stream for oil corps.

DOCUMENT PREDESIGNATION IS AN ARTIFICE, SOUGHT BY DEFENDANTS SO AS TO SHIELD THEIR WITNESSES THROUGH PREPARATION AND REHEARSAL FROM THE SEARCHING TRUTH OF EXAMINATION. IT NO MORE HAS A PLACE IN DEPOSITION THAN DOES LIMITING THE QUESTIONS TO SUBJECT MATTERS AS TO WHICH THE DEPONENTS HAVE RECEIVED ADVANCE WARNING.

The credibility of parties and their witnesses is always at issue in a trial. Also at issue here are the commitment of corporate defendants to health and safety, and their commitment to acting as stewards of the nation's resources while transporting through United States waters material with devastating destructive capability. Searching questions will be asked of these corporations' agents as to their commitment and efforts—corporately and personally—to minimize or eliminate any risk of serious injury or death in transporting material

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with this killing potential. There is no better way to test the credibility of the corporation and of the witness than to be able to confront self-serving statements with corporate documents which show the contrary.

The purpose of discovery rules is not just to speed along the process. Their essential purpose is to make the process—given the number of people involved—effective at searching out the truth. If the defendants know in advance the questions that we will ask of their executives, no doubt they could practice their answers to put a better "spin" on things. But it is no more fair that we must tell them what documents we will use at depositions than to give them a list of questions that we will ask. The only appropriate place for document predesignation is in the final pretrial order setting forth witnesses and exhibits that will be presented at trial—and even there, parties need not designate impeachment material. Predesignation simply has no place in the taking of depositions.

THE SUBPOENA DUCES TECUM IS DISLIKED BY DEFENDANTS PRECISELY BECAUSE IT IS SO EFFECTIVE. IT HAS A PLACE IN ADDITION TO RULE S30 AND 34.

The Subpoena Duces Tecum is the single most useful tool available to determine a witness' knowledge where that knowledge can be traced to specific documents. It is used as an adjunct to the Request to Produce under Rule 34 and the Notice to Produce in connection with a deposition under Rule 30. If obeyed—which we assume would be the case—the Subpoena Duces Tecum will cause the

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deponent to search his or her own files relating to the subject at hand. It therefore is a more finely crafted, more precise way of involving key witnesses personally in the retrieval of documents which they have seen and on which they have written comments, impressions and directives to others within the corporate structure. Because depositions in this case are to be noticed so far in advance of their being taken, the use of Subpoenae Duces Tecum also give the parties the flexibility of being able to have a deponent bring documents to the deposition whose existence was discovered between the dates of noticing the deposition and actually taking it.

BY: _____

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I HEREBY CERTIFY THAT ON THE 18th day of December, 1989, a true and accurate copy of the foregoing ENVIRONMENTAL PLAINTIFFS' REPLY MEMORANDUM ABOUT DISPUTED PROVISIONS IN THE PROPOSED DISCOVERY PRETRIAL ORDER was mailed to all parties listed on the Master Service List, effective November 28, 1989.

Eric R. Cossman

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Liaison Counsel for Consolidated Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In Re the EXXON VALDEZ	No. A-89-095 Civil (Consolidated)
This Document Relates to: All Cases	

Filed on behalf of P1, P3, P8-P12, P13-15, P16-18, P19, P21, P22, P24-28, P30-39, P40-41, P42, P43-44, P46-55, P65-67, P73, P74-76, P77, P78-80, P81-94, P95, P96, P97-111, P112, P113, P118-138, P139-144, P145, P146-147, P165-166, P167, P168, P170-188, P189, P195-196, P202-206, P225, P246-247, P267, and P277.

CONSOLIDATED PLAINTIFFS' REPLY MEMORANDUM REGARDING DISPUTED PROVISIONS IN THE PROPOSED DISCOVERY PRETRIAL ORDER

I. Introduction

The consolidated plaintiffs submit the following memorandum in reply to "All Defendants' Joint Proposals Supplemental To

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The Agreed Procedures For Discovery And Discovery Scheduling" ("Defendants' Memo") which was filed on December 11, 1989.[1]

II. Disputed Provisions

A. Coordination of Discovery With Law and Motion Proceedings

Defendants contend that the purpose of their proposal is only to "require the parties to consider the interaction of legal motions on the scheduling of discovery . . .", Def. Mem. at 2 (emphasis added); and further, that this proposal "merely directs the parties to use common sense in scheduling discovery." Def. Mem. at 4 (emphasis added). If this is truly the sole purpose and directive of defendants' suggested provision, then consolidated plaintiffs' proposed language achieves these objectives and any additional language is simply unnecessary. See Pl. Mem. at 3. However, since defendants insist upon additional language, the import of their proposal must be more than they state.

Instead of merely directing the parties to consider the potential impact of law motions on the scheduling of discrete aspects of discovery, the broad language of defendants'

[1] To the extent that the State of Alaska concurs with the positions expressed by the defendants, plaintiffs' comments herein are addressed to the State as well.

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proposal ascribes a paramount importance to law motions by commanding that their filing or resolution govern the timing and scope of potentially all discovery.[2] Thus, defendants' provision in effect creates a court-sanctioned presumption that the scheduling of discovery should always be subordinated to the scheduling of law motions. As previously stated in plaintiffs' Opening Memo, the coordination of discovery with law proceedings should be resolved on a "fact-specific" basis at the time or after such motions are filed.[3] Any other procedure for coordinating discovery with legal proceedings is unproductive "in light of the array of claims and contentions advanced in the pleadings. . . ." Def. Mem. at 9.

B. Inadvertent Production of Privileged Materials

Defendants oppose plaintiffs' proposal since it allegedly would require additional review of all produced discovery materials "at the cost of countless lawyer and paralegal

[2] In relevant part, defendants' proposal directs that "[i]n determining a schedule for legal motions, the parties shall also coordinate discovery scheduling to defer discovery that may be rendered unnecessary or to expedite discovery concerning issues that may lead to legal rulings narrowing or simplifying this litigation." Def. Mem. at 3 (emphasis added).

[3] The fact that Exxon Shipping "has made payments to over 10,000 claimants", Def. Mem. at 4, n. 1, is completely irrelevant to the issue of coordinating discovery with law and motion proceedings.

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hours." Def. Mem. at 7 (emphasis added). However, defendants' assumption is based on the erroneous premise that there is no need to assiduously review produced discovery materials for privilege claims until some undefined "substantive need" should later arise "in conjunction with case preparation". See Def. Mem. at 7.

As defendants themselves point out, the Discovery Plan places a duty on all parties to make a diligent effort to review discovery information for any applicable privilege claim when responding to any request for such information.[4] See § II,D,1. See also Def. Mem. at 6. Moreover, defendants' own proposal for a "special protective order" regarding confidential information also envisages that discovery materials will be reviewed at the time they are produced. Thus, defendants' assertion that plaintiffs' proposal would somehow require an onerous "re-review" of produced materials which might otherwise be avoided is dubious.

[4] Although plaintiffs' proposal allows the parties an additional sixty (60) days after production to assert claims of privilege, this provision is not intended to exempt the parties from the express obligations otherwise set forth in the Discovery Plan to make a diligent effort to review materials in order to assert any applicable privilege claims when responding to discovery requests. Rather, it is simply intended to temper the ordinary and unavoidable burdens occasioned by a document-by-document review of voluminous materials in the course of production in a complex case such as this.

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Defendants also argue that the parties will suffer no prejudice by permitting any applicable privilege claim to be promptly asserted upon actual discovery of inadvertently disclosed information. Def. Mem. at 7. To the contrary, the substantial prejudice to both the requesting party and the overall case development which would result from such deferral has been set forth in detail in plaintiffs' Opening Memo. See Pl. Mem. at 4-6.

C. Augmentation of the Discovery Plan

Defendants' proposal provides for the parties to "confer regularly to establish deadlines for successive stages in the discovery process." Def. Mem. at 8. However, defendants' proposal, and its underlying rationale, ignore the procedures already set forth in the Discovery Plan.

The intended operation of the Discovery Plan, as set forth in unequivocal terms, provides for discovery to advance as expeditiously as the parties agree is reasonable or, alternatively, that any scheduling disagreements shall be submitted to the Discovery Master for determination. For example, as regard the timing for "Subsequent Sets Of Document Requests", Section V,A,1(b) provides that:

> [t]he timing of subsequent sets of document requests shall be determined by the agreement of the designated counsel for each side. In the event agreement cannot be reached as to timing, each side shall be entitled to submit the matter to

the discovery master for determination. Notwithstanding this provision, nothing herein shall be construed to preclude plaintiffs or defendants from moving before the Discovery Master to allow the service of subsequent sets of requests before resolution of all outstanding issues regarding the first set of document requests or any other prior sets that have been served.

The Plan contains a comparable provision regarding "Subsequent Phase Interrogatories". See § V,B,2(b). Accordingly, defendants' proposal for augmentation is superfluous.

D. Protective Orders

1. General Protective Order

Plaintiffs rely upon and incorporate herein by reference the comments in their Opening Memo concerning defendants' proposed "general protective order". See Pl. Mem. at 7. Even defendants conclude that the proposed "general protective order" is "nothing more than an affirmation" of general professional responsibility since it "merely confirms" that discovery material should not be used for unauthorized purposes.[5] See Def. Mem. at 20, 22 (emphasis added). See also Pl. Mem. at 7. As such, inclusion of this suggested order in the Discovery Plan is unnecessary. To the extent the "general protective

[5] Defendants themselves cite Alaska DR 7-107(G) in arguing that "it is unprofessional and arguably improper for counsel to seek or use discovery information for unauthorized purposes." Def. Mem. at 21.

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order" requested by defendants may be interpreted as imposing greater restrictions than required by the Code of Professional Responsibility, consolidated plaintiffs object to its inclusion for the reasons stated in the responsive memoranda filed by plaintiffs' environmental constituents.

2. Special Protective Order

Plaintiffs rely upon and incorporate herein by reference the comments in their Opening Memo concerning defendants' proposed "special protective order". See Pl. Mem. at 7-9. By way of further response, plaintiffs object to defendants' apparent intention to have this Court impose blanket protective orders regarding the products of discovery under the guise of expediting the pre-trial process.

First, while it may be true that under certain circumstances a blanket protective order may initially expedite discovery, such an approach would place an unfair economic burden on plaintiffs. As stated by the environmentalists in their memorandum concerning the use of protective orders, "defendants are in a much better position to identify those of their documents which require protection from disclosure and justify that protection than plaintiffs are able to review the entirety of the defendants' discoverable records and justify requests

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for disclosure." See "Environmental Plaintiffs' Statement of Position on Discovery and the Use of Protective Orders" at 15.

Second, the provision in the Discovery Plan concerning inadvertent production of privileged materials places a duty on all parties to make a diligent effort to review discovery information for any recognized evidentiary or discovery privilege claim when responding to any request for such information. See § II,D,1 and supra at 3-4. Since the parties shall be reviewing all responsive discovery materials at the time they are produced, a blanket protective order in this case cannot even expedite discovery in the short run.

Finally, consolidated plaintiffs concur with the positions stated in the memoranda filed by the environmentalists regarding defendants' attempt to use blanket protective orders to improperly frustrate the broad public interest in this important civil litigation by precluding the public from access to much of the pretrial process and discovery.[6] Moreover,

[6] While Section VII,C of the Discovery Plan provides that the parties' memoranda concerning discovery disputes shall be initially filed under seal with the Discovery Master, the use of this device in submitting matters for resolution is in no fashion intended to limit the public's access to these materials. Rather, this procedure is for the sole purpose of avoiding undue delay by insuring that the decision package shall already be in the Master's possession in the event the parties are still unable to resolve disputes between themselves after exchanging briefs.

Likewise, the provision in the Discovery Plan restricting attendance at a deposition has been included to resolve the logistics of accomodating potentially large numbers of individuals attending the depositions. Consolidated plaintiffs

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consolidated plaintiffs submit that resolution of the disputes regarding the use of protective orders in these proceedings should not delay the commencement of discovery. See Def. Mem. at 24.

E. Timing of the Comprehensive First Set of Document Requests

Defendants propose that the comprehensive First Set of Document Requests may not be served until forty-five (45) days after submission of answers to Phase One Interrogatories concerning witness and document identification. See § V,B,2(a)(ii). However, in drafting the Discovery Plan, consolidated plaintiffs never contemplated that service of the First Set of Document Requests would in some fashion be contingent upon the service of -- or answers to -- Phase One Interrogatories. Plaintiffs' intention is now, and has always been, to negotiate a scheduling plan which would allow for discovery to proceed as expeditiously as is reasonably possible. To this end, plaintiffs have suggested that all methods of discovery should commence simultaneously upon entry of an Order approving the proposed Discovery Plan. See Pl. Mem. at 2.

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do not dispute the arguments advanced by the environmentalists concerning the rights of others to attend upon proper application and notice to the Court.

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According to defendants' proposal, plaintiffs would be required to wait 105 days from the date they serve Phase One Interrogatories before even being permitted to serve their initial document requests.[7] Moreover, plaintiffs would still not have an opportunity to actually inspect and copy documents for an additional seventy-five (75) days.[8] See § V,A,2.

In sum, assuming discovery commences on January 15, 1990, defendants' proposal would effectively delay document discovery so that the earliest date on which plaintiffs could even begin to inspect and copy defendants' documents would be July 14, 1990. In addition, defendants take their proposal even further, arguing that "the identification of appropriate witnesses and the collection of relevant documents . . . [in response to both Phase One Interrogatories and the First Set of Document Requests] must be accomplished before depositions

[7] Pursuant to the Plan, responses to interrogatories are due sixty (60) days after service. § V,B,3. Pursuant to defendants' proposal, plaintiffs would be required to wait an additional forty-five (45) days after submission of answers to Phase One Interrogatories before serving comprehensive document requests. Def. Mem. at 27. Of course, this calculation assumes that defendants would fully answer -- without objection -- plaintiffs' Phase One Interrogatories. It is unclear from defendants' proposal whether the existence of objections would further delay the time for service of the comprehensive First Set Of Document Requests.

[8] Again, this calculation assumes that defendants would fully answer -- without objection -- plaintiffs' comprehensive First Set Of Document Requests.

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should be commenced." Def. Mem. at 36. Applying this approach, plaintiffs cannot even estimate the approximate date on which defendants' proposal would permit the commencement of deposition scheduling procedures.

Defendants contend that in the absence of their proposed timing provision, the first set of document requests cannot, by definition, be "comprehensive"; and thus, "the whole effort of responding to document identification interrogatories will turn out to be so much busy work." Def. Mem. at 29.[9] However, in making this assertion, defendants incorrectly imply that the Plan's use of the word "comprehensive" literally requires that the initial requests for production be exhaustive. To the contrary, the Plan only requires that the parties shall make a good faith effort in their initial document requests to seek all documents which they fairly and reasonably believe are necessary, and further recognizes that subsequent sets of document requests will undoubtedly be served. See § V,A,1(b).

[9] Plaintiffs contend that requests to produce specific documents are distinct in purpose and nature from interrogatories seeking the identification or location of documents. Moreover, to the extent that these two methods of discovery may elicit responses regarding the same documents, it is efficient and economical that the responding party should answer interrogatories seeking the identification or location of documents at the same time as they respond to requests for production of documents.

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Phase One Interrogatories concerning witness and document identification, as well as the comprehensive First Set of Document Requests, are both intended to begin the winnowing process of discovery so that subsequent sets of document requests and interrogatories on the merits may be served to advance the litigation. Defendants' proposal would totally frustrate this purpose by inordinately delaying all methods of discovery. The fact that consolidated plaintiffs have agreed -- solely in deference to the request of the "large organizations" involved in this litigation -- to attempt to serve as comprehensive a set of document requests as is reasonably possible, does not change the purpose of these initial sets of discovery.

F. Scope of Subsequent Document Requests

In their Opening Memo, plaintiffs foretold of certain perils which would arise from defendants' proposed language limiting the scope of subsequent sets of document requests. See Pl. Mem. at 9-11. Indeed, defendants' interpretation of this language, as set forth in their Memo, confirms plaintiffs' concerns.

Defendants contend that their provision expressly precludes the "submission of subsequent requests for documents that could and should have been included in the original comprehensive

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request." Def. Mem. at 31 (emphasis added). As plaintiffs previously cautioned, this broad standard will not permit the parties to later serve any document requests which may have inadvertently "'slipped through' the[ir] . . . [initial document] screen". Def. Mem. at 7; see also Pl. Mem. at 10.

Moreover, while defendants urge that a "good faith test" should be used in restricting the scope of subsequent document requests, they themselves concede that their provision "will have to be administered with judgment because it is not always possible to foresee the development of the issues at the outset." Def. Mem. at 31. In these circumstances, where the parties will certainly become hopelessly bogged down in disputes concerning whether good faith was in fact exercised, defendants' so-called "test" to restrict subsequent document requests is simply impracticable. See Pl. Mem. at 9-11.

G. Cost of Copying Produced Documents

Defendants state that "[t]he standard practice in all discovery is that the party seeking production of documents pays for the cost of copying any documents the inspecting party desires." Def. Mem. at 32 (emphasis added). To the contrary, as previously cited by plaintiffs in their Opening Memo, the Manual For Complex Litigation 2d provides that the party opposing the filing of documents in a central depository should

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bear the expense of making copies for other parties. See § 21.444; see also Pl. Mem. at 12.

Defendants also suggest that placing the obligation to pay for the cost of copies upon the requesting party will serve as a deterrent to "irresponsible or over broad copying requests." Def. Mem. at 33. It is equally true, however, that placing this obligation upon the producing party will serve as a deterrent to irresponsible and over broad productions of millions of nonresponsive or duplicative documents.

H. Timing of First Phase Interrogatories

Plaintiffs agree that First Phase Interrogatories may be served upon entry of the Discovery Plan or January 15, 1990, whichever is later. See Pl. Mem. at 2.

I. Timing of Requests For Admissions

Plaintiffs agree that Requests For Admissions may be served upon entry of the Discovery Plan or January 15, 1990, whichever is later. See Pl. Mem. at 2. However, plaintiffs strongly disagree with defendants' belief that Requests For Admissions may not "be constructive at this very early stage of the litigation." Def. Mem. at 35. Rather, plaintiffs submit that, in the unique circumstances of this case, admitted matters may substantially narrow the issues for future discovery by

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enabling the parties to avoid the burdensome accumulation of proof.

J. Commencement of Depositions

Plaintiffs agree that the scheduling of depositions should commence upon entry of the Discovery Plan or January 15, 1990, whichever is later. See Pl. Mem. at 2. However, as previously stated, plaintiffs strenuously dispute defendants' contention that First Phase Interrogatories and the comprehensive First Set Of Document Requests must be completed prior to scheduling depositions. See discussion supra at 8-11, regarding "Timing of the Comprehensive First Set of Document Requests". Moreover, plaintiffs disagree that the provisions in the Discovery Plan prohibiting repetitive discovery require that depositions of all witnesses must await the completion of mass exchanges of hundreds of thousands, or even millions, of documents.

K. Document Requests to Party Deponents

Plaintiffs rely upon and incorporate herein by reference the comments in their Opening Memo concerning the absolutely vital importance of a provision permitting document requests to be directed to party deponents in accordance with Fed.R.Civ.P. 30(b)(5). See Pl. Mem. at 12-14.

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L. Place of Depositions

Plaintiffs rely upon and incorporate herein by reference the comments in their Opening Memo concerning the place of depositions. See Pl. Mem. at 14-16. In addition, plaintiffs also wish to make express their understanding that different tracks of simultaneous depositions of non-party deponents may be held in different geographical regions and that depositions of party deponents may be scheduled to take place at the same time as non-party deponents.

M. Deposition Exhibit Predesignation

Plaintiffs rely upon and incorporate herein by reference the comments in their Opening Memo concerning optional -- as opposed to mandatory -- document predesignation. See Pl. Mem. at 16-18. As expressed therein, it is examining counsel's legitimate prerogative to directly confront a witness about his specific knowledge of an event or document, and to control the examination in a fashion which allows him to test the witness' integrity. That mandatory predesignation can be utilized to undermine this prerogative is perhaps best evidenced by defendants' expressed apprehension that, without such a provision, witnesses will not have an opportunity to review

documents or be certain about the areas the noticing party intends to cover. See Def. Mem. at 43.

N. Objections - Continuation of Deposition

Plaintiffs rely upon and incorporate herein by reference the comments in their Opening Memo concerning this disputed provision. See Pl. Mem. at 18-19.

O. Discovery Master's Compensation

Consolidated plaintiffs rely upon and incorporate herein by reference their comments concerning compensation for the Discovery Master as set forth in the separate filing made in response to Judge Shortell's Pretrial Order No. 5, a copy of which is attached as Exhibit "A" to consolidated plaintiffs' December 11, 1989 submission.

III. Conclusion

For the reasons set forth herein, consolidated plaintiffs respectfully request that the joint proposed Discovery Plan should be entered as an order governing discovery procedures and scheduling, as modified by their comments set forth in

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plaintiffs' respon-sive memoranda concerning disputed provisions filed on December 11, 1989 and December 18, 1989.

DATED this 18th day of December, 1989.

Lloyd Benton Miller
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Liaison Counsel for
Consolidated Plaintiffs

David Berger
Harold Berger
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Co-Chairmen Investigation
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

PRE-TRIAL ORDER NO. 9

Organization of Plaintiffs' Counsel

Plaintiffs' cases shall be managed through a case management team constituted as follows:

Plaintiffs' Lead Counsel

Jerry S. Cohen (Cohen, Milstein & Hausfeld) and David Oesting (Davis, Wright & Jones) are appointed as plaintiffs' lead counsel.

Plaintiffs' lead counsel shall be generally responsible for coordinating the activities of plaintiffs during pre-trial proceedings and shall:

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(1) Determine and present to the court and opposing parties the position of the plaintiffs on all matters arising during the pre-trial proceedings;

(2) Coordinate the initiation and conduct of discovery on behalf of plaintiffs consistent with the requirements of Rule 26(g), Federal Rules of Civil Procedure, including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;

(3) Conduct settlement negotiations on behalf of plaintiffs, but without authority to enter binding agreements except to the extent expressly authorized;

(4) Delegate responsibilities for specific tasks to other counsel in a manner to assure that pre-trial preparation for the plaintiffs is conducted effectively, efficiently, and economically;

(5) Monitor the activities of co-counsel to assure that schedules are met and unnecessary expenditures of time and money are avoided; and

(6) Perform such other duties as may be incidental to proper coordination of plaintiffs' pre-trial activities or authorized by further order of the court.

Lead counsel shall provide oversight for all committees and the co-chairmen shall formulate the controlling policies for coordination and management of all plaintiffs' cases, including any hereafter filed.

The Executive Committee

The Executive Committee shall consist of the following:

(1) Jerry S. Cohen (Cohen, Milstein & Hausfeld)

(2) Richard F. Gerry (Bixby, Cowan & Gerry)

(3) David W. Oesting (Davis, Wright & Jones)

(4) Peter Byrnes[1] (Byrnes & Keller)

(5) Kenneth Adams (Dickstein, Shapiro & Morin)

(6) N. Robert Stoll[2] (Stoll, Stoll, Berne & Lokting, P.C.)

(7) Macon Cowles; Williams, Trine, Greenstein & Griffith, P.C.

The Executive Committee shall have day-to-day operational and management authority for all cases in areas not specifically delegated to the Operations Committees, subject only to the policies established by lead counsel. This authority includes, but is not limited to, dealing with the defendants and the courts on all issues and matters not otherwise specified herein except as to settlement. It shall also coordinate the work of all committees.

---

1 Alternate: Michael W. Dundy (Hartig, Rhodes, Norman, Mahoney & Edwards) (Alternates may appear for and vote for members of all committees.)

2 Alternate: Matthew Jamin (Jamin, Ebell, Bolger & Gentry)

Operations Committees

The chairpersons of the Operations Committees shall be the following:

(1) Discovery Committee

David Berger (Berger & Montague)

Charles Ray (Hansen & Ray)[3]

The Discovery Committee shall perform the following functions:

(a) To prepare, pursuant to order of the Court, a structured plan of discovery which will assure, to the greatest degree possible, a streamlined and consolidated discovery procedure to effectuate and maximize economies in the expenditure of judicial and law firm time.

(b) In accordance with such structured plan of discovery, as approved by the court, to prepare and serve on behalf of all plaintiffs the following:

(i) interrogatories;

(ii) requests for production of documents on parties and subpoenas duces tecum on non-parties;

(iii) requests for inspection of the vessel and other physical things;

(iv) notices of depositions; and

(v) requests for admissions.

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[3] An association formed for purposes of these cases. Alternate: John T. Hansen.

(c) To maximize the use of consistent methods for authentication and identification of documents and things.

(d) To organize discovery to ensure that in every respect the requirements for the plaintiffs to establish their cases in full and to support all complaints, including the consolidated amended complaint, are met, while avoiding unnecessary duplication.

(e) To structure a plan for conferring with counsel for adverse parties in order to resolve, to the extent possible, issues arising in the course of discovery in order that extensive briefing and court appearances may be avoided.

(f) To structure a plan for the most effective and economical use of the Discovery Master.

(g) To submit to the court and the Discovery Master for consideration a deposition protocol to control all deposition discovery on a uniform basis, with a view to avoiding as far as possible resort to the court for resolution of controversies which frequently arise during the course of depositions.

(h) To prepare a plan for the creation of the most convenient and economical document depository.

(2) Law Committee

Melvyn I. Weiss (Milberg, Weiss, Bershad, Specthrie & Lerach)

Jeffrey Smyth (Adolph & Smyth)

The Law Committee shall perform the following functions:

(a) The Law Committee shall have responsibility to plaintiffs' lead counsel and the Executive Committee for identifying, analyzing, evaluating, and researching all issues which will require legal briefing and/or the filing of motions regarding both class actions and direct actions. However, class certification issues shall be dealt with separately by an ad hoc committee chaired by Melvyn I. Weiss, comprised of counsel for class plaintiffs.

(b) The Law Committee shall have responsibility for entering into agreements and stipulations with defendants with respect to law and motions, and for scheduling the briefing of motions, responses, and replies.

(c) The Law Committee shall have responsibility for coordinating the preparation of legal memoranda and the trial briefs in this action, as well as responses to opposing legal memoranda and trial briefs.

(d) The Law Committee shall participate in the presentation of legal issues to the court in coordination with the Executive Committee and plaintiffs' lead counsel.

(e) The Law Committee shall also participate in the development of the legal theories upon which this case will be prosecuted, in preparations for trial, and shall assist in the trial of the case.

(f) In the event of an appeal of any issue, interlocutory or otherwise, or any application for an extraordinary writ with respect to any issue arising in this case, the Law Committee

shall have responsibility for making such appeals or applications, or any responses in reply thereto.

(3) Damages Committee

Michael E. Withey (Schroeter, Goldmark & Bender)

Tim Petumenos (Birch, Horton, Bittner & Cherot)

John G. Young (John G. Young & Assoc.)

Melvin Belli[4] (Belli, Belli, Brown, Monzione, Fabbro & Zakaria)

The Damages Committee shall perform the following functions:

(a) Recommending the retention of experts, including the approval of fees and disbursements for the work of such experts;

(b) Working with those experts retained by the committee in developing discrete theories of damages common to all parties;

(c) Coordination and monitoring of experts' work, including regular contact, possible participation in field studies, monitoring of experts' record-keeping procedures, and other incidentals relating to the investigations to be carried out by such experts;

(d) Quantifying damages and preparing experts' testimony for presentation at trial, including, but not limited to,

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[4] Alternate: Steven D. Smith (Smith, Coe & Patterson)

working with experts on the development of reports, visual aids, and all things necessary for the preparation of expert testimony at trial;

(e) Researching and reporting on legal theories of damages;

(f) Preparing appropriate damage discovery of Exxon and Alyeska, and responding to Exxon- and Alyeska-initiated damage discovery of plaintiffs;

(g) Liaison with state and federal authorities on damage issues;

(h) Defending, analyzing, and refuting Exxon's evidence tending to minimize or disprove damages claimed by plaintiffs; and

(i) Developing proofs necessary for the establishment of punitive and/or statutory damages.

(4) Government Liaison Committee

Lewis Gordon (Ashburn & Mason)

Raymond Gillespie

The Government Liaison Committee will perform the following functions:

(a) Serve as liaison for the private plaintiffs to the State of Alaska, including all of its agencies and governmental bodies, both administrative and legislative.

(b) Serve as liaison for the private plaintiffs with the United States Government, including all of its agencies and governmental bodies, both administrative and legislative.

(5) Equitable Relief Committee

The plaintiffs may agree upon such a committee, with duties as described in paragraph 5 of plaintiffs' proposed pre-trial order, if they deem it necessary and if they propose a slate of candidates from which the court may appoint appropriate members. The court has chosen not to create an Equitable Relief Committee at this time because of the lack of specific candidates for membership and its uncertainty as to the need for such a committee.

The Operations Committees shall have responsibility in each of their designated areas to perform all tasks as are appropriate to carry out such responsibility, including the authority to deal directly with the defendants and the courts subject to the policies established by lead counsel and coordination by the Executive Committee.

Liaison Counsel

Lloyd Benton Miller (Sonosky, Chambers, Sachse & Miller) shall be plaintiffs' liaison counsel to the court. His duties are:

(1) To maintain and distribute to co-counsel and to defendants' liaison counsel and up-to-date service list;

(2) To receive and, as appropriate, to distribute to co-counsel orders from the court and documents from opposing parties and counsel;

(3) To attend all Executive Committee meetings as a non-voting member and assume such duties as designated by lead counsel and the Executive Committee;

(4) To serve as liaison to the court on procedural and scheduling matters; and

(5) To maintain and make available to counsel at reasonable hours a complete file of all documents served by or upon each party (except such documents as may be available at a document depository).

State of Alaska

The State of Alaska shall designate an individual who shall serve as an ex officio member of the Executive Committee. The State shall cooperate and work fully with the lead counsel. However, the State shall have the right to present matters to the court or pursue discussions or discovery with the defendants independently of lead counsel under appropriate circumstances and subject to the court's discretion.

Other Counsel

Plaintiffs' counsel who disagree with an action or inaction of lead counsel, or of the Executive Committee, or any of the Operations Committees (or those acting on behalf of those committees), or who have individual or divergent positions, may present written and oral arguments, conduct examination of deponents, and otherwise act separately on behalf of their clients as long as:

(1) They first attempt to resolve the matters involved with the appropriate persons or committees.

(2) They are not duplicative of those efforts undertaken by lead counsel, or one or more committees or their representatives; and

(3) They comply with all existing orders and directives of the court.

Fees

The matter of fees for those designated above has not been discussed in this order. On or before January 31, 1990, plaintiffs' counsel shall agree upon a fee structure for those counsel appointed herein, agree upon a method for payment, and advise the court in camera of the terms of this agreement. In the event no such agreement can be reached, counsel shall advise the court what disagreements have arisen. The court will resolve any disagreements after soliciting such information from plaintiffs as it deems necessary.

DATED at Anchorage, Alaska, this 22 day of December, 1989.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: All cases

AFFIDAVIT OF SERVICE

On the 22nd day of December, 1989, service of Pre-Trial Order No. 9, Organization of Plaintiff's Counsel has been made upon all counsel of record based upon the court's master service list of November 28th, 1989.

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

PRE-TRIAL ORDER NO. 10

Organization of Defendants' Counsel

Pursuant to submissions by counsel, it is ordered that defendants' counsel shall be organized as follows:

Liaison Attorney

(1) Douglas J. Serdahely shall be defendants' liaison counsel.

(2) Defendants' liaison counsel shall be responsible for receiving formal notices from the court on all matters pertaining to this consolidated litigation.

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(3) Liaison counsel shall promptly provide all defendants' counsel with copies of orders or other communications from the court.

(4) Plaintiffs shall serve one copy of all pleadings on defendants' liaison counsel who shall then be responsible for serving the same on all defendants.

(5) In the event that liaison counsel is unavailable, he will appoint a temporary liaison counsel to act in his absence.

Coordinating Committee

(1) Douglas J. Serdahely and Charles P. Flynn shall be defendants' Coordinating Committee. Such committee shall:

(a) meet with and work with plaintiffs' counsel on coordination matters;

(b) contact all defendants' counsel and obtain their positions on coordination matters;

(c) consolidate defendants' submissions to the court to the maximum extent possible;

(d) act on stipulations extending time and other administrative agreements;

(e) coordinate activities of defendants pursuant to existing and future orders of the court; and

(f) otherwise coordinate defendants' activities.

(2) In the event that either Coordinating Committee member is unavailable, he will appoint a temporary Coordinating Committee member to act in his absence.

Executive Committee

(1) Charles W. Bender, Richard M. Clinton, and Robert S. Warren shall be defendants' Executive Committee. Defendant Trans-Alaska Pipeline Liability Fund shall have the right to designate a mutually acceptable member to the Executive Committee should the Fund deem it necessary or desirable. The function of the Executive Committee is to develop, with the input and approval of all defense counsel, case management and organizational decisions for the defendants. The Executive Committee may, with the consent of all defendants, designate individual attorneys to speak as the representative of all defendants with regard to specific matters. Attorneys so designated shall have the same authority as members of the Executive Committee, and specifically shall be empowered to bind all defendants to stipulations and agreements concerning discovery and other case management issues. Such designations shall be made by written notice to plaintiffs' liaison counsel, and defendants' liaison counsel shall be responsible to know at all times the identity of the person or persons authorized to speak for defendants on any specific issue.

(2) Members of the Executive Committee and attorneys designated by the Executive Committee to act on behalf of defendants with respect to specific issues shall be prepared and able to devote full time to their assignments as, when, and where necessary. Defendants' Executive Committee or attorneys designated by the Executive Committee will have the authority to represent defendants on any matters pertaining to case management.

(3) All decisions and actions taken by the Executive Committee shall be by unanimous consent of the members of that committee.

(4) No decision or action taken by the Executive Committee or their designees can bind any defendant without the consent of such defendant.

Privileged Communications

Disclosures and discussions among defendants' attorneys and/or their parties shall not constitute a waiver of any otherwise applicable attorney-client privilege or work product protection.

DATED at Anchorage, Alaska, this 22 day of December, 1989.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

RE: All cases

AFFIDAVIT OF SERVICE

On the 22nd day of December, 1989, service of Pre-Trial Order No. 10, Organization of Defendnant's Counsel has been made upon all counsel of record based upon the court's master service list of November 28th, 1989.

Deputy Clerk