IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	Case A89-095 Civil
	)	(Consolidated)
the EXXON VALDEZ	)	

Re: Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

NOTICE OF MOTION BY DEFENDANTS D-3, D-9, D-11, D-12, D-14, D-19, D-20, AND D-21 FOR JUDGMENT ON THE PLEADINGS

Defendants ALYESKA PIPELINE SERVICE COMPANY (D-3), AMERADA HESS PIPELINE CORPORATION (D-11), ARCO PIPE LINE COMPANY (D-12), BP PIPELINES (ALASKA), INC. (D-19), MOBIL ALASKA PIPELINE COMPANY (D-14), PHILLIPS ALASKA PIPELINE CORPORATION (D-20), UNOCAL PIPELINE COMPANY (D-21), and GEORGE M. NELSON (D-9) (hereinafter collectively referred to as "Defendants") hereby move, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings dismissing each and every claim of certain plaintiffs in the above-referenced proceedings on the ground that each such claim fails to state a claim upon which relief can be granted.

The specific plaintiffs that are the subject of this motion are identified in Appendix A hereto, which sets forth the

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Complaints and, for each such Complaint, the named plaintiffs to whom this Motion pertains.

This Motion is made on the grounds that the identified claims are subject to dismissal because the plaintiffs making them do not complain of any physical impact or injury from the oil on their person or property. Under long-standing maritime law principles a tort claimant (other than a commercial fisherman) cannot recover for purely economic losses or claimed interference with use and enjoyment of resources where such loss or interference does not arise from physical injury to the claimant's person or property.

The Motion will be based upon this Notice, the accompanying Memorandum of Points and Authorities in Support of the Motion, all pleadings and papers on file herein, and such further argument or evidence, oral or written, as the Court may entertain upon the hearing of this Motion.

DATED: February 23, 1990

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By: _____
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APPENDIX A

Amended and Consolidated Class Action Complaint in The Eyak Native Village, et al. v. Exxon Corporation, et al. Case Nos. 3AN-89-4110, etc. (including No. 3AN-89-2665, No. 3AN-89-5188, and No. 3AN-89-5465).

The Motion applies to each cause of action, separately and independently, alleged by the following plaintiffs against moving defendants:

Sea Hawk Seafoods, Inc. (para. 47)

Sagaya Corporation (para. 48)

Seafood Sales, Inc. (para. 49)

Rapid Systems Pacific, Ltd. (para. 50)

Alaska Wilderness Sailing Safaris (para. 51)

The Alaska Sportfishing Association (para. 52)

Michael L. Stanley (para. 53)

Jeff Yates (para. 54)

Tony Lee (para. 55)

Allen Tygert (para. 56)

Tom Elias (para. 57)

Bruce Cooper et al. v Exxon Corporation, et al., Case No. 3AN-89-4493.

The Motion applies to each cause of action, separately and independently, alleged by all plaintiffs against moving defendants.

Icicle Seafoods, Inc. et al. v. Alyeska Pipeline Service Company, et al., Case No. 3AN-89-5272.

The Motion applies to each cause of action, separately and independently, alleged by all plaintiffs against moving defendants.

Region 37, Inland Boatmens' Union, et al. v. Exxon Corporation, et al., Case No. 3AN-89-5461.

The Motion applies to each cause of action, separately and independently, alleged by all plaintiffs against moving defendants.

National Wildlife Federation, et al. v. Exxon Corporation, et al., Case No. 3AN-89-6957.

The Motion applies to each cause of action, separately and independently, alleged by all plaintiffs against moving defendants.

The Copper River Fishermens' Cooperative v. Exxon Corporation, et al., Case No. 3AN-89-7126.

The Motion applies to each cause of action, separately and independently, alleged by this plaintiff against moving defendants.

Ron Ozmina, et al. v. Exxon Corporation, et al., Case No. 3AN-89-9389.

The Motion applies to each cause of action, separately and independently, alleged by all plaintiffs against moving defendants.

First Amended Consolidated Class Action Complaint in Hugh Wisner, et al. v. Exxon Corporation, et al., Case No. 3KO-89-265.

The Motion applies to each cause of action, separately and independently, alleged by the following plaintiffs against moving defendants:

The Karluk Lodge, Inc. (para. 9, 32(d))

Kodiak Salmon Packers, Inc. (para. 10)

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FOR THE DISTRICT OF ALASKA

In re	)	Case A89-095 Civil
	)	(Consolidated)
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RE: Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS D-3, D-9, D-11, D-12, D-14, D-19, D-20 AND D-21 FOR JUDGMENT ON THE PLEADINGS

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I.

INTRODUCTION

This motion calls for application of well-established principles of maritime law to dismiss actions brought by plaintiffs whose only purported damages in these proceedings are of the type not recoverable in maritime cases.

As the voluminous pleadings make clear, the grounding of the "Exxon Valdez" has spawned a seemingly boundless variety of claims from all quarters by plaintiffs asserting damage in some form from this marine incident. The extensive variety of claims arising from this spill is not unique, however. Indeed, in prior maritime pollution cases courts have addressed an equally wide array of claims and repeatedly have dismissed actions of the type at issue here through application of a "bright-line" test rejecting claims other than those flowing from physical damage to a plaintiff's person or property. This integral feature of maritime law is the fulcrum of the carefully-struck balance between compensation for traditionally recognized victims of maritime accidents and the federal policy of fostering a uniform and predictable environment in which maritime commerce may be conducted. Thus, the courts consistently have reaffirmed this rule in light of the stifling unpredictability that would result from indeterminate and limitless liability in the rule's absence.

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Many of the plaintiffs presently seeking recovery in these actions assert solely those claims that the controlling test rejects: claims for purely economic damages where there has been no physical injury to a plaintiff's person or property. It is these plaintiffs to whom this motion is addressed.[1/] Dismissal of such claims at this stage is critical to the efficient progress of this litigation on behalf of those other plaintiffs who, at least, plead some form of damage that is legally cognizable. Accordingly, it is appropriate now for the Court to consider and to grant this motion to dismiss.

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1/ As indicated in the Notice of Motion and Appendix A thereto, this motion is directed only to named plaintiffs who appear to be unable to state any claims arising from physical injury or impact to their person or property from oil spilled in the "Exxon Valdez" grounding. Accordingly, named plaintiffs who claim actual impact from the oil, such as the Kodiak Island Borough, for example, are not addressed at this stage of the proceedings, even though certain of the damages they allege, i.e., economic damages that do not flow from the claimed physical impact of oil, will be equally subject to dismissal under this rule through summary judgment. Finally, of course, this motion does not address unnamed members of the purported class actions not certified, many of whose claims also appear likely to prove fatally defective for lack of any physical impact or injury.

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II.

BACKGROUND

The allegations in these consolidated actions present the Court with a classic maritime tort.[2/] According to the complaints, shortly after midnight on March 24, 1989, the tanker "Exxon Valdez" struck Bligh Reef in Prince William Sound, rupturing several of its cargo tanks and spilling an estimated 11 million gallons of oil into the Sound. As the Court is well aware, literally hundreds of plaintiffs since have filed lawsuits, some individually and others on behalf of several purported classes. Although the specific allegations relating to the defendants' conduct differ among the various complaints, the gravamen of each complaint is largely the same, asserting that defendants negligently caused the grounding to occur, were negligent in their efforts to contain and clean up the oil, and had misrepresented their ability to respond to oil spills in the navigable waters of the Sound.

With respect to the damage allegations, however, the variety of plaintiffs, and of the circumstances of their alleged injuries, is enormous. Plaintiffs include, of course, commercial

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2/ There are at least 120 active complaints pending in the consolidated "Exxon Valdez" proceedings in the State and Federal Courts. The statement of factual allegations in this memorandum does not purport to be a recital of the allegations in any specific complaint, but, instead, represents allegations that appear generally in all of the pleadings.

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fishermen and owners of real or personal property that allegedly was injured by direct physical impact from the spill. Beyond these, however, the consolidated complaints reflect a wide range of parties seeking purely economic damages who can claim no physical injury to their persons or property. These plaintiffs, who are the subject of this motion, include the following:[3/]

(1) "AREA BUSINESS" PLAINTIFFS: As generally alleged in the relevant complaints, this group consists of persons and entities, including their employees, who engage in businesses providing goods, equipment, or services, other than commercial fishing, in or to the Alaska area. The "area business" entities identified in the complaints include, among others, boat charterers, taxidermists, and fishing lodges. The Eyak Native Village, et al. v. Exxon Corp., et al., Case No. A89-095 ("Eyak Native Village") and Wisner et al. v. Exxon Corp., et al., Case Nos. A89-238, et al. ("Wisner") First Amended Consolidated Class Action Complaints both are brought on behalf of, inter alia,

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3/ The defendants are submitting concurrently with this motion an Appendix listing those plaintiffs and complaints to which this motion applies. The plaintiffs described in the Memorandum are by way of example only. Furthermore, in citing excerpts from the limited discovery occurring to date, defendants are mindful of the Federal Court's ruling in Pretrial Order No. 8 and are in no way attempting to transform this into a Rule 56 motion. Rather, this evidence is cited to show that the plaintiffs at issue not only have failed to plead, but cannot plead, the facts necessary for recovery.

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purported "area business" classes. See also Sigler, et al. v. Exxon Corporation, et al., Case No. A89-118 ("Sigler") (plaintiffs are a pilot who flies tourists and a seller of fire and safety equipment to businesses).

One instance of these "area business" claims is the suit brought by The Karluk Lodge, Inc., in which it claims that it, and the businesses it seeks to represent, incurred the following damages as a result of the oil spill:

> [A] general decline in demand for their goods and services, a substantial decline in profits and revenues, lost opportunities, lost ability to attract clientele, and decreased value to their businesses.

Wisner Consolidated Complaint, at ¶ 85. See also Sigler Complaint, at ¶ 32 (damages alleged to flow from loss of commercial activity in area causing, in turn, reduction in plaintiffs' business).

Significantly, the specific damage claims of these area businesses do not contain allegations of any physical injury or impact from the oil as a discrete element of their damages.

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Instead, the complete sum and substance of their alleged damage is economic loss.[4/]

(2) "USE AND ENJOYMENT" PLAINTIFFS: These plaintiffs, according to one complaint brought on behalf of this group, consist of "all persons and entities, including, inter alia, persons engaged in sport and recreational fishing whose customary use and enjoyment of the natural resources in and around the shores and waters of the Area has been adversely affected by the oil spill." Eyak Native Village Consolidated Complaint, at ¶ 84(e). Purported

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4/ Paragraph 124(d) of the Eyak Native Village Consolidated Complaint, as well as other complaints brought by these plaintiffs, do include a generalized allegation that "plaintiffs have been damaged and injured in their businesses and property." See also Wisner Consolidated Complaint, at ¶ 123 (general allegation that "plaintiffs' property has been injuriously affected") and ¶ 140 (allegation of trespass by oil entering "into and upon waters, the surface and subsurface of lands owned or leased by plaintiffs or in which plaintiffs have other exclusive property rights"). However, these undifferentiated allegations in multi-plaintiff actions clearly avoid alleging that any oil physically impacted and injured each individual plaintiff's property and that the specific damages claimed by the "area business" plaintiffs arose from any such impact. Indeed, that the complaints cannot be interpreted nor amended to assert such impact, at least as to all "area business" claimants, was made clear by Tom Elias, owner of Hunter Fisher Taxidermy, Inc., a business put forward by these plaintiffs as a typical representative. Elias testified that his Anchorage-based fish mounting business experienced no direct impact from the spill, and his alleged damages are lost profits resulting from a decrease in the number of fish brought to him for mounting. Deposition of Tom Elias, at pp. 96-97. Similarly, The Karluk Lodge, Inc., denies any physical impact from the oil on its property and, instead, seeks only economic damages, including lost revenues from cancellations and lack of bookings allegedly due to publicity surrounding the spill. Deposition of Martha M. Sikes, at pp. 21-22.

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"use and enjoyment" classes are alleged in both the Eyak Native Village and Wisner Consolidated Complaints, with named plaintiffs who are sportfishermen (the Alaska Sportfishing Association), a hunter/guide (Tony Lee), and a kayaker (Jeff Yates). There are individual actions by members of this group as well. See Sigler, et al. v. Exxon Corporation, et al., Case No. A89-117 (plaintiffs allege to have "lived, enjoyed, recreated, fished, relaxed, and travelled in [the affected area]").

This group includes recreational fishermen and hunters, hunting and fishing guides, photographers, kayakers, and others who allege impairment of their recreational and aesthetic use of the natural resources allegedly affected by the oil spill. Again, these plaintiffs do not claim any physical injury or impact by the oil on their person or property; indeed, as a general matter, they do not even claim any economic loss. See Eyak Native Village Consolidated Complaint, at ¶ 124(e). Instead, the alleged injuries for which this group seeks to assert a claim are described, in plaintiffs' own words, as "hedonic."[5/]

5/ As noted in Defendants' Memorandum in Opposition to the Motions of Certain Plaintiffs for Class Certification, all of the named plaintiffs in the use and enjoyment class now claim that they no longer seek individual monetary damages on these claims but, instead, only desire establishment of a fund to restore the environment. However, the complaints have not been amended to eliminate the request for individual damages, and, in any event, plaintiffs making such a prayer for relief would still need to possess a cognizable cause of action.

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(3) "PROCESSOR AND TENDER" PLAINTIFFS: Plaintiffs in this group are seafood canneries, processors and tenders, their employees, and suppliers of gear and vessels to such businesses, who claim loss of profits, loss of means of producing income, and loss of economic benefits allegedly resulting from the oil spill. The Wisner Consolidated Complaint includes Kodiak Salmon Packers, Inc., a member of this group. See also, Icicle Seafoods, Inc., et al. v. Alyeska Pipeline Service Company, et al., Case No. A89-264, and Whittier Seafoods, Inc. et al. v. Exxon Corporation, et al., Case No. A89-149 ("Whittier Seafoods") (plaintiff Whittier Seafoods, Inc.) Once again, these plaintiffs do not appear to allege any physical injury to their property from oil impact as a discrete element of their damages. See, e.g., Whittier Seafoods Complaint, at ¶¶ 18 and 19 (damages alleged are loss of income, economic loss, and loss of means of producing income).

* * *

If the claims of these various groups were permitted to stand, defendants would face potential exposure to virtually unlimited liability for damages. However, the courts of the United States squarely have rejected such unlimited liability, unequivocally holding that, under maritime law, a defendant may not be held liable for damages simply on the basis that a plaintiff can demonstrate some type of adverse effect from a defendant's conduct. Rather, for sound and long-established policy reasons, courts repeatedly have limited the liability of maritime

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tortfeasors to damages flowing from physical injury to person or property.

Whether courts have described this limitation on liability in terms of "duty," "proximate cause," or "remoteness," or have attempted to draw lines based on "direct" or "indirect" harm, the result has been consistent: courts have recognized a bright line sharply delineating permissible and impermissible claims. To defendants' knowledge, no court applying federal maritime law has allowed recovery for the purely economic damages, or for the so-called "hedonic" damages, sought here.[6/]

In sum, allegations of wrongdoing based on the grounding of a tank vessel engaged in maritime commerce and the resulting activities in response to the grounding and spill constitute a maritime tort. As a result, federal admiralty jurisdiction attaches, and substantive maritime law determines the reach of liability, to the exclusion of any conflicting state law. Maritime law is unequivocal in drawing this line short of the plaintiffs identified in this motion. For these reasons, the Court must dismiss from these actions any plaintiff who has not alleged either direct physical injury to plaintiff's person or physical damage to plaintiff's property.

6/ As is detailed in Section IV(C) below, this rule of no recovery absent personal injury or physical injury to a proprietary interest is subject to a single, limited exception -- commercial fishermen -- expressly described as the special "favorites of admiralty." Union Oil Co. v. Oppen, 501 F.2d 558, 567 (9th Cir. 1974).

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III.

FEDERAL MARITIME LAW APPLIES TO ALL CLAIMS STEMMING FROM THE GROUNDING OF THE "EXXON VALDEZ"

Article III, § 2 of the United States Constitution extends the federal judicial power to "all cases of admiralty and maritime jurisdiction." The Supreme Court has held that admiralty jurisdiction attaches to a tort when two standards have been met -- the "locality" test and "maritime nexus" test. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972).

The claims in these actions ultimately all involve the events leading up to, and resulting from, the grounding of a commercial vessel plying a navigable waterway. As a result, both of the tests clearly are met, and admiralty jurisdiction is established.

A. Admiralty Jurisdiction Attaches To Plaintiffs' Claims.

1. The Locality Test.

The first requirement for admiralty jurisdiction is that the tort have a maritime "locality" -- i.e., the wrong must have occurred on the high seas or navigable waters. Executive Jet Aviation, 409 U.S. at 266. Under this test, "the tort 'occurs' where the alleged negligence took effect." Id. Thus, admiralty jurisdiction attaches even though it is claimed that the source of the wrong was on land, provided that the effect of the wrongful conduct took place on the high seas. See, e.g., Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976) (admiralty jurisdiction attached to plaintiff's claims that the Coast Guard, by making

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land-based decision not to rescue a drowning victim, was negligent); Jones v. Bender Welding & Machine Works, Inc., 581 F.2d 1331, 1337 (9th Cir. 1978) (failure to warn of engine defects); Harville v. Johns-Manville Products Corp., 731 F.2d 775, 782 (11th Cir. 1984) (exposure to asbestos on vessels in navigable waters satisfied locality requirement even though the tortious activities of manufacturers occurred on land); Sawczyk v. U.S. Coast Guard, 499 F. Supp. 1034, 1038 (W.D.N.Y. 1980) (failure to inspect rafts); The Normannia (Beers v. Hamburg-American Packet Co.), 62 F. 469, 472-73 (D.C.N.Y. 1894) (misrepresentations on land concerning voyage).[7/]

2. The "Maritime Nexus" Test.

The second prong of the admiralty jurisdiction analysis requires that the wrong bear "a significant relationship to traditional maritime activity," described as that "involving navigation or commerce on navigable waters." Executive Jet Aviation, 409 U.S. at 268, 256; Foremost Insurance Co. v. Richardson, 457 U.S. 668, 672-75 (1982). This test reflects the principle that the focus of admiralty jurisdiction is to protect maritime commerce and ensure adherence to uniform standards in the

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7/ Maritime jurisdiction also extends to consequential shoreside property damage resulting from a shipping accident on navigable waters. See, e.g., Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740; Louisville & Nashville R.R. Co., 597 F.2d 469, 472 (5th Cir. 1979) (recognizing that the Admiralty Extension Act "merely expands the locality rule of admiralty jurisdiction to encompass 'ship-to-shore' torts"); Palumbo v. Boston Tow Boat Co., 21 Mass. App. 414, 487 N.E.2d 546 (1986).

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operation of vessels. Foremost Insurance, 457 U.S. at 674-75; In re Complaint of Paradise Holdings, Inc., 795 F.2d 756, 759 (9th Cir.), cert. denied, Stone v. Paradise Holdings, Inc., 479 U.S. 1008 (1986).

The "maritime nexus" test is a flexible one, requiring only some relationship of the conduct in question to "navigation," broadly defined, or to maritime commerce. See, e.g., Oppen v. Aetna Insurance Co., 485 F.2d 252, 257 (9th Cir. 1973) (holding that an oil spill stemming from a fixed oil platform over the Outer Continental Shelf that caused physical injury to vessels and interfered with navigation constituted a maritime tort even though such drilling was not in itself a traditional maritime activity); Paradise Holdings, 795 F.2d at 760 (the Aetna court held that "because of the maritime nature of the plaintiffs' claim, the suit was cognizable in admiralty despite the arguably non-maritime activities of the defendant that gave rise to the claim"); Foremost Insurance, 457 U.S. at 674-75.[8/]

8/ Defendants note that the Supreme Court, on January 22, 1990, granted certiorari in Sisson v. Ruby, et al., No. 88-2041, opinion below reported at 867 F.2d 341 (7th Cir. 1989), a case involving issues relating to the scope of admiralty jurisdiction. However, the questions involved are not pertinent to the matters covered by this motion because they concern (1) the extension of admiralty jurisdiction to a fire aboard a private pleasure craft docked at a recreational marina and (2) the Limitation of Liability Act, 46 U.S.C. § 181 et seq., as a separate ground of admiralty jurisdiction.

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3. Both Tests Clearly Are Met In This Oil Spill Litigation.

There is no question that the conduct at issue here had its effect in navigable waters and bears a significant relationship to maritime commerce. All alleged wrongs relate directly to a traditional maritime activity -- the operation of a tank vessel on the high seas and the planning and implementation of response measures to deal with a maritime accident involving that vessel.

Applying this two-pronged analysis, courts uniformly have held that actions stemming from the spill of oil or other pollutants on navigable waters are within admiralty jurisdiction. See, e.g., State of Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1031 (5th Cir. 1985) (en banc), cert. denied, White v. Testbank, 477 U.S. 903 (1986); Oppen v. Aetna Insurance Co., 485 F.2d at 256-57; Union Oil Co. v. Oppen, 501 F.2d 558, 561 (9th Cir. 1974); In re Oil Spill by Amoco Cadiz, 699 F.2d 909 (7th Cir.), cert. denied, Astilleros Espanoles, S.A. v. Standard Oil Co., 464 U.S. 864 (1983). As one court concluded in analyzing an oil spill action:

> The essential facts supporting the legal theories are that a vessel discharged oil into navigable waters . . . and [plaintiff] incurred costs in cleaning up the oil from those waters. The facts satisfy the elements of admiralty jurisdiction -- a maritime locality and a significant relationship to a traditional maritime activity.

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In re Oswego Barge Corp., 664 F.2d 327, 334 (2d Cir. 1981). The facts in these consolidated actions equally justify the attachment of admiralty jurisdiction.

B. Federal Maritime Law Governs The Reach Of Defendants' Liability.

The critical significance of admiralty jurisdiction lies in the substantive law that the court must apply to actions subject to such jurisdiction. "With admiralty jurisdiction comes the application of substantive admiralty law." East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986). See also Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959), overruled on other grounds, Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

It also is clear that maritime law applies whether an action has been brought in state or federal court. As the Supreme Court noted in Kermarec, an action where the alleged wrongful conduct had, as here, occurred on navigable waters:

> The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. . . . If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties.

358 U.S. at 628.

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Finally, as discussed in detail in Section V below, the determination that maritime law applies has direct impact on when, and to what extent, principles of substantive state law should be enforced. While under some circumstances state law unquestionably may supplement federal maritime law, it equally is without question that state law may not be applied to displace or contravene established maritime principles. Thus, to the extent there is any inconsistency between a purportedly applicable state law or remedy and the applicable federal maritime principle, the latter must prevail.

IV.

MARITIME LAW DOES NOT PERMIT RECOVERY BY A PLAINTIFF ASSERTING PURELY ECONOMIC OR "HEDONIC" DAMAGES IN THE ABSENCE OF ANY DIRECT PHYSICAL INJURY TO PERSON OR PROPERTY

A. Claims For Purely Economic Loss Are Not Cognizable Under Maritime Law.

A fundamental principle of maritime tort law is that plaintiffs who suffer no physical injury to their person or property from an alleged maritime tort may not recover for any alleged pecuniary or economic losses, even though these losses may be deemed a foreseeable consequence of the defendant's conduct. This "bright-line" rule represents the long-standing, oft-discussed, and consistently applied interpretation of the Supreme Court's holding in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). In Robins Dry Dock, the Supreme Court (per

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Justice Holmes) held that a negligent dry dock company was not liable to third-party charterers of a ship for economic losses suffered when the vessel was not provided to them on time. The Court ruled that the charterers could not recover economic damages for loss of the vessel's use because there was no physical injury to the charterers or their property.

Since Justice Holmes' seminal ruling, courts have interpreted Robins Dry Dock as standing for the broad principle that maritime law precludes recovery for alleged maritime torts by plaintiffs who have suffered purely economic loss unaccompanied by physical damage. See, e.g., State of Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d at 1021 ("claims for economic loss unaccompanied by physical damage to a proprietary interest were not recoverable in maritime tort"); Getty Refining & Marketing Co. v. M/T Fadi B, 766 F.2d 829, 833 (3d Cir. 1985) ("where the negligence does not result in physical harm, thereby providing no basis for an independent tort, and the plaintiff suffers only pecuniary loss, he may not recover for the loss of the financial benefits of a contract or prospective trade"); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51 (1st Cir. 1985) (adopting Robins rule); Holt Hauling & Warehousing Systems, Inc. v. M/V Ming Joy, 614 F. Supp. 890, 895 (E.D. Pa. 1985) ("negligently inflicted injuries to purely economic interests are simply not compensable, even though directly and foreseeably caused by defendant's negligence").

In adhering to this rule, courts consistently emphasize that it is a pragmatic limitation necessary to preclude a

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potentially endless chain of recoverable economic harm. In Getty Refining, for example, the Third Circuit observed:

> [T]his approach has the virtue of what Holmes called "predictability" and Llewellyn, "reckonability," by saying that the law shall go thus far and no further.
>
> Absent drawing the line where it now is, a court could plausibly decide that wave upon wave of successive economic consequences were foreseeable. . . .
>
> In a different context, Cardozo stated the concern that extending liability under these circumstances would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

766 F.2d at 833. See also Holt Hauling, 614 F. Supp. at 895 ("Many accidents produce economic ripples which affect a theoretically infinite number of parties . . . . [C]ompensating everyone who suffers some economic disadvantage from an accident would require both a staggering commitment of judicial resources -- as courts struggle to determine the connection between the accident and each claimant's monetary loss -- and a consequent risk of increasingly arbitrary, ad hoc decision making at the margins. . . . For these reasons, Robins Dry Dock's prudent limitation on tort recovery remains good law . . . .").

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The Supreme Court recently reaffirmed the force of the Robins Dry Dock rule in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). There, the Court ruled that a manufacturer could not be held liable under maritime law, whether under a theory of strict liability or in negligence, for purely economic damages stemming from a product defect. Endorsing the public policy considerations detailed above, the Court noted:

> [W]here there is a duty to the public generally, foreseeability is an inadequate brake . . . . Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product . . . . [I]f the charterers -- already one step removed from the transaction -- were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. "The law does not spread its protection so far." Robins Dry Dock. . . .

476 U.S. at 874.

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Thus, for a myriad of public policy reasons, Robins Dry Dock has withstood the test of time and stands as a fundamental tenet of maritime law. Applied here, the rule precludes compensation for all plaintiffs in these cases who claim no direct physical injury to their person or property but, instead, seek purely economic or "hedonic" damages.

B. Courts Repeatedly Have Dismissed Claims For Purely Economic Loss In Oil Spill And Pollution Cases.

In Barber Lines, the Court of Appeals described how the absence of the "bright-line" rule could wreak havoc in the context of an oil spill case:

> [An] oil spill foreseeably harms not only ships, docks, piers, beaches, wildlife, and the like, that are covered with oil, but also harms blockaded ships, marina merchants, suppliers of those firms, the employees of marina businesses and suppliers, the suppliers' suppliers, and so forth. To use the notion of "foreseeability" that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases. . . .

764 F.2d at 54. Here, of course, such endless waves of plaintiffs have become reality in the wake of the grounding of the "Exxon Valdez."

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Faced with similar prospects in previous spill cases, courts repeatedly have rejected efforts to circumvent this rule. Thus, in a leading recent case, State of Louisiana ex rel. Guste v. M/V Testbank, the court granted summary judgment in an action arising from a chemical spill in the Mississippi River Gulf against a wide array of plaintiffs who, as here, alleged economic losses without any physical injury to their person or property. The dismissed plaintiffs included shipping interests unable to traverse waterways closed by the discharge of a highly toxic chemical, marina and boat rental operators, wholesale and retail seafood enterprises that processed and distributed seafood, seafood restaurants, tackle and bait shops, and recreational fishermen, oystermen, shrimpers and crabbers. 752 F.2d at 1028. Applying the Robins Dry Dock rule to dismiss causes of action based on both federal and state common law and statutes, the Court of Appeals observed:

> Review of the foreseeable consequences of the collision of the SEA DANIEL and TESTBANK demonstrates the wave upon wave of successive economic consequences and the managerial role plaintiffs would have us assume . . . .
>
> Plaintiffs concede, as do all who attack the requirement of physical damage, that a line would need to be drawn -- somewhere on the other side, each plaintiff would say in turn, of its recovery.

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> Plaintiffs advocate not only that the lines be drawn elsewhere but also that they be drawn on an ad hoc and discrete basis. The result would be that no determinable measure of the limit of foreseeability would precede the decision on liability.

752 F.2d at 1028.

Similarly, in an action resulting from an oil spill in Casco Bay, Maine, the court rejected plaintiffs' theories of maritime and state law negligence, trespass, nuisance, and statutory violations. See Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Maine 1973), aff'd per curiam, 559 F.2d 1200 (1st Cir. 1977). The court applied maritime law to hold that owners of motels, restaurants, and other businesses depending on tourism for revenues had no cause of action unless they were owners of shore property physically injured by the spill.

Other courts reaching decisions in spill and pollution cases also have rejected causes of action for the same types of economic loss, without physical injury, sought by plaintiffs here. See, e.g., Barber Lines, 764 F.2d at 52 (owners of ship forced to use distant pier because of oil spill in harbor could not bring admiralty action against the wrongdoing vessel and its owners to recover costs for the delay; "one who suffers only financial loss, unaccompanied by physical injury, cannot recover damages from a negligent defendant, whether or not the financial loss is foreseeable"); In re Lloyd's Leasing, Ltd., 697 F. Supp. 289, 290

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(S.D. Texas 1988) (in oil spill off the Texas coast, the court dismissed claims of those who suffered economic loss exclusive of physical damage; such claims could not be sustained because "'physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss . . .'"); OKC Dredging, Inc. v. Amerada Hess, 1981 A.M.C. 1927, 1928 (S.D. Ala. 1979) (oil spill in Mobile River; dredging company that suspended work because of spill stemming from vessel hitting fuel terminal dock could not recover economic losses).

Certain plaintiffs in these actions also make claims for "hedonic" damages -- otherwise described as claims for alleged loss of pleasure or of "use and enjoyment" of the affected resources -- that simply are an attenuated variation on the theme of purely economic damages. Not surprisingly, courts applying maritime law have been equally quick to reject these claims. The Ninth Circuit, for example, previously has rejected largely identical "use and enjoyment" claims arising in the context of an oil spill. See Oppen v. Aetna Insurance Co., 485 F.2d at 260 (owners of private pleasure boats damaged in Santa Barbara oil spill could recover for physical damage claims; however, they could not recover for loss of their "navigational rights," which amounted only to deprivation of their "occasional Sunday piscatorial pleasure"). Similarly, in Union Oil Co. v. Oppen, the Ninth Circuit observed that the door was closed to claims "by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill . . . ." 501 F.2d at 570.

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C. These Plaintiffs Do Not Fall Within The Single, Unique Class Of Persons Afforded Recovery For Purely Economic Losses.

As demonstrated above, the maritime "no-recovery" rule for purely economic losses is well-established. Indeed, in the lengthy history of this rule, the courts have recognized but a single exception for a clearly delineated and finite group: commercial fishermen.

The special treatment accorded to this group is anchored in the commercial fishermen's direct use of the sea's resources and, even more importantly, in the group's status as admiralty's "favorites." See Carbone v. Ursich, The Del Rio, 209 F.2d 178, 182 (9th Cir. 1953) (fishing boat crew members could recover their share of profits from defendant owners of a boat that negligently fouled their fishing nets; allowing fishermen to recover "is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty"); Union Oil Co. v. Oppen, 501 F.2d at 570; Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472 (9th Cir. 1984) (citing Oppen and Carbone for the proposition that the "rationale for the rule allowing recovery of lost profits in an admiralty negligence action is 'the familiar principle that seamen are favorites of admiralty and their economic interests entitled to the fullest possible legal protection'"); Barber Lines, 764 F.2d at 56 (noting the favored status of seamen).

Significantly, the courts never have applied the considerations that account for the special treatment of commercial fishermen to permit claims by others for purely economic injury.

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Indeed, courts specifically have rejected efforts by other groups to invoke these special protections, as clearly reflected in the uniform body of maritime law discussed above. Thus, even as it applied the commercial fishing exception to the no-recovery rule, the Ninth Circuit in Union Oil Co. v. Oppen explicitly stated:

> [I]t must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969 . . . . Nothing said in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible.

501 F.2d at 570.

As a result, no plaintiffs, other than those seeking recovery as commercial fishermen, may avail themselves of this limited exception to the maritime rule precluding recovery for purely economic damages.

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V.

FEDERAL MARITIME LAW PRECLUDES THE IMPOSITION OF CONFLICTING STATE REMEDIES FOR TORTIOUS CONDUCT STEMMING FROM MARITIME ACTIVITY

Plaintiffs here may seek to argue a right to relief for purely economic or "hedonic" injuries based on various state law causes of action. This, however, they cannot do. Even assuming such recovery might be available to these plaintiffs under state law theories in a non-maritime context, the existence of admiralty jurisdiction and the controlling principle of Robins Dry Dock preclude application of any such inconsistent provision of state law in this maritime case.

A. Federal Maritime Law Applies, To The Exclusion Of Inconsistent State Law, Regardless Of The Forum In Which The Maritime Action Is Pending.

Even if the alleged state law theories were construed to permit these plaintiffs' claims, an issue expressly reserved by the defendants, application of such theories to allow recovery for purely economic damages that are not recoverable under federal maritime law could not withstand constitutional scrutiny. The authorities, both federal and state, are numerous and emphatic in denying plaintiffs the ability to assert such inconsistent state law claims. Those authorities compel the same result here.

As noted earlier, when admiralty jurisdiction attaches, substantive admiralty law must be applied. See, e.g., East River, 476 U.S. at 864; Kermarec, 358 U.S. at 628. This principle is

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rooted in the Supremacy Clause, U.S. Const. art. VI, cl. 2, which invalidates state laws that "interfere with, or are contrary to, 'federal law.'" Furthermore, it applies regardless of whether the action is pending in a state or federal court.

Known as the "reverse-Erie" doctrine, this principle dictates that because federal maritime law applies to maritime torts, any state-provided remedies must conform to the federal standards. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986). See also Carey v. Bahama Cruise Lines, 864 F.2d 201, 207 (1st Cir. 1988) ("the Admiralty Clause still prohibits state attempts 'to modify or displace essential features of the substantive maritime law'").

As one commentator has noted: "One constitutional truism may be got out of the way at once: . . . state legislation is clearly invalid where it actually conflicts with the established general maritime law or federal statutes." Gilmore and Black, The Law of Admiralty, 1-17 (1975). Thus, federal maritime law determines when a cause of action exists for a claimant based on a maritime tort, and state laws may not change that. See Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985).

Alaska state courts long have recognized the requirement that they apply substantive maritime law when dealing with a maritime claim. They consistently have held that conflicting state theories cannot supplant the maritime rule when that rule is clear. Thus, in Shannon v. City of Anchorage, 478 P.2d 815, 818 (Alaska 1970), the Supreme Court held that the trial court erred in

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failing to apply substantive maritime law to an injured seaman's case. In so ruling, the Court observed:

> Generally, the "savings to suitors" clause means that a suitor asserting an in personam admiralty claim may elect to sue in a "common law" state court through an ordinarily civil action. In such actions, the state courts must apply the same substantive law as would be applied had the suit been instituted in admiralty in a federal court.

478 P.2d at 818 (emphasis added).[9/] See also Maxwell v. Olsen, 468 P.2d 48, 50-51 (Alaska 1970)(state court handling passenger

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9/ The federal admiralty jurisdiction statute, 28 U.S.C. § 1333(1), provides that federal courts have original jurisdiction, exclusive of state courts, of admiralty or maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." This clause preserves the existence of jurisdiction in state courts, but does not establish any substantive principles restricting the primacy of maritime law. See, e.g., Bahama Cruise Lines, 864 F.2d at 208 n.5 (trial court erred in applying state comparative negligence rule to injured cruise passenger's action; "the plaintiff does not have the power to choose 'whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law'"); Icelandic Coast Guard v. United Technologies Corp., 722 F. Supp. 942, 949 (D. Conn. 1989) ("Even if plaintiff's commercial losses would be cognizable under the applicable state tort law products liability scheme . . ., claims for such losses nevertheless are not permitted where they would be in conflict with the applicable substantive admiralty law. The 'savings to suitors' clause permits use of state law remedies only to the extent that those remedies do not conflict with governing federal maritime standards."); In re Complaint of DFDS Seaways (Bahamas) Ltd., 684 F. Supp. 1160, 1162 (S.D.N.Y. 1987) ("It is well settled that federal maritime law is to be applied to the exclusion of conflicting state law even in state courts.") (emphasis in original).

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injury case was required to apply federal doctrine of comparative negligence rather than contributory negligence standard; under "savings to suitors" clause, the state courts must apply the same law as would have been applied in an admiralty court); Anderson v. Alaska Packers Ass'n, 635 P.2d 1182, 1184 (Alaska 1981)(injured fisherman's claim could not be brought under a state workmen's compensation statute because the claim was subject to exclusive federal maritime jurisdiction).

It is indeed true that substantive state law may play a role in maritime cases, but only in limited circumstances not found here. Thus, if no federal maritime principle covers a situation, so that a "gap" in the law exists, state law may be invoked to fill that gap. In Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310 (1955), for example, the Supreme Court noted the absence of federal admiralty law relating to certain marine insurance contract issues and determined that the maritime court should apply state law on those issues. In reaching this result, however, the court held that while state law may be imported absent any admiralty rule on point, in the presence of such a rule "states can no more override such judicial rules validly fashioned than they can override Acts of Congress." 348 U.S. at 314.

Similarly, states are not precluded entirely from appropriate exercise of police powers through statutes designed to regulate behavior of enterprises, including maritime enterprises, in areas where the state has an interest. In no instance, however, has state law been invoked to contravene an established federal

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maritime rule, for such a result is outside state law's permissible role.[10/]

The predominance of federal maritime law is critical if its policy objectives of uniformity and predictability are to be achieved. Thus, courts may not invoke state remedies if to do so would disrupt the cohesiveness of maritime law and defeat the reasonably settled expectations of maritime actors. "The policy behind the grant of exclusive jurisdiction is to ensure a nationally uniform system of maritime law." Anderson v. Alaska Packers Ass'n, 635 P.2d at 1184. As the Supreme Court recognized in Moragne v. States Marine Lines, 398 U.S. at 401 and n.15, uniformity vindicates federal policies and "remov[es] the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."

10/ Thus, for example, in Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), the Supreme Court held that a Florida statute related to oil spills in state waters was not facially unconstitutional, because it was not inconsistent on its face with federal maritime law. Similarly, in Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), the Court upheld portions of a state regulatory scheme designed to prevent maritime accidents on a finding that the state scheme was not inconsistent with the federal regulations in the same area. Neither Askew nor Ray considered the issue of who is entitled to recover for injuries arising from a maritime accident and neither case ever has been applied to permit conflicting state rules of recovery to displace or contravene the established maritime rule under Robins Dry Dock. While Askew was discussed by the Ninth Circuit in Oppen v. Aetna Insurance Co., 485 F.2d at 257-60, the court in that case found no conflict between maritime law and state law (both of which denied recovery to plaintiffs) and hence did not reach the issue of the enforceability of conflicting state laws.

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The Supreme Court has acknowledged that the policy of uniformity is a primary basis for invalidating attempts to apply inconsistent state law principles. In Foremost Insurance, the Court observed that "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities." 457 U.S. at 676. Thus, the Court found admiralty jurisdiction to exist even in an accident involving non-commercial vessels. Failure to do so, the Court observed, would have frustrated the goal of uniformity, because "the duties and obligations of . . . navigators traversing navigable waters flowing through more than one state would differ 'depending upon their precise location within the territorial jurisdiction of one state or another.'" Id. See also Daughtry v. Diamond M. Co., 693 F. Supp. 856, 863 (C.D. Cal. 1988)(state statute releasing party entering into good faith settlement did not apply to federal maritime actions; "The Supreme Court has noted the constitutional difficulties in directly applying a myriad of state law rules which would tend to destroy the uniformity of federal maritime law. . . . To subject maritime co-defendants to varying rules of liability would violate a policy behind federal maritime law, that is, to create uniform rules which tend to facilitate maritime commerce.").

Applying these controlling concepts, courts in a variety of contexts have rejected attempts to apply state law in maritime actions. See, e.g., Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); Evich v. Morris, 819 F.2d 256, 257-58 (9th Cir.),

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cert. denied, 484 U.S. 914 (1987); Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 80 (9th Cir. 1983). See also Kalmbach, Inc. v. Insurance Co. of Pennsylvania, Inc., 422 F. Supp. 44, 45 (D. Alask 1976) (Alaska civil rule could not allow award of attorneys' fees in suit within maritime jurisdiction; "If the Erie rule were applied in diversity cases with maritime issues, it would destroy that uniformity and often make the choice of law depend upon whether one sued in admiralty and maritime or diversity.").

One court has summed up the rule of maritime law supremacy this way:

> [S]tate law may not be applied to "contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations." Even if state law does not contravene an established principle of admiralty, it may be deemed preempted if it is in direct contravention of the uniformity of the admiralty law in some crucial respect.

St. Hilaire Moye v. Henderson, 496 F.2d 973, 980 (8th Cir.), cert. denied, 419 U.S. 884 (1974), as quoted and adopted in Kalmbach, Inc. v. Insurance Co. of Pennsylvania, Inc., 422 F. Supp. at 45, and Sewell v. M/V Point Barrow, 556 F. Supp. 168, 170 (D. Alaska 1983).

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B. Plaintiffs Who Are Precluded From Recovery Under Maritime Law Cannot Recover Here Under State Law.

As previously established, cases applying substantive maritime law routinely have denied recovery to plaintiffs claiming purely economic or "hedonic" damages without physical injury to person or property. Indeed, it is hard to imagine a more "characteristic feature" of substantive maritime law than the long-standing Robins Dry Dock rule.

Allowing plaintiffs to recover under state common law or statutory theories when they clearly are not entitled to do so under maritime law would, as the court held in Powell v. Offshore Navigation, Inc., 644 F.2d 1063 (5th Cir.), cert. denied, 454 U.S. 972 (1981), conflict impermissibly with federal maritime law:

> State law may of course supplement federal maritime law, as in the exercise of its police powers or in the provision of an additional maritime tort remedy; state law may not, however, conflict with federal maritime law, as it would be redefining the requirements or limits of a remedy available at admiralty.

644 F.2d at 1065 n.5.

Facing claims in Testbank largely identical to those here, the court was concise in its rejection of plaintiffs' attempt to rely on state law claims. There, plaintiffs argued that economic losses should be recoverable under state law claims sounding in negligence and nuisance, or under a state statute, the Louisiana

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Environmental Affairs Act of 1980. The court rejected these state law theories, expressly noting that "[t]o permit recovery here on state law grounds would undermine the principles we seek to preserve today." 752 F.2d at 1032. The same result is compelled in these actions.

It is beyond dispute that the "bright line" rule originating in Robins Dry Dock is a well-established, "characteristic feature" of federal maritime law, which, though long-standing, retains its vitality to the present day as courts continue to apply it in maritime spill cases. Grounded upon substantial considerations of public policy, the rule is crucial to the smooth flow of maritime commerce nationally and internationally. In view of these factors, there is no basis for adoption of any contravening state remedies. There is no "gap" to fill, nor any basis to blur the bright line. In short, the Robins Dry Dock rule must be the rule of decision here.

VI.

CONCLUSION

From the complaints before this Court, it is apparent that plaintiffs allege a wide range of ripple effects from the grounding of the "Exxon Valdez." The pending lawsuits are an integral part of the process for determining whether and, if so, to what extent, persons experiencing those effects are entitled to compensation. The claims in these lawsuits do not arise in a legal vacuum, however; they must be evaluated within the long-standing framework of maritime law that establishes clear principles to be applied in

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the adjudication of all purported claims. As one court has observed, "our abhorrence of massive oil spills" is no basis for failing to apply settled legal standards. Union Oil Co. v. Oppen, 501 F.2d at 570. One of the most fundamental of those principles is the Robins Dry Dock rule, which determines claims that are permissible and claims that are not.

Application of that principle requires that defendants' motion, pursuant to Rule 12(c), be granted.

DATED: February 23, 1990

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

Re Case Nos. A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446

AFFIDAVIT OF SERVICE BY MAIL
ON BEHALF OF DEFENDANTS D-3, D-9, D-11 through D-12, D-14, D-19 through D-21

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Linda S. Foley, an employee of Burr, Pease and Kurtz, 810 N Street, Anchorage, Alaska, being first duly sworn, states that on February 26, 1990, service of a Notice of Motion by Defendants D-3, D-9, D-11, D-12, D-14, D-19, D-20 and D-21 for Judgment on the Pleadings; Memorandum of Points and Authorities in Support of Motion of Defendants D-3, D-9,

2373-45
CPF/lsf

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D-11, D-12, D-14, D-19 through D-21 for Judgment on the Pleadings has been made upon all counsel of record based upon the court's Master Service List of February 13, 1990.

Linda S. Foley
Linda S. Foley

SUBSCRIBED and SWORN to before me this 26th day of February, 1990.

Nancy E. Krueger
NOTARY PUBLIC in and for Alaska
My Commission Expires: 3-11-93

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