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

EXXON MOBIL CORPORATION, and EXXON SHIPPING COMPANY,

Plaintiffs,

vs.

POLAR EQUIPMENT, INC., d/b/a COOK INLET PROCESSING and NAUTILUS MARINE ENTERPRISES, INC.,

Defendants.

Case No. 3AN-07-10901CI

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

1. Exxon Mobil Corporation and Exxon Shipping Company (collectively "Exxon") are the plaintiffs in this case. Initially, there were two defendants, Nautilus Marine Enterprises, Inc. ("NME") and Polar Equipment, Inc. d/b/a Cook Inlet Processing ("CIP"). (Exh. P1076). CIP settled before trial.

2. This case came for trial before this court on Exxon's claims for declaratory relief and reformation in a non-jury trial on November 1-3, 2010. The court heard testimony from four witnesses: John Daum, negotiator for Exxon; Michael Smith, Chief Attorney for Exxon; M. Thomas Waterer, President of NME; and Erich Speckin, expert witness for Exxon.

3. The parties also presented the deposition testimony of Mr. Phillip Weidner, attorney and sole negotiator for CIP and NME; Mr. Michael

Shupe, principal of CIP; Mr. Wayne Hawn, associate at Weidner & Associates, APC; Edward Weigelt, Jr., private counsel for NME; and Carla Christofferson, counsel for Exxon.

4. Parties presented closing arguments on January 26, 2011.

II. PROCEDURAL HISTORY

5. In September of 2006, Exxon entered into a settlement agreement (the "Settlement Agreement") with NME and CIP.

6. The Settlement Agreement was intended to resolve a lawsuit by CIP and NME against Exxon in the U.S. District Court for the District of Alaska. (Complaint, No. 3AN-09-7869 CI (June 5, 2009) ("Complaint" at ¶ 1). The underlying lawsuit related to the 1989 Exxon Valdez oil spill. (*Id.* at ¶ 14).

7. Exxon now seeks declaratory relief or, in the alternative, reformation of the Settlement Agreement. (*Id.* at ¶¶ 4-5).

8. The issue between the parties is how to calculate prejudgment interest. The parties dispute whether, under the Settlement Agreement, prejudgment interest would be compounded regardless of whether state law or federal law applied. Inherent to the parties' disagreement is whether state or federal law would apply.

9. Based on the Settlement Agreement, Judge Holland of the United States District Court for the District of Alaska entered Judgment, with CIP and NME entitled to recover prejudgment interest at the rate of

10.5% compounded annually. (Exh. 2002). Before Judge Holland entered Judgment on July 23, 2007, Exxon raised the issue whether the interest should be compounded. Exxon appealed the Judgment.

10. On April 16, 2007 the Court of Appeals for the Ninth Circuit, in a related case, *Sea Hawk Seafoods v. Exxon,* No. 05-35468 ruled that state law would apply. (Exh. P1092).

11. On March 10, 2009 in the appeal of this case the Ninth Circuit ruled that Judge Holland improperly failed to consider extrinsic evidence regarding whether the parties agreed to compound interest. The Ninth Circuit ruled that Judge Holland did not abuse his discretion in denying leave to supplement the answer to add a counterclaim for reformation. (Exh. P-1100).

12. In the meantime, in August of 2007 Exxon filed this state lawsuit – 3AN-07-10901CI.

13. After the remand from the Ninth Circuit, Judge Holland vacated the Judgment in the Federal District Court case on July 13, 2009. On September 10, 2009 Judge Holland issued a stay until the state court proceedings conclude. (Exh.1102).

III. THE PREJUDGMENT INTEREST DISPUTE

14. It is important to understand the context of the dispute leading up to the Settlement Agreement. In two similar cases, Judge Holland had previously ruled that federal law would govern the calculation of

prejudgment interest under 28 U.S.C. § 1961. That statute sets the T-Bill rate as the "default" rate, although the court has the power to vary it in its discretion under extraordinary circumstances. The statute expressly provides that interest will be "compounded annually." (Exh. P1000; Exh. P1001). Judge Holland's rulings in the previous cases had found no extraordinary circumstances and applied the default T-Bill rate, or 4.11% compounded annually on damages accrued in 1992, and 3.54% compounded annually on damages accrued in 1993. (Daum 66:16-19).

15. Exxon took the position that these prior rulings were correct, that federal law should govern, that the T-Bill rate should be used, and that the rate should be compounded annually as provided by the statute. (Daum 43:16-44:10).

16. NME disagreed and in late June of 2006 filed a motion in the District Court, seeking to establish prejudgment interest under Alaska's state prejudgment interest statute. (Exh. P1006; *see also* Daum 45:17-46:24).

17. The Alaska statute in effect at the time of NME's damages in 1992 and 1993 (A.S. 09.30.070(a), since amended) provides that prejudgment interest is 10.5% simple in the absence of a contrary agreement. (*Id.*)

18. In the motion, NME's attorney Mr. Weidner argued that since NME's claims were based on Alaska state law, Alaska state law should also

govern the calculation of prejudgment interest. Thus NME requested that the court "apply the state statutory prejudgment interest rate of 10.5%." (Exh. P1006.0035).

19. In the alternative, Mr. Weidner argued that, assuming Judge Holland continued to apply federal law, the court should use the prime rate or "some other federal standard, compounded annually" based on equitable principles. (*Id.*) Judge Holland denied the motion as premature. (Daum 46:25-47:11).

IV. SETTLEMENT NEGOTIATIONS

20. On June 29, 2006 Mr. Weidner wrote a letter to Mr. Daum initiating serious discussions that led to the settlement. (P1005; *see also* Daum 42:17-22).

21. Mr. Weidner was the primary negotiator on behalf of NME. Mr. Daum was the primary negotiator on behalf of Exxon.

22. During negotiations, Mr. Weidner and Mr. Daum exchanged numerous proposals. There was mention of both simple and compound interest, and there was mention of both state and federal prejudgment interest rates.

23. Needless to say, the parties also ran various scenarios regarding the prejudgment interest rate. Again, there were computations of simple interest and compound interest, as well as computations under state law and various scenarios under federal law.

24. In early September of 2006 Mr. Weidner called Mr. Daum and asked if Exxon would be interested in a settlement modeled on a previous settlement between Exxon and Sea Hawk, where the issue of prejudgment interest would be reserved for Judge Holland to decide, and if necessary, for the Ninth Circuit Court of Appeals to decide.

25. On September 11, 2006 Mr. Weidner wrote to Mr. Daum with the settlement proposal that the parties settle the principal amount of damages and allow Judge Holland to resolve the issue of "computation and assessment of prejudgment interest". (Exh. P1030.0002).

26. After consultation with Exxon, Mr. Daum accepted the substance of Mr. Weidner's letter and agreed to leave the determination of prejudgment interest to the District Court. (Daum 68:16-69:2; 69:25-70:5).

27. In his testimony, Mr. Daum was credible on this point, that it was his belief that Judge Holland would rule consistently as he had done previously, and apply federal law in a compounded interest rate. Mr. Daum was clear in his position that should state law would apply, then the 10.5% interest rate would be simple.

28. Mr. Weidner's testimony does not contradict Mr. Daum's recollection of events and the discussion. Mr. Weidner's position reflected in his testimony was that he expected Exxon to keep its word. At best, Mr. Weidner suggested that there was an implicit understanding that to make NME whole, compound interest would be required.

V. DRAFTING OF THE LETTER AGREEMENT

29. In response to Mr. Weidner's September 11, 2006 letter, Mr. Daum re-drafted a letter agreement (the "Letter Agreement"), which Mr. Daum explicitly stated was "completely consistent" with Mr. Weidner's letter. (Exh. P1043.0003). (*See also* Daum 70:25-71:5).

30. The relevant provisions of the Letter Agreement are as follows:

> 1. Exxon agrees to pay CIP ... $710,750.06 on account of damages accrued in 1992 and NMI ... $1,797,859.50 on account of damages accrued in 1992, and to pay CIP $113,851.03 on account of damages accrued in 1993, and NMI $1,928,696.65 on account of damages accrued in 1993, together with prejudgment interest on those sums as provided by law, and an additional sum which CIP and NMI wish to allocate to attorneys' fees. The parties agree that if prejudgment interest is payable at 4.11% on damages accrued in 1992, and at 3.54% on damages accrued in 1993, compounded annually, the total amount payable by Exxon will come to $8.5 million. In any event, Exxon will pay that sum to CIP and NMI on or before September 20, 2006. . . .
>
> 3. Exxon contends that the correct rate of prejudgment interest in this case is 4.11% on damages accrued in 1992 and 3.54% on damages accrued in 1993. CIP and NMI contend that higher rates of prejudgment interest apply. CIP, NMI, and Exxon stipulate that the issue of the correct rate of prejudgment interest in this case shall be submitted to the Court for resolution and the entry of an appropriate judgment, with all parties preserving rights of appeal to the Ninth Circuit from any adverse decision. . . .
>
> (Exh. P1043.0004).

31. Both parties signed the Letter Agreement on September 14, 2006. They intended it to "constitute an agreement" to settle the case. (Exh. P1043.0001). This agreement to settle was binding between NME and Exxon. (*Id.*; *See also* Daum 74:14-25).

32. At the time the parties settled the case by way of the Letter Agreement, Mr. Weidner and Mr. Daum had never discussed an agreement to pay compound interest no matter what law applied. (Daum 75:18-22). At that time, Mr. Daum had not represented to Mr. Weidner that Exxon would pay compound interest in all circumstances regardless of the rate chosen. (Weidner Depo. 174:18-23).

33. After reviewing the written exchange of offers and counter-offers, the Letter Agreement, as well as the testimony of Mr. Daum and Mr. Weidner, this court finds there is no evidence that the parties discussed and reached agreement that only compound interest would apply regardless of whether state or federal law controlled.

VI. THE SETTLEMENT AGREEMENT

34. The Letter Agreement provided for the preparation of a more formal Settlement Agreement. (Exh. P1043.0005). The Settlement Agreement was intended to implement the provisions of the Letter Agreement with additional standard language.

35. Mr. Daum transmitted a draft settlement agreement to Mr. Weidner on September 18, 2006. (Daum 76:11-23).

36. Attached as Exhibit A to the draft settlement agreement was a form of proposed final judgment that the District Court might choose to use in effectuating the Settlement Agreement. Mr. Daum drafted this form and included it for the District Court's convenience. (Daum 82:9-22). It is from the Proposed Order that the genesis of this dispute arises.

37. The proposed final judgment included the following:

> WHEREAS, in Order No. __, the Court determined that plaintiffs Polar Equipment, Inc., d/b/a Cook Inlet Processing, and Nautilus Marine Enterprises, Inc. (collectively, the "Seafood Processors") were entitled to recover prejudgment interest from defendants Exxon Mobil Corporation and Exxon Shipping Company (collectively, "Exxon") on 1992 damages at the rate of __%, compounded annually, and were entitled to recover prejudgment interest on 1993 damages at the rate of __%, compounded annually, and also were/were not entitled to recovery of Rule 82 attorneys' fees on additional prejudgment interest;

38. Mr. Daum drafted the proposed final judgment based on his expectation that Judge Holland would rule that federal law applied, consistent with his two previous rulings.

39. Mr. Daum did not intend the proposed final judgment to be an independently operative provision. (Daum 85:5-7). Judge Holland was not required to use the exact form of judgment or simply "fill in the blank." The agreement would have been binding even if Judge Holland did not sign the proposed judgment. (Daum 82:9-22).

40. Mr. Weidner made revisions to Mr. Daum's draft of the settlement agreement and transmitted them to his clients for input, along

with a copy of the Letter Agreement to "insure the documents conform to the Settlement agreed to on September 14, 2006." (Exh. P1055.0001).

41. NME's principal Mr. Waterer and his private counsel Mr. Weigelt provided feedback on this draft of the settlement agreement. (Exh. P1060; Exh. P1069). After receiving their input, Mr. Weidner sent a draft with proposed changes back to Mr. Daum. (Exh. P1070).

42. Although the parties negotiated some unrelated matters, they did not make any changes or have any substantive discussions on the prejudgment interest issue and the first recital of the proposed final judgment remained unchanged in the final version of the agreement. (Daum 88:13-23).

43. The parties and their representatives signed the Settlement Agreement on September 29, 2006 and October 2, 2006. (Exh. P1076).

44. The Settlement Agreement contains paragraph 3.1, which reflects the parties' agreement that resolution of the rate of interest payable would be determined by the District Court. Paragraph 3.1 contains language similar to the Letter Agreement:

> Exxon contends that the correct rate of pre-judgment interest in this case is 4.11% compounded annually on damages accrued in 1992 and 3.54% compounded annually on damages accrued in 1993. The Seafood Processors contend that higher rates of prejudgment interest apply. Exxon and the Seafood Processors agree that the issue of the correct rate of prejudgment interest in this case shall be submitted to the District Court for resolution and entry of an appropriate judgment, with all parties preserving rights of appeal

> to the Ninth Circuit from any adverse decision. When the District Court has rendered its decision on the correct rate of pre-judgment interest, and such decision is final on appeal, Exxon shall pay to the Seafood Processors a sum equal to the difference, if any, between: (a) interest on $2,508,609.56 calculated at the pre-judgment interest rate the Court shall find correct for damages accruing in 1992 plus interest on $2,042,547.68 calculated at the pre-judgment interest rate the Court shall find correct for damages accruing in 1993; and (b) interest on $2,508,609.56 at 4.11%, compounded annually, plus interest on $2,042,547.68 at 3.54%, compounded annually. The period for which interest shall be payable on the sum of $2,508,609.56 shall commence on July 1, 1992, and continue through November 1, 2006, or the date the Court enters judgment, whichever is earlier. The period for which interest shall be payable on the sum of $2,042,547.68 shall commence July 1, 1993, and continue through November 1, 2006, or the date the Court enters judgment, whichever is earlier.
>
> (Exh. P1076.0006).

45. The Settlement Agreement also contains paragraphs 3.5 and 3.5.1–3.5.4, which set forth the final judgment's agreed-upon and required terms. This section provides that NME agrees to entry of final judgment and:

> This Final Judgment shall be in the same form as Exhibit A to this Settlement Agreement, and shall include the following provisions:
>
> 3.5.1 A dismissal with prejudice of all Claims of the Seafood Processors;
>
> 3.5.2 A full and final release and discharge of Exxon from all Claims by each of the Seafood Processors . . . ;
>
> 3.5.3 An order forever barring the parties identified in paragraph 3.5.2 from asserting, instituting, maintaining, prosecuting or enforcing any Claim against Exxon . . . .;

3.5.4 A reservation of jurisdiction over the Claims of the Seafood Processors against Exxon to enforce this Settlement Agreement and the Final Judgment.

(Exh. P1076.0008-0009).

46. Paragraph 3.5 makes clear that per the parties' agreement, the Final Judgment entered by Judge Holland had to contain certain specific provisions. There is nothing in Paragraph 3.5 that provides for compound interest regardless of whether state or federal law applied. The parties did not agree that Exxon would pay compound prejudgment interest regardless of whether state or federal law was found to govern. (Daum 48:4-8; Weidner Depo. 157:8-12). There is also nothing in the discussions between the parties, the Letter Agreement, or the Settlement Agreement that the parties would disregard Alaska State law's application of simple interest.

VII. NME'S INTERNAL COMMUNICATION RELATING TO THE SETTLEMENT AGREEMENT

47. NME's conduct does not support its contention that it believed that the proposed final judgment constituted a promise by Exxon to pay compound interest regardless of the rate chosen.

48. NME's and Mr. Weidner's internal communications during the negotiation period confirmed their own understanding that prejudgment interest would be compounded if federal law applied and simple if state law applied. (Trial Testimony of M. Thomas Waterer ("Waterer") 281:120-304:16). Between July 11 and September 25, 2006 these internal

communications referenced simple interest numerous times and never once calculated the 10.5% Alaska rate as compounded. (Waterer 324:1-325:3).

49. On July 11, 2006, Siao Ling Kok, an outside accountant for NME, sent a document to Mr. Waterer in care of Mr. Weidner. This document contained three pages entitled "Analysis of Accrued Interest on Damages for NME," one page of which calculated damages based on the "Alaska Statutory Rate of 10.5% - Simple Interest," while the other two pages calculated damages based on compounded "Federal Lending Rates." (Exh. P1009.0007-0009).

50. On July 13, 2006 Ms. Kok sent to Mr. Weidner damages calculations entitled "Exxon Offer of Settlement Analysis" in which she calculated the Alaska 10.5% interest rate using simple interest. (Exh. P1010.0002).

51. On July 14, 2006 Ms. Kok transmitted to Mr. Weidner calculations of interest multipliers and rates of interest using various federal rates compounded annually and the Alaska 10.5% interest rate using simple interest. (Exh. P1014.0005, 0012).

52. On August 29, 2006 Mr. Waterer sent a letter to Mr. Weidner and Mr. Mike Shupe, President of CIP, copying Mr. Ed Weigelt, then advisor and current counsel to NME. Attached to Mr. Waterer's letter were several charts, including updated "Interest Multiplier[]" charts, which were

calculated using simple interest when applying the Alaska statutory rate of 10.5%. (Exh. P1022.0002, 0004).

53. On September 9, 2006 Mr. Waterer sent a letter to Messrs. Weidner, Shupe, and Weigelt with further calculations of Exxon's offer applying interest multipliers which used simple interest to calculate the Alaska statutory rate and compound interest when calculating various federal rates. (Exh. P1027).

54. On September 11, 2006 Mr. Waterer sent another letter clarifying his prior analysis and included a copy of the updated interest multiplier table calculating the Alaska statutory rate as 10.5% simple. (Exh. P1033).

55. On September 25, 2006, after he saw the proposed judgment in the draft settlement agreement, Mr. Waterer continued to direct his accountant to perform calculations of NME's potential recovery using simple interest under Alaska state law and compound interest under federal law. (Exh. P1065). (*See also* Waterer 308:9-2).

56. In all the documents except one, in each instance where NME used the Alaska statutory rate, simple interest was used. NME used compound interest when the federal rate was used. Many different federal rates were used, some higher and some lower than 10.5%.

57. The one exception is that at his deposition, Mr. Waterer produced a telephone log book from 2006 that he claimed to have only

found recently. (Waterer 325:12-15). The notes purported to reflect conversations between Mr. Weidner and Mr. Waterer supporting the existence of an agreement by Exxon to pay compound interest regardless. (Exh. P1003).

58. This court finds Mr. Waterer's credibility to be severely compromised and his testimony not believable. This court's impression of Mr. Waterer's testimony is that he was very careful in answering questions, approaching perjury but never committing it.

59. Mr. Waterer admitted at trial that as many as six entries were altered after the fact, some as recently as last winter. (Waterer 328:12-329:9). Mr. Waterer also admitted that it was possible that all the additions were related to compound interest and that the additions were made to assist NME's litigation position in this case. (*Id.*) Yet Mr. Waterer steadfastly maintained that he did not know when he made those alterations.

60. If there had been any discussions regarding an agreement to pay compound interest, Mr. Waterer's notes would have reflected them. Mr. Waterer's alteration of his notes to add six references to interest or compound interest confirms that there was no such purported agreement documented in the unaltered notes.

61. Mr. Waterer intentionally removed from his second notebook one or more pages with entries dated September 26 and possibly September 27. (Trial Testimony of Erich Speckin 461:9-471:3). During this time, Mr.

Waterer and Mr. Weidner were reviewing the draft Settlement Agreement. (Exh. P1069; Exh. P1070).

62. Mr. Waterer's intentional destruction of pages from September 26 and/or 27, 2006 creates the inference that Mr. Waterer removed pages containing information harmful to NME's legal position.

VIII. POST-SETTLEMENT BRIEFING

63. Following execution of the Settlement Agreement in 2006, Exxon paid to CIP and NME the full amount required by the Agreement, equal to $8.5 million, representing the amount of 1992 and 1993 losses, with prejudgment interest thereon calculated according to the methodology of Order No. 369, and an additional sum which CIP and NME allocated to attorneys' fees. (Complaint ¶ 34).

64. The settlement proceeds were distributed, $5 million to NME and $3.5 million to CIP. (Exh. P1076; *See also* Waterer 568: 21-21).

65. On February 20, 2007 CIP and NME filed motions, consistent with the parties' settlement, seeking to have the District Court award a higher amount of prejudgment interest than what Exxon had previously paid. (Exh. P1088; Exh. P1089).

66. CIP and NME argued that Alaska state law should govern the interest payable on their claims, not federal maritime law. (Exh. P1088.0005; Exh. P1089.0003).

67. In the alternative, CIP and NME argued that if 28 U.S.C. § 1961 applied, the District Court should use a rate higher than the default rate. CIP's motion, signed by Mr. Weidner, stated expressly that if the Alaska state rate was used to calculate interest, the interest would be simple and not compound, consistent with A.S. 09.30.070(a). (Exh. P1089.0004).

68. In CIP's reply brief, filed April 13, 2007, Mr. Weidner accused Exxon of distorting CIP's position by suggesting that CIP was seeking compound interest under A.S. 09.30.070(a). (Exh. P1091.0004). Mr. Weidner was emphatic that to the extent the Alaska interest rate statute governed, CIP was seeking only simple interest and that "the Court should rule that the interest rates **(other than Alaska statutory)** are compounded." (*Id.* Emphasis in Original).

69. Notably, NME did not argue in its briefing that the 10.5% Alaska statutory rate should be compounded on the basis that the parties had agreed to do so in the Settlement Agreement. (Exh. P1088).

70. In an April 20, 2007 declaration, Mr. Waterer proposed several alternatives that he believed would be fair "under the circumstances." The alternatives sought by Mr. Waterer included having Judge Holland award simple interest, interest compounded monthly, and others which would not have been possible without modification of the form of the proposed judgment. (Exh. P1113.16). These proposals are all

inconsistent with NME's current position that there was an agreement to compound interest regardless, and NME's position that the form judgment constitutes the agreement.

71. The first written document suggesting that the parties agreed interest would be compounded if Alaska law applies is a June 12, 2007 letter from Mr. Weidner to Mr. Weigelt. In that letter, Mr. Weidner states "after I conducted a review of the applicable settlement documents executed by Exxon on the one hand, and Nautilus and Cook Inlet on the other, it became apparent that the settlement agreement, page 8, paragraph 3.5, provides for the entry of a judgment in the same form as Exhibit A to the settlement agreement. Exhibit A calls for the imposition of compound interest, leaving only the rate blank." (Exh. P1093.0001).

72. Wayne Hawn, an associate at Mr. Weidner's firm who participated in drafting settlement letters, the Settlement Agreement, and post-settlement briefs, first learned in June 2007 that Mr. Weidner claimed that the Settlement Agreement contained an agreement to pay compound interest. Mr. Hawn was surprised by Mr. Weidner's new argument because it was a departure from the argument for simple interest CIP made in its prior briefing. (Deposition of Wayne Hawn, September 30, 2010, 100:4-12). Mr. Hawn never heard the term "fill in the blanks" during settlement negotiations. (*Id.* at 96:6-11).

73. On June 15, 2007 CIP and NME filed supplemental briefs that for the first time argued that the proposed final judgment to the Settlement Agreement contained a promise that Exxon would pay interest compounded annually under state law. (Exh. P1095; Exh. P1096).

74. CIP and NME's supplemental briefs were filed after the Ninth Circuit held on April 16, 2007 in the *Sea Hawk* appeal that state law governs the issue of prejudgment interest. (Exh. P1092).

CONCLUSIONS OF LAW

75. Exxon requests relief on two alternative grounds. First, Exxon seeks a declaratory judgment that the Settlement Agreement did not contain any agreement that Exxon would pay compound interest, did not contain any agreement to pay compound interest except to the extent applicable law required it, and did not contain any agreement that Exxon would pay compound interest if state law controlled prejudgment interest.

76. Alternatively, Exxon seeks reformation of the first recital in the proposed final judgment to delete the phrase "compounded annually." Such reformation would conform the language of the Settlement Agreement to reflect the parties' true intent at the time of contracting.

77. Because this court grants declaratory relief in Exxon's favor, there is no need for this court to reach the reformation issue.

IX. DECLARATORY RELIEF

78. The burden of proof for Exxon's claim for declaratory relief is a preponderance of the evidence. *Kreider v. C.I.R.*, 762 F.2d 580, 588 (7th Cir. 1985) (stating that, regarding an ambiguous contract, "the parties bear the burden of proving their respective interpretations by a mere preponderance of the evidence"); *Yzaguirre v. Barnhart*, 58 Fed. App. 460, 462 (10th Cir. 2003) ("The circuits that have considered this issue have concluded that the preponderance of the evidence is the proper standard, as it is the default standard in civil and administrative proceedings.") (internal quotation marks omitted) (citing cases from the 4th, 7th, and 11th Circuits).

79. Under Alaska law, the court's "primary goal" in interpreting the Settlement Agreement and proposed judgment is to "give effect to the parties' reasonable expectations." *Brotherton v. Warner*, 2010 WL 3928791, *3 (Alaska 2010).

80. When there is a written contract setting out the terms of an agreement between the parties, the parol evidence rule, a rule of substantive law, generally precludes the parties from using evidence of prior agreements (also known as extrinsic evidence) to contradict the written terms. *Froines v. Valdez Fisheries Dev. Ass'n*, 75 P.3d 83, 86 (Alaska 2003).

81. In Alaska, the parol evidence rule is derived from AS 45.02.202 and Restatement (Second) of Contracts § 210, *et seq.* The Alaska

Supreme Court has interpreted the rule in the form of a three-part test.[1] *Froines*, 75 P.3d at 87; *Still v. Cunningham*, 94 P.3d 1104, 1109 (Alaska 2004). Under the three-part test, the trial court must consider (1) whether the contract is integrated, (2) what the contract means, and (3) whether the prior agreement conflicts with the integrated agreement. *Still*, 94 P.3d at 1109. In determining the first two prongs of this test, the court may consider the extrinsic evidence itself. *Id.*

82. In this case, there is no question that the Settlement Agreement is an integrated agreement; it is "a writing constituting the final expression of one or more terms of an agreement." *See* Restatement (Second) of Contracts § 209 (1981). Thus the analysis moves to the second prong of the three-part test, determining what the contract means.

83. Once the meaning is determined, the analysis would move to the third prong, whether the extrinsic evidence or prior agreement conflicts with the written agreement. If there is a conflict, then the prior agreement cannot be enforced. *Still*, 94 P.3d at 1109. However, part of the analysis of the test's second prong is a determination of whether the extrinsic evidence conflicts with the written agreement. Thus, determination of the second prong necessarily overlaps with determination of the third prong.

84. According to *Froines* and *Still*, determination of "what the contract means" (the second prong) is generally a question for the court, as

[1] While the traditional formulation of the parol evidence rule only allowed extrinsic evidence if the contract was ambiguous, the Court in *Froines* made clear that ambiguity is no longer the determining factor in Alaska. *Froines*, 75 P.3d at 88.

the words of an integrated agreement remain the most important evidence of intention. *Id.* However, the meaning of the contract may be a question for the fact finder when the interpretation of the written document depends on the resolution of conflicting extrinsic evidence. It is a preliminary question for the court to determine the meaning of the agreement and whether there is conflicting evidence. *Id.* If so, then the court as fact finder may decide the meaning of the contract as it depends on the resolution of the conflicting evidence, as long as the language of the contract is susceptible to two asserted meanings. *Froines*, 75 P.3d at 87; *Still*, 94 P.3d at 1109-10. Again, the extrinsic evidence itself may be used to make all of these determinations.[2]

85. Under the first step in the process, the settlement entered into by the parties on September 29, 2006 is an integrated contract. It contains all the terms of the agreement between the parties.

86. The second step would be to determine, looking at the contract, what is provided for the prejudgment interest rate. Before proceeding with the analysis, there is a question of what constitutes the Settlement Agreement and whether it includes Exhibit A, the Proposed

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[2] *Still* recognized the evident challenge presented by considering the extrinsic evidence to determine if the extrinsic evidence should be considered:

> There is an obvious tension between using extrinsic evidence of a prior agreement for the purpose of determining the meaning of an integrated contract, and barring the use of a prior agreement to change an integrated contract once its meaning is determined. The evidence which is consulted to determine meaning may be the same evidence which is later excluded, or rendered irrelevant, by the parol evidence rule.

Still, 94 P.3d at 1109.

Judgment. This court concludes that it does not. Exhibit A is a separate document titled (Proposed) Final Judgment. Section 3.5 provides that "Final Judgment shall be in the same form as Exhibit A to this Settlement Agreement and shall include the following provisions". It then goes on to list the provisions that are to be included in the Final Judgment. The proposed Judgment was just that, a proposal for Judge Holland to use at his discretion.

87. Looking at the integrated Settlement Agreement, the parties agreed that "that the issue of the correct interest rate of prejudgment interest in this case shall be submitted to the District Court for resolution and entry of an appropriate judgment with all parties preserving rights of appeal to the Ninth Circuit from any adverse decision."

88. Section 3 is titled Settlement of Claims. The operative language of paragraph 3.1 is that the parties dispute the appropriate prejudgment interest rate. It states that Exxon contends that the correct rate of prejudgment interest in the case is 4.11% compounded annually on damages accrued in 1992 and 3.54% compounded annually on damages accrued in 1993. The Seafood Processors contend that higher rates of interest apply.

89. The agreement does not address the issue of simple or compound interest, and whether simple interest shall only be applied to the state interest rate and whether compound interest shall only be applied to

the federal interest rate. The agreement is also silent and does not say that only compound interest would be applied.

90. Reading the settlement's literal language, it contains nothing that limits Judge Holland's discretion to decide not only the numerical percentage but also whether it would be simple or compound interest. Indeed, this court need not go further than the four corners of the document to resolve the issue between the parties.

91. The extrinsic evidence shows that the parties never agreed to compound interest.

92. As discussed previously, extrinsic evidence may be considered to discern the meaning of the contract and also whether the prior agreement conflicts with the integrated agreement. "Under Alaska law, '[i]t is not necessary to find that an agreement is ambiguous before looking to extrinsic evidence as an aid' to determine its meaning." *In re Exxon Valdez*, 2009 WL 605900, *1 (9th Cir. 2009) (quoting *Estate of Polushkin v. Maw*, 170 P.3d 162, 167 (Alaska 2007)).

93. At best, if this court were to consider Exhibit A as part of the integrated agreement, there may be an "ambiguity" regarding the use of compound interest only, and Judge Holland was merely assigned the task of "filling in a number." If the proposed judgment is ambiguous, then the court should "resolve[] that ambiguity by determining the reasonable expectations of the contracting parties" in light of the "extrinsic evidence regarding the

parties' intent at the time the contract was made." *Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 9 (Alaska 2009) (internal quotation marks omitted); *Brotherton*, 2010 WL 3928791 at *3. *See also Wenzell v. Ingrim*, 228 P.3d 103, 107 (Alaska 2010); *Hartley v. Hartley*, 205 P.3d 342, 347 (Alaska 2009). Considering extrinsic evidence does not change the conclusions reached by the court.

94. All of the extrinsic evidence demonstrates that the parties never agreed that interest would be compounded.

95. The extrinsic evidence also demonstrates that the proposed judgment (including the first recital and words "compounded annually") was intended to provide a form of judgment that Judge Holland could use to implement the parties' agreement. The proposed judgment was not intended to include or be an agreement to pay compound interest.

96. The expectation of the parties was to reserve the prejudgment issue for Judge Holland to decide.

97. Accordingly, Declaratory Judgment is GRANTED in Exxon's favor.

ORDER RE: SPOLIATION

98. Shortly before trial, Exxon filed a motion regarding spoliation of evidence, claiming that NME and Tom Waterer had altered or destroyed evidence. The court deferred ruling on that motion, suggesting that the parties argue it at trial and reserving ruling until after trial. Exxon has

renewed the motion, and it is ripe for review.

99. Spoliation is the destruction or alteration of evidence or the intentional concealment of evidence until it is destroyed. *State v. Carpenter*, 171 P.3d 41, 64 (Alaska 2007) (quoting *Hibbits v. Sides*, 34 P.3d 327, 330 (Alaska 2001)).

100. To establish spoliation, a party must provide evidence that the other party altered or destroyed evidence. *Doubleday v. State, Comm. Fisheries Entry Comm'n*, 238 P.3d 100, 106 (Alaska 2010). The party must also show that the altered/destroyed evidence would have been relevant. *Apone v. Fred Meyer, Inc.*, 226 P.3d 1021, 1030 n.29 (Alaska 2010). Finally, the party must show that absence of the evidence prejudiced their preparation for the case. *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484, 491 (Alaska 1995).

101. Here, the evidence in question, Mr. Waterer's notebooks, was not relevant to the court's decisions. Mr. Weidner and Mr. Daum were the primary negotiators of the Settlement Agreement, and their testimony was the only evidence the court needed to consider. Therefore, spoliation has not occurred. Exxon's motion is DENIED.

102. Nonetheless, as discussed earlier, the court finds that Mr. Waterer intentionally altered his notebooks to support NME's position. The court also finds that Mr. Waterer intentionally removed pages from his notebook that undermined NME's case.

103. Under Alaska Rule of Civil Procedure 37, the court has broad discretion in assessing discovery sanctions. *Allstate Ins. Co. v. Dooley*, 243 P.3d 197, 200 (Alaska 2010). Even without finding spoliation, the court can sanction Mr. Waterer and NME.

104. The court first finds that the pages missing from Mr. Waterer's notebook would have undermined NME's position. *Doubleday*, 238 P.3d at 106. Also, the court will consider this violation in assessing attorney fees and costs, potentially forcing NME to bear an additional portion of Exxon's attorney fees and costs. ARCP 37(b)(2).

DATED this 17 day of March 2011 at Anchorage, Alaska.

Sen K. Tan
Superior Court Judge

I certify that on 3·18·11 a copy of the above was mailed to each of the following at their addresses of record:

Serdahely/ Weidner/ Coe/ Weigelt

M. Lucas
Judicial Assistant