No. 14-31374

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: DEEPWATER HORIZON

Karl W. Rhodes; Zeke's Landing Marina, L.L.C.;
B-Boy Productions, Inc.; Leytham Photography, L.L.C.,
d/b/a as Rae Leytham; Kirby Joseph Rivere, et al.
Plaintiff-Appellants-Cross Appellees,

v.

BP Exploration & Production, Incorporated;
BP America Product Company
Defendants-Cross Claimants-Appellants-Appellees-Cross Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
MDL No. 2179, Civ. A. No. 10-2771, Civ. A. No. 10-4536

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLANTS

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(*caption and counsel listing continue on inside cover*)

BP P.L.C.,

Defendant-Appellee,

v.

Transocean, Limited,

Third Party Defendant-Appellee,

Halliburton Energy Services, Incorporated,

Cross-Defendant-Appellee-Cross Appellant,

United States of America,

Cross Defendant-Appellee,

Transocean Deepwater, Incorporated; Transocean Holdings, L.L.C.; Transocean Offshore Deepwater Drilling, Incorporated; Triton Asset Leasing GMBH

Cross Defendants-Appellees-Cross-Appellants,

State of Alabama,

Claimant-Appellee-Cross Appellant,

State of Louisiana,

Claimant-Appellee.

United States of America

Plaintiff-Appellee,

v.

BP Exploration & Production, Incorporated; BP America Production Company

Defendants-Cross Claimants-Appellants-Cross Appellees,

v.

Transocean Deepwater, Incorporated; Transocean Holdings, L.L.C.; Transocean Offshore Deepwater Drilling, Incorporated; Triton Asset Leasing GMBH

Defendants-Cross Defendants-Appellees-Cross Appellants,

Transocean, Limited,

Cross Defendant-Appellee.

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby states that the National Association of Manufacturers has no parent corporation and has issued no stock.

CERTIFICATE OF INTERESTED PARTIES

NAM adopts Defendants-Appellants' Certificate of Interested Parties.

/s/ Phil Goldberg
Phil Goldberg
Counsel for Amicus Curiae National Association of Manufacturers

June 8, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. NAM has a substantial interest in ensuring that the Fifth Circuit Court of Appeals and multi-district litigations follow traditional principles of law and promote sound public policy. Manufacturing employs more than 12 million men and women and contributes more than $2.1 trillion to the U.S. economy annually. It has the largest economic impact of any major sector, accounting for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

As explained in this brief, if a district court administering multi-district litigations can invoke federal law from other circuits and make determinations under those laws, it will violate well-accepted law and destroy the efficiencies of the MDL process that Congress established. The result will create significant confusion, duplication and inefficiencies for many of NAM's members who rely on the uniformity of MDL rulings. Pursuant to FRAP 29(a), the source of authority for NAM's filing of this brief is through consent of all the parties.

STATEMENT OF THE CASE

NAM adopts Defendants-Appellants' Statement of the Case to the extent relevant to the arguments in this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal District Court took an extraordinary and *ultra vires* step in the "Findings of Fact and Conclusions of Law" when it tried to preserve punitive damages under the law of other federal circuits. *See* ¶¶568-71. After concluding that BP "cannot be held liable for punitive damages under general maritime law" in the Fifth Circuit, the District Court observed in a cursory manner that it believed "punitive liability would attach" under the law as applied in the Ninth and First Circuits. *See* ¶¶567, 570-71. Under well-accepted precedent, the District Court is bound to apply this Circuit's rulings and only this Circuit's rulings to all cases in the MDL, including those that may be tried in other Circuits. *See In re Korean Airlines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987). Upholding this rule of law is essential for assuring that multi-district litigation can provide a "just and efficient" resolution of pre-trial motions. *See id.*

In assessing the availability of punitive damages law, even under the Fifth Circuit case law, the Court stated its belief that "an award of punitive damages [is] appropriate" and expressed frustration that the Fifth Circuit "does not appear to leave room" for such a finding. ¶¶562, 566. The law of the Fifth Circuit is the

correct one; it properly discards punitive damages when the defendant itself did not engage in the egregious conduct. The purpose of punitive damages is to punish and deter deplorable acts. When anyone, including a company, is penalized for the deplorable acts of others, punitive damages miss their mark. The District Court may have concluded so begrudgingly, but it correctly held that BP is not subject to punitive damages directly, or under vicarious liability theories, for conduct of employees that do not have policy-making roles in the company.

Therefore, NAM urges the Court to strike ¶¶568-71 of the Findings of Fact and Conclusions of Law as being *ultra-vires* expressions of law in other circuits and uphold the District Court's conclusion that punitive damages are unsupported by the evidence and law of this case.

ARGUMENT

I. THE COURT MUST OVERTURN THE DISTRICT COURT'S *ULTRA-VIRES* ATTEMPT TO RULE ON THE AVAILABILITY OF PUNITIVE DAMAGES UNDER LAWS OF OTHER FEDERAL CIRCUITS

The unwieldy mass and variety of claims arising out of the April 20, 2010 incident on the offshore-drilling rig *Deepwater Horizon* provides a quintessential example of when MDL coordinated management is needed. *See In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in The Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (noting there are some 200 actions consolidated in this MDL). These actions allege a variety of claims including wrongful death and personal injury,

property damage and economic loss, and natural resource damage. They also involve scores of separate plaintiffs and defendants. As the Judicial Panel on MDLs observed, "[a]lmost all" of the parties supported having their claims consolidated in this MDL. *See id.* at *2. Defendants petitioned to have the MDL in the Southern District of Texas, and "plaintiffs support[ed] centralization in the Eastern District of Louisiana." *Id.* The Panel chose the E.D. of La. because it was the "geographic and psychological 'center of gravity'" of the docket and could handle this large multidistrict proceeding. *Id.* at *3.

MDLs such as this one have become essential tools for managing pre-trial proceedings when a multitude of cases arise out of common questions of fact. *See* 28 U.S.C. § 1407. The objective of the MDL judge is to ensure just and efficient conduct of all pre-trial issues, including discovery motions, evidentiary rulings, and establishing the law of the case. *See In re Exterior Siding & Aluminum Coil Antitrust Litig.*, 538 F. Supp. 45, 47 (D. Minn. 1982) ("The transfer to a single jurisdiction, for pretrial proceedings, of numerous cases pending in various district courts, affords the opportunity for centralized, coordinated and consolidated management thereby avoiding the chaos of conflicting decisions and fostering economy and efficiency in judicial administration."). Initially, "the vast majority of transferred cases [were] resolved, and [did] not return" to their originating courts, which are called "transferor courts." *See Korean Airlines*, 829 F.2d at

1178. The claims were "settled or resolved by summary judgment" or retained by the MDL court for trial under the "self-transfer" rule. *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 46 (1998). The Supreme Court, though, barred the practice of "self-transfer," and the expectation is now that claims may very well return to their originating courts. *Id.; In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 2005 WL 106936 (S.D.N.Y. 2005). It is important that the Court decide this issue and provide clarity for this and future MDL courts.

A. The District Court Is Required to Apply the Law of The Fifth Circuit and Only the Fifth Circuit

It has become well-accepted law in circuits around the country that when a claim is governed by federal law, as here, the MDL court must "apply the law" of its circuit and only its circuit. *Id.* The seminal decision the circuits follow is *Korean Airlines*, where then-Judge Ruth Bader Ginsburg wrote for the D.C. Circuit that the MDL court must "decide a federal claim in the manner it views as correct without deferring to the interpretation of the [originating] circuit." 829 F.2d at 1171, 1174 (citation omitted). There is only one "law of the case," and District Courts are bound to follow the Supreme Court and the Court of Appeals for the circuit in which it sits. *Id.* at 1176.[1] Since then, "circuit and district courts have uniformly applied the law" of the MDL's circuit to issues of federal law. *MTBE*,

[1] *See Panetti v. Quarterman*, 551 U.S. 930, 961 (2007) ("The District Court, of course, [is] bound by Circuit precedent.").

2005 WL 106936, *4.[2] This Court should join the other circuits and affirm that its law governs the cases consolidated in the Fifth Circuit for pretrial proceedings, including when these cases are returned to their originating or "transferor" jurisdictions. *See Korean Air Lines*, 829 F.2d at 1176.

Circuits with rulings on this point have explained the importance of applying uniform law to all cases consolidated in an MDL that arise under federal law, which is the situation here as punitive damages are being sought solely for violations of general federal maritime law. *See* ¶561. In this regard, there is a marked distinction between MDLs where claims are governed by federal versus state substantive law. *See id*. at 1173. When state law governs claims, an MDL judge must "apply divergent state positions on a point of law" because "[o]ur system contemplates differences between different states' laws." *Id*. at 1175.

By contrast, "the federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law." *Id*. at 1175 (citation omitted).

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[2] *See*, *e.g.*, *In re Gen. Am. Life Ins. Co. Sales Practices Litig.,* 391 F.3d 907, 911 (8th Cir. 2004); *Murphy v. F.D.I.C.*, 208 F.3d 959, 964-66 (11th Cir. 2000); *In re Gen. Motors Corp. "Piston Slap" Products Liab. Litig.,* 2006 WL 1049259, at *2 n. 6 (W.D. Okla. Apr.19, 2006); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.,* 323 F. Supp. 2d 861, 876–77 (S.D. Ohio 2004); *Moore v. Sulzer Orthopedics, Inc.,* 337 F. Supp. 2d 1002, 1009–11 (N.D.Ohio 2004); *In re Enron Corp. Sec., Derivative, & ERISA Litig.,* 2004 WL 1237497, at *7–14 (S.D. Tex. May 20, 2004); *In re Ikon Office Solutions, Inc. Sec. Litig.,* 86 F. Supp. 2d 481, 484 (E.D. Pa. 2000); *Hartline v. Sheet Metal Workers' Nat'l Pension Fund,* 201 F. Supp. 2d 1, 2– 4 (D.D.C. 1999); *In re Indep. Serv. Orgs. Antitrust Litig.,* 1998 WL 919125, at *2– 3 (D. Kan. Dec. 31, 1998).

"[B]ecause there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory." *Id.* "[I]t is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law. *Id.* at 1175-76; *In re Automotive Refinishing Paint*, 229 F.R.D. 482, 486 (E.D. Pa. 2005) (stating the purpose of unitary federal law "would be undermined if we were required to apply the precedents of each court … rather than relying on the law of the transferee forum.").

Parties that disagree with a Circuit's interpretation of federal law, as plaintiffs do in this case, can appeal the District Court's ruling. Here, plaintiffs have directly appealed the District Court's ruling against the availability of punitive damages under the Fifth Circuit's precedent. If plaintiffs further disagree with this precedent, which Alabama clearly does, they "could always seek review by the Supreme Court" to "provide a single interpretation" for the circuits. *MTBE*, 20005 WL 106936, *3 (citing *Korean Air*, 829 F.2d at 1176).

Courts have wisely observed that allowing MDL judges to consider the law of the circuits where claims may be transferred for issues where circuit splits exist would irreparably "thwart[]" the essential function of MDLs. *MTBE*, 2005 WL 106936, *5. Congress enacted the MDL statute to assure "the 'just and efficient conduct' of related cases filed in various federal districts by consolidating them for

pre-trial purposes before one court." *See Menowitz v. Brown,* 991 F.2d 36, 40 (2nd Cir. 1993). "The objective of transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation costs, and save the time and effort of the parties, the attorneys, the witnesses, and the courts." Manual for Complex Litig. (Fourth) § 20.131, at 220 (2004). "[W]ithout limiting the sources of binding precedent, each motion in multi-district litigation could easily turn into a review of the interpretations of all or most of the circuits, a result at odds with the fundamental purpose of section 1407." MTBE, 2005 WL 106936, *5. [3]

This Court does not have direct precedent on this issue. *See In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576 (5th Cir. 2014) (stating "we need not reach the issue of which circuit's law should apply because regardless of which circuit's approach we use, the outcome is the same"). The Court, though, made statements consistent with *Korean Air Lines* when it adopted the "law of the case" doctrine for claims transferred from MDLs. *See In re Ford Motor Co.*, 591 F.3d 406, 411 (2009). As this Court explained, when a case consolidated in an MDL is remanded to its originating court, that judge cannot

[3] It would further frustrate the purpose of MDLs to have "multicircuit appeals" on conflicting interpretations of law. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-92 (J.P.M.D.L. 1968). If the District Court were allowed to make determinations under punitive damage law of other Circuits, BP presumably would be allowed to appeal those determinations to those Circuits. "Such multidistrict appeals would be fraught with multiplied delay, confusion, conflict, inordinate expense and inefficiency, which Section 1407 intended to eliminate." *Id.*

"overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *Id.* at 411. Rather, as with any judge taking over a case from another judge, the judge in the transferor court can only "correct serious errors." *Id.* "[A]ny widespread overturning of transferee court decisions would frustrate the principle aims of the MDL process and lessen the system's effectiveness." *Id.*[4]

The District Court's attempt here to assess circuit splits on the availability of punitive damages is "counterproductive, *i.e.*, capable of generating rather than reducing the duplication and protraction Congress sought to check."[5] *Korean Air Lines*, 829 F.2d at 1176. Ironically, the Ninth Circuit, which the District Court observes may allow for punitive damages, was an early adopter of *Korean Air Lines*. *See Newton v. Thomason*, 22 F.3d 1455 (9th Cir. 1994) (adopting the D.C. Circuit rule because district courts in the Ninth Circuit are bound to apply Ninth Circuit precedent). Similarly, this Court should rule that the Ninth and First Circuit standards for the availability of punitive damages under maritime law have

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[4] In *Chinese Manufactured Drywall*, the Court stated that *Ford Motor* did not decide the broader issues raised by *Korean Air Lines*, but only "which circuit's law should apply to a *forum non conveniens*." *See* 742 F.3d at 586 ("Ford Motor is not determinative of which circuit's precedent applies here, as it dealt with the separate issue of forum non conveniens.") (internal citation omitted).

[5] The Fifth Circuit has followed this same rationale in adopting the "law of the case" doctrine for claims transferred to District Courts in the Fifth Circuit after being consolidated in an MDL in another Circuit. *See Ford Motor Co.*, 591 F.3d at 411.

no application to claims consolidated in the Fifth Circuit. The Court should strike ¶¶568-571 from the District Court's "Findings of Fact and Conclusions of Law" and hold that Fifth Circuit precedent governs cases in this MDL.

B. Allowing the District Court to Make Determinations Under the Law of Other Circuits Will Destroy the Efficiencies of the MDL Process

As a practical matter, allowing a district court to apply law of multiple jurisdictions to cases consolidated in an MDL will irreparably impede the MDL process. Rather than efficiently determine each issue of law, courts will have to wade through a multitude of briefs on the case law of other circuits for each and every issue of federal law where a circuit split exists. "No doubt, a considerable amount of the judge's time will be consumed attempting to determine whether litigants accurately describe differences in other circuits' interpretations of federal law. And, if the judge is persuaded that some difference does or *may* exist, it will be no small task to explain the inconsistent and contradictory rulings." *Korean Air Lines*, 829 F.2d at 1184 (J. Williams concurrence).

The importance of an issue to a claim does not change the obligation of a District Court to apply its own circuit law to cases consolidated before it as part of an MDL. Circuit splits exist on many issues that arise in MDLs, including those that can affect the viability of an entire claim. Over the past thirty years, courts have expressed their appreciation that the location of an MDL, just as where a

claim is filed, can be highly determinative. *See id.* But, as the D.C. Circuit held in *Korean Air Lines*, "there is no compelling reason to allow [a] plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray." *Id.* at 1172.

In *Korean Air Lines*, the issue was whether a financial limitation set forth in a federal statute applied to the claims such that it would significantly curtail each plaintiff's ability to recover damages. *See id*. at 1172. In *Menowitz v. Brown*, the circuit split was over a statute of limitations and whether the plaintiffs' claims were entirely time-barred. *See* 991 F.2d at 39-40. The *Menowitz* court held that all such claims were time-barred under the statute as interpreted by the circuit in which the MDL was located, even though one of the claims would have been allowed to proceed in the circuit where that claim was filed. *Id.* The Second Circuit explained that while such a result was unfortunate for that one plaintiff, "no litigant has a right to have the interpretation of one federal court rather than that of another determine his case." *Id.* (internal quotation omitted).

NAM members, as well as other litigants, are regularly engaged in litigation where circuit splits can affect key issues for compensatory and punitive damages. For example, products liability and toxic tort claims are common subjects of MDLs and often hinge on the application of the *Daubert* evidentiary standard. In the Eighth Circuit, the failure of experts to rule out other possible sources of a disease

is not fatal to their conclusions about causation. *See Johnson v. Mead Johnson & Co., LLC*, 754 F. 3d 557, 562 (8th Cir. 2014) (adopting the view that *Daubert* and Federal Rule of Evidence 702 "greatly liberalized" the admission of expert scientific testimony). But, the Sixth Circuit has found otherwise. *See Tamraz c. Lincoln Elec. Co*., 620 F.3d 665, 674 (6th Cir. 2010). If an MDL must rule on the availability of expert evidence where this issue is present, the ability of plaintiffs to receive compensation from the named defendants when there may be other causes of the injuries will differ substantially based on where the cases are consolidated.

Such circuit splits also arise under procedural issues. For example, in *In re Porsche Cars No. Am.*, the MDL consolidated products liability cases from California, Florida, Georgia, Illinois, Michigan, New Jersey, New York, Ohio, Texas and Washington. 880 F.Supp.2d 801, 812 (S.D. Ohio 2012). The court observed that while the parties cited cases from various circuits discussing heightened pleading requirements under FRCP 9(b), the MDL sat in the Sixth Circuit and must "analyze federal procedural law in accordance with the Sixth Circuit precedent." *Id*. at 815 (citing *Korean Air Lines*); *see also In re Asbestos Prods. Liab. Litig.*, 965 F. Supp. 2d 612 (E.D. Pa. 2013) (applying the Third Circuit's application of the Federal Rules to allow plaintiffs to cure improper service of their claims, rather than dismiss the defendants and require refiling).

Here, the District Court asserted that it was merely indulging a request from Alabama. *See* ¶569. Accordingly, it "briefly" looked at some, but not all applicable Circuit rulings, focusing only on circuits that allegedly would allow punitive damages. *Id.* It is possible, therefore, that the District Court was merely signaling its disagreement with this Circuit's precedent. A District Court certainly is entitled to express disapproval of its circuit's interpretation of law, but it is still bound to apply that law. The District Court erred in making determinations under the law of other circuits. The Court should apply *Korean Air Lines* and strike these determinations to safeguard the integrity of the MDL process.

II. THE DISTRICT COURT PROPERLY HELD THAT PUNITIVE DAMAGES ARE NOT AVAILABLE IN THE FIFTH CIRCUIT

Despite the District Court's statements in favor of punitive damages in this case, NAM appreciates that the District Court still properly applied the Fifth Circuit standards for punitive damages. *See* ¶¶561-567. The Fifth Circuit has held that a company, here BP, can be subject to punitive damages "only if it authorizes or ratifies" the acts of its agents or employees. *See Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 651-52 (5th Cir. 1989) (following *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969)). As the District Court concluded in its findings of fact, the employees at issue in this case "were not policy-making officials, nor did the reckless conduct emanate from corporate policy." ¶¶566.

The Fifth Circuit approach to punitive damages recognizes that vicarious liability for punitive damages is the exception, not the rule. Unlike compensatory damages that make a plaintiff whole for her injuries, the purpose of punitive damages is to punish a defendant when it harmed the plaintiff as the result of outrageous, deplorable acts, and to deter it and others from engaging in such egregious conduct. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492-93 (2008) (stating punitive damages should be viewed as quasi-criminal in nature). Punitive Damages express "moral condemnation" of the actor. *See id.* As with criminal law, imposing such condemnation against someone requires that person to have the appropriate level of culpability.[6]

Vicarious liability, by contrast, is not based on fault, but economics. It is a shortcut for allocating risk based on the notion that when an employee negligently harms someone while acting in furtherance of the employer's enterprise, the employer is better positioned to bear the costs of the injuries than the harmed individual. *See* Prosser and Keeton on Torts, 500 (5th ed. 1984) (stating the company can "absorb them, and to distribute them, through prices, rates or liability insurance"); *see also* Bryant Smith, *Cumulative Reasons and Legal Method*, 27

[6] *State v. Hy-Vee, Inc*. 616 N.W.2d 669, 671 (Iowa Ct. App. 2000); *see also State v. Guminga*, 395 N.W.2d 344, 347-48 (Minn. 1986) ("Crime does and should mean condemnation and no court should pass that judgment unless it can declare that the [employer's] act was culpable. This is too fundamental to be compromised.") (quoting Model Penal Code § 2.05 cmt. 1 (1985)).

Tex. L. Rev. 454 (1949). The Supreme Court has long supported this definition. Nearly two centuries ago, in *The Amiable Nancy*, Justice Story wrote for a unanimous Court that a ship owner must pay "just compensation" when his ship's crew plundered a neutral vessel. *See* 16 U.S. (3 Wheat.) 546, 558-59 (1818).

The risk distribution concept behind vicarious liability, in terms of logic and public policy, does not extend to punitive damages. *See* C*ooper Indus., Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 432 (2001) (compensatory and punitive damages "serve distinct purposes."). Courts have "long recognized that agency principles limit vicarious liability for punitive damages." *See*, *e.g.*, *Lake Shore & Michigan S. Ry. Co. v. Prentice*, 147 U.S. 101, 106 (1893) (A principal should not be subject to "exemplary damages for an intent in which he did not participate."). When a party who has not engaged in serious wrongful conduct is punished, punitive damages do not serve their purpose. *See* Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 La. L. Rev. 501, 516 (2010).

The "managerial agent" rule, which the Ninth Circuit has adopted, would apply vicarious liability for punitive damages when a "managerial agent" engages in the egregious act at issue. *See Protectus Alpha Navigation Co., Ltd. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985). As demonstrated in the case at bar, the managerial test does not cure the fundamental inconsistency between vicarious liability and punitive damages. Specifically, the Ninth Circuit stated that

the purpose for creating this lower standard is to burden companies with choosing their managerial agents "wisely." *Id.* at 1386. The District Court found here, though, it "does not appear that [BP] recklessly hired its employees." ¶¶566. Further, as this Court has appreciated in another context, determining which employee are "managerial agents" has "proven difficult to apply." *See In re Hellenic Inc.*, 252 F.3d 391, 394 (5th Cir. 2001). In *Hellenic*, the Court created a "non-exhaustive" eight factor test as "merely [an indication of] the array of considerations that are potentially relevant to the managing agent inquiry." *Id*. at 397. Such uncertainty is antithetical to the culpability requirement for punitive damages.

The current Fifth Circuit punitive damages rule for maritime cases also is in concert with modern Supreme Court expressions of concern with the size, frequency, and ambiguous standards of some recent punitive damage awards. *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. Rev. 881 (2009) (surveying the Court's punitive damages jurisprudence). The Supreme Court has instructed that the "degree of reprehensibility of the defendant's conduct" is the "most important indicium of the reasonableness of a punitive damages award." *State Farm Mut.*

Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2002) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

As the District Court properly concluded, BP should not be punished for the misdeeds of its employees; BP's policies and conduct were not implicated in this incident. As this Court recognized in *P&E Boat Rentals, Inc*., the objectives of punitive damages "are not achieved when courts drop the hammer on the principal for the wrongful acts of the simple agent or lower echelon employee." 872 F.2d at 652. Punishment should be due only when an incident is tied to an employer's authorization or ratification of the employee's conduct. The ramifications of the incident, personal or public opinion, and perceived financial resources are not legally sufficient reasons to charge BP with punitive damages. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L Rev. 1, 66-67 (1982).

CONCLUSION

For the reasons set forth above, the Court should strike ¶¶568-71 of the Findings of Fact and Conclusions of Law and uphold the District Court's conclusion that punitive damages are not permitted under Fifth Circuit precedent.

Respectfully submitted,

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Dated: June 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2015, an electronic copy of the foregoing Brief for Amicus National Association of Manufacturers was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point.

2. The brief also complies with Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(b) because it contains 3,870 words.

/s/ Phil Goldberg
Phil Goldberg

Dated: June 8, 2015

CERTIFICATE OF COMPLIANCE
WITH ECF FILING STANDARD (A)(6)

Pursuant to the United States Court of Appeals for the Fifth Circuit's ECF Filing Standard (A)(6), I hereby certify that (1) the required privacy redactions have been made to the foregoing Brief; (2) this electronic submission is an exact copy of the paper document; and (3) this submission has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Phil Goldberg
Phil Goldberg

Dated: June 8, 2015