No. 11-1475

IN THE

Supreme Court of the United States

ICICLE SEAFOODS, INC.,

Petitioner,

v.

DANA CLAUSEN,

Respondent.

On Application For Partial Stay Of Judgment Of The Supreme Court Of Washington, Pending Disposition Of A Petition For A Writ Of Certiorari

REPLY IN SUPPORT OF APPLICATION PARTIALLY TO STAY JUDGMENT

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REPLY IN SUPPORT OF APPLICATION TO STAY JUDGMENT OF THE SUPREME COURT OF WASHINGTON

In this maritime case, the Washington Supreme Court affirmed a $1.3-million punitive award against Petitioner Icicle Seafoods, Inc., that was over 34 times greater than Respondent Dana Clausen's compensatory damages. In its initial application, Icicle showed that the Court should grant a stay of the punitive-damages portion of the judgment both because of the reasonable probability that this Court will grant certiorari (and reverse) due to the sharp conflict between the decision below and the decisions of this Court and of other courts, and because of the serious risk that Icicle will be unable to recover the security that it has posted in state court if those funds are released to Clausen. *See Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers). Clausen's response confirms that the Court should grant a stay.

I. CLAUSEN'S ATTEMPT TO PORTRAY ICICLE'S APPLICATION AS PREMATURE IS UNAVAILING

Clausen inaccurately portrays Icicle's application as premature. Seizing on the temporary stay granted to permit Icicle to seek relief from this Court, Clausen suggests (at 1 & 7 n.4) that relief is still available below and that the present application is an improper (and even "deceptive[]") "attempt to sway a member of this Court in advance of consideration of its certiorari petition." This mischaracterizes the order below. That order did not leave open the possibility of granting the relief sought here—a partial stay of enforcement pending this Court's disposition of the case under 28 U.S.C. § 2101(f). The Washington Supreme Court

squarely denied that relief, and granted only a temporary stay to permit Icicle's application to this Court.

Specifically, in the Washington Supreme Court, Icicle sought a stay pending this Court's disposition of the case, using two procedural mechanisms—an emergency motion for a stay and a notice seeking review of the trial court's denial of a stay. In the event that relief was denied, Icicle as a fallback "request[ed] a stay to allow time to seek a stay from a justice of the United States Supreme Court." Icicle Application, Ex. D at 13. The court below expressly denied the principal relief requested by Icicle: its order states flatly "[t]hat [Icicle's] Motion for Discretionary Review and Emergency Motion are denied." Icicle Application, Ex. E. It granted only Icicle's "request for a stay . . . for a period of 35 days," Icicle Application, Ex. E, which plainly refers to Icicle's fallback request for time to seek this Court's intervention. Clausen does not even attempt to provide any other interpretation. None exists. Because Icicle reasonably pursued all state-court avenues for a stay under 28 U.S.C. § 2101(f) pending this Court's disposition of this case, its application is properly presented now.

II. THERE IS A REASONABLE PROBABILITY THAT THE COURT WILL GRANT CERTIORARI AND REVERSE IN THIS CASE

In its application, Icicle illustrated (at 8-14) that there is a reasonable chance that the Court will grant certiorari (and reverse) because the decision below: (1) conflicts with this Court's decisions in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), on the question whether attorney's fees are properly included in the

compensatory-damages element of the ratio between compensatory and punitive damages that applies when considering federal limits on punitive awards; (2) conflicts with the decisions of several other state and federal appellate courts on that ratio question; (3) raises an important and recurring issue concerning the ratio; and (4) improperly ignores *Exxon*'s punitive-to-compensatory ratio limit for punitive damages in maritime cases. Clausen's response fails to cast doubt on these points.

Notably, Clausen does not contest that there is a significant split of authority on the inclusion of attorney's fees in the punitive-damages ratio. Nor does he contest the recurring and important nature of that question. And he likewise fails to address Icicle's demonstration that both *Exxon* and *State Farm* are inconsistent with the inclusion of attorney's fees in the punitive-damages ratio. This issue alone raises a reasonable likelihood that this Court will grant certiorari, and reverse. Likewise, Clausen does not contest that the Washington Supreme Court's interpretation of *Exxon* as imposing no rule beyond the specific facts of that case raises an important and recurring issue worthy of this Court's review.

The arguments Clausen does make—all of which go to the merits of the decision below—fare no better.

First, Clausen contends (at 10-11) that his attorney's fees were properly included in the ratio because such fees are purportedly compensatory under *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and dicta in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). But this misses the point. Regardless of whether Clausen's court-awarded attorney's fees (like all attorney's

fees) in some sense "compensate" for litigation costs, they are not compensatory damages in the sense used in this Court's punitive-damages cases: *i.e.*, the factfinder's determination of damages on the plaintiff's substantive claim, measuring the actual harm (not the litigation cost) caused by the defendant's conduct. *See, e.g.*, Icicle Application Ex. A, Pet. for Cert., at 20-24; *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual *harm as determined by the jury*.") (emphasis added). Indeed, even the court below treated the fees as collateral relief rather than damages, stating that "the fee recovery is *not* part of the plaintiff's *substantive claim for damages*; in this case, the seaman's damages are for maintenance and cure." Pet. App. 12a (emphasis added). If Clausen's attorney's fees were actually compensatory damages, he would have needed to prove them at trial. *See* Wash. R. Civ. P. 54(d)(2); Fed. R. Civ. P. 54(d)(2). That is why the Utah Supreme Court refused to include attorney's fees in the ratio on remand from *State Farm* in a similar case alleging bad faith against an insurer. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 420 (Utah 2004).

Notwithstanding the dicta that Clausen cites, moreover, the Court has repeatedly treated such bad-faith attorney's fees as "punitive." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991). Indeed, Clausen entirely ignores *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2571 (2009), which cited *Vaughan* as its main support for the holding that "punitive

damages awards . . . remain available in maintenance and cure actions after the . . . passage" of the Jones Act. *Id.*

Second, Clausen asserts (at 8 & n.6) that *Exxon* did not establish a binding punitive-to-compensatory damages limit in maritime cases, because that decision was limited to the specific facts presented: "'1) where the defendant's conduct is "worse than negligent but less than malicious;" 2) where the conduct is not driven by the profit motive; 3) where the conduct is subject to regulatory sanctions; and 4) where the plaintiff's damages are significant and the compensatory award is substantial.'" This argument is irreconcilable with *Exxon*'s logic, which rejected such multi-factored tests for determining the appropriateness of punitive damages on the ground that those types of tests "leave [the Court] skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers." 554 U.S. at 504. Instead, the Court opted for an objective, "quantified approach" to capping punitive damages. *Id.*; *see id.* at 506 (noting that the proper test would "have to take the form adopted in those States that have looked to the criminal-law pattern of quantified limits"). Moreover, as the dissent recognized below, at most, the "highest ratio considered potentially applicable in *Exxon* was 3:1." Pet. App. 26a. *Exxon* cannot be interpreted to permit the over 34 to 1 ratio allowed here.

Third, Clausen repeatedly seeks (at 9-10) support for his interpretation of *Exxon*'s limits on punitive damages in cases saying there is no firm *due-process* limit on the ratio of punitive to compensatory damages. But *Exxon* specifically

imposed stricter limits on the punitive-to-compensatory ratio for maritime cases than are imposed by the Due Process Clause, as an exercise of the Court's federal common law authority in maritime cases. *See Exxon*, 554 U.S. at 502; *see also id.* at 507 (noting that the Court in maritime cases "act[s] . . . in the position of a common law court of last review"). In all events, the 34-to-1 ratio in this case exceeds even the constitutional standards, no matter how egregious Clausen claims Icicle's conduct to have been. *See State Farm*, 538 U.S. at 425 (noting that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").

In sum, none of Clausen's arguments undermines the reasonable likelihood that this Court will grant certiorari, and reverse the judgment of the Washington Supreme Court.

III. ICICLE LIKELY WILL SUFFER IRREPARABLE INJURY IF THE COURT FAILS TO GRANT A STAY

Icicle's application showed (at 21-23) that Icicle likely will suffer irreparable injury if the Court fails to grant a stay because of the risk (1) that Clausen will spend the funds before the end of this case, and (2) that the funds that Clausen provides his attorneys will be unrecoverable under state law.

In response, Clausen attempts (at 12) to distinguish all of Icicle's cases—which have repeatedly found irreparable harm where "it [was] unlikely that disputed payments made pursuant to [a lower court's] judgment could be recovered," *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers)—on the ground that they "involve[d] government agencies or

organizations being ordered to pay out awards to hundreds or even thousands of recipients, which would cause an administrative nightmare should reversal mandate a recouping of those funds." But none of those opinions indicated that this test for irreparable harm depended on whether a government litigant or a private litigant was seeking a stay. Both *Philip Morris* and *American Trucking Association v. Gray*, 483 U.S. 1306, 1309 (1987) (Blackmun, J., in chambers), involved private entities like Icicle.

Nor do these cases indicate that the test for irreparable injury depends on the administrative costs of the recovery. Rather, that test turns on whether it would be possible to obtain a full recovery at all. *See, e.g., Philip Morris*, 131 S. Ct. at 4 ("If expenditures cannot be recouped, the resulting loss may be irreparable."). And here, it is likely that expenditures could not be recouped for the reasons explained—Clausen will be judgment proof and Icicle will have no remedy against his lawyers.

Clausen next notes (at 12-13) that state law allows Icicle to seek a recovery against him if this Court reverses. That does nothing to show that Icicle's injury is reparable. Any claim against Clausen would be pointless if Clausen has already spent a significant portion of the funds. And the very authorities that Clausen cites make clear that there are serious obstacles to a state-law claim against Clausen's lawyers, who likely will obtain a significant portion of his punitive award. *See Ehsani v. McCullough Family P'ship*, 159 P.3d 407, 410-11 (Wash. 2007) (en banc).

Clausen lastly cites (at 13) *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers), and *Sampson v. Murray*, 415 U.S. 61 (1974), for the

proposition that "'[m]ere injuries . . . in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory . . . relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'" *Sampson*, 415 U.S. at 90 (citation omitted). These cases rebut Clausen's claim that *Philip Morris* and *Ledbetter* turned on whether it would be administratively costly to seek recoupment. And they do nothing to undermine Icicle's argument, because its entire point is that adequate relief likely will be unavailable at the end of this case. To the extent that Clausen suggests that Icicle must *affirmatively prove* that any funds would be unrecoverable, he is mistaken. A stay requires only a "*likelihood* of irreparable harm," not a *certainty* of it. *Philip Morris*, 131 S. Ct. at 2 (emphasis added). A likelihood at least exists here.

IV. CLAUSEN IS WRONG TO SUGGEST THAT THE EQUITIES FAVOR HIM

Icicle lastly showed (at 23-24) that the equities favored a stay because full security has been posted for the punitive-damages judgment and Clausen has already received more than half a million dollars in compensatory damages, costs, and attorney's fees. Clausen responds (at 14) that this argument conflicts with Icicle's claim that he will spend any punitive award. But Clausen nowhere disputes the notion that his lawyers will receive a portion of that award immediately. In addition, Clausen argues (at 14) that "[t]hrough its despicable conduct, Icicle managed to avoid paying Clausen what it owed him for six years," and that Clausen's Petition for Writ of Certiorari is a "pointless last-ditch effort to avoid its

legal responsibilities." Setting aside that the jury found that Clausen suffered no additional injuries on his maintenance-and-cure claim over and above Icicle's failure to pay the $37,420 in maintenance and cure (Pet. App. 30a n.2), this allegation is simply a re-hash of Clausen's argument that the Court will not grant certiorari. As explained, however, the decision below conflicts with decisions of this Court, adds to an existing split of authority in the lower courts, and raises an important issue. So the likelihood of certiorari adds to the equities suggesting that a stay is proper here.

CONCLUSION

For these reasons, Petitioner Icicle Seafoods, Inc., respectfully requests that the Court stay the portion of the Washington Supreme Court's judgment awarding Respondent Dana Clausen $1.3 million in punitive damages pending the disposition of this case.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I certify that a copy of the Reply in Support of Application Partially to Stay Judgment in *Icicle Seafoods v. Clausen*, No. 11-1475, was served via overnight mail on all parties required:

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I declare under penalty of perjury that the foregoing is true and correct.

Date: June 21, 2012

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