IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

Criminal No. 5:14-cr-00244

UNITED STATES OF AMERICA

v.

DONALD L. BLANKENSHIP

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS ALPHA'S RESTITUTION CLAIMS, OR, IN THE ALTERNATIVE, FOR DISCOVERY AND AN EVIDENTIARY HEARING

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Donald L. Blankenship, through undersigned counsel, has moved the Court to dismiss the claims of Alpha Natural Resources, Inc., and its subsidiaries (collectively "Alpha"), for restitution in this case. Based on a single misdemeanor conviction, the government asks the Court to order Mr. Blankenship to pay Alpha almost $28 million dollars for Alpha's legal fees, investigative expenses, and fines. This is an unprecedented attempt to add draconian penalties to an offense that Congress has classified as a misdemeanor, and Alpha has no right to recover any of these expenditures from Mr. Blankenship as restitution.

First, restitution is not a sentencing option in this case. The sentence for a misdemeanor conspiracy is limited to the maximum sentence for the offense that is the object of the conspiracy. Here, that object is the willful violation of mine safety regulations, 30 U.S.C. § 820(d). The applicable restitution statute – 18 U.S.C. § 3663 – does not authorize restitution for Title 30 violations.

Second, even if restitution is a sentencing option, it can only be imposed if the Court decides not to impose any other punishment. Section 3663 authorizes restitution for

misdemeanors only “in lieu of” other punishments, such as incarceration and a fine, not “in addition to” other punishments, as is permitted for felonies.

Third, Alpha is not a “victim” under the restitution statute. Alpha made at least two independent, knowing, and voluntary decisions to accept the liabilities for which it now seeks restitution: acquiring Massey Energy Company (“Massey”) in 2011 and then entering into a non-prosecution agreement with the government (“the NPA”). Those decisions were the cause of Alpha’s claimed “harm.” Moreover, Alpha cannot establish that its expenditures were economic losses. Alpha viewed the UBB explosion and government investigations as an opportunity to acquire Massey at a lower price and factored into its offering price for Massey’s shares the types of expenditures it now seeks to recover.

Fourth, Alpha is barred from obtaining restitution because its status as a “victim” is derived from its acquisition of Massey, which the superseding indictment alleged was a participant in criminal conduct. Participants in criminal conduct cannot receive restitution. To be clear, Mr. Blankenship denies participation in a criminal conspiracy. But Alpha admitted criminal culpability by actions – entering into the NPA and agreeing to fines, restitution, remedial expenditures, and cooperation – that reflect an admission of corporate criminal responsibility.

Fifth, well-established law in the Fourth Circuit prevents Alpha from recovering its claimed attorney’s fees and investigative expenses.

Sixth, the MSHA fines paid by Alpha could not have been proximately caused by the offense of conviction. The underlying citations were not included in the superseding indictment and Mr. Blankenship had no notice of them – the citations were issued more than a year and a half after the expiration of the alleged conspiracy. Moreover, MSHA assessed the fines against

the company, not any individual, as it could have done. And Alpha made the independent, voluntary decision to pay the fines rather than to contest the citations as part of the global resolution in the NPA.

Seventh, the Fifth Amendment's Due Process Clause, the Sixth Amendment's Jury Trial Clause, and the Eighth Amendment's Excessive Fines Clause all forbid the imposition of almost $28 million in restitution for this misdemeanor conviction, especially without any jury determination beyond a reasonable doubt of Mr. Blankenship's responsibility for the fines, attorney's fees, and investigative expenses sought by Alpha.

Eighth, the Court should deny restitution because the process of determining restitution would unduly complicate and prolong the sentencing proceedings. That statutory basis for denying restitution is especially applicable here. If Alpha's restitution claim is not denied as a matter of law, as it should be, a fair process for determining restitution would require many months of attorneys' time, and weeks, if not months, of this Court's time. None of the approximately 100 MSHA citations at issue in the restitution claim were at issue at trial. All were issued more than a year and a half after the end of the conspiracy period and after Mr. Blankenship left Massey. None were subject to any adjudicatory process within MSHA, as Alpha agreed not to contest them as a condition of non-prosecution. Whether each alleged safety violation occurred, and whether the offense of conviction directly and proximately caused each violation, would have to be determined on a citation-by-citation basis for each of the 100 citations. Whether the offense of conviction directly and proximately caused each alleged expenditure of attorney time or investigative expense would also have to be determined. These decisions will require extensive discovery from the government, Alpha, and others, and a lengthy evidentiary hearing. Alpha has ample resources to pursue recovery of its expenditures from Mr.

Blankenship in another forum. It should not be permitted to do so in the ill-fitting form of a restitution claim in this criminal case.

Ninth, the same restrictions that prohibit the Court from ordering restitution to Alpha under 18 U.S.C. § 3663 also prohibit the Court from ordering restitution as a condition of probation or supervised release.

Tenth, even if Alpha's restitution claim is not barred as a matter of law, the Court should exercise its discretion to deny restitution to Alpha for all of the reasons set forth in this memorandum.

Finally, if the Court does not dismiss Alpha's restitution claim now, it must provide Mr. Blankenship with the same due process protections available for a criminal trial so that he can defend himself from a claim of $28 million. Those protections include early return document subpoenas, an adequate period of time for discovery and other preparation, and an evidentiary hearing at which the Federal Rules of Evidence, the right to cross-examination, and a heightened standard of proof apply.

To be clear, this memorandum and the underlying motion seek dismissal of Alpha's restitution claims as a matter of law and proper exercise of this Court's discretion *prior* to the unnecessary expenditure of the parties' and the Court's time and resources on discovery and an evidentiary hearing. Judicial economy weighs heavily in favor of a preliminary ruling on the legal questions presented here.

This memorandum does not address the evidentiary deficiencies that will prevent the government from satisfying its burden of proving that the offense of conviction directly and proximately caused each of the expenditures for which Alpha seeks restitution. Those deficiencies will be developed in discovery and presented in other submissions and at any

hearing. To cite but one example, the notion that Mr. Blankenship's conduct in the conspiracy caused Alpha to spend more than $2.4 million dollars in legal fees for the representation of alleged co-conspirator Chris Blanchard is, in a word, preposterous. Among other deficiencies in Alpha's claim, those fees include almost three years of work by Mr. Blanchard's attorneys developing a defense to a criminal prosecution of Mr. Blanchard (not for his cooperation with the government, as Alpha claims) before he was presented in November 2014 with the Hobson's choice between indictment or immunity and cooperation.

BACKGROUND

This Court previously addressed the issue of restitution in two related proceedings: the sentencing of Gary May, the mine superintendent at UBB, and the sentencing of David Hughart, the President of Massey's Green Valley resource group. In the course of those proceedings, this Court found that May, who pled guilty to felony conspiracy to conceal violations of mine safety regulations from MSHA, could not be ordered to pay restitution because "there [wa]s no identifiable victim" of his offense. *United States v. May*, No. 12-cr-50, ECF No. 43 at 25 (Jan. 17, 2013). This Court reached the same conclusion when sentencing Hughart, who pled guilty to conspiracy to commit willful violations of mine safety violations and conspiracy to conceal violations from MSHA. *See United States v. Hughart*, No. 12-cr-220, ECF No. 38 at 40-41 (Sept. 10, 2013).

On December 3, 2015, Mr. Blankenship was convicted of a single misdemeanor charge of conspiracy to violate mine safety and health standards at UBB and acquitted of all other charges.

The government recently sent a summary of Alpha's claim for restitution to the probation office and defense counsel. Ex. A (Letter from S. Ruby to J. Gwinn, Feb. 25, 2016).[1] According to the letter, the government intends to seek an order of restitution requiring Mr. Blankenship to pay Alpha approximately $28 million as a result of his misdemeanor conviction.

The $28 million claim apparently comprises three categories of Alpha's expenses: (1) $4.3 million purports to be legal fees "for the representation of certain company employees who cooperated as witnesses in the investigation and prosecution of the offense of conviction"; (2) $13.4 million purports to be legal fees and investigative costs Alpha claims are related to the investigation and prosecution of the offense of conviction; and (3) $10 million is for fines that Alpha paid for safety citations issued by MSHA in December 2011, after MSHA completed its investigation of the UBB explosion. For the reasons set forth below, Alpha is not entitled to receive restitution for any of these expenses as a matter of law.[2]

ARGUMENT

District courts have no inherent power to order restitution, and therefore they must rely on a statutory source of authority to do so. *United States v. Cohen*, 459 F.3d 490, 498 (4th Cir. 2006). In this case, the government is seeking a restitution order under the discretionary-restitution statute, 18 U.S.C. § 3663.[3] Section 3663 gives district courts the discretion to award restitution to any "victim" of a defendant's offense. A "victim" is defined as "a person directly

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[1] The draft presentence report incorporates the content of the letter in a section summarizing the government's position regarding restitution.

[2] The defense's understanding is that the government is not seeking an order of restitution for any other person or entity or for any other harm, including harm resulting from the April 5, 2010 explosion at UBB. If the government's position changes, the defense will address it in a supplemental submission. Because the offense of conviction was not the proximate cause of the explosion, any claim for restitution for harm caused by the explosion must be denied.

[3] The mandatory-restitution statute, 18 U.S.C. § 3663A, is not applicable here, because it is restricted to certain enumerated crimes. However, some cases construing it are informative, because it includes some language identical to some portions of the discretionary statute. *See, e.g., United States v. Abdelbary*, 746 F.3d 570, 575-76 (4th Cir. 2014); *United States v. Sharp*, 463 F. Supp. 2d 556, 563 (E.D. Va. 2006). The procedures governing restitution are set forth in 18 U.S.C. § 3664.

and proximately harmed as a result of the commission of an offense," including, for conspiracy offenses, a "person directly harmed by the defendant's criminal conduct in the course of the . . . conspiracy." 18 U.S.C. § 3663(a)(2).

Restitution under § 3663 must "be tied to the loss caused by the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 418 (1990). Restitution may not be ordered for "'relevant conduct,' 'a related offense,' or a 'factually relevant offense.'" *United States v. Freeman*, 741 F.3d 426, 434 (4th Cir. 2014) (citing *Hughey*, 495 U.S. at 418). Furthermore, restitution in a conspiracy case must be traceable to "the *defendant's* criminal conduct in the course of the . . . conspiracy," not anyone else's. 18 U.S.C. § 3663(a)(2) (emphasis added).

The government bears the burden of demonstrating the causal connection between a victim's loss and the offense of conviction, as well as the amount of that loss. *See* 18 U.S.C. § 3664(e). The Fourth Circuit "has overturned restitution awards in which the Government could not show the requisite causal connection between the specific conduct underlying the offense of conviction and the victims' losses." *Freeman*, 741 F.3d at 434. "[E]very dollar" of restitution sought "must be supported by record evidence" demonstrating its specific connection to the offense of conviction. *United States v. Sharma*, 703 F.3d 318, 323 (5th Cir. 2012).

Finally, § 3663 includes a "complexity exception" that directs the district court to decline to order restitution if doing so would be unduly burdensome. *See* 18 U.S.C. § 3663(a)(1)(B)(ii).

As a matter of law, Alpha is not entitled to receive the restitution it claims in this case. Even if it were arguably eligible for restitution, the Court should rely on the complexity exception and its discretion to decline restitution. In the alternative, the Court should grant Mr. Blankenship discovery and order an evidentiary hearing on the relevant issues, with the procedural protections required by law.

I. The Court's Authority to Order Restitution Based on a Misdemeanor Conviction is Strictly Limited.

Because Mr. Blankenship was convicted of a misdemeanor, the Court's authority to order restitution is strictly limited. First, the punishment for a conspiracy to commit a misdemeanor is limited to what is provided for the underlying misdemeanor – if no restitution is permitted for that offense, as is the case here, then no restitution may be ordered. Second, even if restitution is an available punishment for the misdemeanor, § 3663 expressly directs that restitution may only be ordered "in lieu of" any other punishment.

A. Restitution is Not an Available Punishment for Misdemeanor Conspiracy to Violate Federal Mine Safety and Health Standards.

Restitution is not an available punishment for the conspiracy of which Mr. Blankenship was convicted. The conspiracy statute limits the punishment for conspiracies to commit a misdemeanor to that which is available for the object offense. Because Mr. Blankenship was convicted of conspiring to commit a misdemeanor for which restitution is not an available punishment, the Court may not require him to pay restitution on the basis of that conviction.

Under 18 U.S.C. § 371, if a defendant is convicted of a conspiracy to commit a misdemeanor, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." Restitution is a form of punishment. *See Pasquantino v. United States*, 544 U.S. 349, 365 (2005) ("The purpose of awarding restitution . . . [is] to mete out appropriate criminal punishment."); *Cohen*, 459 F.3d at 496 ("[R]estitution is . . . part of the criminal defendant's sentence."); *United States v. Bruchey*, 810 F.2d 456, 461 (4th Cir. 1987) (Restitution is "fundamentally 'penal' in nature."). Therefore, if a defendant is convicted of a conspiracy to commit a misdemeanor, he may not be ordered to pay restitution in excess of the maximum restitution provided for such misdemeanor.

In this case, Mr. Blankenship was convicted of conspiracy to commit a misdemeanor – violation of federal mine safety and health standards. *See* 30 U.S.C. § 820(d). Restitution is not an available punishment for any offense under title 30, including § 820(d). *See* 18 U.S.C. § 3663(a)(1)(A) (specifying the offenses for which restitution may be ordered). An order of restitution in this case would therefore "exceed the maximum punishment provided" for the misdemeanor Mr. Blankenship was convicted of conspiring to commit. Section 371 thus bars the Court from ordering any restitution here.

B. The Court May Not Order Restitution for a Misdemeanor If It Imposes a Term of Imprisonment, a Fine, or Any Other Punishment.

Even if the Court finds that restitution is an available punishment in this case, it may not order restitution if it imposes a term of imprisonment, a fine, or any other punishment. The restitution statute only authorizes a district court sentencing a defendant convicted of a misdemeanor to impose restitution "in lieu of" any other punishment.

In defining a district court's authority to order restitution, § 3663 provides, in relevant part, that the "court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or, *in the case of a misdemeanor, in lieu of any other penalty authorized by law*, that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3663(a)(1)(A) (emphasis added). "In lieu of" means "in the place of" or "instead of." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/lieu (last visited Mar. 7, 2016). Because Mr. Blankenship was convicted of a misdemeanor conspiracy, § 3663(a)(1)(A) only authorizes the Court to order him to pay restitution "instead of" any other penalty.

Indeed, Magistrate Judge VanDervort confirmed this meaning of the statute when he observed that "the maximum penalty which could be imposed based upon [Mr. Blankenship's] conviction, aside from the mandatory assessment and supervised release, is up to one year in

prison and a $250,000 fine *or* restitution." ECF No. 561 at 7 (emphasis in original). The District Court for the Southern District of New York has taken the same position. *United States v. Bengis*, No. 03-cr-308, 2007 WL 1450381, at *5 n.6 (S.D.N.Y. May 17, 2007) ("As a result of his misdemeanor guilty plea, [the defendant] was sentenced to twelve months imprisonment and forfeiture of $1.5 million to the United States. This appears to mean that [the defendant] is ineligible for restitution under the VWPA."). Accordingly, the Court may not order any restitution in this case if it imposes a term of imprisonment, a fine, or other punishment.

A single, out-of-circuit decision from over 20 years ago held that a district court could impose restitution in addition to a penalty in misdemeanor cases. *See United States v. Miguel*, 49 F.3d 505 (9th Cir. 1995). That decision, however, does not bind this Court, is deeply flawed, and has been undermined by subsequent developments in the law.

First, the *Miguel* court ignored the clear text of § 3663(a)(1)(A), and instead rested its holding on a strained interpretation of the legislative history. *See id.* at 509-10. In the Fourth Circuit, however, "[w]hen the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Mitchell*, 518 F.3d 230, 233-34 (4th Cir. 2008) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989)). Indeed, the Fourth Circuit has specifically directed that "[t]he plain language" of § 3663 "is to be given effect." *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992). Because § 3663(a)(1)(A) plainly states that restitution may only be ordered for a misdemeanor "in lieu of" any other penalty, the Court's "sole function . . . is to enforce it according to its terms." *Mitchell*, 518 F.3d at 233-34 (quoting *Ron Pair Enters.,* 489 U.S. at 241-42). "[A]rguments about purpose, history, and statutory titles cannot contradict a law's plain text." *United States v. Otuya*, 720 F.3d 183, 190 (4th Cir. 2013).

Second, subsequent congressional action has demonstrated that Congress meant what it said when it directed that restitution may only be ordered "in lieu of" punishment in misdemeanor cases. In 1996, one year after *Miguel* was decided, Congress passed the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A, a separate restitution statute enumerating a list of crimes – none of which apply here – for which district courts are required to impose restitution. The text of that statute is quite revealing. While § 3663 authorizes the district court to order restitution only "in lieu of" any other penalty in misdemeanor cases, § 3663A empowers the court to order restitution "*in addition to* or in lieu of" any other penalty for misdemeanors within the scope of that statute. *Compare* 18 U.S.C. § 3663(a)(1)(A) *with* 18 U.S.C. § 3663A(a)(1) (emphasis added). The inclusion of the "in addition to" language in § 3663A(a)(1) makes clear that Congress understood that § 3663 limited district courts to imposing <u>either</u> restitution or punishment, but not both, on defendants convicted of misdemeanors. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Abdelshafi*, 592 F.3d 602, 608 (4th Cir. 2010) (citation omitted).

The congressional debate over § 3663A confirmed that the inclusion of the "in addition to" language in that provision was intentional, and that the absence of such language in § 3663(a)(1)(A) limited district courts' authority to order restitution for misdemeanor convictions. "Under current law," one representative explained, referring to § 3663, "[w]hile [] restitution may be ordered in addition to any other penalty if the crime is a felony, *it can only be ordered in lieu of any other penalty if the crime is a misdemeanor*. . . . [§ 3663A] would ensure that offenders make restitution to their victims by mandating that restitution be paid to victims of

crime, in addition to any other penalty authorized by law." 141 Cong. Rec. H1307, 104th Cong., 1st Sess. (daily ed. Feb. 7, 1995) (remarks of Mr. McCollum) (emphasis added).

Finally, the *Miguel* court failed to apply the rule of lenity because it concluded, wrongly, that interpreting § 3663(a)(1)(A) to limit district courts' authority to order restitution would be "implausible." *Miguel*, 49 F.3d at 510 (citation omitted). "Under the rule of lenity any criminal statute, including a sentencing provision, must be construed in favor of the accused and against the government if it ambiguous." *United States v. Hall*, 972 F.2d 67, 69 (4th Cir. 1992). As demonstrated above, § 3663(a)(1)(A) is not ambiguous – it clearly states that district courts may only order restitution for misdemeanor convictions "in lieu of" any other penalty. But even if it were ambiguous, the rule of lenity would require the Court to interpret it against the government and in favor of Mr. Blankenship. Despite what the *Miguel* court suggested, it is not "implausible" to believe that Congress intended to limit district court's authority to order restitution in misdemeanor cases. Misdemeanors are less serious crimes than felonies, and therefore merit less serious punishment. Congress recognized that difference when it enacted § 3663.

In sum, the plain text of § 3663 does not authorize the Court to order restitution if it imposes any other penalty in this case. Although there is one decades-old case reaching a contrary conclusion, its reasoning is unsound and has been contradicted by subsequent developments in the law. It should be rejected.

II. Alpha is Not a Victim Because Its Own Decisions, Not the Offense of Conviction, Caused the Expenditures for Which It Now Seeks Restitution, and Because It Cannot Establish That It Was Harmed.

Alpha is not a "victim" in this case. It is a volunteer and an opportunist. Alpha's knowing and voluntary acts of acquiring Massey and then entering into the NPA with the

government – not the conspiracy – were the direct and proximate causes of Alpha's claimed "harm" of paying fines, legal fees, and investigative costs. Moreover, following the explosion at UBB, Alpha viewed Massey's liabilities as an opportunity to acquire Massey at a favorable price. It factored into its offering price for Massey the types of liabilities for which it now seeks restitution. Therefore, Alpha suffered no economic harm when those liabilities became due.

A. <u>By Acquiring Massey, Alpha Knowingly and Voluntarily Acquired The Liabilities for Which It Now Seeks Restitution.</u>

Alpha acquired Massey in June 2011, more than a year after the UBB explosion and the commencement of government investigations of Massey. There can be no doubt that Alpha was fully aware of the expenses it would incur as a result of the Massey acquisition and government investigations. In a proxy statement explaining the terms of the acquisition to its shareholders, Alpha specifically acknowledged that acquiring Massey also meant acquiring certain regulatory, legal, and investigatory expenses:

> [T]he U.S. Attorney's Office and the federal Mine Safety and Health Administration, in conjunction with the State of West Virginia, are currently investigating the UBB explosion. On February 28, 2011, Massey's head of security at the UBB mine was charged with obstruction of justice and making false statements in connection with the U.S. Attorney's investigation. On March 22, 2011, federal criminal charges were filed against a former Massey employee who worked at UBB until August 2009 in connection with falsifying his foreman's license and making false statements in connection with the U.S. Attorney's investigation.
>
> The outcomes of these pending and potential cases, claims, and investigations are uncertain. Depending on the outcome, these actions could have adverse financial effects or cause reputational harm to Alpha. Alpha may not resolve these actions favorably or may not be successful in implementing remedial safety measures that may be imposed as a result of some of these actions and/or investigations. Also, under the merger agreement, Alpha has agreed to leave in place and not to modify those provisions granting rights to indemnification and exculpation from liabilities

> for acts or omissions occurring at or prior to the effective time of the merger and related rights to the advancement of expenses in favor of any current or former director, officer, employee or agent of Massey contained in the organizational documents of Massey and its subsidiaries and certain related indemnification agreements.

Ex. B at 42-43 (Proxy Statement Excerpt).[4] Alpha's informed business decision to acquire Massey was the independent cause of the expenditures it now seeks as restitution.

B. <u>By Entering Into the NPA, Alpha Knowingly and Voluntarily Agreed to Make the Expenditures for Which It Now Seeks Restitution.</u>

After acquiring Massey, Alpha then made the independent, knowing, and voluntary decision to incur and pay the specific regulatory, legal, and investigatory expenses for which it now seeks restitution. In December 2011, Alpha executed a non-prosecution agreement with the federal government, attached as Exhibit C. First, with respect to the fines assessed at UBB, Alpha "agree[d] that it will not contest . . . any citation or order issued by MSHA on December 16, 2011, in connection with the investigation of the UBB explosion . . . and will pay in full proposed penalties of $10,828,191 for all such citations within 30 days of the execution of this Agreement." Ex. C at 5.[5] Second, with respect to the attorney's fees and investigatory expenses, Alpha agreed:

> Until the date upon which all investigations and prosecutions conducted by the Government against any individuals that arise out of the conduct described in this Agreement are concluded . . . [to] (a) cooperate fully with the Office, DOJ, the Federal Bureau of Investigation, DOL, including MSHA and the DOL Office of Inspector General, and any other law enforcement agency designated by the Office and DOJ; (b) use [its] best efforts to promptly secure the attendance and truthful statements or testimony of any officer, agent, or employee of Massey or Alpha at

[4] This portion of the proxy statement also makes it clear that Alpha voluntarily agreed to indemnify and advance the legal fees and expenses of former Massey officers and employees. That decision by Alpha in the acquisition agreement, not the alleged conspiracy, is the cause of Alpha's payment of the $4.3 million in employee legal fees sought in restitution.

[5] The fines for which Alpha seeks restitution appear to be included in this group. None of the citations underlying the fines were included in the superseding indictment against Mr. Blankenship or addressed at trial. All of the citations were issued in December 2011, twenty months after the end of the conspiracy period in the indictment.

> any meeting or interview or before the grand jury or at any judicial proceeding related to the conduct described in this Agreement . . . and (d) provide the Government, upon request, all non-privileged information, documents, records, or other tangible evidence about which the Government or any designated law enforcement agency inquires in connection with any investigation or matter related to the conduct described in this agreement.

Id. at 6. By agreeing to settle rather than contest the citations issued at UBB and by agreeing to cooperate fully with the government's investigation, Alpha once again knowingly and voluntarily assumed responsibility for the expenses for which it now seeks restitution.

C. <u>Because Alpha – Twice – Knowingly and Voluntarily Accepted the Liabilities, It is Not a Victim Entitled to Restitution.</u>

To be compensable under the restitution statute, a victim's harm must have been "directly and proximately" caused by the defendant's criminal conduct. 18 U.S.C. § 3663(a)(2). "One is not a 'victim' . . . merely because the party suffered a causally related or derivative loss as a result of the crime." *United States v. Mintz*, No. 09-cr-194, 2010 WL 3075477, at *2 (E.D.N.C. Aug. 5, 2010) (citations omitted). "[V]oluntary expenditures," therefore, even if related to the offense of conviction, "are not losses" for which restitution may be ordered. *Gall v. United States*, 21 F.3d 107, 112 (6th Cir. 1994).

Here, Alpha's claimed harms are "directly and proximately" attributable solely to *its own knowing and voluntary decisions to accept those costs* – first when it acquired Massey, then a second time when it entered the NPA. Each of those decisions was an independent cause that has no proximate connection to Mr. Blankenship. Indeed, it defies logic to contend that, during the indictment period, Mr. Blankenship could have reasonably foreseen that Alpha would acquire Massey more than a year later and then enter an agreement with the federal government wherein it agreed not to contest any citations issued at UBB and to fully participate in a criminal investigation of the company.

D. The Government Cannot Establish that Alpha Sustained Any Economic Loss By Making the Payments for Which It Seeks Restitution.

The government must establish that Alpha sustained an economic loss by making the payments for which it now seeks restitution. *See* 18 U.S.C. § 3664(e). The government cannot satisfy that burden. Alpha was not financially harmed at all. Alpha made a calculated decision to acquire Massey at a price that factored in Massey's liabilities arising from the UBB explosion and government investigations. Weighing the anticipated costs of Massey's potential liabilities, Alpha's financial advisor, Morgan Stanley, deemed the transaction acquiring Massey "fair from a financial point of view to Alpha." Ex. B at 92. With full knowledge that it would be accepting Massey's regulatory, legal, and investigatory liabilities, Alpha's Board of Directors declared the acquisition "fair to, and in the best interests of, Alpha and its stockholders." *Id*. at 11; *see also id.* at 86 (noting that the "Alpha board of directors . . . considered the potential adverse impact of . . . the outcomes of pending and potential litigation and governmental investigations involving Massey, particularly with regard to the UBB explosion"); *id.* at 87 (stating that the "Alpha board of directors concluded that the anticipated benefits of the merger would outweigh the [adverse] considerations").

By negotiating a "fair" price for Massey in light of its regulatory, legal, and investigatory liabilities, Alpha avoided suffering any "actual loss" as a result of those liabilities. Restitution is limited to a victim's "actual loss," meaning the harm that the victim actually suffered as a result of the offense of conviction. *United States v. Harvey*, 532 F.3d 326, 339 (4th Cir. 2008). The restitution statute "expressly forecloses" the possibility of double recovery by a victim. *United States v. Karam*, 201 F.3d 320, 329 n.11 (4th Cir. 2000). Therefore, if one company acquires another company, the acquirer may not seek restitution for the acquired company's liabilities when the price it paid in the acquisition already accounted for them. *See, e.g., United States v.*

Martin, 803 F.3d 581, 592 (11th Cir. 2015). In other words, because Alpha knew that it would be obliged to pay certain costs related to the government's investigation of Massey when it acquired the company, the "fair" price it negotiated for the acquisition would have been discounted to reflect those anticipated costs. As a result, Alpha would not have suffered any net "actual loss" for which it could receive restitution.

Finally, it would be contrary to public policy to allow Alpha to escape its obligations under the NPA by shifting those burdens to Mr. Blankenship. The NPA was an agreement between Alpha and the federal government to address Alpha's *own* liabilities. To shift to Mr. Blankenship the financial commitments set forth in the NPA would rewrite the document and lessen the punishment which the U.S. Attorney's Office determined was appropriate and to which both parties agreed. Corporations that enter non-prosecution agreements with the federal government must not be permitted to avoid the responsibilities they undertake by retroactively reassigning those burdens to their former executives.

III. Alpha is Barred from Obtaining Restitution Because It is a Charged and Admitted Participant in the Alleged Criminal Conduct.

Mr. Blankenship asserted and continues to assert that he did not participate in any conspiracy with anyone and that Massey was committed to safety under his leadership. Nevertheless, Massey, now merged into Alpha, was identified as a co-conspirator in the criminal offense for which Mr. Blankenship was convicted. *See* ECF No. 169, ¶ 87(a) (charging that Mr. Blankenship and others conspired "for Blankenship *and Massey*, as operators of UBB, to willfully violate mine safety and health standards at UBB") (emphasis added). The indictment thus made clear that "Massey" itself, separate and apart from Mr. Blankenship, willfully violated mine safety standards. The indictment also alleged that Massey as a company profited from the alleged safety violations based on the "conclu[sion] that it was less expensive to routinely pay

fines for violating [mine safety] standards than to allocate the necessary funds to following them." ECF No. 169 at ¶ 58. The prosecution repeated these allegations throughout the trial, including in closing argument. *See, e.g.,* Trial Tr., Vol. 28 at 5862 (Nov. 17, 2015) ("[E]very time you hear 'Massey,' you should be thinking defendant's criminal conspiracy to break the law and run coal.").

The superseding indictment is riddled with allegations that individuals at Massey other than Mr. Blankenship were co-conspirators. Those alleged co-conspirators included underground workers, mine superintendents, resource group presidents, and the Board of Directors. *See, e.g.,* ECF No. 169 at ¶ 91 (it was part of the conspiracy that "others known and unknown to the Grand Jury" instructed subordinates to violate mine safety standards); *id.* at ¶ 92 (it was part of the conspiracy that "others known and unknown to the Grand Jury" failed to provide UBB with enough resources); *id.* at ¶ 93 (it was part of the conspiracy that "others known and unknown to the Grand Jury" pressured UBB management to increase production and cut costs); *id.* at ¶ 95 (it was part of the conspiracy that Massey "officials" awarded compensation without regard for safety violations and failed to discipline for safety violations); *id.* at ¶ 96 (it was part of the conspiracy that "persons known and unknown to the Grand Jury would and did routinely commit willful, readily preventable violations of mandatory federal mine safety and health standards at UBB"). At trial, the government, after repeatedly refusing to identify alleged co-conspirators, finally did so when it sought to admit certain evidence. *See, e.g.* Trial Tr. Vol. 5 at 1108 (Oct. 14, 2015) (Andy Coalson); Trial Tr. Vol 6 at 1269 (Oct. 15, 2015) (Chris Adkins); Trial Tr. Vol. 8 at 1480 (Oct. 19, 2015) (Christopher Blanchard); *id.* at 1685 (Gary May); Trial Tr. Vol 9 at 1755-56 (Oct. 20, 2015) (mine supervisors); Trial Tr. Vol. 18 at

3777 (Nov. 2, 2015) (Hughie Stover). These allegations of other conspirators at Massey also implicate Alpha, through its acquisition of Massey, in the charged conspiracy.

Alpha, furthermore, effectively admitted its own criminal culpability in this case by entering into the NPA. In the NPA, Alpha agreed to pay hundreds of millions of dollars for "restitution," remedial programs, and fines for MSHA citations issued to Alpha's subsidiaries for alleged safety violations, and also agreed to fulfill other obligations, including cooperation in the government's investigations. *See* Ex. B, ¶¶ 5-10. In return, the government promised not to criminally prosecute Alpha for the conduct attributable to it in the criminal indictments of Hughie Stover and Thomas Harrah, for the conduct attributable to it related to the UBB explosion, for the conduct underlying the MSHA citations, and for a broad range of additional conduct. *See* Ex. B, ¶ 11. The NPA states that it "will not be deemed to constitute any admission by [Massey, Alpha, their affiliates, or individuals] of *civil liability* under any local, state, or federal statute or any principal of common law." Ex. B, ¶ 15 (emphasis added). However, corporate non-prosecution and deferred prosecution agreements like the one entered into by Alpha are tantamount to *criminal* guilty plea agreements designed to avoid the collateral consequences of a criminal conviction in civil and regulatory proceedings. *See* Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea By Another Name?*, INSIDE LITIGATION (Winter 2006). The agreements are widely and reasonably viewed as the modern day equivalent of a corporate guilty plea. *See id.*

Multiple federal Courts of Appeal have held that a "co-conspirator cannot recover restitution for crimes in which he or she participates." *United States v. Lazarenko*, 624 F.3d 1247, 1251 (9th Cir. 2010); *see also In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014); *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006). Co-participants are

barred from being treated as victims both as a matter of statutory text and based on plain common sense. First, "[t]hrough its textual references to a 'defendant' and a 'victim,'" § 3663A "contemplates at least two distinct classes of individuals: perpetrators and victims." *Wellcare*, 754 F.3d at 1239. Section 3663A "highlights the perpetrator-victim distinction when it states, 'the *defendant* [must] make restitution to the *victim*.' . . . [G]iven [this] text, a victim does not exist without a perpetrator, and a perpetrator cannot be his own victim.'" *Id.* (emphasis in original). Second, "courts have recognized that Congress could not have intended" a co-conspirator to collect restitution for crimes in which it participated, since "[o]therwise, the federal courts would be involved in redistributing funds among wholly guilty co-conspirators." *Lazarenko*, 624 F.3d at 1251; *see also Reifler*, 446 F.3d at 127 (treating co-conspirators as victims entitled to restitution would "adversely reflect[] on the public reputation of the judicial proceedings"). This is so even if the co-conspirator/victim "was not a willing participant" in acts included in the conspiracy. *Lazarenko*, 624 F.3d at 1252.

Section 3663, therefore, prohibits the Court from treating Alpha as the victim of its own crime. Indeed, "any order . . . that has the effect of treating coconspirators as 'victims,' and thereby requires 'restitutionary' payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings" that an appellate court will reverse it "sua sponte." *Reifler*, 446 F.3d at 127.

IV. Alpha's Harms Are Not Compensable under the Restitution Statute.

Even if Alpha could be considered a victim entitled to receive restitution – which it is not – the types of losses it claims are not compensable under the restitution statute. The Court has

no authority to order restitution for Alpha's legal and investigatory expenses and the offense of conviction cannot be the proximate cause of the fines paid by Alpha.

A. Attorneys' Fees and Investigative Costs are Not Compensable under the Restitution Statute.

The Fourth Circuit has made crystal clear that the restitution statute does not authorize the district courts to award restitution for consequential damages, including attorneys' fees and investigative costs. Section 3663 enumerates specific categories of loss for which the Court may order restitution; it does not permit blanket compensation for all harm suffered by a victim. Two of these categories are potentially relevant here: § 3663(b)(1), which permits restitution for a victim's lost property, and § 3663(b)(3), which permits restitution for a victim's practical expenses while participating in the government's investigation. Neither category includes consequential damages, such as Alpha's attorneys' fees or investigative costs. Therefore, the Court may not order Mr. Blankenship to pay restitution for such costs.

1. Damaged, Lost, or Destroyed Property

First, the restitution statute permits a court to order a defendant to pay restitution for "damage to or loss or destruction of property." *See* 18 U.S.C. § 3663(b)(1). The Fourth Circuit has made clear that the "plain language" of this provision precludes a district court from awarding restitution for "consequential damages such as attorney's and investigators' fees." *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992). Indeed, the Fourth Circuit just recently reaffirmed that this language "does not authorize restitution for consequential damages" and that it is therefore "improper" for a district court to order restitution for "attorneys' and investigators' fees." *United States v. Abdelbary*, 746 F.3d 570, 577-78 (4th Cir. 2014) (citation omitted).

The sole circumstance in which a court may order restitution for attorneys' fees or investigative costs under this provision is the "exceptional scenario" where "a victim's attorney fees are incurred in a civil suit, and the defendant's overt acts forming the basis for the offense of conviction involved illegal acts during the civil trial, such as perjury." *Id.* Those unique circumstances, obviously, are not present here. Therefore, § 3663(b)(1) does not permit the Court to order restitution for Alpha's or its employees' attorneys' fees or investigative expenses.

2. Lost Income, Child Care, Transportation, and Other Expenses

Second, the restitution statute permits a court to order restitution for "lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id.* at § 3663(b)(4). Attorneys' fees and investigative costs are not "lost income," "child care," or "transportation." The only way such costs could be covered by this provision, therefore, is if they were the "other expenses" to which the statute refers. However, as several district courts in this Circuit have held, the statutory language cannot be read so broadly. This provision is meant to encompass only practical expenses incurred by individual victims participating in the investigation of their offenses, not millions of dollars' worth of attorneys' fees and investigative costs expended by a large corporation.

As the District Court for the Eastern District of Virginia has explained, § 3663(b)(4)'s general reference to "other expenses" is "a paradigmatic example where the textual interpretive canon of *ejusdem generis* should be applied." *United States v. Okun*, No. 08-cr-132, 2009 WL 2365979, at *4 (E.D. Va. July 31, 2009). "'When general words follow specific words in a statutory enumeration, we . . . construe the general words to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* (citing *Ayes v. U.S. Dept. of Veterans Affairs*, 473 F.3d 104, 109 n.3 (4th Cir. 2006). Applying that interpretive

canon to the provision at issue here, the District Court in *Okun* found that "[t]he relevant listed specific examples in Subsection (b)(4) all pertain to logistical necessities imposed on victims in order to allow them to participate in the investigation of their offenses, e.g., transportation to meetings with federal agents or child care during those meetings. *Attorneys' fees . . . do not fit this general pattern.*" *Id.* (emphasis added). Several other district courts in this Circuit have agreed. *See, e.g., United States v. Chong Lam*, No. 07-cr-374, 2011 WL 1167208 (E.D. Va. Mar. 28, 2011) ("Consequential damages such as attorneys' fees may not be included in a restitution judgment" under § 3663A(b)(4).); *United States v. Mintz*, 2010 WL 3075477, at *2 ("Consequential fees are not included in the restitution calculation" under § 3663(b)(4), including "attorneys' and investigation fees."). Alpha's attorneys' fees and investigative costs, therefore, are not "other expenses" for which restitution may be ordered.

The Second Circuit has, in certain instances, permitted district courts to order restitution for attorneys' fees and investigative expenses. *See United States v. Amato*, 540 F.3d 153, 160 (2d Cir. 2008). That approach, however, conflicts with Fourth Circuit precedent. It has already been specifically rejected by at least one district court in this circuit. *See Okun*, 2009 WL 2365979, at *4. This Court should reject it as well.

First, as the District Court for the Eastern District of Virginia explained when it declined to follow *Amato*, that decision's broad reading of the phrase "other expenses" in § 3663(b)(4) is "somewhat puzzling," since the Second Circuit "even realized that their 'interpretation of the statute renders Congress' reference to child care and transportation expenses somewhat superfluous.'" *Okun*, 2009 WL 2365979, at *4 (quoting *Amato*, 540 F.3d at 161). By contrast, the District Court explained, "[t]he Fourth Circuit tends to utilize the doctrine of *ejusdem generis* in a somewhat more stringent manner, and that approach [should] guide[] the analysis of the

statute at hand." *Id.* (citing *United States v. Ryan-Webster*, 353 F.3d 353, 365 (4th Cir. 2003)). Based on the Fourth Circuit's more stringent approach to statutory interpretation, "other expenses" must be read narrowly to exclude restitution for attorneys' fees and investigatory costs.

Second, as the District Court in *Okun* also noted, the Second Circuit's decision "rel[ied] on [its] broad interpretation of the remedial function of the [restitution statute], rather than a strict construction of the statutory language itself." *Id.* at *3 (citing *Amato*, 540 F.3d at 161). "The Fourth Circuit," by contrast, "has explained that an award of restitution must conform to the plain language of the statute." *Id.* at *5. "The plain language of the [restitution] statute is to be given effect, even if costs that are not included would appear to be justified as a way of making the victim whole." *Mullins*, 971 F.2d at 1147. Reading § 3663(b)(4) according to its plain terms, as the Fourth Circuit requires, it is clear that attorneys' fees and investigatory expenses are not covered by this provision.

In sum, the Second Circuit's strained reading of § 3663(b)(4) is contrary to both logic and to Fourth Circuit precedent. This is perhaps the reason why, as the *Okun* court noted, that the Second Circuit's approach has been rejected by the Fifth, Seventh, and Tenth Circuits. *See Okun*, 2009 WL 2365979, at *3 (citing *United States v. Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002); *United States v. Shepard*, 269 F.3d 884, 887 (7th Cir. 2001); *United States v. Barton*, 366 F.3d 1160, 1167 (10th Cir. 2004)). This Court should do the same.

B. Alpha Cannot Recover from Mr. Blankenship the Fines Alpha Decided to Pay MSHA.

The fines Alpha chose to pay MSHA, as a matter of law, cannot have been "directly and proximately" caused by Mr. Blankenship's alleged conduct. The causal chain between Mr. Blankenship's personal conduct in the charged conspiracy and Alpha's payment of the fines is

simply too attenuated. The citations underlying the fines were issued twenty months after the end of the conspiracy charged in the indictment, after Mr. Blankenship left Massey. Mr. Blankenship could not have known about them during the course of the alleged conspiracy. Moreover, the issuance of citations by MSHA reflected an independent, intervening decision that broke any chain of causation with Mr. Blankenship. So too was Alpha's decision not to contest the citations as part of the NPA's global resolution of criminal and regulatory matters.

Moreover, for the government to assert that Alpha (or Massey) incurred any economic harm as a result of paying those fines is inconsistent with its theory of prosecution and the indictment. The superseding indictment alleged that the conspiracy reflected the "cho[ice] to maximize profits by depriving UBB of the coal miners and non-coal-production time that it needed to comply with mandatory federal mine safety standards" based on the "conclu[sion] that it was less expensive to routinely pay fines for violating [mine safety] standards than to allocate the necessary funds to following them." ECF No. 169 at ¶ 58. If, as the government alleged, the company was able to "maximize profits" because it was "less expensive to routinely pay fines for violating [mine safety] standards," then the company could not have suffered any actual loss as a result of those fines.

Finally, the Court should not override MSHA's decision to assess fines only against the company and not against individuals. MSHA had authority to do both. *See* 30 U.S.C. § 820(c). Congress exclusively assigned to MSHA, not to the federal courts, the authority to assess civil penalties for the violation of mine safety regulations, and to decide on whom to impose those penalties. *See* 30 U.S.C. § 820(i). Congress directed that when assessing civil monetary penalties, MSHA should apply its technical expertise to weigh a number of specific considerations: "[T]he operator's history of previous violations, the appropriateness of such

penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." *Id.* For each of the fines at issue here, MSHA conducted this analysis and elected to impose fines on the company, not on any individual. The Court should not substitute its judgment for MSHA's by shifting responsibility for the fines to Mr. Blankenship, rather than the company.

V. The Determination of Restitution for the Fines, Alpha's and Its Employees' Attorney's Fees, and Alpha's Investigative Costs Would Overly Prolong and Complicate These Proceedings.

Even if Alpha were a victim and the costs sought by the government were compensable under the restitution statute – neither of which is the case – the Court should not order restitution here because the determination would overly prolong and complicate the sentencing process.

Section 3663 contains a "complexity exception" that allows a district court not to order restitution if "the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims." 18 U.S.C. § 3663(a)(1)(B)(ii). This exception "reflects Congress's intention that the process of determining an appropriate order of restitution be 'streamlined' and that the restitution 'determination be made quickly.'" *United States v. Reifler*, 446 F.3d 65, 136 (2d Cir. 2006) (citations omitted). The restitution statute was not meant to permit "a sentencing judge [to] . . . adjudicate all civil claims against a criminal defendant arising from conduct related to the offense." *United States v. Kones*, 77 F.3d 66, 69 (3d Cir. 1996).

> Rather, it was expected that entitlement to restitution could be readily determined by the sentencing judge based upon the evidence he had heard during the trial of the criminal case . . . The kind of case that Congress had in mind was one in which liability

> is clear from the information provided by the government and the defendant and all the sentencing court has to do is calculate damages . . . This aspect of Congress's expectation is important because it counsels against construing the text of the statute in a way that would bring fault and causation issues before the sentencing court that cannot be resolved with the information otherwise generated in the course of the criminal proceedings on the indictment.

Id. at 69-70.

The complexity exception "call[s] for a weighing of the burden of adjudicating the restitution issue against the desirability of immediate restitution-or otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *Id.* at 68-69. In applying the provision, "'a burdensome, complicated, or speculative calculation provides a good reason for the district court to decline to exercise its discretion.'" *United States v. Martinez*, 690 F.3d 1083, 1089 (8th Cir. 2012) (citation omitted). "[C]ourts have exercised their discretion to invoke this exemption in cases involving 'difficult issues of causation and speculative loss.'" *In re Allen*, 568 Fed. Appx. 314, 315 (5th Cir. 2014).

The complexity exception was designed to avoid precisely the situation presented here. Determination of restitution for the fines, fees, and expenses would require the Court to consider difficult issues of causation and responsibility. For the Court to consider restitution for the fines, it would have to determine, with respect to each and every one of the 100 citations, whether the alleged condition or practice actually existed at UBB, whether the alleged condition or practice was a regulatory violation, and, if so, whether the violation was "directly and proximately" caused by Mr. Blankenship's personal conduct in the course of the alleged conspiracy. 18 U.S.C. § 3663(a)(2). That means the Court would have to assess whether each individual citation would have been issued "but for" something Mr. Blankenship did and whether the

issuance of that citation would have been reasonably foreseeable to him at the time. *See United States v. Martin*, 195 F.3d 961, 968 (7th Cir. 1999) (Posner, J.); *Mintz*, 2010 WL 3075477, at *2; *United States v. Sharp*, 463 F. Supp. 2d 556, 567 (E.D. Va. 2006); *United States v. Credit Suisse*, No. 14-cr-188, 2014 WL 5026739, at *4 (E.D. Va. Sept. 29, 2014). The determination would have to be made based on witness testimony and documentary evidence subject to cross-examination. Given the number of citations at issue – approximately 100 – and the difficult issues of proof, causation, and responsibility with respect to each, such proceedings would raise complex legal and evidentiary issues and would require a substantial amount of the Court's time.

Similarly, for the Court to consider restitution for Alpha's legal and investigatory costs, it would have to determine, with respect to each timekeeper's expenditure of time, whether it was "tied to the loss caused by the offense of conviction." *Hughey*, 495 U.S. at 418. "[E]very dollar" of restitution sought "must be supported by record evidence" demonstrating its specific connection to the offense of conviction. *Sharma*, 703 F.3d at 323. The Court's scrutiny on this point must be exacting – restitution is not available simply because there was a "factual connection" between a victim's loss and the offense of conviction, *United States v. Davis*, 714 F.3d 809, 813-14 (4th Cir. 2013), or because the loss and the offense were "inextricably intertwined," *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 (4th Cir. 1995). A restitution decision on Alpha's claimed attorneys' fees and investigative costs, therefore, will require the parties and the Court to sift through nearly $18 million in bills and timesheets in order to determine precisely which of these claimed costs were "tied to the offense of conviction" – conspiracy to willfully violate mine safety standards – and which arose from other, non-compensable aspects of the investigation, such as the UBB explosion, the three charged offenses of which Mr. Blankenship was acquitted, potential and actual charges against

other individuals, Massey employees' attorneys' work on their client's own criminal exposure, and so forth. "Other expenses" under § 3663(b)(4), moreover, are only compensable if they were "necessary," which the Court must also assess with respect to each dollar of restitution Alpha seeks. The result, once again, will be exactly the kind of complicated, prolonged proceeding that § 3663's complexity exception is meant to avoid.

The restitution determination here also would be complicated by evidence related to Alpha's 2011 acquisition of Massey. As previously noted, Alpha acquired Massey with full knowledge of the fines and expected legal and investigatory liabilities. The Court will have to analyze Alpha's valuation of those liabilities, as well as the accompanying reduction in purchase price it negotiated, in order to determine whether Alpha suffered any "actual harm" from these expenses, or if, instead, it is seeking to collect a windfall for costs for which it already has been compensated. *See United States v. Karam*, 201 F.3d 320, 329 n.11 (4th Cir. 2000); *see also United States v. Rakhamimov*, 13-cr-0662, 2015 WL 6739579, at *4 (D. Md. Nov. 2, 2015). This difficult financial analysis will only add to the complexity of the case.

In *United States v. Martin*, 803 F.3d 581 (11th Cir. 2015), for example, the Eleventh Circuit vacated an order requiring a defendant convicted of mortgage fraud to pay restitution to the successors of his original lenders, since the district court had not determined what amount the successors had paid the original lenders to acquire the mortgages, and thus the court could not have known whether the successors had actually suffered a loss from the unpaid loans. *See id.* at 592. Similarly, in *United States v. Baker*, 25 F.3d 1452 (9th Cir. 1994), the Ninth Circuit vacated an order requiring defendants convicted of making false statements on loan applications to pay restitution to the successor bank, since the original lender had written off the loans as

uncollectible before the successor took over, and thus "[t]he government ha[d] not shown that [the successor] sustained any loss from the bad loans to the defendants." *Id.* at 1455.

Moreover, Alpha has the resources to purse its claims in a civil proceeding rather than through restitution in a criminal case in which none of the necessary issues were determined at trial. Reliance on the complexity exception is especially appropriate where, as here, there are alternative avenues for relief. *See, e.g., United States v. Gallant*, 537 F.3d 1202, 1254 (10th Cir. 2008); *United States v. Ferguson*, 584 F. Supp. 2d 447, 458 (D. Conn. 2008); *United States v. Kline*, 199 F. Supp. 2d 922, 927 (D. Minn. 2002).

For all of these reasons, even if the Court finds that Alpha is a victim and that it may be entitled to restitution for the fines, attorney's fees, and investigative costs, the Court should exercise its discretion under the complexity exception and decline to order restitution.

VI. There Are Multiple Constitutional Bars to Alpha's Restitution Claims.

The government's request for $28 million in restitution to Alpha is not only barred by the restitution statute, but also by the Fifth, Sixth, and Eighth Amendments to the Constitution. Even if the Court finds that Alpha is entitled to restitution under § 3663, therefore, it should still dismiss Alpha's claims based on these constitutional provisions.

A. The Sixth Amendment's Jury Trial Clause Prohibits the Court from Ordering Restitution Based on Facts Not Found by the Jury at Trial.

The Sixth Amendment's Jury Trial Clause prohibits the Court from ordering any restitution based on facts not found by the jury at trial. Because the jury in this case did not find that Mr. Blankenship was responsible for any fines assessed at UBB, nor for any of Alpha's legal or investigatory expenses, the imposition of restitution for such costs would violate the Jury Trial Clause.

In the Supreme Court's landmark *Apprendi* decision, it held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* rule applies to the assessment of a monetary penalty, such as a fine, just the same as it does to a prison sentence. *See Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350-51 (2012). Indeed, the Court has specifically warned against imposing large monetary penalties based on judicial fact-finding at sentencing: "[W]here the defendant is an individual, a large fine may 'engender a significant infringement of personal freedom' . . . So far as *Apprendi* is concerned, the relevant question is the significance of the fine from the perspective of the Sixth Amendment's jury trial guarantee. Where a fine is substantial enough to trigger that right, *Apprendi* applies in full." *Id.* at 2352. Applying this rule, the Court recently held that a district court had erred by imposing an approximately $38 million dollar fine on a corporation based on facts found at sentencing, emphasizing that the size of the fine was "exemplary" and "exactly what *Apprendi* guards against." *Id.* at 2352.

Although the Fourth Circuit held, in 2012, that *Apprendi* did not apply to restitution orders, that holding has been undermined by a subsequent Supreme Court decision and is no longer good law. In *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012), the Fourth Circuit reasoned that *Apprendi* did not apply to restitution because "there is no prescribed statutory maximum in the restitution context" and therefore "the rule of *Apprendi* is simply not implicated to begin with." This hyper-technical restriction on the *Apprendi* rule, however, can no longer hold after the Supreme Court's recent decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013). There, the Court held that *Apprendi* applies to facts that increase the mandatory minimum for a crime, thus making clear that it is not limited to cases involving a "prescribed

statutory maximum." Instead, the Court offered a broader explanation of the *Apprendi* rule: "Any fact that, by law, *increases the penalty for a crime* . . . must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2155 (emphasis added). Restitution, of course, is a "penalty." *See Pasquantino*, 544 U.S. at 365; *Cohen*, 459 F.3d at 496; *Bruchey*, 810 F.2d at 461. After *Alleyne*, therefore, it is clear that *Day*'s reasoning no longer holds, and that the *Apprendi* rule does apply to restitution. When calculating a defendant's restitution obligations, a district court must limit itself to the facts found by the jury at trial.

Here, the jury never found that Mr. Blankenship caused any of the fines at the UBB mine or any of Alpha's legal or investigatory expenses. Therefore, if the Court finds at sentencing that he is responsible for such costs and imposes restitution based on those findings, it will have "increase[d] the penalty for [the] crime" and violated his right to a jury trial. *Alleyne*, 133 S. Ct. at 2155.

Apprendi applies with special force in this case because the government is seeking a massive restitution order of $28 million dollars. That figure nears the $38 million dollar penalty that, when imposed on a corporation, the Supreme Court described as "exemplary" and "exactly what *Apprendi* guards against." *Southern Union*, 132 S. Ct. at 2352. Given that Mr. Blankenship "is an individual," this large monetary penalty "'engender[s] a significant infringement of [his] personal freedom,'" and is clearly "substantial enough" to trigger "the Sixth Amendment's jury trial guarantee" such that "*Apprendi* applies in full." *Id.* The Court, therefore, cannot order him to pay restitution for the UBB fines or Alpha's legal or investigatory expenses.

B. The Fifth Amendment's Due Process Clause Forbids Facts Found at Sentencing by a Preponderance of the Evidence from Becoming the "Tail Which Wags the Dog of the Substantive Offense."

The Fifth Amendment's Due Process Clause forbids a district court from attaching such "great or disproportionate" penalties to facts found by a preponderance of the evidence at sentencing that they become "the 'tail which wags the dog of the substantive offense.'" *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 257 (4th Cir. 2001) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004). In this case, Mr. Blankenship was not charged with or convicted of causing any particular citations at UBB, or any of Alpha's legal or investigatory expenses. Accordingly, it would violate the Due Process Clause for the Court to find by a preponderance of the evidence at sentencing that he was responsible for those costs and to impose $28 million dollars in restitution as a result.

The Due Process Clause requires that every element of a criminal offense be proved to a jury beyond a reasonable doubt. *See McMillan*, 477 U.S. at 84 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). District courts, however, typically apply a lower, preponderance-of-the-evidence standard of proof at sentencing. The Supreme Court has therefore stressed that district courts must not allow facts found at sentencing to so "dramatically increase the sentence" that they become "a tail which wags the dog of the substantive offense." *United States v. Watts*, 519 U.S. 148, 156 n.2 (1997); *McMillan*, 477 U.S. at 87-88; *see also Photogrammetric Data Services*, 259 F.3d at 258. Courts of appeal have overturned sentences that violated this rule. *See, e.g., United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999) (overturning sentence where judicial fact-finding at sentencing increased sentencing range from 24-30 months to 63-78 months); *United States v. Gigante*, 94 F.3d 53 (2d Cir. 1996) (overturning sentence where

judicial fact-finding at sentencing increased sentences from 27-33 months to 188 and 200 months); *United States v. Townley*, 929 F.2d 365 (8th Cir. 1991) (overturning sentence where judicial fact-finding at sentencing increased sentencing range from 15-21 months to 121-151 months).

Here, Mr. Blankenship was neither charged with, nor convicted of, causing any of the fines assessed at UBB or any of Alpha's legal or investigative expenses. The only crime of which he was convicted was misdemeanor conspiracy to violate mine safety standards, which carries a maximum punishment of one-year imprisonment and a $250,000 fine. If the Court finds, based on a mere preponderance of the evidence, that he is responsible for the costs claimed by the government and therefore imposes a massive $28 million dollar restitution order, it will have increased the monetary penalty he faces over one-hundred-fold. Its findings, in other words, will have become a "tail which wags the dog" of the substantive conspiracy offense. Such an order would violate the Due Process Clause.

C. The Eighth Amendment's Excessive Fines Clause Prohibits the Court from Imposing a Grossly Disproportionate Restitution Order.

The Eighth Amendment's Excessive Fines Clause prohibits the Court from imposing restitution that is "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003). Because the offense of which Mr. Blankenship was convicted is a mere misdemeanor, punishable by a maximum of one year in prison and a $250,000 fine, the imposition of the government's requested $28 million in restitution would violate the Excessive Fines Clause.

The Fourth Circuit repeatedly has held that restitution orders are "fines" for purposes of the Excessive Fines Clause. *See Newsome*, 322 F.3d at 342; *United States v. Bollin*, 264 F.3d 391, 419 (4th Cir. 2001); *see also United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008);

United States v. Dubose, 146 F.3d 1141, 1144-46 (9th Cir. 1998). A fine is considered "excessive" if "it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. Conspiracy to violate mine-safety standards is a misdemeanor that carries a maximum punishment of one year in prison and a $250,000 fine. The government's requested $28 million in restitution is over a hundred times greater than the maximum fine permitted for the offense in this case. A $28 million dollar restitution order, therefore, would be "grossly disproportional" to the gravity of the offense of conviction and would violate the Excessive Fines Clause. *Id.*

VII. The Court May Not Order Restitution as a Condition of Probation or Supervised Release.

The same restrictions that prohibit the Court from ordering Mr. Blankenship to pay restitution to Alpha as part of his sentence also prohibit the Court from ordering him to pay restitution as a condition of probation or supervised release.

Two statutory provisions define the Court's authority to order a defendant to pay restitution as a condition of probation or supervised release. First, 18 U.S.C. § 3563(b)(2), which governs conditions of probation, gives district courts the discretion to order "that the defendant . . . make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A))." Section 3556, referenced in this provision, simply instructs the sentencing court to order restitution in accordance with § 3663(a) and § 3663A. Second, 18 U.S.C. § 3583(d), which governs conditions of supervised release, gives district courts the discretion to order "any condition set forth as a discretionary condition of probation in section 3563(b)."

Together, these provisions authorize a district court to impose restitution as a condition of probation or supervised release in accordance with § 3663 and § 3663A, "but not subject to the

limitation of section 3663(a) or 3663A(c)(1)(A)." The "limitation" set forth in § 3663(a) and § 3663A(c)(1)(A) is the list of offenses for which restitution may be ordered under each statute. *See* 18 U.S.C. § 3663(a) (authorizing discretionary restitution for Title 18 crimes and other specified offenses); 18 U.S.C. § 3663A(c)(1)(A) (authorizing mandatory restitution for specified offenses). In other words, § 3563(b) and § 3583(d) authorize a district court to order restitution as a condition of probation or supervised release for offenses other than those enumerated in § 3663(a) and § 3663A(c)(1)(A).

Every other restriction on the district court's authority to order restitution, however, remains. In *United States v. Freeman*, 741 F.3d 426 (4th Cir. 2014), for example, the Fourth Circuit made clear that restitution ordered as a condition of probation or supervised release must still be tied to the offense of conviction, and not any other conduct: "[R]egardless of whether restitution is ordered pursuant to the VWPA [§ 3663], the MVRA [§ 3663A] or as a condition of supervised release or probation, the alleged victims must be victims of the *offense of conviction*." *Id.* at 434-35 (emphasis in original). The Fourth Circuit also rejected as poorly reasoned, context-specific "dicta" its prior suggestion in *United States v. Oceanpro Indus., Inc.*, 674 F.3d 323 (4th Cir. 2012), that the definition of "victim" under § 3563(b) and § 3583(d) could be broader than that under § 3663, explaining that an attempt to expand the definition of "victim" under *Oceanpro* "falls flat." *Freeman*, 741 F.3d at 439.

All the other restrictions on restitution remain in place as well, including the limits on the Court's authority to order both restitution and other punishment for a misdemeanor conviction, the "direct and proximate" causation requirement, the "actual loss" requirement, the prohibition on co-conspirators being treated as victims, the specific categories of loss for which restitution may be ordered, the complexity exception, and the constitutional bars. "[S]ection 3583(d)

cannot be used to circumvent otherwise applicable substantive limitations on an award of restitution." *United States v. Maturin*, 488 F.3d 657, 660 n.1 (5th Cir. 2007); *see also United States v. Kieffer*, 794 F.3d 850, 853-54 (7th Cir. 2015); *United States v. Varrone*, 554 F.3d 327, 334 n.8 (2d Cir. 2009); *United States v. Romines*, 204 F.3d 1067, 1069 (11th Cir. 2000); *United States v. Cottman*, 142 F.3d 160, 170 (3d Cir. 1998); *United States v. Comer*, 93 F.3d 1271, 1278 & n.6 (6th Cir. 1996); *United States v. Kakish*, No. 07-cr-337, 2010 WL 5026952, at *2 (E.D. Va. Dec. 3, 2010).

The Court, therefore, may not order Mr. Blankenship to pay restitution to Alpha as a condition of probation or supervised release.

VIII. The Court Should Exercise Its Discretion Not to Order Restitution.

Section 3663, as well as § 3563(b) and § 3583(d), give a district court the discretion to order restitution, but do not require it to do so. *See* 18 U.S.C. § 3663(a)(1)(A) ("The court . . . may order . . . restitution."); *see also* 18 U.S.C. §§ 3563(b) & 3583(d). There are many reasons to exercise discretion and deny restitution to Alpha, including this Court's previous determination in two related cases that there were no victims and no restitution could be ordered, the fact that the offense of conviction is a misdemeanor, Alpha's knowing and voluntary acceptance of the expenses for which it now seeks restitution when it acquired Massey and entered into the NPA, Massey's status as an alleged coconspirator, Alpha's admission of criminal culpability, the extraordinarily complicated factual questions presented by Alpha's claims, the resources of the court that will have to be devoted to the determination of the restitution claims, the availability of alternative proceedings for Alpha to assert its claims, and the substantial statutory and constitutional questions presented by these unusual claims. For all of these reasons, restitution should be denied.

IX. In the Alternative, the Court Must Grant Mr. Blankenship Due Process Protections, Including An Opportunity for Full Discovery and an Evidentiary Hearing.

Finally, if the Court does not dismiss Alpha's restitution claim now, it must afford Mr. Blankenship the same due process protections available for a criminal trial so that he can defend himself from a claim of $28 million. Specifically, the defense requests the power to issue early return document subpoenas, Rule 16 discovery, a discovery period of 180 days, sufficient time for counsel to prepare for any hearing, and an evidentiary hearing at which the Federal Rules of Evidence, the right to cross-examine, and a heightened standard of proof apply.[6]

The restitution statute authorizes the Court to "require additional documentation or hear testimony." 18 U.S.C. § 3664(d)(4). Federal Rule of Criminal Procedure 32 allows the Court to conduct an evidentiary hearing regarding sentencing matters. Federal Rule of Criminal Procedure 57(b) authorizes the Court to fashion rules of procedure appropriate to the circumstances of each case. The Due Process Clause requires the Court to employ procedures proportionate to the magnitude of the private interest at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Apprendi* and its progeny require proceedings with all of the protections of a criminal trial when, as here, factual issues are determined that have not been determined at the guilt phase of trial.

In this case, substantial due process protections are necessary due to the significant interests at stake – $28 million – and the fact that none of the issues to be determined in the restitution proceedings – including causation, the categories and amounts of the restitution claim, and Alpha's discount in the merger with Massey – have been adjudicated. In the typical criminal

[6] The government's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny also apply to Mr. Blankenship's sentencing. *See Basden v. Lee*, 290 F.3d 602, 609 (4th Cir. 2002).

restitution case, nearly all relevant issues are adjudicated in the criminal trial, which provides due process to the defendant. Here, none were.

First, the Court should grant Mr. Blankenship a fair opportunity to obtain discovery. In order to present a defense against Alpha's restitution claims, Mr. Blankenship must be able to discover the facts underling those claims. He did not have that opportunity prior to or during his trial. At a minimum, the defense should be permitted to issue early return document subpoenas and given a six month discovery period and sufficient time to prepare for any hearing. Indeed, if this were a civil suit brought by Alpha against Mr. Blankenship seeking $28 million in damages, discovery would be a year and Mr. Blankenship would have the full panoply of civil discovery tools, including subpoenas, document production requests, interrogatories, requests for admission, and depositions.

Second, the Court should grant Mr. Blankenship an evidentiary hearing so that the defense may rebut the government's claims with cross-examination, other documentation, and testimony. A hearing is particularly important here given the number of issues in dispute, which the defense could not hope to effectively refute in the absence of a hearing. Indeed, "unless the defendant stipulates to the amount of restitution proffered . . . the district judge must conduct a hearing to consider the propriety of the amount of restitution." *United States v. Peden*, 872 F.2d 1303, 1311 (7th Cir. 1989); *see also United States v. Herrera*, 466 Fed. Appx. 409, 426 (5th Cir. 2012) ("When a hearing is necessary to protect a convicted defendant's due process rights, then the failure to hold a hearing constitutes an abuse of discretion."); *United States v. Griffin*, 324 F.3d 330, 368 (5th Cir. 2003) ("The record does not indicate that there was a separate hearing detailing whether [the purported victim] qualifies for restitution as a 'proximate victim' and what amount he should receive if he does qualify. Therefore, on remand, the district court should

conduct a hearing to determine [the purported victim's] status as a 'direct and proximate' victim.").

Finally, the Court should ensure that the evidentiary hearing is governed by adequate procedural protections, including a heightened burden of proof, the right to cross-examination, and application of the Federal Rules of Evidence. The facts here are hotly contested and involve difficult issues of proof, causation, and responsibility. It is very likely, moreover, that there will be contradictory witness testimony and perhaps even contradictory documentary evidence. The only way to ensure Mr. Blankenship's right to due process in this $28 million dollar dispute, therefore, is to provide him the same procedural protections that he would be afforded for a criminal trial.

CONCLUSION

For the reasons set forth above, Mr. Blankenship respectfully requests that the Court dismiss Alpha's claims for restitution in this case. In the alternative, he requests that the Court grant him discovery, as well as an evidentiary hearing with the procedural protections he has requested.

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Respectfully submitted,

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I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 7th day of March, 2016 on:

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