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Did Congress Intend For Corporations To Benefit From The MVRA?

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Cover Page Footnote

Admitted in New York, New Jersey, and the District Court of New Jersey. Pace University School of Law, cum laude (2013); Villanova University, B.S. Business Administration and International Business (2008). Associate attorney concentrating in Directors and Officers Liability at Kaufman Borgeest & Ryan LLP based in New York. I would like to thank my mother, sister, boyfriend, and family who collectively provide the motivating force behind my every accomplishment. Additionally, this paper would not have been possible without the expertise and guidance of Professor Jill I. Gross. Thank you all for every word of encouragement and your invaluable support.

DID CONGRESS INTEND FOR CORPORATIONS TO BENEFIT FROM THE MVRA?

A LOOK AT THE LEGISLATIVE HISTORY OF THE MANDATORY VICTIMS RESTITUTION ACT OF 1996 AND THE COURTS' APPLICATION OF THE MVRA TO CORPORATIONS

LESLIE M. VILLACIS, Esq.*

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INTRODUCTION

In the years 2009 through 2012, the Department of Justice and the

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Securities and Exchange Commission investigated and prosecuted Rajat Gupta (“Gupta”), a former employee of the multinational investment banking firm, The Goldman Sachs Group, Inc. (“Goldman Sachs”), for conspiracy and insider trading violations in *United States v. Gupta*¹, *SEC v. Rajaratnam*² and related proceedings.³ Gupta had, on multiple occasions, disclosed material nonpublic information that he had obtained in his role as a director of Goldman Sachs to Raj Rajaratnam (“Rajaratnam”), the founder and manager of the hedge fund Galleon Management, LP.⁴ His unlawful disclosures included providing information about Berkshire Hathaway Inc.’s \$5 billion investment in Goldman Sachs before public announcement as well as Goldman Sachs’ financial results for the second and fourth quarters of 2008.⁵ Additionally, Gupta disclosed financial results he obtained through his role as director of The Procter & Gamble Company, which Rajaratnam then relayed to others who traded on the information at Galleon Management, L.P.⁶

In 2011, a jury convicted Rajaratnam of 14 counts of securities fraud stemming from his illegal trades, sentenced him to 11 years in prison, and ordered him to pay \$150 million in fines and forfeitures.⁷ Later in 2012, a jury found Gupta guilty of conspiracy and securities fraud due to his involvement in the insider trading scheme with Rajaratnam and was later sentenced to 24 months in prison.⁸ In connection with those investigations and the subsequent enforcement proceedings of *United States v. Gupta*⁹ and *SEC v. Rajaratnam*,¹⁰ Goldman Sachs paid over \$6.9 million in legal fees to its attorneys.

In *United States v. Gupta*,¹¹ Goldman Sachs sought restitution from a U.S. District Court in the Southern District of New York for the \$6.9 million in legal fees it paid to Sullivan & Cromwell LLP, pursuant to the Mandatory Victims Restitution Act (“MVRA”).¹² Goldman Sachs

¹ 848 F. Supp. 2d 491, 492 (S.D.N.Y. 2012).

² 2012 WL 362031 (S.D.N.Y. Jan. 31, 2012).

³ See *S.E.C. v. Rajaratnam*, 822 F. Supp. 2d 432 (S.D.N.Y. 2011); *S.E.C. v. Gupta*, 281 F.R.D. 169 (S.D.N.Y. 2012).

⁴ See *Rajaratnam*, 822 F. Supp. 2d at 432; see also 11, Simon M. Lorne & Joy Marlene Bryan, *Criminal Convictions for Insider Trading*, *Acquisitions & Mergers* § 1:29 (2013) (discussing Gupta’s disclosures spanning from 2007 to January 2009).

⁵ *Rajaratnam*, 822 F. Supp. 2d at 432.

⁶ *Id.*

⁷ *United States v. Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2011).

⁸ See *United States v. Gupta*, 848 F. Supp. 2d 491, 492 (S.D.N.Y. 2012); *United States v. Gupta*, 2012 WL 5246919 (S.D.N.Y. Oct. 24, 2012).

⁹ 848 F. Supp. 2d at 492.

¹⁰ 822 F. Supp. 2d 432 (S.D.N.Y. 2011).

¹¹ 2013 WL 662954 (S.D.N.Y. Feb. 25, 2013).

¹² 18 U.S.C. § 3663A (Supp. 2012).

incurred these legal fees when Sullivan & Cromwell assisted Goldman Sachs in its internal investigation of Gupta, represented Goldman Sachs and its directors, officers, and employees in responding to inquiries from criminal and regulatory enforcement investigations, and represented Goldman Sachs in the prosecutions of Gupta and Rajaratnam as well as provided other legal services.¹³ In this case, the court viewed Goldman Sachs as an “identifiable victim [that] suffered a . . . pecuniary loss.”¹⁴ Judge Rakoff stated that the MVRA “mandates restitution in a fraud case like this”¹⁵ and such restitution could include “necessary . . . other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”¹⁶ The court noted that both the United States Attorney’s Office and the Securities and Exchange Commission investigated Gupta’s ties to the insider trading scheme of leaking boardroom secrets to Rajaratnam.¹⁷ Additionally, the court explained that Gupta had already been convicted of conspiring with Rajaratnam to commit securities fraud.¹⁸

In its request for restitution, Goldman Sachs provided the court with 542 pages worth of billing records that specified the work performed by the firm of Sullivan & Cromwell LLP “with sufficient particularity to assess what was done, how it was done, and why it was done.”¹⁹ The court allowed Goldman Sachs to recover for the “fees incurred during its participation in the parallel SEC cases against Gupta and its fees incurred in connection with this case during the pendency of the criminal prosecution of [Rajaratnam],”²⁰ but identified and excluded a number of entries. The court excluded ten percent of the requested restitution and ordered Gupta to pay Goldman Sachs over \$6.2 million.²¹ In his decision, Judge Rakoff did not discuss or even mention the legislature’s intent to allow corporations to benefit as victims under the MVRA. Rather, Judge Rakoff’s decision relied on settled precedent within the Second Circuit allowing corporations to recover for these types of expenses (i.e. attorney’s fees and internal investigation costs) and on this basis ruled in favor of Goldman Sachs under the MVRA.

Like Goldman Sachs, numerous other corporations have been

¹³ Non Party the Goldman Sachs Group, Inc.’s Mem. of Law in Supp. of its Req. for Restitution at 2.

¹⁴ 18 U.S.C. § 3663A(c)(1)(A)(ii)–(c)(1)(B) (Supp. 2012).

¹⁵ *Gupta*, 2013 WL 662954 (S.D.N.Y. Feb. 25, 2013).

¹⁶ 18 U.S.C. § 3663A(b)(4) (Supp. 2012).

¹⁷ *See Gupta*, 848 F. Supp. 2d at 491; *Rajaratnam*, 822 F. Supp. 2d at 432.

¹⁸ *See Gupta*, 848 F. Supp. 2d at 491.

¹⁹ *Gupta*, 2013 WL 662954 (S.D.N.Y. Feb. 25, 2013).

²⁰ *Id.* (referring to SEC civil proceeding, *Rajaratnam*, 822 F. Supp. 2d at 432).

²¹ *Id.*

plagued with insider trading schemes and directors or employees who fail to abide by securities laws, such as the case illustrated above.²² Corporations usually have agreements with directors and employees that bind the corporation to advance attorney fees to the director and employee if he or she were to become the subject of a government investigation or a defendant in civil and/or criminal proceedings. However, the corporation must also expend its own company resources (i.e. time spent by other directors, employees, and staff) as well as monetary resources in seeking legal advice for its own internal investigations, obtaining legal representation for its cooperation with the authorities conducting those government investigations, and pursuing related civil and/or criminal proceedings.²³

As a result of this use of corporate resources, which may result from misconduct of a director or employee, corporations have been requesting restitution to recover as “victims” under the MVRA.²⁴ However, the MVRA does not specifically define a “victim” as including a corporation, but rather uses the term “person.”²⁵ When interpreting congressional statutes, if a statute is clear and unambiguous, courts will interpret the statute according to its plain meaning since it is a better indicator of Congress’ intent.²⁶ However, when a statute is ambiguous, that is, when it has two or more plausible alternative readings, courts may resort to the legislative history in order to give effect to Congress’

²² See, e.g., Press Release, U.S. Securities and Exchange Commission, SEC Charges Denver-Based Insurance Executive with Insider Trading (Oct. 26, 2012), available at <http://www.sec.gov/news/press/2012/2012-217.htm> (charging insurance company CEO with insider trading based on information he obtained regarding a firm’s acquisition of stock in a company); Press Release, U.S. Securities and Exchange Commission, SEC Charges Oil Company CEO as Source in Insider Trading Case (Nov. 28, 2012), available at <http://www.sec.gov/news/press/2012/2012-243.htm> (charging CEO of an oil and gas company with insider trading for leaking confidential information to an insurance executive who traded on that information); see also *United States v. Anderson*, 533 F.3d 623, 626 (8th Cir. 2008) (charging a CEO and chairman of board of directors of company with insider trading and money laundering of his stock in the company); *United States v. Falcone*, 97 F. Supp. 2d 297, 298 (E.D.N.Y. 2000) (convicting a securities broker with insider trading under a misappropriation theory from acquiring contents of a business magazine column, *Business Week*, from an employee of McGraw-Hill Company before it was published).

²³ There is a separate and related case for indemnification against Raj Rajaratnam, however, that topic is beyond the scope of this paper. See *United States v. Rajaratnam*, 2012 WL 362031 (S.D.N.Y. Jan. 31, 2012).

²⁴ See *United States v. Skowron*, 839 F. Supp. 2d 740 (S.D.N.Y. 2012); *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011); *United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009); *United States v. Elson*, 577 F.3d 713 (6th Cir. 2009); *United States v. Amato*, 540 F.3d 153 (2d Cir. 2008); *United States v. Ojeikere*, 545 F.3d 220 (2d Cir. 2008); *United States v. Donaghy*, 570 F. Supp. 2d 411, 431 (E.D.N.Y. 2008); *United States v. DeRosier*, 501 F.3d 888 (8th Cir. 2007); *United States v. Phillips*, 477 F.3d 215, 224 (5th Cir. 2007); *United States v. Beard*, 145 F. App’x 853 (5th Cir. 2005); *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004); *United States v. Cummings*, 281 F.3d 1046, 1051–53 (9th Cir. 2002).

²⁵ 18 U.S.C. § 3663A(a)(2) (Supp. 2012).

²⁶ See, e.g., *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002) (construing the MVRA as applying to the government).

intent.²⁷

When it enacted the statute, did Congress consider corporations to be “victims” entitled to restitution under the MVRA? This answer has not been provided or discussed by existing case law applying the MVRA. This article answers this question. In addition, it highlights the possible issues a judge may encounter in the application and interpretation of the MVRA, the current use of the MVRA by corporations, and offers potential defenses a defendant could employ in challenging a corporate giant’s restitution request. Additionally, I discuss several policy arguments justifying the application of the MVRA to corporations as well those arguments that oppose it. Finally, I conclude with a discussion on the restitution the MVRA may provide to shareholders who qualify as victims under the statute.

I. THE ENACTMENTS OF THE VWPA AND THE MVRA

Until 1982, a “victim’s only option [to obtain monetary compensation for a crime] was to file a separate civil suit.”²⁸ In 1982, Congress passed the Victim and Witness Protection Act (“VWPA”).²⁹ This statute gave federal courts discretion on whether or not to order restitution to victims for crimes covered under the statute. Additionally, when calculating restitution amounts, a federal court could consider the defendant’s economic circumstances, such as financial resources, needs, earning ability, and whether or not the defendant had dependents.³⁰

However, many courts have not ordered restitution, even though it was within their authority to do so under the VWPA.³¹ In some cases, even when the court provided victims with restitution, victims were not adequately compensated for the crime that was committed.³²

²⁷ See *United States v. Boccagna*, 450 F.3d 107, 114 (2d Cir. 2006) (“Only if we conclude that [the MVRA’s] statutory language is ambiguous ‘do we resort . . . to canons of construction and, if the meaning [still] remains ambiguous, to legislative history.’”) (quoting *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 422 (2d Cir. 2005)); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (indicating that the court’s purpose is to give effect to the intent of Congress).

²⁸ Matthew Spohn, *A Statutory Chameleon: The Mandatory Victim Restitution Act’s Challenge to the Civil/Criminal Divide*, 86 Iowa L. Rev. 1013, 1014 (2001) (discussing the history of the VWPA and MVRA).

²⁹ 18 U.S.C. § 3663 (2006).

³⁰ 18 U.S.C. § 3663(a)(1)(B)(i)(II) (2006).

³¹ See 141 Cong. Rec. S19273, S19277 (daily ed. Dec. 22 1995) (statement of Sen. Hatch) (“[T]he overwhelming sentiment in the legislature was that the rate at which the federal judiciary was imposing restitution was ‘simply not enough.’”). See also S. Rep. 104-179, at 13 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 926, where Senator Hatch explains that in 1994 “[f]ederal [c]ourts ordered restitution in only 20.2 percent of criminal cases.” (citing United States Sentencing Commission Annual Report 1994, tbl.22).

³² See H.R. Rep. 104-16, at 4 (1995). See also S. Rep. 104-179, at 18 (1995), *reprinted in* 1996

In the House Report on Victim Restitution Act of 1995 (the “House Report”), the Committee on the Judiciary discussed that the court is to determine restitution based on the full amount of the victim’s losses.³³ The Committee stated that, “[u]nder existing law, crime victims’ rights [we]re still too often overlooked. Even though the law provides the means to address the rights of victims, the [VWPA] does not, however, provide for a means to make victims whole.”³⁴ Thus, a victim provided with restitution under the VWPA was not adequately compensated since he was not made whole by not receiving the full amount “that [he or she] is due.”³⁵

Crime victims’ rights were no longer overlooked when, in 1996, Congress passed the Mandatory Victims Restitution Act of 1996 (“MVRA”).³⁶ “When the 1996 Act [(the MVRA)] was enacted, Congress took a wide range of crimes and moved them from being covered under the permissive 1982 Act [(VWPA)] to being covered under the mandatory 1996 Act.”³⁷ The MVRA removed the discretionary power of the court in imposing restitution and made it mandatory “to those Federal offenses in which an identifiable victim suffers physical injury or a pecuniary loss.”³⁸ Under the MVRA, the “victim” must be “directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.]”³⁹ Additionally, under the MVRA, a judge can no longer fashion the restitution order by considering the

U.S.C.C.A.N. 924, 931. (“It is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that offender be held accountable to repay these costs.”); see also Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1690–91 (2009) (“Congress’ view that judges were deficiently imposing restitution corresponded with its assessment that victims of crime were being inadequately compensated. Accordingly, a primary impetus behind the enactment of the MVRA was the desire to better recompense victims.”).

³³ H.R. Rep. 104-16, at 4 (1995).

³⁴ *Id.*

³⁵ S. Rep. 104-179, at 12 (1995).

³⁶ S. Rep. 104-179, at 13 (1995). (statement of Sen. Hatch) (“[W]hile significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution.”).

³⁷ Sarah N. Welling, *Restitution*, 3 Fed. Prac. & Proc. Crim. § 546 (4th ed. 2012).

³⁸ S. Rep. 104-179, at 18 (1995); see also S. Rep. 104-179, at 12 (1995) (“Crimes for which mandatory restitution would apply include crimes of violence, felony crime against property (including crimes committed by fraud or deceit), product tampering, and certain drug crimes.”).

³⁹ 18 U.S.C. § 3663A(a)(2) (Supp. 2012). Several circuit cases have shed light on what the terms “direct and proximate harm” require to show a causal connection under the MVRA. In *United States v. Speakman*, the United States Court of Appeals for the Tenth Circuit stated that the government must show that the defendant’s conduct is the “but-for” cause of the victim’s direct harm and that the defendant proximately caused the harm. 594 F.3d 1165, 1171 (10th Cir. 2010). The court went on to discuss how other circuits have interpreted the causal requirement under the MVRA and other federal statutes such as the Second Circuit’s interpretation of the causal requirement under the Crime Victims’ Rights Act “[encompassing] the traditional ‘but for’ and proximate cause analyses.” *Id.* (quoting *In re Antrobus*, 519 F.3d 1123, 1126 (10th Cir. 2008) (citation omitted)).

defendant's financial circumstances,⁴⁰ but instead the defendant has to pay the full amount of the victim's losses. However, the judge can consider the defendant's financial resources in determining a schedule or paying the restitution.⁴¹ Moreover, to prevent overreaching, the restitution order must be limited to losses "from the specific offense for which the defendant was indicted and convicted."⁴² "The MVRA and VWPA do not overlap. [The] MVRA makes restitution *mandatory* for the crimes it covers, and the VWPA [*allows*] discretionary restitution for non-MVRA crimes [it covers]."⁴³

II. THE PURPOSE OF RESTITUTION UNDER THE MVRA—A CIVIL OR CRIMINAL PENALTY?

Both the House and Senate Reports on the bill in its initial stages shed light on Congress' intended purpose for the MVRA. The MVRA, known in its beginning stages as the H.R. 665 bill, passed the House of Representatives on February 7, 1995. This bill made restitution mandatory in all federal criminal cases. In the House Report, Senator McCollum, from the Committee on the Judiciary, stated that the purpose of the bill "is to ensure that criminals pay *full* restitution to their victims for all damages caused as a result of the crime."⁴⁴ Thus, as explained earlier, it seems that the primary motivation in enacting the MVRA was the belief that the VWPA "had not adequately compensated crime victims."⁴⁵

After passing the House, the bill proceeded for review by the Senate. In the Senate Report, Senator Hatch stated that the current bill "would not address the inconsistencies arising from various congressional enactments since 1982."⁴⁶ The stated purpose of the MVRA given in the Senate Report was "to improve the administration of justice in Federal criminal cases by requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes."⁴⁷ Thus, the purpose of the MVRA is to make the victim whole based on the wrongs committed by a defendant.⁴⁸ But, does this mean that the purpose of the

⁴⁰ 18 U.S.C. § 3664(f)(1)(A) (Supp. 2012).

⁴¹ 18 U.S.C. § 3664(f)(2) (Supp. 2012).

⁴² *United States v. Gordon*, 480 F.3d 1205, 1211 (10th Cir. 2007) (quoting *United States v. Fogg*, 409 F.3d 1022, 1028 (8th Cir. 2005)).

⁴³ *United States v. Battista*, 575 F.3d 226, 231 n.3 (2d Cir. 2009) ("See 18 U.S.C. § 3663A(a)(1)(A) (excluding from the VWPA 'offense[s] described in section 3663A(c).')").

⁴⁴ H.R. Rep. 104-16, at 4 (1995).

⁴⁵ Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Calif. L. Rev. 1687, 1689 (2009) (citing H.R. Rep. 104-16, at 4 (1995)).

⁴⁶ S. Rep. 104-179, at 14 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 928.

⁴⁷ S. Rep. 104-179, at 12 (1995).

⁴⁸ See, e.g., *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004) ("The primary and overarching goal of the MVRA is to make victims of crime whole.").

MVRA is civil in nature or criminal in nature?⁴⁹

While courts have split on this exact issue, those cases mostly revolve around whether or not an application of the MVRA to offenses committed prior to its adoption would violate the *ex post facto* clause of the United States Constitution. If a statute's purpose were civil in nature, rather than punitive, then there would be no violation of the *ex post facto* clause. However, even if the legislature intended the statute as a civil one, if the statutory scheme is so punitive, either in purpose or effect, that it negates the legislature's intent, then the statute violates the *ex post facto* clause.⁵⁰ The majority of circuits have determined that an order of restitution under a federal statute like the MVRA, in a criminal case, does violate the *ex post facto* clause when applied to offenses committed prior to its adoption since the proceeding is criminal in nature.⁵¹ However, if the offense was a conspiracy, restitution under the MVRA could be ordered "before and after the effective date of the MVRA[.]"⁵² The Seventh Circuit and Tenth Circuit have been in the minority among the circuits and have held that the *ex post facto* clause does not apply to restitution under the MVRA because it is not a criminal penalty.⁵³

⁴⁹ For the purposes of this article, I am refraining from the application of the *ex post facto* clause statutory analysis and simply providing the majority and minority views of the circuits, which have applied the test and analysis seen in *United States v. Ward*, 448 U.S. 242, 248–49 (1980). See Matthew Spohn's *A Statutory Chameleon: The Mandatory Victim Restitution Act's Challenge to the Civil/Criminal Divide*, 86 Iowa L. Rev. 1013, 1026 (2001), for a complete review on the application of the Ward test by the courts in reaching the majority and minority views.

⁵⁰ *Johnson v. Bredeesen*, 624 F.3d 742 (6th Cir. 2010) (applying the MVRA, but discussing *ex post facto* analysis regarding a twenty-fourth amendment claim).

⁵¹ See *United States v. Leahy*, 438 F.3d 328, 334–35 (3d Cir. 2006) (expressing agreement with Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits); *United States v. Edwards*, 162 F.3d 87, 91 (3d Cir. 1998) ("[L]egislative history also evinces a Congressional intent to . . . make mandatory restitution under the MVRA a penalty separate from civil remedies available to the victims of crime; and . . . to ensure that restitution under the MVRA is a form of criminal penalty rather than civil redress."); *United States v. Elson*, 577 F.3d 713, 721 (6th Cir. 2009); *United States v. Schulte*, 264 F.3d 656 (6th Cir. 2001); *United States v. Williams*, 128 F.3d 1239, 1241–42 (8th Cir. 1997); *United States v. Montgomery*, 384 F.3d 1050, 1064 (9th Cir. 2004); *United States v. Baggett*, 125 F.3d 1319, 1320–21 (9th Cir. 1997); *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998); *United States v. Rezaq*, 134 F.3d 1121, 1140 (D.C. Cir. 1998).

⁵² See, e.g., *United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003) (citing *United States v. Kubick*, 205 F.3d 1117, 1128–29 (9th Cir. 1999) (applying MVRA to a conspiracy to commit bankruptcy fraud)).

⁵³ See *United States v. Wells*, 177 F.3d 603 (7th Cir. 1999) (finding that restitution does not qualify as punishment); *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998) (finding that Congress did not indicate a preference for either a civil or criminal statute and that the MVRA did not have a punitive effect); *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005) (applying the MVRA to a murder prosecution case and finding that restitution did not qualify as a criminal punishment, thus, a jury determination under the Sixth Amendment was not required); see also 22 *Mandatory Restitution to Victims of Certain Crimes*, 9A Fed. Proc., L. Ed. § 1694 (2012) (citing *United States v. Nichols*, 169 F.3d 1255, 1279 (10th Cir. 1999) (also finding that restitution does not qualify as punishment)).

Even with this split among the circuits, neither Congress nor the Supreme Court of the United States has clarified or decided the nature of the restitution afforded by the MVRA. The circuits have petitioned the Supreme Court of the United States asking for guidance. For example, the Third Circuit petitioned for a *writ of certiorari* addressing the circuits' splintered view, but the Court denied it.⁵⁴ Thereafter, the Seventh Circuit filed a petition with the Supreme Court and, in its first question, explicitly stated the Circuit's view of the restitution imposed under the MVRA as civil in nature and requested an answer on whether or not the Circuit's view was in error.⁵⁵ More precisely, the petition's initial question stated, "Did the Seventh Circuit err in holding, in conflict with eight other circuits and this Court's decision in *Pasquantino v. United States*,⁵⁶ that restitution imposed as part of a criminal sentence under the Mandatory Victims Restitution Act is a "civil penalty?"⁵⁷ The Court also denied this petition.

There is further evidence of Congress' intent for the MVRA to serve as a criminal statute in the placement of the statute under "Crimes and Criminal Procedure" in Title 18 of the United States Code. Additionally, Rule 32(c) of the Federal Rules of Criminal Procedure was also amended to apply to proceedings relating to the issuance of restitution orders.⁵⁸ However, a statute's placement in the criminal code is not dispositive.⁵⁹

In sum and substance, whether it is a criminal or civil penalty, under the MVRA, restitution is awarded in federal proceedings as a separate *part* of a criminal sentence that is meant to compensate the victim of a crime and make the victim financially whole. Regardless of whether a court deems the statute as criminal or civil in nature, it can be argued that a corporation that has become the victim of a crime should be able

⁵⁴ See *Dantone, Inc. v. United States*, 2006 WL 1994675 (U.S.) ("Whether restitution, which the Third Circuit sitting *en banc* below unanimously held was a criminal penalty (joining the Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits, but in direct conflict with the Seventh and Tenth Circuits), nonetheless falls outside the ambit of *Booker*, *Blakely*, *Ring*, and *Apprendi* (as a fractured 7 to 5 majority of the Third Circuit *en banc* held below).").

⁵⁵ See *Bonner v. United States*, 2008 WL 2773353 (U.S.) ("If the answer to the first Question Presented is 'yes,' did the Seventh Circuit err in concluding, in conflict with this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2004), that the Sixth Amendment did not entitle petitioners to a jury trial on the amount of restitution?").

⁵⁶ 544 U.S. 349 (2005). In *Pasquantino v. United States*, the Supreme Court described the purpose of a restitution award under the MVRA in the case before the Court as "[necessary to] mete out appropriate criminal punishment for that conduct." 544 U.S. at 365.

⁵⁷ See *Bonner*, 2008 WL 2773353 (U.S.) and accompanying text in note 51.

⁵⁸ S. Rep. 104-179, at 12 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 925 ("[Bill] has the further purpos[e] of establishing one set of procedures for the issuance of restitution orders in Federal criminal cases, and of consolidating the procedures for the collection of unpaid restitution with existing procedures for the collection of unpaid fines[.]").

⁵⁹ See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363-64 (1984).

to recover from the wrongdoer for those losses the wrongdoer cost the corporation. This is in accord with the legislature's view that "[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that the offender be held accountable to repay these costs."⁶⁰ The offender would have "to face the harm suffered by his victim[] and, to others harmed by his unlawful actions."⁶¹ In light of the purpose of the MVRA to make the victim whole, if the corporation suffered a "pecuniary loss"⁶² from an offense that is *covered* under the MVRA, then the corporation would and should be entitled to mandatory restitution. However, does a corporation fit within the definition of "victim" as expressed by the statute?

III. WHO IS A VICTIM BY THE TERMS IN THE MVRA AND DOES A CORPORATION FIT?

In the Senate Report, the Committee on the Judiciary began the Discussion section by stating, "each year 25% of U.S. households are victimized by one or more crimes."⁶³ The Report goes on to discuss how people can become victims of such violent crimes with some injuries requiring medical attention, treatment, and stay at a hospital.⁶⁴ This discussion does not mention corporations as victims of crime, but rather focuses on individuals and U.S. households. Moreover, in the Legislative History section, Senator Hatch emphasizes the minimal amount of restitution ordered in murders, kidnappings, robberies, and sexual abuse cases.⁶⁵

The legislative history does not offer any suggestion that at the time the bill passed Congress thought about whether a corporation would be able to recover under the MVRA. Rather, it seems there was a concern for victims of violent crimes such as those listed in the Report. Although the Committee used the term "corporation" in the Senate Report, the Committee was referring to corporations convicted of federal felonies themselves and the need for them to contribute to the Crime Victims Fund.⁶⁶

In looking at the statutory language, the MVRA defines

⁶⁰ S. Rep. 104-179, at 18 (1995).

⁶¹ H.R. Rep. 104-16 at 5 (1995).

⁶² 18 U.S.C. § 3663A(c)(1)(B) (Supp. 2012).

⁶³ S. Rep. 104-179, at 17 (1995).

⁶⁴ *Id.*

⁶⁵ S. Rep. 104-179, at 13 (1995).

⁶⁶ S. Rep. 104-179, at 29 (1995) (statement of Sen. Leahy). In 1984, Congress created the Crime Victims Fund to be funded with fines and penalties paid by persons convicted of federal crimes. The Fund provides for federal assistance to state and local crime victims.

the term “victim” as:

a *person* directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian.⁶⁷

In using the term “person,” the Legislature has provided some guidance on interpreting the term when used within any act of Congress. “[U]nless the context indicates otherwise[,] . . . the word[] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[.]”⁶⁸ Thus, since not indicated otherwise in the statute or legislative history of the MVRA, the term “corporation” does fit within the definition of “person” set forth by Congress.⁶⁹ Further, the Supreme Court has instructed that, “it is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”⁷⁰

Accordingly, if a corporation proves a causal connection as an identifiable victim (within the definition provided by the legislature in the MVRA) to a crime covered under the statute, such as fraud or deceit,⁷¹ it may be entitled to restitution if it has suffered a pecuniary loss.⁷² A corporation may not qualify as a victim entitled to restitution,

⁶⁷ 18 U.S.C. § 3663A(a)(2) (Supp. 2012) (emphasis added).

⁶⁸ 1 U.S.C. § 1 (2012).

⁶⁹ See Catharine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, 62 Fed. Probation 95 (1998) (stating that that even though the VWPA refers to victims as “persons” the federal code includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies as “persons” and restitution is ordered for these entities frequently).

⁷⁰ *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 687 (1978)).

⁷¹ 18 U.S.C. § 3663A(c)(1)(A)(ii) (Supp. 2012). There are also Title 18 crimes related to fraud that affect financial institutions, which involve corporations: 18 U.S.C. § 1344 on bank fraud and 18 U.S.C. § 1348 on securities and commodities fraud.

⁷² 18 U.S.C. § 3663A(c)(1)(B) (Supp. 2012).

however, when it has taken part in the offense for which the defendant was convicted or was a co-conspirator.⁷³ Many corporations have become aware of the beneficial application of the MVRA to protect a corporation's resources, but what exactly can the corporation recover?

IV. RECENT TREND IN CORPORATIONS RECOVERING UNDER § 3663A(b)(4)

Even if a corporation does qualify as a "victim" within the meaning of the MVRA, the legislature made sure to provide for restitution for only certain offenses and certain costs. Thus, those opposed to corporations collecting under the MVRA can gain some comfort in the fact that the recent trend has allowed corporations to recover only for legal fees, accounting costs, and investigative costs.⁷⁴ Moreover, speculative losses or losses "in which the victim's loss is not clearly causally linked to the offense" are not subject to mandatory restitution.⁷⁵

Courts have either granted or denied a corporation's restitution request of attorney's fees, accounting costs, and investigative costs through two provisions within the MVRA. The first provision, 18 U.S.C. § 3663A(b)(1), requires a court to order restitution "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense[.]"⁷⁶ Courts have denied restitution requests by corporations, under subsection (b)(1), finding these costs to be consequential damages and not "damage to or loss or destruction of property," and thus, prohibited under this provision of the MVRA.⁷⁷

However, courts have awarded attorney's fees, accounting costs, and investigative costs based upon another MVRA provision, 18 U.S.C. § 3663A(b)(4), which states that the defendant will be required to

⁷³ See, e.g., *United States v. Ojeikere*, 545 F.3d 220 (2d Cir. 2008).

⁷⁴ See *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011) (holding that attorney's fees can be properly included as "other expenses"); *United States v. Battista*, 575 F.3d 226 (2d Cir. 2009) (allowing the NBA to recover restitution of attorney's fees and accounting costs resulting from the NBA's assisting the government in the investigation and prosecution of a referee-defendant involved in a conspiracy to transmit wagering information); *United States v. DeRosier*, 501 F.3d 888 (8th Cir. 2007) (holding that a restitution award including bank attorney's fees and investigative costs based on defendant's conviction of wire fraud is appropriate where losses are caused by the defendant's fraudulent conduct and it is reasonable and foreseeable that a bank would investigate the defendant's conduct); *United States v. Beaird*, 145 F. App'x 853 (5th Cir. 2005) (awarding a corporation attorney's fees and litigation expenses for their assistance to the FBI regarding wire fraud and aiding and abetting crimes).

⁷⁵ S. Rep. 104-179, at 19 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 932.

⁷⁶ 18 U.S.C. § 3663A(b)(1) (Supp. 2012).

⁷⁷ See *United States v. Piggie*, 303 F.3d 923, 928 (8th Cir. 2002) (awarding attorney's fees using § 3663A(b)(4) and explaining that § 3663A(b)(1), precludes an award of such damages); see also *United States v. Onyiego*, 286 F.3d 249 (5th Cir. 2002) (holding that attorney's fees are consequential damages under § 3663A(b)(1) and thus barred from restitution order).

provide restitution to the victim for “necessary . . . and other expenses incurred during participation in the investigation or prosecution of the offense or [the victim’s] attendance” at proceedings related to the offense.⁷⁸ Under this provision, corporations must submit proof of attorney’s fees, accounting costs, and investigative costs to the court, and the judge,⁷⁹ in determining the restitution order, reviews such evidence under a preponderance of the evidence standard.⁸⁰

Despite the legislature’s limitation of mandatory restitution to certain offenses and costs, those opposed to corporations collecting under the MVRA may argue that corporations should still not be entitled to restitution. Corporations can already shelter themselves from overpaying for a director’s or employee’s misconduct through purchasing insurance. However, even though “[m]any insurance policies do provide coverage for costs associated with class action and other litigation[,] . . . [they] do not cover investigations, particularly those that have not reached a formal stage.”⁸¹ Despite this, courts have expressed disagreement on whether or not to include costs for internal investigations in a restitution order.

Internal investigation costs are costs for investigations by a corporation or employer, performed internally rather than costs related to providing assistance to government investigations. The Second, Fifth, Seventh, Eighth, and Ninth Circuits have taken a broader view under § 3663A(b)(4) and have awarded corporations and institutions restitution for their internal investigations as “necessary” expenses.⁸² Subsection (b)(4) highlights that costs awarded under this section should be for those “investigations” occurring “during” the participation

⁷⁸ 18 U.S.C. § 3663A(b)(4) (Supp. 2012).

⁷⁹ See, e.g., *United States v. Hosking*, 567 F.3d 329, 333 (7th Cir. 2009) (“[S]pecific findings of fact reflected in the record still are necessary at times and contemplates that district courts provide an explanation of their reasoning, supported by articulated findings of fact.” (quoting *United States v. Menza*, 137 F.3d 533, 538 (7th Cir. 1998))). The court in *Hosking* dealt with applying the VWPA. However, courts can rely on cases that apply the VWPA as precedent in interpreting the MVRA. See *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004) (citing *United States v. Randle*, 324 F.3d 550, 555–56 & nn.2–3 (7th Cir. 2003)).

⁸⁰ 18 U.S.C. § 3664(e) (2012).

⁸¹ *Recovering Leal Fees and Costs Through Criminal Restitution*, White Collar Crime Rep. (BNA) No. 4, at D-39 (Jan. 16, 2009).

⁸² See *Amato*, 540 F.3d at 153; *United States v. Phillips*, 477 F.3d 215, 224 (5th Cir. 2007); *Hosking*, 567 F.3d at 332; *United States v. Gordon*, 393 F.3d 1044, 1057 (9th Cir. 2004) (holding that there was no abuse in discretion in a district court’s restitution order including investigation costs incurred by employer in connection with an embezzlement of a corporation’s stock holdings when those costs were in response to grand jury subpoenas and government requests to analyze documents) (citing *Cummings*, 281 F.3d at 1051–53 (holding that corporation was entitled to restitution for the losses sustained in refilling financial statements that were originally manipulated by a partner who attempted to conceal an under accrual)); *Piggie*, 303 F.3d at 928 (awarding four universities restitution for the investigations it performed on student athletes).

or prosecution of an offense. Some circuits favor a broader view in interpreting the terms “during” and “investigation.” For example, the Second Circuit takes such a broad view and includes those investigative costs incurred both prior and subsequent to the government’s involvement.⁸³ In *United States v. Amato*, the United States Court of Appeals for the Second Circuit found that the defendants were liable for their employer’s attorney’s fees, including internal investigative costs, and accounting costs related to the defendants’ mail and wire fraud conspiracy.⁸⁴ *Amato* was one of the first cases ordering mandatory restitution stemming from a white-collar crime under subsection (b) (4) instead of subsection (b)(1).⁸⁵ Under *Amato*, investigative expenses including internal investigations can be included in restitution orders as long as they are “necessary.”⁸⁶ This was the case in *United States v. Skowron*, where a defendant was convicted of a conspiracy to commit securities fraud and obstruction of an SEC investigation.⁸⁷ In that case, the court also awarded the corporation costs for the corporation’s launch of its own internal investigation.⁸⁸

On the other hand, other courts assume that the term “investigation” refers only to government investigations and those expenses incurred for the “purpose of assisting” the government in the investigation and prosecution of an offense.⁸⁹ For example, the D.C. Circuit has taken a narrow view of § 3663A(b)(4) and has made clear that it will not include internal investigation costs as part of a restitution order. In *United States v. Papagno*, the United States Court of Appeals for the District of Columbia held that costs of an internal investigation were not necessary expenses since criminal investigators or prosecutors did not request it or require it.⁹⁰ The court went further and clarified its holding by stating that even if an internal investigation was required by a criminal investigator or prosecutor, those expenses may still not be considered “necessary” and therefore, may not be awarded.⁹¹

⁸³ See, e.g., *Gupta*, 2013 WL 662954 (S.D.N.Y. Feb. 25, 2013).

⁸⁴ *Amato*, 540 F.3d at 162–163.

⁸⁵ See White Collar Crime Report, *supra* note 70.

⁸⁶ See *Gupta*, 2013 WL 662954 (S.D.N.Y. Feb. 25, 2013).

⁸⁷ 839 F. Supp. 2d 740 (S.D.N.Y. 2012).

⁸⁸ *Id.* (also awarding costs associated with responding to the SEC investigation and providing for defense of defendant and other employees).

⁸⁹ See *United States v. Donaghy*, 570 F. Supp. 2d 411, 431 (E.D.N.Y. 2008) *aff'd sub nom.* *United States v. Battista*, 575 F.3d 226 (2d Cir. 2009); *United States v. Norman Goldstein, M.D., Inc.*, 2008 WL 659676 (D. Haw. Mar. 11, 2008) (holding that internal investigations not performed with the purpose of assisting the government are consequential damages and should not be awarded); *United States v. Bogart*, 490 F. Supp. 2d 885 (S.D. Ohio 2007) *aff'd*, 576 F.3d 565 (6th Cir. 2009), *aff'd sub nom.* *United States v. Elson*, 577 F.3d 713 (6th Cir. 2009) (same).

⁹⁰ 639 F.3d 1093, 1099 (D.C. Cir. 2011).

⁹¹ *Id.* at 1100.

There are justifications for granting a corporation's request for restitution of costs associated with an internal investigation. For example, corporations often share results from internal investigations with government agencies when assisting them with the prosecution of an offense. Thus, the corporation would be participating in a government's investigation of the defendant's wrongful conduct when it shares such results. Further, these prior internal investigation results would be *necessary* to the government's later investigation and prosecution. "It seems unjustifiable to deny restitution simply because a corporation found necessary information before the government formally requested it."⁹²

V. POSSIBLE PROBLEMS IN A JUDGE'S APPLICATION OF 18 U.S.C. § 3663A(b)(4)

When applying § 3663A(b)(4), a judge may need to tackle several troubling issues. These issues revolve around a judge's interpretation and ultimate determination as to what is considered "necessary," a judge's evidentiary review of a corporation's requested costs, and a judge's role as a fact-finder in fashioning restitution orders.

A. WHAT IS NECESSARY?

There seems to be yet another circuit split in the assessment of what is considered "necessary" under the MVRA when awarding costs under § 3663A(b)(4). The statute does not provide any direction on what "necessary" includes and thus leaves the interpretation of this term up to the courts.

The MVRA removed the discretionary power of the judge in awarding restitution in certain cases and made it mandatory.⁹³ However, the judge may exercise discretion in determining the amount of restitution owed to a victim.⁹⁴ Accordingly, the judge exercises this discretion when assessing what other necessary expenses should be included in a restitution order. Moreover, although the government has the burden of proving these expenses by a preponderance of the evidence,⁹⁵ the defendant has the burden to disprove what expenses are not necessary. The defendant must research the split between the circuits, choose and argue a favorable case precedent, and, if the court

⁹² See White Collar Crime Report, *supra* note 70.

⁹³ See S. Rep. 104-179, at 18 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 931.

⁹⁴ See H.R. Rep. 104-16, at 4 (1995); see also 18 U.S.C. § 3664(a) (Supp. 2012) ("For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order.")

⁹⁵ 18 U.S.C. § 3664(e) (Supp. 2012).

grants a restitution order in favor of the corporation, appeal the order. If a defendant appeals an order arguing that the amount ordered is excessive, then a district court's restitution order will be reviewed for abuse of discretion. However, a district's court's legal conclusions underlying a restitution order will be reviewed *de novo*, and its factual findings for clear error (i.e. a district court's interpretation of the MVRA).⁹⁶

Some courts have not developed any definition of what "necessary" includes. In *United States v. Donaghy*, the U.S. District Court for the Eastern District of New York awarded attorney's fees after determining that the corporation in fact paid the fees and incurred them for the purpose of assisting the government in the investigation and prosecution of an offense.⁹⁷ The court did not seem to delve into any further review of what "necessary" really means for the corporation and the costs it wishes to recover. The Fifth and Eighth Circuits have not offered or applied any test and rather have awarded costs under § 3663A(b)(4) based on the fact that they are not considered consequential damages, which are prohibited under § 3663A(b)(1).⁹⁸ Additionally, the Court of Appeals for the Second Circuit in *United States v. Amato* stated that the court had previously upheld the inclusion of lost income as other necessary expenses under § 3663A(b)(4) "without considering whether [the] loss was a direct and foreseeable result of the defendant's offense."⁹⁹ The Ninth Circuit, on the other hand, has added an additional causal requirement when interpreting these expenses under § 3663A(b)(4) aside from the one used to identify who is a victim under § 3663A(a)(2). The Ninth Circuit holds that a judge must carefully analyze whether the expenses were a *direct and foreseeable* result of the defendant's wrongful actions.¹⁰⁰

⁹⁶ See *United States v. Kennedy*, 643 F.3d 1251, 1256 (9th Cir. 2011); *United States v. Marino*, 654 F.3d 310, 316 (2d Cir. 2011); *United States v. Higuera-Llamas*, 574 F.3d 1206, 1209 (9th Cir. 2009); *Amato*, 540 F.3d at 158; *Ojeikere*, 545 F.3d at 222; *United States v. Barton*, 366 F.3d 1160, 1164–65 (10th Cir. 2004) (citing *United States v. Quarrell*, 310 F.3d 664, 676–78 (10th Cir. 2002)).

⁹⁷ 570 F. Supp. 2d 411, 431 (E.D.N.Y. 2008).

⁹⁸ See, e.g., *United States v. Onyiego*, 286 F.3d 249 (5th Cir. 2002) (holding that attorney's fees are consequential damages under § 3663A(b)(1) and thus barred from a restitution order).

⁹⁹ *Amato*, 540 F.3d at 162 (citing *United States v. Douglas*, 525 F.3d 225, 254 (2d Cir. 2008)).

¹⁰⁰ See, e.g., *United States v. Gordon*, 393 F.3d 1044, 1057 (9th Cir. 2004) (holding that there was no abuse of discretion in a district court's restitution order including investigation costs incurred by employer in connection with an embezzlement of a corporation's stock holdings when those costs were in response to grand jury subpoenas and government requests to analyze documents) (citing *Cummings*, 281 F.3d at 1051–53 (holding that corporation was entitled to restitution for the losses sustained in refilling financial statements that were originally manipulated by a partner who attempted to conceal an under accrual)).

B. JUDGE'S REVIEW OF THE EVIDENCE

As stated earlier, corporations can submit proof of attorney's fees, accounting costs, and investigative costs to support the request for a restitution order. A heavy burden rests upon the defendant in rebutting the evidence offered to the judge.

Under the MVRA, the judge reviews the evidentiary proof to determine the amount of restitution under a preponderance of the evidence standard.¹⁰¹ After a court convicts and sentences a defendant, a court then has ninety days after the date of sentencing to fashion the restitution order.¹⁰² Given the ninety-day time constraint, the parties—and most importantly the judge—have a limited time in which to review the evidence provided by the parties in addition to the memoranda in support or in opposition to the restitution request. The defendant must review the billing or accounting records of the corporation or law firm and point out what is not a necessary expense and thus excludable from the restitution order. How well, given the court's docket size, can a judge review hundreds of pages of records within such a short amount of time?¹⁰³

Given all of these factors, there is a margin for error by the judge in evaluating the evidence provided by the parties. In interpreting billing or accounting records, the judge (and also the defendant) may not be familiar with the corporation's or law firm's practices in maintaining and accurately documenting their records.¹⁰⁴ How then can a defendant

¹⁰¹ 18 U.S.C. § 3664(e) (Supp. 2012) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.").

¹⁰² 18 U.S.C. § 3664(d)(5) (Supp. 2012). *But see* Alexander J. Sisemore, *Straying from the Written Path: How the Supreme Court Eviscerated the Plain Meaning of the Mvra's Ninety-Day Deadline Provision and Legislated from the Bench in Dolan v. United States*, 64 Okla. L. Rev. 211, 223 (2012) (citing *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010)) (discussing *Dolan* where the Court decided that the MVRA's ninety-day deadline "is a speed-seeking deadline and that when the deadline is missed, the court retains the power to order restitution pursuant to the MVRA."); *see also* Beth Bates Holliday, Annotation, *Who Is a "Victim" Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996* (18 U.S.C.A. § 3663A), 26 A.L.R. Fed. 2d 283 (2008) (citing *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004)) ("The purpose behind the statutory 90-day limit on the determination of victims' losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality, but rather to protect crime victims from the willful dissipation of defendants' assets.").

¹⁰³ As explained in the introductory paragraphs to this article, Judge Rakoff had to review 542 pages of billing records provided by Goldman Sachs to establish the costs associated with the legal advice received from Sullivan & Cromwell, LLP. *See Gupta*, 2013 WL 662954 (S.D.N.Y. Feb. 25, 2013).

¹⁰⁴ A judge, however, can base a restitution order's conclusions on "well-recognized industry standards and norms." *United States v. Serawop*, 505 F.3d 1112, 1125 (10th Cir. 2007). In *Serawop*, the United States Court of Appeals for the Tenth Circuit found that the United States District Court for the District of Utah acted within its "abundant discretion" in ordering a defendant convicted of voluntary manslaughter to pay restitution. 505 F.3d at 1124 (*quoting* *United States v.*

be adequately protected?

C. JUDGE'S ROLE AS THE FACT-FINDER

Judges must exercise caution in fashioning restitution orders and specifically point out reasons as to why they are awarding or denying such costs.¹⁰⁵ Thus, this protects the defendant and the judge, if and when a defendant appeals the order and an appellate court then reviews it. Judges have shown careful analysis in making these restitution orders through reducing costs requested by a corporation.¹⁰⁶ For example, in *United States v. Gupta*, Judge Rakoff identified a small number of entries that he deemed were not "reasonably necessary under the MVRA" and thus excludable from the restitution order.¹⁰⁷ The court found that nine percent of the total amount requested by Goldman Sachs was excludable. In explaining the restitution order, even Judge Rakoff noted that there was a margin for error in reviewing the evidence and exhibiting careful fact-finding by increasing the amount excludable to ten percent.¹⁰⁸ Although it was beneficial for the defendant, Judge Rakoff's action illustrates the judge's discretion in determining the amount of restitution under the MVRA since there was no precedent cited by the court indicating whether or not the judge could increase the amount excludable from an order without evidentiary support.

VI. MVRA USE AND APPLICATION BY A CORPORATION AND A DEFENDANT

Case precedent on the application of the MVRA by corporations has provided some guidance, although not uniform, as to what factors should be considered by a corporation in claiming restitution as a victim under the MVRA and requesting restitution as well as what defenses a defendant can bring to oppose that request.

Cases have indicated how a corporation can obtain a more favorable restitution award. For example, if a corporation wishes to recover for its lost expenses, which may include attorney's fees, internal investigations, and auditing costs, incurred as a result of the

Oslund, 453 F.3d 1048, 1063 (8th Cir. 2006)). In determining the amount of restitution, the district court cross-examined an economist appointed by the court to measure the "victim's potential earning capacity" and based its conclusions on "well-recognized industry standards and norms." *Serawop*, 505 F.3d at 1125.

¹⁰⁵ See *Amato*, 540 F.3d 153 and cases discussed in note 79.

¹⁰⁶ See *Gordon*, 393 F.3d at 1057 (analyzing a district court's findings and finding that there was a careful analysis of the costs sought since the district court had denied expenses, which were "extraordinary," "overlapping," or "duplicative.").

¹⁰⁷ 2013 WL 662954, at *1 (excluding costs relating to post-conviction deposition preparation and finding number of attorneys staffed on a task was excessive).

¹⁰⁸ *Id.*

defendant's wrongful conduct, the corporation should request that the court order restitution under § 3663A(b)(4) rather than § 3663A(b)(1).

On the other hand, defendants can raise several defenses against the corporation's restitution request. For example, the defendant can claim the requested restitution expenses are not "necessary" under § 3663A(b)(4). Also, if attorney's fees are requested under § 3663A(b)(1), the defendant can claim these expenses are consequential and thus barred under the MVRA.¹⁰⁹ The defendant can also argue that the corporation has not provided adequate documentation of the expenses requested. Further, the defendant can challenge the evidence provided by the corporation by detailing which expenses should be excluded. Lastly, a corporation would not be entitled to benefit from the MVRA if a defendant can prove that the so-called victim corporation was actually a "perpetrator of the offense of conviction" or a "co-conspirator" and thus, not entitled to restitution.¹¹⁰

It is worth noting that defendants have also tried, unsuccessfully, to defend against a corporation's restitution request for attorney's fees, accounting costs, and investigative costs under 18 U.S.C § 3663A(b)(4). Under this provision, defendants argued that only expenses incurred for *ongoing* government investigations or prosecutions can and should be awarded.¹¹¹ However, courts have rejected this argument and found that there was no requirement that a corporation could only receive restitution for costs incurred as a result of an ongoing investigation.¹¹²

VII. POLICY ARGUMENTS REGARDING MVRA APPLICATION TO CORPORATIONS

A. IN FAVOR OF MVRA'S APPLICATION TO CORPORATIONS

The outcome of courts ordering restitution to corporations may

¹⁰⁹ For example, if a defendant is being sued for attorney's fees in either the Fifth, Seventh, or Tenth Circuit, under § 3663A(b)(1), the defendant can argue that these costs have been viewed as consequential damages and thus should be excluded. See Deborah F. Buckman & Kenneth B. Sills, Annotation, *Mandatory Victims Restitution Act—Measure and Elements of Restitution to Which Victim is Entitled*, 51 A.L.R. Fed. 2d 169 (2010) (citing *Onyiego*, 286 F.3d at 249; *Barton*, 366 F.3d at 1160; *United States v. Shepard*, 269 F.3d 884 (7th Cir. 2001)). However, if a defendant is being sued in the Second Circuit or Eighth Circuit, attorney's fees have been awarded under § 3663A(b)(4), where they are not regarded as consequential. See, e.g., *Piggie*, 303 F.3d at 928.

¹¹⁰ See *Ojeikere*, 545 F.3d at 220; *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006).

¹¹¹ *United States v. Dwyer*, 275 F. App'x 269, 272 (5th Cir. 2008) (quoting *United States v. Miller*, 406 F.3d 323 (5th Cir. 2005) (rejecting the defendant's argument that only those costs associated with an ongoing investigation could be recovered: "[t]here is no precedent resolving the question whether expenses incurred before the government's investigation were incurred 'during' the investigation for purposes of § 3663A(b)(4).[.]").

¹¹² *Id.*

indicate judicial approval of the MVRA's application to corporations.¹¹³ The judiciary's actions may be due to a desire to promote and instill a cooperative relationship between the private and public sectors. Additionally, by allowing corporations to benefit from the MVRA, it creates a societal impact as well as a societal benefit.

Although some courts have provided corporations with restitution for internal investigative costs not required or requested by the government, a court will certainly award those costs incurred while assisting any government agency. These costs include responding to grand jury subpoenas and document requests, including collecting, searching, and reviewing documents for document productions, investigative or pre-trial meetings, and interviews with government staff. Through granting restitution orders including such costs incurred by corporations in participating in government investigations, a strong cooperative relationship forms between corporations and government lawyers. These orders encourage corporations to provide time, resources, and assistance to enforcement counsel in the investigation and prosecution of a defendant's wrongful conduct. This creates a relationship between the private and public sector that forms the foundation for helping current victims of the crime and future victims of a similar crime.

Congress created the MVRA as a result of increasing awareness of the impact crimes have upon victims within a society. Thus, Congress would also not ignore the impact that corporations bring to society.¹¹⁴ Corporations increase economic growth in terms of supplying jobs and increase social welfare, by providing compensation packages that include health care, life insurance policies, and retirement pension plans. Additionally, corporations provide investment vehicles such as equity, fixed income, or commodities, which investors can purchase thereby pumping more money into the stock market. Not only does this serve to stabilize economic growth and provides investors with higher returns than certificate of deposits at their local banks, but also the purchase and sale of securities are used as a measure by research

¹¹³ It is possible that the recent trend in the courts application of the MVRA to corporations may be due to Congress' inaction in amending the statute in order to exclude corporations and/or the lack of discussion within the statute's legislative history. *See e.g., Isaacson v. Dow Chemical Co.*, 517 F.3d 129 (2d Cir. 2008) ("Statutory presumption that the term 'person' includes corporations is not irrebuttable, and it can be overcome where the legislative history of the statute under consideration shows that the normal rule of construction would run contrary to the statutory intent.").

¹¹⁴ *See* H.R. Rep. 104-16, at 4 (1995); *see also* S. Rep. 104-179, at 18 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 931 ("It is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that offender be held accountable to repay these costs.").

analysts to effectively evaluate economic activity and performance. Corporations also provide for new or improved technology, tools, and goods used by the public in everyday life at home or in another profession, which contribute to raising the public's standard of living. Lastly, numerous corporations also give back to the community in terms of creating foundations, which for example, donate to underprivileged children domestically or internationally, or provide scholarships or internship programs for individuals of diverse backgrounds. Thus, these facts demonstrate how corporations provide a great societal benefit that cannot be ignored.

As a result of the desire to promote a cooperative relationship between the government and the private sector in addition to the benefits provided by corporations, a victim corporation should be allowed to recover under the MVRA for wrongful conduct committed against it.

B. DISAPPROVAL OF MVRA'S APPLICATION TO CORPORATIONS

Despite the substantial benefits that corporations provide to society, there are also some detriments to allowing corporations to benefit under the MVRA. Although restitution orders may make the corporation financially whole, such an award may not address a corporation's subpar compliance or subpar supervisory procedures that neglected to alert the corporation to the wrongful conduct and could have avoided or mitigated the resulting offense.

Through providing restitution for a corporation's internal investigations, the MVRA may discourage a corporation's actions in taking its own time and resources to create a safe and law-abiding work environment. Corporations must comply with strict regulations, especially financial corporations. These regulations include compliance measures that corporations must take, in order to detect improper or unusual conduct by an employee committed by phone, email, or wire that may indicate for example, fraudulent transactions, excessive trading, or trading after hours, etc. By allowing recovery for internal investigations of a company's director or employee, the company is rewarded for either its mismanagement or subpar supervision of its employee, or subpar compliance with applicable regulations, which could have led to the underlying offense. Moreover, a court's award of a restitution order that includes costs for internal investigations may promote higher than necessary costs for internal investigations for work that could have been avoided had strict adherence to compliance systems been followed at the company or had the company had better

supervisory means and procedures.

As a result, there may be no need to encourage cooperation with government investigations. If a defendant committed the wrong while working for the corporation, it is already in the corporation's interest to provide such assistance to the government in its investigations. A failure to cooperate with the government may lead to a shareholder's derivative suit—something that could cost far more to defend than providing assistance to the government. Further, such investigations will provide guidance on how to better assess a director or employee's actions and place the corporation on alert for future misconduct. Those opposed to corporations recovering for expenses incurred while assisting the government in its investigations under the MVRA may argue that the relationship created by the government's investigation does not exceed the benefit the corporation receives from the government's investigative findings. This is because when the government is investigating a director or employee's wrongful conduct, it may not have occurred, but for the company's subpar adherence to compliance standards or semblance of supervisory neglect. Thus, a corporation arguably should also not be allowed to recover for such expenses.

It is true that corporations do provide jobs, tools, and other goods; however, when a restitution order is awarded and the corporation receives that money from the defendant, it is up to the corporation on where to place that money. The amount recovered may not be used for maintaining or creating stricter compliance tools and procedures or creating another compliance officer position. In this respect, restitution orders may not necessarily increase society's interest since the company is reimbursed for expenses that it may have had to incur based on its neglectful supervision or investigative procedures it should have undertaken previously, but failed to do.

VIII. CORPORATE SHAREHOLDERS AS "VICTIMS" UNDER THE MVRA

Corporations who succumb to insider trading schemes or other corrupt practices are not the only victims of such wrongful conduct. Since Congress intended corporations to recover from the benefits of the MVRA, then it follows that a corporation's investors and shareholders should also be able to recover from the MVRA. For example, since corporations can recover for the losses incurred in spending resources due to the wrongdoing of a defendant, then investors and shareholders should also be able to recover as victims for the failure of the company to properly supervise the defendant's actions and/or for the defendant's misconduct.

Shareholders may claim that these actions affected the corporation and its share value in a negative manner. Shareholders may prove the causal connection by asserting that “but for” the defendant’s action in defrauding the company, they would not have been harmed. For example, if a defendant is convicted of a white-collar crime, this fact in itself brings negative attention to the corporation and causes the share price of the corporation to decrease. Thus, it can be considered reasonable and foreseeable that a fraud committed by a director or employee of the company would hurt the corporation and, at the same token, hurt those investors in the corporation.¹¹⁵

Courts have permitted MVRA restitution for investors for costs stemming from a defendant’s conduct committed in a scheme or conspiracy.¹¹⁶ For example, in *United States v. Ross*, the court found a president and CEO of a company guilty of wire fraud and money laundering in a scheme where the defendant fraudulently obtained financing fees from individuals and other businesses and would then reject the loans since it could not provide such financing.¹¹⁷ The individuals who were defrauded included stockholders who were seeking reimbursement of the \$3.5 million in expenses they paid as advanced financing fees in the defendant’s scheme to defraud.¹¹⁸ The United States Court of Appeals for the Eighth Circuit reviewed the language of preliminary commitment agreements, which allowed for the transfer of the fees and found in favor of the stockholders who paid such fees and were proximately harmed by the defendant’s fraud scheme.¹¹⁹ Thus, if a stockholder would like to recover for investments made in a corporation where those investments were lost due to a scheme or conspiracy to commit white-collar crimes, victims, or in this

¹¹⁵ See *United States v. Marino*, 654 F.3d 310 (2d Cir. 2011) (requiring defendant to pay investors for concealment of Ponzi scheme that was the cause in fact and proximate cause for investors’ loss); *United States v. Kline*, 199 F. Supp. 2d 922 (D. Minn. 2002) (finding that shareholder was entitled to restitution as a victim of insider trading since insider trading was material to shareholder’s stock sale); *F.D.I.C. v. Howse*, 802 F. Supp. 1554 (S.D. Tex. 1992) (“In deciding whether shareholder may bring nonderivative action, court looks to nature of wrong, whether to shareholders as whole or only to shareholder hurt by misconduct.”).

¹¹⁶ See *United States v. Dove*, 585 F. Supp. 2d 865 (W.D. Va. 2008) (imposing restitution in copyright infringement crime based on the high number of victims and the difficulty in identifying harm to the victims); *United States v. Ferguson*, 584 F. Supp. 2d 447 (D. Conn. 2008) (also refusing to impose restitution since the case was too complicated as to make the MVRA applicable in that, the court could not identify all the victims); *United States v. Ojeikere*, 545 F.3d 220 (2d Cir. 2008); *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006) (vacating restitution order since order required defendant to pay restitution to persons who were not victims since they had made stock purchases after the stock fraud conspiracy ended or were co-conspirators in the fraud).

¹¹⁷ 210 F.3d 916 (8th Cir. 2000).

¹¹⁸ *Ross*, 210 F.3d at 924 (“The \$3.5 million merely reflects the fees collected by [the company] and does not include expenditures made by would-be borrowers in reliance on the promise of funding, which trial testimony suggests far exceeds the challenged restitution ordered.”).

¹¹⁹ *Id.*

case investors, can only recover if they prove that they were directly and proximately harmed by the conspiracy.¹²⁰ This requires “that the harm to the victim be closely related to the scheme, rather than tangentially linked.”¹²¹ Moreover, a restitution award for a defendant convicted of a crime involving a conspiracy, scheme, or pattern of criminal activity may cover losses for related conduct for which the defendant was not convicted.¹²²

In *United States v. Collardeau*, stockholders who lost money on investments in a public company as a result of a securities, mail and wire fraud conspiracy were not found to be victims under the MVRA.¹²³ The government had requested damages for three separate classes of shareholder-victims. The United States District Court for the District of New Jersey found that it was difficult to determine identifiable victims since liability was not clear by the factual record presented and the court had to devote more resources to the case other than just calculating damages. The court explained, “[t]he 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.”¹²⁴ This opinion sheds further light on the obstacles shareholders may face if they seek restitution under the MVRA.

The court in *Collardeau* discussed what type of proof is required in order for victim shareholders to successfully prevail under the MVRA. The investor, in reality the government on behalf of the investor, must offer proof that the harm suffered by the investor was part of the offense underlying the conviction. The shareholder must establish causation and show that the corporation harmed her directly. For example, in a securities fraud case, the shareholder must prove both transaction causation and loss causation.¹²⁵

¹²⁰ 18 U.S.C. § 3663A(a)(2) (Supp. 2012). See, e.g., *United States v. Hall*, 467 Fed. App'x. 47 (2d Cir. 2012) (holding that clients who worked with defendant, convicted of conspiracy, were victims and entitled to restitution for lost profits resulting from their payment of fees to defendant to purchase fraudulent investment vehicles).

¹²¹ *United States v. Kones*, 77 F.3d 66, 71 (3d Cir. 1996).

¹²² See Beth Bates Holliday, Annotation, *Who Is a “Victim” Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. Fed. 2d 283 (2008); see also Sarah N. Welling, *Restitution*, 3 Fed. Prac. & Proc. Crim. § 546 (4th ed. 2012) (citing *United States v. Elson*, 577 F.3d 713 (6th Cir. 2009); *United States v. Maturin*, 488 F.3d 657, 661 (5th Cir. 2007); *United States v. Fogg*, 409 F.3d 1022 (8th Cir. 2005)).

¹²³ 2005 WL 1106475 (D.N.J. Apr. 28, 2005).

¹²⁴ *Id.* (citing *United States v. Kones*, 77 F.3d 66, 69 (3d Cir. 1996)).

¹²⁵ *Id.* (“Transaction causation . . . requires only an allegation that ‘but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction.’”) (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172–73 (3d Cir. 2001) (“Loss causation demonstrates that the fraudulent misrepresentation

Shareholders can use transaction causation to prove a shareholder's reasonable reliance under the fraud-on-the-market theory.¹²⁶ Further, victims could use a theory of illiquidity to demonstrate transaction causation. Under this theory, a shareholder asserts "no reasonable investor would have purchased [the corporation's] stock if he was aware of [the defendant's] conduct."¹²⁷

In order to prove loss causation, the shareholder must demonstrate a causal connection between the defendant's conduct and a victim's loss¹²⁸ by proving that the defendant's conduct directly caused loss to the investors. Price fluctuations must occur after the public becomes aware of the conduct underlying a conspiracy, i.e. when the defendant is indicted or when the conspiracy is revealed.¹²⁹

Another hurdle shareholders must surpass is proving that they are identifiable victims under the MVRA and not so large "as to make restitution impracticable."¹³⁰ In cases where there are numerous victims, a court may invoke the "complication exceptions" to the imposition of mandatory restitution under § 3663A(c)(3)(a)–(b).¹³¹ The court must be provided with enough factual information so as to readily determine the victim, the calculation of damages, and the specific conduct that caused the damages "without conducting either an evidentiary hearing or continued supplemental briefing."¹³²

Courts have invoked the complexity exceptions in denying shareholder restitution.¹³³ For example, in *United States v. Reifler*, the

actually caused the loss suffered.") and *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005).

¹²⁶ *Id.* ("Causation lies in the fact that the plaintiff relied on the market price of the security as an indicator of the future value of the stock[.]") (*citing* *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 373 (3d Cir. 2002)).

¹²⁷ *Id.*

¹²⁸ *See id.* (*citing* *Kones*, 77 F.3d at 69); *see also* *Cummings*, 189 F.Supp.2d at 76–77 (indicating that in criminal restitution cases, a loss causation analysis applies).

¹²⁹ *Id.*

¹³⁰ 18 U.S.C. § 3663A(c)(3)(a) (Supp. 2012).

¹³¹ *See* *United States v. Rigas*, 409 F.3d 555, 563 (2d Cir. 2005) (upholding a district court's application of MVRA exceptions in that there were too many victims and the factual issues were too complex that it would extend the sentencing process too long); *United States v. Catoggio*, 326 F.3d 323, 326–27 (2d Cir. 2003) (vacating a restitution order and remanding after finding that the methods employed by the district court were not in accordance with the procedures Congress set forth in the MVRA since even though the victims and losses were identifiable, it would take too much time to "unravel the effects of a complex scheme of the type used by [the defendant] and his co-conspirators to perpetrate this fraud.").

¹³² *Collardeau*, 2005 WL 1106475 at *1.

¹³³ *See* *Dove*, 585 F. Supp. 2d at 865 (refusing to impose restitution in copyright infringement crime based on the high number of victims and the difficulty in identifying harm to the victims); *see also* Catharine M. Goodwin et al., *Narrow "Complication" Exception for Mandatory Restitution: 18 U.S.C.A. § 3663A(c)(3)*, *Federal Criminal Restitution* § 4:14 (2012) (*citing* *United States v. Ferguson*,

Second Circuit vacated a restitution order since the order required a defendant to pay restitution to persons not considered victims.¹³⁴ The court held that those persons were not proper victims under the MVRA since they had made stock purchases after the stock fraud conspiracy ended or were co-conspirators in the fraud.¹³⁵ The Second Circuit explained:

Congress plainly intended that sentencing courts not become embroiled in intricate issues of proof, as it provided that the MVRA is to be inapplicable if the court finds that the determination of complex factual issues related to the cause or amount of the victims' losses would unduly burden the sentencing process. This provision reflects Congress' intention that the process of determining an appropriate order of restitution be streamlined . . . and that the restitution determination be made quickly.¹³⁶

Thus, if the court is not provided with enough factual information, a court *will not* apply the MVRA since it would involve "determining complex issues of fact" and would "complicate or prolong the sentencing process[.]"¹³⁷

The hurdles presented above may be difficult for a shareholder to overcome, even with enough and adequate factual information. In cases where a shareholder requests restitution under the MVRA, a court may impose a strict reading and application of the statute since shareholders are sufficiently protected in terms of liability. Shareholders are limited to the investments they make in a company and they are free to voluntarily buy or sell their shares. Perhaps those investors or shareholders with majority positions may have more means of providing enough factual information regarding their status as an identifiable victim, calculation of their damages, and the specific conduct that caused those damages. Thus, in these cases, a court may be willing to consider them as victims entitled to benefit from the MVRA.

584 F. Supp. 2d 447 (D. Conn. 2008) ("the court concluded the numerous shareholders of the mutual funds who lost money in the fraud could not be sufficiently identified without undue complication[.]").

¹³⁴ 446 F.3d 65 (2d Cir. 2006).

¹³⁵ *Id.* at 136.

¹³⁶ *Id.* (internal quotations and citations omitted); *see also* United States v. Edwards, 162 F.3d 87, 91 (3d Cir. 1998) ("[L]egislative history also evinces a Congressional intent to streamline the administration of restitution within the criminal justice system[.]").

¹³⁷ 18 U.S.C. § 3663A(c)(3)(b) (Supp. 2012).

CONCLUSION

The MVRA by its very terms provides for mandatory restitution of an identifiable victim for a defendant's wrongful conduct in federal crimes. The MVRA was passed in order to recognize the impact the crime has on the victim and to ensure that the defendant be held accountable to repay these costs.¹³⁸ Since corporations have fallen victims to fraud, deceit, insider trading, and other white-collar crimes more recently, it is only appropriate for the MVRA to apply to corporations as well. Further, the legislative history provides that, in enacting the MVRA, Congress wanted to ensure that all victims who fall within the ambit of the MVRA be afforded such mandatory restitution. Thus, a corporation should be entitled to restitution for any offense committed by a former corporate director, officer, or employee that has directly and proximately caused harm to the corporation and the offense is covered under the MVRA.

These remedial principles form the foundation of the MVRA. Thus, Judge Rakoff's decision in *United States v. Gupta*¹³⁹ does seem to promote the purpose of the MVRA in holding Gupta accountable to Goldman Sachs. Although the opinion lacks a discussion on whether or not Congress intended for corporations, specifically and literally, to benefit from the MVRA, it is indisputable that Goldman Sachs was an identifiable victim of Gupta's wrongful misconduct. The company had to expend millions of dollars to cooperate with the government due to Gupta's misconduct. Moreover, employees had to devote time away from their usual roles within the company in order to sit in on depositions and interviews with internal investigative staff as well as government staff. An award of restitution in favor of Goldman Sachs demonstrates the court's recognition of the impact the insider trading conspiracy and related securities law offenses had upon Goldman Sachs. A restitution award in Goldman Sachs favor ensures that Gupta is held accountable and forced to repay the losses suffered and incurred by Goldman Sachs. Such an award makes them financially whole.

Corporations have proved to be successful in their requests for restitution in recent years. In light of the regulations protecting market integrity, it is likely that corporations will continue to benefit from mandatory restitution under the MVRA. A corporation has to take adequate measures to protect itself from wrongful conduct especially if that conduct occurs within the organization. Corporations have much damage control to do to protect the company in terms of its share

¹³⁸ S. Rep. 104-179, at 18 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 931.

¹³⁹ 2013 WL 662954, at *1.

value and its shareholders, especially if it is a public corporation like Goldman Sachs. Therefore, expenses for attorney's fees, costs incurred in assisting the government, internal investigative costs, and auditing costs have been considered as such adequate measures.

It may appear that courts are providing corporations with an automatic refund for these types of expenses and affording a defendant little protection in defending against a corporate giant. However, by allowing for recovery of these costs, the MVRA further promotes and instills a cooperative relationship between the private and public sector, which in turn may help to protect all current and future victims. Further, courts and Congress are aware of the benefit that corporations offer in providing jobs and furthering economic growth. Thus, under a balancing test, in terms of promoting a social impact, a court should punish a defendant for wrongful conduct committed upon a corporation even if it is a large "victim." Congress enacted the MVRA for the benefit of the public, and corporations should continue to be included and treated as part of that public.