UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	**CRIM. NO.: 2:13-0001-JTM-SS**
v.	*	**SECTION: H**
TRANSOCEAN DEEPWATER INC.	*	
	* * *	

JOINT MEMORANDUM IN SUPPORT OF GUILTY PLEA BY TRANSOCEAN DEEPWATER, INC.

NOW INTO COURT, through the undersigned attorneys, come the United States of America and the defendant, Transocean Deepwater Inc. ("Transocean"), which respectfully request that this Court accept the defendant's guilty plea pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure on the terms set forth in the Cooperation Guilty Plea Agreement submitted to the Court on January 3, 2013 ("Plea Agreement") (Rec. Doc. No. 3-1).

As demonstrated below, the proposed Plea Agreement imposes fair, just, and appropriate corporate punishment for Transocean's role in the largest environmental disaster in United States history. The Plea Agreement appropriately reflects the nature of the offense charged, the defendant's role in the conduct at issue, the environmental impact of the Macondo well blowout, and Transocean's past and ongoing cooperation in the government's investigation. The Plea Agreement, and the separate proposed civil consent decree pending before Judge Barbier, also serve to deter and prevent future misconduct and protect the public from future criminal conduct by Transocean and others.

Pursuant to the Plea Agreement, Transocean is prepared to plead guilty to violating the Clean Water Act ("CWA") based on Transocean's negligent discharge of oil into the Gulf of Mexico, in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3). As part of its guilty plea, Transocean is obligated, pursuant to the Plea Agreement, to pay $400 million in criminal recoveries – the second highest criminal environmental recovery in United States history next to BP's recent sentencing with respect to this same incident. Pursuant to the separate proposed civil agreement with the United States, Transocean has agreed to resolve the government's civil Clean Water Act claim and pay an additional $1 billion in civil penalties and accept substantial injunctive relief, including numerous drilling safety-related requirements. In addition, pursuant to the Plea Agreement Transocean is subject to a five-year term of probation – the maximum permitted by law.

The size and scope of the criminal penalty imposed on Transocean fairly and reasonably balances the seriousness of the spill and its consequences with an assessment of Transocean's role in the offense. Transocean's crew, though negligent, carried out drilling operations in general, and the negative test in particular, under BP's instruction and supervision. Transocean lost nine employees among the eleven who perished during the explosions onboard the *Deepwater Horizon*. The Plea Agreement also fairly considers the relative sizes of BP and Transocean, and the relative impact of the incident on Transocean. Transocean, while a large company by some standards, is significantly smaller than BP and was disproportionately impacted financially by the aftermath of the spill, incurring substantial financial losses. Finally, the Plea Agreement also appropriately reflects Transocean's cooperation with the Deepwater Horizon Task Force.

In arriving at the agreed-upon charge and admission of guilt, as well as the fines, penalties, terms of probation, and related civil injunctive relief, the United States has considered a vast amount of complex factual and legal information developed over more than two years. From the United States' perspective, the fine and associated payments under the Plea Agreement represent a just and appropriate negotiated resolution built on the work of numerous prosecutors, investigators, support staff members, and other personnel that began even before the oil well was capped. The government's and Transocean's work, both cooperatively and independently over the past two years, developed their respective understandings of the complex factual and legal issues presented by this case; that hard-earned understanding served as a foundation for the negotiation of the Plea Agreement presently before the Court. The United States and Transocean therefore respectfully request that the Court accept the Plea Agreement as a reasonable product of vigorous arm's length negotiations and careful analysis of the relevant issues. *See United States v. C.R. Bard, Inc.*, 848 F. Supp. 287, 288 (D. Mass. 1994) ("When, as here, the joint sentencing recommendation is the result of arms' length negotiations between capable counsel, this court believes the agreement should be accepted if it is reasonable.")

BACKGROUND AND TERMS OF THE PLEA AGREEMENT

I. TRANSOCEAN'S FACTUAL ALLOCUTION

Pursuant to the Plea Agreement, Transocean has agreed that the government could prove at trial the facts set forth in Exhibit A to the Plea Agreement beyond a reasonable doubt. Transocean's admissions in its allocution are summarized below.

Transocean has hundreds of employees working throughout the Gulf of Mexico in oil drilling operations. (Plea Agreement, Ex. A, ¶ 1.) BP contracted with a Transocean

affiliate to obtain the services of a mobile offshore drilling unit to drill an exploratory well in a portion of the U.S. outer continental shelf known as Mississippi Canyon Block 252, also known as the Macondo well, located approximately 50 miles off the coast of Louisiana. Transocean provided the crew to drill the Macondo well pursuant to BP's plans and instructions. (*Id.* ¶¶ 2-3.) Drilling at Macondo began in October 2009; was halted by Hurricane Ida in November 2009; and resumed around the end of January 2010. (*Id.* ¶¶ 4-5.)

On April 9, 2010, BP decided to cease drilling and to begin planning for a process called "temporary abandonment" – which requires casing and cementing at the bottom of the well to avoid the flow of oil and gas to the surface, testing the casing and cement, and then removing the drilling fluids and blowout preventer (BOP) that are used to prevent discharge of oil and gas during drilling operations. (*Id.* ¶¶ 5, 6.)

A critical part of the temporary abandonment process is what is known in the industry as "negative testing." (*Id.* ¶ 7.) Negative testing assesses whether the recently-installed cement plug at the bottom of the well has integrity, *i.e.*, whether it will prevent oil and gas from entering the well and traveling up the well to the surface. (*Id.*) BP determined whether and how negative testing would be conducted on the Macondo well. BP, through its Well Site Leaders stationed on the *Deepwater Horizon*, was responsible for supervising the negative testing, and had the ultimate responsibility to ensure all operations, including the negative test, were conducted safely and according to the industry standard of care. (*See United States v. BP Exploration and Production, Inc.*, 12-cr-292 (E.D.La.), Rec. Doc. No. 2-1.)

During the evening of April 20, 2010, Transocean personnel, supervised by BP's Well Site Leaders, conducted negative testing of the Macondo well. (Plea Agreement, Ex. A, ¶ 10.) As part of their joint duty to maintain well control, both Transocean and BP were required to monitor the well and take appropriate action during the negative test to prevent a blowout, ensure the safety of rig personnel, and protect against harm to the environment. (*Id.* ¶ 9.)

During the first two hours of the negative testing, anomalous pressures were observed on the drill pipe. (*Id.* ¶ 10.) BP's Well Site Leaders and the Transocean crew commenced, but did not complete, investigation of the pressure anomalies. (*Id.*) Rather, BP's Well Site Leaders instructed the Transocean crew, and the crew agreed, to change the manner in which the test was conducted. (*Id.* ¶ 11.) Although the revised procedure produced no flow on the kill line, the anomalous pressure on the drill pipe remained and BP's Well Site Leaders and the Transocean crew did not properly investigate, explain, or remediate these anomalies. (*Id.*)

BP's Well Site Leaders nonetheless instructed the Transocean crew to continue the temporary abandonment process. (*Id.* ¶¶ 11-12.) Oil and natural gas rushed up to the rig, causing a massive explosion. (*Id.*) Oil and natural gas then began flowing into the Gulf of Mexico; by the time the well was capped in July 2010, several million barrels of oil had been discharged.

The failure by BP's Well Site Leaders and the Transocean crew to investigate and fully resolve the anomalous pressures observed during the negative test, prior to proceeding with temporary abandonment, violated the standard of care applicable in the

deepwater oil exploration industry and was a proximate cause of the blowout and spill. (*Id.* ¶ 14.)

II. TRANSOCEAN'S COOPERATION

Transocean has provided substantial cooperation during the Deepwater Horizon Task Force's investigation of the events at Macondo. Counsel for Transocean contacted the Task Force within days of its formation and provided continuous and meaningful cooperation. As noted above, Transocean, pursuant to the Plea Agreement, must continue to cooperate in the government's investigation.

III. THE PLEA AGREEMENT

The Plea Agreement provides for Transocean to pay a total of $400 million in criminal recoveries and to be subject to five years of probation, the statutory-maximum term. The payments are composed of a $100 million criminal fine, to be paid in full within 60 days of sentencing,[1] and $300 million in other criminal relief to be paid as a special condition of probation. The $300 million in additional criminal relief falls into two categories.

First, Transocean must pay $150 million over two years to the National Fish and Wildlife Foundation ("NFWF"). (Plea Agreement, Proposed Order ¶¶ 2-3.) NFWF will use approximately half the payments to conduct or fund projects to remedy harm to resources where there has been injury to, or destruction, loss, or loss of use of those resources resulting from the Macondo oil spill in Alabama, Florida, Mississippi, and Texas. (*Id.* ¶ 4.a.) NFWF will use the other half of the payments to create or restore

[1] Pursuant to 26 U.S.C. § 9509(b)(8), the $100 million criminal fine will be paid to the Oil Spill Liability Trust Fund. The Fund is used to pay certain oil spill response and removal costs, as well as for natural resource damage assessments and other statutorily-defined purposes.

barrier islands off the coast of Louisiana and/or to implement river diversion projects on the Mississippi or Atchafalaya Rivers to create, preserve, and restore coastal habitat, in order to remedy harm to resources where there has been injury to, or destruction, loss, or loss of use of those resources resulting from the spill. (*Id.* ¶ 4.b.)

Second, Transocean must also pay $150 million to the National Academy of Sciences, in five payments spread over a four-year period, to fund an endowment for programs focused on human health and environmental protection, including matters related to offshore drilling and hydrocarbon production and transportation in the Gulf of Mexico and on the United States outer continental shelf. (Plea Agreement, Ex. B1, at 2.)

Transocean Ltd., Transocean's ultimate parent company, has agreed to guarantee all payments due from Transocean under the Plea Agreement.

IV. TRANSOCEAN'S SETTLEMENT OF THE UNITED STATES' CIVIL CLEAN WATER ACT PENALTY CLAIMS

At the same time Transocean entered into the Plea Agreement, the company also agreed to resolve the government's civil Clean Water Act penalty claims. *See* Proposed Consent Decree, MDL 2179, Rec. Doc. 8157.[2]

Monetary terms. Under the terms of a proposed consent decree lodged with the district court on the same day as the Plea Agreement, Transocean will pay $1 billion in civil Clean Water Act penalties in three installments over a two-year period – a record civil penalty under the Clean Water Act.

[2] Transocean and three affiliated entities (Transocean Offshore Deepwater Drilling Inc., Transocean Holdings LLC, and Triton Asset Leasing GmbH) are parties to the proposed consent decree. These four entities are the named Transocean Defendants in the government's civil complaint, *United States of America* v. *BP Exploration & Production Inc. et al.*, Civ. Action No. 2:10-cv-04536 (E.D. La.).

Injunctive relief. Under the terms of the consent decree, Transocean will also be subject to extensive injunctive measures designed to improve performance and prevent recurrence of an uncontrolled well flow and discharge of hydrocarbons into U.S. waters. These injunctive relief measures include, *inter alia*:

- detailed oversight requirements for drilling operations, including particular requirements for blowout preventers on all Transocean rigs operating in U.S. waters, and training and competency assessments for key rig personnel;
- yearly oil spill training;
- requirements for oil spill exercises;
- requirements for an oil spill response plan; and
- best practices requirements, including provisions addressing communications with operators and alarm system safety.

(Consent Decree ¶¶ 15-19.) In addition, Transocean will invest at least $10 million in a newly created technology innovation group focused on drilling safety. (*Id.* ¶ 20.)

The consent decree also requires extensive reporting by Transocean to the United States on its activities under the decree and imposes significant compliance mechanisms, including the following:

- a board of directors committee will oversee compliance with the decree;
- an Independent Consent Decree Compliance Auditor will report annually to the United States on Transocean's compliance with the consent decree; and
- an Independent Process Safety Consultant, experienced in process safety, operations and risk management in the offshore drilling industry, will review process safety practices and make reports to a designated board committee. (*Id.* ¶¶ 21-23, 31-33.)

LEGAL STANDARD

Federal Rule of Criminal Procedure 11(c)(1)(C) authorizes the government to enter into plea agreements with defendants in which, *inter alia*, the parties agree that a particular sentence is the appropriate disposition of the case. *See* Fed. R. Crim. P. 11(c)(1)(C)*; see also United States v. BP Prods. N. Am., Inc.*, 610 F. Supp. 2d 655, 674-78 (S.D. Tex. 2009). In assessing a Rule 11(c)(1)(C) plea, the Court must make an "individualized assessment of the plea agreement," *BP Prods.*, 610 F. Supp. 2d at 674, to ensure that it constitutes a "reasonable disposition," taking into account, among other things, "'the exigencies of plea bargaining from the government's point of view,' including 'limited resources and uncertainty of result.'" *Id.* at 662 (quoting *United States v. Bundy*, 359 F.Supp.2d 535, 538 (W.D. Va. 2005)). In making this assessment, the Court should analyze the proposed plea agreement in light of 18 U.S.C. §§ 3553, 3563, and 3572, which govern the imposition of sentences, including fines and probation, in federal criminal cases. *See id.* at 727-28. Those statutory provisions require that all federal criminal sentences take into account a number of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant; the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; the need to afford adequate specific and general deterrence to criminal conduct; and the need to protect the public. *See* 18 U.S.C. § 3553(a). Discretionary conditions of probation must be reasonably related to those same factors, and must "involve only such deprivations of liberty or property as are reasonably necessary." 18 U.S.C. § 3563(b). Fines, meanwhile, must be imposed after consideration of the Section 3553 factors mentioned above, as well as additional factors including the defendant's ability to pay, any burden imposed by the fine on third parties, and, in the case of

organizational defendants, the size of the organization and any measures taken by it to discipline responsible employees and to prevent a recurrence. *See* 18 U.S.C. § 3572(a).

The advisory Sentencing Guidelines' policy statements provide that when the parties agree to a specific sentence in a plea agreement under Rule 11(c)(1)(C), the district court may accept the plea agreement if it is satisfied that the agreed sentence is either within the applicable Guideline range or outside the Guideline range for justifiable reasons. *See* U.S.S.G. § 6B1.2(c); *see also Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (Kennedy, J., plurality op.) (noting that district court must "give due consideration" to the Guidelines when considering a binding plea agreement). The relevant Guidelines for organizational defendants do not provide any specific fine Guideline range for environmental offenses. *See* U.S.S.G. § 8C2.1, cmt. background. Rather, the Guidelines provide that "the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572," referred to above. U.S.S.G. § 8C2.10. With respect to probation, the Guidelines' provision for organizational defendants, Section 8D1.1, requires a term of probation in various circumstances, including when the monetary penalty is not to be paid in full at the time of sentencing or when probation is necessary to "enforce a remedial order."

ANALYSIS

The proposed sentence under the Plea Agreement provides just punishment, adequately deters both the defendant and others from engaging in similar criminal conduct in the future, protects the public, promotes respect for the law, appropriately accounts for the nature and seriousness of the offense, and the history and characteristics of Transocean.

I. THE AGREED SENTENCE IS JUST, FAIR AND REASONABLE

The $400 million in fines and other payments provided by the Plea Agreement represent a serious criminal penalty. The amount exceeds the largest criminal penalties ever effectively imposed for an environmental crime prior to the Macondo oil spill, and is second only to the fines and other monetary penalties imposed on BP in this same matter. Aside from BP, examples of criminal fines for the lead defendants in other oil spills and related disasters are set forth below. All are significantly lower than the penalties called for in the Plea Agreement.

- In February 2010, a federal judge sentenced Fleet Management Ltd. to a fine of $10 million upon its guilty plea to a misdemeanor violation of the Clean Water Act, among other crimes, for its role in the spillage of approximately 58,000 gallons of oil into the San Francisco Bay.

- In September 2008, CITGO pleaded guilty to a misdemeanor violation of the Clean Water Act and was sentenced to pay a fine of $13 million for the negligent discharge of 53,000 barrels of oil into the Indian Marais and Calcasieu Rivers in Louisiana.

- In 2007, BP Exploration (Alaska) Inc. pleaded guilty to a misdemeanor violation of the Clean Water Act for a 200,000 gallon Alaskan oil spill in 2006, and paid a criminal fine of $12 million, along with $8 million in other criminal relief.

- In December 2002, Shell Pipeline Company was sentenced to a criminal fine of $15 million, and Olympic Pipeline Company was sentenced to a criminal fine of $6 million, upon pleading guilty to misdemeanor violations of the Clean Water Act and other charges after the rupture of a pipeline resulted in the discharge of over 230,000 gallons of gasoline into the Whatcom Creek in Washington and led to a fire that caused the death of three people.

- In February 1999, Colonial Pipeline Company (whose shareholders included Mobil, Amoco, and Texaco) was fined $7 million after pleading guilty to a misdemeanor violation of the Clean Water Act for spilling nearly one million gallons of oil into the Reedy River in South Carolina, in what was then the sixth-largest oil spill in United States history.

- In September 1996, a federal judge fined three corporations – Bunker Group Puerto Rico, Bunker Group Incorporated, and New England Marine Services – $25 million each after they were convicted of a misdemeanor violation of the

Clean Water Act and other offenses for what the judge characterized as "recklessly negligent" conduct resulting in the spillage of more than 750,000 gallons of oil off the coast of Puerto Rico.

- In October 1991, Exxon was sentenced to pay a fine of $150 million, $125 million of which was remitted, or discounted, based on Exxon's cleanup costs, cooperation, and other factors, resulting in a total effective fine of $25 million, $7 million of which was imposed under the Clean Water Act. Exxon pleaded guilty to a misdemeanor violation of the Clean Water Act and other offenses arising from the *Exxon Valdez* oil spill in Prince William Sound, Alaska, then the largest oil spill in United States history.

Comparison of the outcomes above with the $100 million Clean Water Act fine and the $400 million in total criminal payments under the Plea Agreement demonstrates that the Plea Agreement provides just punishment, reflects the nature and seriousness of the offense and its impacts, promotes respect for the law, and furthers the statutory goals of specific and general deterrence.

The Clean Water Act violation charged in the Information, and the size and scope of the criminal penalty to be imposed on Transocean, are also just, fair and reasonable in light of Transocean's role in the conduct at issue. Transocean's crew, together with BP's Well Site Leaders, was negligent in its execution of the negative pressure test, and Transocean fully accepts criminal responsibility for the crew's negligence. However, as both BP and Transocean acknowledge, the Transocean crew carried out drilling operations in general and the negative test in particular under the instruction and supervision of BP, through its Well Site Leaders. Transocean was contracted to provide a drilling rig and rig crew to implement BP's drilling plan and instructions under the supervision of BP's Well Site Leaders. BP was responsible for designing the Macondo well, including the bottom hole cement plug that failed, and for planning all operations on the rig, including the plan to abandon the well and the testing included in that plan. BP

had the ultimate authority to determine whether the negative pressure testing was successful and when planned operations should proceed. BP, through its Well Site Leaders stationed on the rig, was responsible for supervising the Transocean rig crew in their implementation of BP's drilling plan. BP was entitled to make and did in fact make the final decisions as to the negative testing. Knowing of the continuing abnormal pressure on the drill pipe, the BP Well Site Leaders nonetheless deemed the test a success. The Well Site Leaders also instructed the Transocean crew to proceed with displacement of the heavy drilling mud, a decision that permitted hydrocarbons to migrate up the well. The resulting explosion killed eleven men, including nine of Transocean's employees – the very men who had worked on the negative test and who carried out the BP Well Site Leader's instruction to continue displacing the drilling mud. BP made admissions of guilt under oath as its own culpability in this respect at the recent guilty plea before Judge Vance.

The $400 million in total criminal penalties also takes account of Transocean's size, particularly as compared to BP. The total criminal relief imposed under the BP plea agreement is $4 billion, ten times greater than the total relief here, in part because BP is significantly larger than Transocean. BP reported revenue in 2011 of approximately $386 billion, while Transocean Ltd. (Transocean's parent company) reported consolidated revenue of approximately $9 billion. *See* BP Annual Report and Form 20-F 2011; Transocean 2011 Annual Report. BP's market capitalization ($141 billion as of close of trading on the NYSE on January 11, 2013) is approximately 7.5 times that of Transocean Ltd. (approximately $19 billion on the same date).

The fine and other monetary sanctions imposed on Transocean appropriately also reflect that Transocean has a much less serious criminal history than BP.[3]

Further, Transocean has cooperated with the United States since the inception of the criminal investigation of the Macondo Well blowout, explosion, oil spill, and response, and has agreed to continue cooperating in any ongoing criminal investigation related to Macondo. This factor as well is worthy of consideration in assessing the appropriateness of the proposed sentence. *See* 18 U.S.C. § 3553(a)(1), (2)(B)-(C); *United States v. Fernandez*, 443 F.3d 19, 33 (2d Cir. 2006) (defendant's cooperation appropriately considered under 18 U.S.C. § 3553(a)(1) as part of defendant's "history and characteristics").

The reasonableness of the proposed criminal sentence should also be viewed in light of Transocean's settlement of the United States' civil Clean Water Act penalty claims. Pursuant to the proposed civil consent decree, Transocean is obligated to pay $1 billion in civil Clean Water Act penalties, the largest civil Clean Water Act penalty ever imposed. Moreover, pursuant to the proposed consent decree Transocean is obligated to

[3] The criminal history of the collective BP-group of companies includes the following: (1) BP Products North America, Inc.'s 2009 conviction under the Clean Air Act, arising out of a deadly explosion at a BP refinery in Texas City, Texas, in 2005. BP pleaded guilty, paid a $50 million fine, and served three years of probation. (2) BP Exploration (Alaska) Inc.'s 2007 conviction under the Clean Water Act, arising out of a 2006 pipeline spill in the Prudhoe Bay area of Alaska. BP pleaded guilty, paid $20 million in fines and other monetary penalties, and served three years of probation. (3) BP America, Inc.'s 2007 deferred prosecution agreement arising out of commodities price manipulation in 2004. BP paid over $300 million in civil and criminal penalties. (4) BP Exploration (Alaska) Inc.'s 2000 conviction under the Comprehensive Environmental Response, Compensation, and Liability Act for failing to timely report the dumping of hazardous waste into oil wells by one of its contractors on the North Slope of Alaska. BP was fined $500,000, put on five years of probation, and ordered to implement a nationwide environmental management program that purportedly cost the company $15 million or more.

undertake significant remedial measures. This combination of civil penalties and injunctive relief, considered together with the criminal penalties imposed pursuant to the Plea Agreement, reinforce that the Plea Agreement provides just punishment, deters, and protects the public from a recurrence of similar criminal conduct. *See* 18 U.S.C. § 3572(a)(8) (in assessing fine against organization, court should consider "any measure taken by the organization . . . to prevent a recurrence of such an offense"); *see also BP Prods.*, 610 F. Supp. 2d at 677-78, 729 (in evaluating the reasonableness of the terms of plea agreement and fine, court may properly consider defendant's other expenditures and financial commitments).

Finally, in analyzing the adequacy of the fine under the Plea Agreement, the Court may also "take into account ... 'uncertainty of result.'" *Id.* at 729-30 (quoting *Bundy*, 359 F. Supp. 2d at 538). The result of any negotiated compromise inherently incorporates the risk each side bears that it might not prevail if the case were to be fully litigated through trials and appeals. The outcome of any trial inherently involves some level of uncertainty, as all parties appreciate. That uncertainty supports the reasonableness of a Rule 11(c)(1)(C) plea negotiated at arms' length by active and vigorous litigants. In particular, this case presents litigation uncertainty with respect to the maximum fine that could be imposed in the event of a conviction at trial. Transocean has agreed in the Plea Agreement to a fine imposed pursuant to the Alternative Fines Act ("AFA"). 18 U.S.C. § 3571(d). However, the AFA would not apply where a sentencing court determines that its use would "unduly complicate or prolong the sentencing process." 18 U.S.C. § 3571(d). Here, absent the Plea Agreement, Transocean would likely argue that attempting to

prove pecuniary loss or gain would trigger Section 3571(d)'s complexity provision. Were Transocean to prevail in that regard, then the criminal fine would be capped by the maximum fine in the CWA – $25,000 per day, or $2.175 million, assuming the government could prove the violation occurred for 87 days. 33 U.S.C. § 1319(c)(1).

At a trial in this case, the government also would likely face the argument that, under the Supreme Court's recent holding in *Southern Union Co. v. United States*, it is required to prove beyond a reasonable doubt the factual basis (*i.e.*, the pecuniary loss or gain) to support any alternative fine amount under the AFA. *Cf. Southern Union Co. v. United States*, 132 S. Ct. 2344, 2351 & n.4 (2012) ("In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s 'animating principle' . . . ."). [4] The government in this filing takes no position on the validity of that argument, but the uncertainty it could be argued to create counsels in favor of the Court accepting the Plea Agreement.

Application of *Southern Union* in this case might also require the government to prove beyond a reasonable doubt that the charged conduct proximately caused the pecuniary loss that purportedly serves as the basis for any AFA fine. *See United States v. Sanford Ltd.*, No. 11-cr-352 (BAI-I), 2012 WL 2930770, at *12 (D.D.C. July 19, 2012) (holding that the government must

[4] The *Southern Union* dissent argued that the Supreme Court's application of *Apprendi* to criminal fines could create significant problems of proof for the prosecution in AFA cases, particularly in environmental cases. *Southern Union Co.*, 132 S. Ct. at 2344, 2370 (Breyer, J., dissenting) (discussing the potential impact of the Court's holding on Section 3571(d) and noting that in "an environmental pollution case, the jury may have particular difficulty assessing different estimates of resulting losses").

"prove that a given monetary amount (either a gain or a loss) was proximately caused by the conduct of the charged offense in order to qualify …. under § 3571(d)"); *BP Prods.*, 610 F. Supp. 2d at 689 (discussing proximate cause requirement of Section 3571(d)). As a result, jury litigation of damages could be protracted and complex, reinforcing the separate risk of litigation over whether Section 3571's complexity provision would be triggered.

The Plea Agreement eliminates these risks. Transocean has stipulated that there is a factual basis for the $100 million criminal fine under Section 3571(d); it has stipulated that the fine and other payments contemplated by the Plea Agreement do not exceed applicable maximum statutory fines; and it has agreed to waive a trial (jury or bench) with respect to those payments. (Plea Agreement ¶ 5.) If, however, the Court were to decline to accept the Plea Agreement, the stipulations and agreement would not be binding on Transocean, and they would not be admissible in subsequent proceedings. The government could then face the very issues discussed above, which, even assuming the government were to obtain a conviction at trial, could potentially result in Transocean paying a capped total criminal fine ($2.175 million) that would be a small fraction of the fines and other payments required by the Plea Agreement.

In short, a trial and possible appeal in this case would necessarily involve litigation risks for both parties. The proposed Plea Agreement reasonably accounts for and eliminates those litigation risks.

II. ADDITIONAL OBSERVATIONS BY TRANSOCEAN[5]

A. Transocean Implemented Immediate Safety Changes After the Macondo Disaster

In addition to the performance requirements contained in the consent decree, Transocean has implemented significant environmental safety improvements in the period following the Macondo Well incident that pre-date the consent decree and that are entirely separate from its obligations:

First, Transocean issued a revised well control manual incorporating improved negative testing procedures and specific guidance on well control barrier requirements. That revised manual has now been in place for over a year.

Second, Transocean implemented new procedures to increase centralized control over the company's internal rig management system audits. The new audit format is larger in scope and the audit team is led by an internal auditor who is independent of the geographic management team.

Third, Transocean developed International Association of Drilling Contractor standard Safety Cases for its drilling operations. This process, which is not required by any regulation, goes a step beyond the development of "major hazards risk assessments" contemplated by the consent decree. It involves identifying the hazards and risks associated with drilling operations, determining how those risks can be controlled (and how damage can be mitigated in the event of an incident), and then putting the appropriate safety measures in place. As of November 2012, Transocean has completed its safety cases documents for each rig working under the consent decree. These documents set out job-specific environmental safety roles and requirements. Transocean

[5] This Section II consists of statements by Transocean alone.

has now begun the approximately 18-month process of ensuring that its crews are trained in accordance with these new requirements.

Fourth, Transocean revamped its centralized control of BOP safety testing, ensuring that appropriate procedures are set at the corporate level and that BOPs are tested under highly rigorous standards.

Fifth, and finally, in 2011 Transocean completed a gap assessment of internal policies and procedures against the requirements of operators' Safety and Environmental Management Systems (SEMS). Minor modifications were made to policies to ensure that Transocean's operational responsibilities are in compliance with SEMS.

Transocean has been and remains committed to avoiding the recurrence of any accident, and especially one on the scale of Macondo.

B. Transocean Accepts Responsibility for Its Conduct

Transocean accepts responsibility for the criminal conduct that is the subject of the Plea Agreement and Information filed in this case. Transocean deeply regrets the incalculable consequences of the blowout, including the loss of life and injury, the suffering of families and friends and colleagues, and the devastating impact of the ensuing spill on the Gulf Coast region. Transocean has demonstrated its acceptance of responsibility by studying the event carefully for lessons learned, by cooperating with the United States' investigation, and by entering into the Plea Agreement and the simultaneous civil consent decree. Since the tragedy, to date, Transocean has paid over $140 million in salary continuation, maintenance benefits, medical benefits and settlements, and continues to work to resolve any remaining claims.

CONCLUSION

For the reasons set forth above, the parties respectfully and jointly request that the Court accept the proposed guilty plea by the defendant pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure on the terms set forth in the Plea Agreement submitted to the Court on January 3, 2013.

New Orleans, Louisiana, this 8th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all defense counsel of record.

/s/ Derek A. Cohen
DEREK A. COHEN
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