UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-CR-20906-COOKE
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UNITED STATES OF AMERICA

vs.

ALCATEL-LUCENT FRANCE, S.A.,
f/k/a "Alcatel CIT, S.A.,"
ALCATEL-LUCENT TRADE INTERNATIONAL, A.G.,
f/k/a "Alcatel Standard, A.G.," and
ALCATEL CENTROAMERICA, S.A.,
f/k/a "Alcatel de Costa Rica, S.A.,"

Defendants.
_____/

UNITED STATES OF AMERICA

vs.

ALCATEL-LUCENT, S.A.,
f/k/a "Alcatel, S.A.,"

Defendant.
_____/

GOVERNMENT'S RESPONSE TO ICE'S
PETITION FOR VICTIM STATUS AND RESTITUTION

The United States, through the undersigned attorneys, respectfully opposes the petition by Instituto Costarricense de Electricidad, S.A. ("ICE"), regarding victim status and restitution related issues. Under the facts and circumstances in the instant matter, which reflect profound and pervasive corruption at the highest levels of ICE, the government does not believe it is appropriate to consider ICE a victim in these cases. Nevertheless, contrary to ICE's suggestions, this Court, the U.S. Probation Office, and the government have all accorded ICE with the rights typically reserved

for victims and provided ICE with an opportunity to make its arguments. Moreover, regardless of whether ICE is considered a victim, the government does not believe that restitution should be ordered in this matter, because, under the facts and circumstances present in this case, any restitution calculation would be entirely speculative and would unduly prolong and complicate the sentencing process – something that the law does not support. Indeed, ICE's initial petition, memorandum of law, and exhibits – consisting of nearly 1,300 pages – many of which are in Spanish (only portions of which are translated) underscores this point. Furthermore, ICE's filings betray that ICE is actually seeking redress for a series of complex civil contract issues related to the quality of products and the sufficiency of services, which are not the proper subject of a criminal matter or the charges in this case. The difficulty of assessing these complex issues is probably best demonstrated by the fact that the same claims by ICE were just preliminarily rejected in a Costa Rican court without reaching the merits after a year-long trial involving more than 60 witnesses, countless exhibits, and six years of litigation.

Regrettably, ICE's petition is filled unnecessarily with vitriolic allegations and false accusations questioning the motives, competence, and conduct of the U.S. Department of Justice and the U.S. Securities and Exchange Commission ("SEC") in this matter. Apparently the government has become the target for ICE's attacks merely because the government has a good faith disagreement with ICE regarding its claim to victim status and right to restitution. The government does not intend to address each spurious allegation. The Court, however, should be aware that, contrary to ICE's claims, the proposed resolution of these two cases before the Court reflects the seriousness of the conduct at issue, promotes respect for the law, and provides for just punishment for the offenses committed. In fact, the proposed penalty is one of the largest in history for a

violation of the Foreign Corrupt Practices Act, and had it been proposed just three years ago, it would have been the largest in history. The proposed resolution also includes an enhanced compliance program to ensure that future violations are prevented, and it requires the retention of an independent compliance monitor to review and ensure the effective implementation of the enhanced compliance program. This resolution is comprehensive, and it was only reached after careful and considered analysis. A memorandum in support of the proposed plea agreements and deferred prosecution agreement is being filed simultaneously.

Moreover, contrary to the ICE's counsel's claims regarding the government's supposed "imperialist" view of Latin America, the United States has worked cooperatively with its law enforcement counterparts in Costa Rica during the course of the investigation and prosecution of this matter. There were multiple exchanges of information and evidence, in-person meetings, and phone calls and emails, and that collaboration has proven important for both governments in pursuing their respective parallel investigations. In fact, within the past few weeks a court in Costa Rica convicted the former president of Costa Rica, Miguel Angel Rodriguez, and a number of now-former ICE officials for the same bribery that forms the basis of the instant cases. This follows the Costa Rican Government's resolution last year in which Alcatel-Lucent France, S.A., one of the defendants here, agreed to pay $10 million in reparations to Costa Rica for "moral damages" to the people of Costa Rica. (Jan. 20, 2010 Settlement Agreement Btwn. Office of the Attorney Gen. of the Rep. of Costa Rica and Alcatel-Lucent France, Ex. 1.) This marked the first time in Costa Rica's history that a foreign corporation paid the Costa Rican Government damages for corruption. (Reuters, *Alcatel-Lucent Agrees to Pay $10 Mln in Costa Rican Case* (Jan. 21, 2010), Ex. 2.) The United States is

proud of this collaborative effort and continues to maintain a positive relationship with law enforcement in Costa Rica.

This relationship between Costa Rican and United States law enforcement has had an important impact on tackling international corruption. But it does not follow that the state-owned entity at which corruption was so pervasive in the tender process should now be permitted status as a victim or awarded restitution under the facts and circumstances in these cases. For the reasons set forth below, the Court should decline ICE's invitation to ignore its complicity in the corruption that gave rise to the instant charges and make a purely speculative restitution award in a U.S. court apparently designed to short-circuit ongoing civil litigation in Costa Rica that has been pending for more than six years.

PROCEDURAL BACKGROUND

On December 27, 2010, a criminal Information was filed against Alcatel-Lucent France, f/k/a "Alcatel CIT," Alcatel-Lucent Trade International, f/k/a "Alcatel Standard," and Alcatel Centroamerica, f/k/a "Alcatel de Costa Rica" (collectively, the "Defendant Subsidiaries") charging each of the Defendant Subsidiaries with conspiracy to commit offenses against the United States, to wit: violating the anti-bribery provisions, the books and records provisions, and internal controls provisions of the Foreign Corrupt Practices Act of 1977 (hereinafter the "FCPA"), as amended, Title 15, United States Code, Section 78dd-1, *et seq.*, in violation of Title 18, United States Code, Section 371. (DE 1 ¶¶ 80-171.)[1] In addition, on December 27, 2011, the government also filed a criminal Information against Alcatel-Lucent, S.A., f/k/a "Alcatel," ("Defendant Alcatel-Lucent"), the parent

[1] All "DE" citations refer to the docket entries in the case against the Defendant Subsidiaries. Citations to the related case against the parent company, Defendant Alcatel-Lucent, will be cited as "ALU DE" for ease of reference.

company of the Defendant Subsidiaries. (ALU DE 1.) On February 22, 2011, a plea agreement for each of the Defendant Subsidiaries was filed in which each agreed to plead guilty to conspiring to violate the FCPA, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. (DE 10, DE 11, DE 12.) Also on February 22, 2011, the government filed a Deferred Prosecution Agreement ("DPA") in the case against Defendant Alcatel-Lucent. (ALU DE 10.)

The case against the Defendant Subsidiaries and the related case against Defendant Alcatel-Lucent were consolidated before the Honorable Patricia A. Seitz, who held a hearing on March 1, 2011, at which time Judge Seitz determined that she had a conflict (or at least the appearance of conflict), and the government, Defendant Subsidiaries, Defendant Alcatel-Lucent, and counsel for ICE agreed that the best course of action would be for Judge Seitz to recuse herself from both cases and have them transferred to another judge. (*See* DE 3, DE 15, DE 16. *See also* ALU DE 9.)

On March 4, 2011, the case against the Defendant Subsidiaries was transferred to this Court, and the Court immediately set a status hearing for March 9, 2011. (DE 18.) On March 9, 2011, after hearing from the government, the Defendant Subsidiaries, and counsel for ICE, the Court directed the U.S. Probation Office to prepare a memorandum, which would review the proposed plea agreements and address the victim/restitution issues. (DE 20 at 19-21.) On March 17, 2011, this Court accepted the transfer of the case against the parent company, Defendant Alcatel-Lucent. (ALU DE 13.) On April 27, 2011, the Court scheduled a status hearing for May 11, 2011. On May 2nd and May 3rd, ICE filed its instant petition and memorandum of law alleging that it is a crime victim and entitled to restitution. (DE 22, DE 24. ALU DE 16, ALU DE 17.) At the May 11th status hearing, the Court heard from the government, counsel for ICE, and counsel for Defendant Alcatel-Lucent and the Defendant Subsidiaries, and the Court set June 1, 2011, for a change of plea.

DISCUSSION

While the government does not believe ICE is a victim for the reasons discussed below, the Court need not decide this issue to resolve this matter. *See In re Acker*, 596 F.3d 370, 372-73 (6th Cir. 2010). Rather, the Court need only find that ICE has received the rights of a crime victim, which ICE has, irrespective of whether it is, in fact, a victim. This is because, regardless of ICE's victim status, restitution should not be awarded here for two different reasons. First, because restitution is a compensatory remedy, an award of restitution must be based on *the amount of loss actually caused* by the defendant's conduct. In other words, restitution is limited to the victim's provable actual loss. But here the conduct involved a corrupt tender process in which it is impossible to know which company would have won the bid and at what price, and thus, trying to unwind this process a decade later and determine the amount of loss, if any, would be sheer speculation. Second, given the breadth and depth of the losses claimed by ICE, including numerous complex questions of fact concerning the quality of the products and services provided by the Defendant Subsidiaries, determining these complex issues of fact would complicate and prolong the sentencing process to such a degree that the Court should find that the need to provide restitution to ICE is far outweighed by the burden on the sentencing process, particularly given the reparations already paid and the various avenues of redress available to ICE in Costa Rica to address these very claims.

I. ICE Should Not Be Considered a Victim

ICE is not a victim under the facts and circumstances present in these cases. While a crime victim is a person "directly and proximately harmed as a result of the commission of a Federal offense," a person involved in the crime should not be considered a victim. *Cf.* 18 U.S.C. §§

3771(d)(1), (e); *see United States v. Lazarenko*, 624 F.3d 1247, 1250-52 (9th Cir. 2010). Said differently, there must be a fact-specific inquiry made to determine whether the person seeking victim status was involved in the criminal conduct, which the Court noted at the March 9th hearing. (DE 20 at 21.) Here, while ICE officials and ICE itself could not be charged with extortion or bribery, it does not mean that ICE officials and ICE *itself* were not, in fact, involved in – and responsible in part for – the criminal conduct.[2] To the contrary, the evidence gathered during the investigation suggests that corruption at ICE was pervasive in the tender process and occurred at the highest reaches of ICE. Under these circumstances, to accord ICE "victim" status would undermine the meaning and purpose behind these victim rights. *See Lazarenko*, 624 F.3d at 1250-52. This is not to say that in each instance in which a foreign official has solicited and been paid bribes the ministry or state-owned entity for which he or she worked could never be considered a victim. Indeed, ICE cites some examples. (Mem. at 10.) But under the facts here, ICE should not be so considered.

According to the government's principal cooperator, former Alcatel CIT executive Christian

[2] It is important to note that while the FCPA outlaws the payment of bribes to foreign officials, it does not permit the foreign officials themselves to be charged with the receipt of the bribes, even if the bribes were demanded by the foreign officials in the first instance; that is, it criminalizes the supply side, but not the demand side. *See United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (finding Congress intended "to exempt foreign officials from prosecution for receiving bribes, especially since Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power"). But just because the FCPA cannot reach the corrupt officials themselves does not mean that those corrupt officials – or the governmental entity for which they worked – should be considered "victims," much less entitled to restitution.

Sapsizian,[3] corruption at ICE had existed for a long time.[4] Sapsizian recalled being solicited for a bribe by an ICE official in the early 1980s, and after the bribe solicitation was declined, Alcatel lost the bid. After this experience, Sapsizian said they were no longer naive to the process in Costa Rica. Sapsizian also recounted losing a bid in the early 1990s to a German company even though Alcatel's bid was 20% lower than a German company's bid. Sapsizian did not think it was a coincidence and later inquiries by him confirmed as much.

Alcatel eventually started paying bribes to ICE officials; principal among them was Jose Antonio Lobo. According to Sapsizian, Lobo initially demanded 1% of a single contract with ICE, but later increased his demand to 1.5% of all contracts with ICE:

> Sapsizian recalled that Lobo was fairly insistent with his demands for payment especially when he increased his demands to one and one half percent (1.5%) of the contract value. Lobo argued for the higher amount of commission because, "the president [Miguel Angel Rodriguez] wanted him (Lobo) to share his commission." According to [Edgar] Valverde, Lobo originally only asked for one percent (1%). Sapsizian explained that Lobo was asking for one and one half percent of all Alcatel business not just the 400,000 line contract.

The number and amount of bribes demand and payments, as well as the number of recipients, escalated from there. In the end, numerous ICE officials received substantial amounts of bribes. Specifically, an Alcatel agent, Servicios Notariales, paid the following ICE officials, which included members of the Board of Directors:

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[3] ICE's counsel has repeatedly expressed support for Sapsizian and advocated for his early release based upon his cooperation. (*See, e.g.*, Jan. 4, 2011, Email from B. Wiand to C. Duross, Ex. 3.)

[4] The government is prepared to submit *in camera* and *ex parte* to the Court all of the FBI 302s of interviews of Sapsizian.

Official	Identified in Indictment	Approximate Amount of Bribe
Jose Antonio Lobo ICE Director	ICE Official 1	$2,560,000 and $100,000 in certificates of deposit
Guido Sibaja Fonseca ICE Official	ICE Official 2	$945,000
Rodrigo Mendez Soto ICE Official	ICE Official 3	$145,000
Eduardo Fonseca Garcia ICE Official	ICE Official 4	$110,000
Joaquin Alberto Fernandez ICE Director	ICE Official 5	$1,300,000

(DE # 1 ¶ 48; ALU DE # 1 ¶ 48.) In addition, another Alcatel agent, Intelmar, made payments from in or around December 2002 to in or around October 2003 totaling approximately $930,000 to Hernan Victor Bravo Trejos, who was also on the Board ("ICE Official 6" in the charging documents).[5] (DE # 1 ¶ 49; ALU DE # 1 ¶ 49.) Even with all of these payments, ICE officials constantly demanded more. For example, Joaquin Alberto Fernandez, who served on the Board of Directors and was at one point the vice president of the Board of Directors, "frequently voiced the same complaint that the kickback payments were not coming fast enough." Sapsizian said that toward the end of this time period Fernandez was "less polite" when he raised this complaint to Sapsizian or Alcatel.

Yet in spite of all of these bribe payments, Sapsizian believed ICE officials collected bribes from Alcatel's competitors, too. For example, Sapsizian "suspected that Lobo was collecting an equal or higher amount of kickbacks from their competitors." Sapsizian said of another ICE Director, Guido Sibaja Fonseca, "he was much more demanding of kickbacks from Alcatel and *other*

[5] Lobo passed on hundreds of thousands of dollars to the then-president of Costa Rica, Miguel Angel Rodriguez.

suppliers due to financial difficulties he was facing." (Emphasis added.) Sapsizian also provided information about improper gifts, travel, and entertainment to ICE officials provided by another Alcatel competitor, a Swedish telecommunications company.

Sapsizian's suspicions about the depth of corruption at ICE are further supported by the recent conviction of another international businessman, Julian Messent, in the United Kingdom. Messent was the head of the Property (Americas) Division of PWS International Ltd., which is a London-based insurance business. (Oct. 26, 2010 Serious Fraud Office, Press Release: *Insurance Broker Jailed for bribing Cost Rican officials*, Ex. 4.) Messent was sentenced to 21 months' imprisonment after admitting that he authorized corrupt payments of almost $2 million to Costa Rican officials at ICE and the state insurance company, Instituto Nacional de Seguros.[6] (*Id*.) Another former ICE Director, Alvaro Retana, was investigated in 2004 by the Commission of Control and Public Expenditures of the Costa Rican Legislative Assembly and eventually left ICE over allegations that he and Jose Antonio Lobo accepted a pleasure trip to Europe in 2003, which was paid for by the same Swedish company identified by Sapsizian, with whom ICE was negotiating a $130 million contract. (*See* Mercedes Aguero Rojas, *Alvaro Retana Remains Silent*, Al Dia, April 23, 2004, Ex. 5.)

This should not have come as a surprise to ICE as an organization as there were warning signs. For example, in August 2003, an internal audit of ICE "revealed irregularities in the institution which involve a total of at least one billion *colones*." (Berlioth Herrera, *Audit Reveals*

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[6] Incidentally, under the sentencing order in the United Kingdom, Messent was not required to pay restitution to ICE or Instituto Nacional de Seguros. Rather, Messent was ordered to pay money to the government of Costa Rica, something which Alcatel-Lucent has already done here. (*See* Ex. 1.)

Anomalies in ICE, La Nacion, Aug. 30, 2003, Ex. 6.) The report was grave, going "so far as to state clearly to the directors that 'serious deficiencies in internal control mechanisms' were detected that are 'worrisome since audits work on the basis of sample'; that is, there may be many more deficiencies." (*Id*.) Ironically, Jose Antonio Lobo, who later pleaded guilty to accepting bribes, stated during the meeting at which the audit report was presented, "it is worth noting that 'the work was done on the basis of samples, and samples usually do not reflect even 10 percent of what is going on.'" (*Id*.)

Perhaps the best evidence of the corruption that existed at ICE during this time frame comes from one of the corrupt Directors himself, Jose Antonio Lobo. During a debriefing with Costa Rican prosecutors that was later made public, Lobo said this about the culture of corruption at ICE:

> The defendant is asked by the prosecutor whether, based on his experience and involvement as a former member of ICE's Board of Directors, he knows if the bestowal of gifts or rewards by the companies that enter into contracts with ICE has been established as a practice or a requirement for securing the contract. With respect to this matter, he states: The perception I have is that "a kind of culture" has developed, which I think has its origins in the private contracting world at the international level, where different companies or corporations develop policies of giving gifts to senior executives and representatives of companies that are potential clients or users of their products, in order to guarantee access to those markets under competitive conditions favorable to rival companies. I think that this practice has been transferred in a certain way to Costa Rica, with the obvious adaptations, since possibly the most important purchasers of goods and services in the country are State-run enterprises or institutions subject to numerous regulations. The worst thing about this situation is that, clearly, it has not been focused exclusively on ICE; we know of practices of this nature at other institutions. I also note a certain cyclical nature, in that at a particular time it affects one company or sector, and then later another company or another sector.

(Oct. 15, 2004 Statement of J. Lobo, Ex. 7.) In this same statement, Lobo discussed receiving "rewards" from other ICE vendors. In one instance, Lobo received wire transfers from a company called Teletec, S.A., after a purchase on which he had worked was approved by ICE for the benefit

of Cibertec, S.A. (*Id*. at CR 031011 ("I asked Hernán [Bravo] the reason for this, and he told me that it was a gift in thanks for the acquisition of the aforementioned equipment from CIBERTEC, S.A. I do not know whether TELETEC and CIBERTEC are the same company, but it is clear that TELETEC made the gift payment because of the contract with CIBERTEC.").) In total, Lobo admitted receiving "gifts" of $44,989, $15,000, and $50,218 from Teletec. (*Id*.) In another instance, Lobo received a $29,833.95 "gift" from a company called Empaques Aspeticos after giving his account information to another member of the Board of Directors. (*Id*. at CR 031011-12.) When Lobo later "asked Hernán [Bravo] about the origin of the money," Bravo "told [Lobo] not to ask." (*Id*.)

A fair assessment of these facts and circumstances has led the government to conclude that not just the corrupt ICE officials are to blame for the corruption that existed at ICE, but ICE itself as an organization is also responsible. In short, ICE *as an organization* appears to have had a deeply ingrained culture of corruption. *First*, it appears clear that corruption at ICE existed for many years – if not decades – according to Sapsizian. *Second*, this corrupt conduct did not just involve some low-level employees. Here, *nearly half of the Board of Directors of ICE received bribes* in just this case alone. It is hard to conceive of a component of a business organization more in control of and responsible for an organization than the board of directors, which in this case appears to have been profoundly corrupt. *Third*, the corruption at ICE as an organization was pervasive in the tender process. The evidence gathered during this investigation suggests that ICE officials were receiving bribes from other companies, and indeed, there is at least one other conviction stemming from corruption at ICE in which another businessman at another company in another industry also paid bribes to obtain business with ICE. And the 2003 audit report indicating "serious deficiencies in

internal control mechanisms" points to structural problems of the organization as a whole – not just on an individual basis. Unfortunately, it appears that ICE *as an organization* permitted itself to become a vehicle for the solicitation and receipt of bribe money by its own officials, whose positions at ICE provided them with the very platform from which to solicit these bribes in the first instance. Accordingly, ICE cannot now simply shirk responsibility for this pervasive corruption, blame Defendant Alcatel-Lucent and former ICE officials (now calling them "disloyal"), and appear before this Court claiming to have been a victim of the very corruption in which it was complicit.

None of this is to say that ICE today is not a dramatically different organization. Since October 2004, the media publicity surrounding the corruption scandal at ICE and the subsequent investigation and prosecution by law enforcement officials in Costa Rica have hopefully had a significant impact on the tolerance of corruption at ICE. Indeed, as mentioned above, the government has worked closely with its Costa Rican law enforcement counterparts to investigate and ultimately prosecute this conduct. But actions (and inaction) have consequences, and while the current ICE leadership may be different and committed to ethical practices, such as adopting a recent Code of Ethics (Pet. at Ex 22-15), ICE can neither ignore its responsibility for this past corruption nor the role it, as an organization, played in this criminal conduct.

For the foregoing reasons, the government does not believe that ICE should be considered a victim.

II. Regardless of Its Status, ICE Has Been Accorded the Rights Typically Reserved for Victims

While the government does not believe ICE is a victim under the facts and circumstances present here, the Court need not decide this issue to dispose of this matter. That is because regardless of whether ICE is a victim, this Court, the U.S. Probation Office, and the government

have afforded ICE the rights of a crime victim contained in the Crime Victims' Rights Act, 18 U.S.C. § 3771. *See Acker*, 596 F.3d at 372-73. The Sixth Circuit in *Acker* determined that deciding whether the petitioner was a victim was "largely beside the point," because the district court had, in fact, afforded the petitioners the rights of a crime victim under the CVRA as "the petitioners were allowed a full opportunity for participation." *Id*. at 373. The same is true here.

While counsel for ICE have made various claims that the rights under the CVRA have not been afforded to ICE,[7] such assertions cannot survive scrutiny. As discussed at the May 11th hearing, a crime victim has certain specific rights delineated in the CVRA:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.

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[7] (*See, e.g.*, Pet. at 1 ("Department's failure to protect [ICE's] rights"), 2 ("illegally deprive victims of Alcatel-Lucent's criminal conduct of the rights to which they are entitled to by statute"), 11-12 ("As mentioned above, at no time has the Department contacted ICE regarding its rights as a victim or attempted to gather information from ICE regarding the vast damages and harm it has suffered."), 14 ("None of these obligations [under Section 3771] were met or even attempted by the Department in connection with the criminal investigation and prosecution relating to Alcatel[-]Lucent."); *see, e.g.*, Mem. of Law at 1 ("[T]he DOJ inexplicably continues to ignore its obligations to ICE under 18 U.S.C. § 3771."), 1-2 ("DOJ sought to deprive ICE of its statutory victim rights"), 2 ("The DOJ and Alcatel seek to exclude ICE"), 11 ("wholesale failure to satisfy its statutory obligations to ICE"), 11-12 ("intended solely to avoid the legal requirements and congressional mandate underlying 18 U.S.C. 3771"), 20 ("[T]he DOJ has failed and refused to provide appropriate notice and assistance to ICE.").)

(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a). Here, the U.S. Department of Justice, the U.S. Probation Office, and this Court have all afforded ICE with the rights accorded crime victims under the CVRA making the issue of victim status "largely beside the point." *See Acker*, 596 F.3d at 372-73.

First, the government has provided reasonable, accurate, and timely notice of all public court proceedings in these two criminal cases. From the very first hearing before Judge Seitz to the most recent hearing before this Court, ICE has been provided reasonable, accurate, and timely notice of these hearings. For example, before the March 1st hearing before Judge Seitz, the government provided immediate notice of the hearing to ICE's counsel:

> I just finished speaking with Judge Seitz's chambers, and the Court is going to have a status conference on Tuesday, March 1, 2011 at 9 am. Judge Seitz's courtroom is located in the Wilkie D. Ferguson, J.R. U.S. Courthouse, 400 North Miami Avenue, Miami, Florida 33128. I believe an order will be issued today or tomorrow morning, but I wanted you to know as soon as I knew.

(Feb. 24, 2011 Email from C. Duross to B. Wiand and D. Pearlman, Ex. 8.) A notice was, in fact, issued the next day with copies to all "Counsel of Record" (DE 13), and given that counsel for ICE had made an appearance in the matter (DE 4, DE 5), presumably ICE's counsel received notice via the CM/ECF system, too. (*See* Ex. 9 (listing ICE's counsel on service list).) Similarly, when the case against the Defendant Subsidiaries was transferred to this Court and a status hearing was set, counsel for the government provided notice to ICE's counsel within 24 hours (on a Saturday) and made a concerted effort to apprise ICE's counsel of the procedural status of the two cases:

> As you know, Judge Seitz recused on Tuesday, and the case was re-assigned to Judge Lenard. Later that same day, Judge Lenard recused, and the case was re-assigned to Judge Cooke. Friday afternoon I received notice of a status hearing before Judge Cooke on Wednesday, March 9, 2001 at 10:30 am. She is located in Courtroom

> 11-2. The related case (*United States v. Alcatel-Lucent, S.A.*) has not yet been transferred. After getting the notice Friday, I checked with Judge Cooke's chambers about the related case, and her courtroom deputy informed me that the judge was not in town but that when Judge Cooke returned (on Tuesday, I believe), Judge Cooke would likely speak with Judge Seitz, and the matter might be consolidated before Judge Cooke without the need for another motion to transfer. Thus, by the time of the status hearing on Wednesday both matters may well be pending before Judge Cooke.
>
> Have a good weekend.

(Mar. 5, 2011 Email from C. Duross to B. Wiand, D. Pearlman, and G. Morello, Ex. 10.) Again, because the notice was issued via the CM/ECF system (DE 18), presumably it was sent directly to ICE's counsel, too. (*See* Ex. 11 (listing ICE's counsel on service list).) Finally, before the most recent hearing, after ICE's counsel received the CM/ECF notice from the Court, ICE's counsel contacted the government about the subject matter of the hearing. The government responded within 24 hours (on a weekend) to ICE's counsel:

> I received the same notice. The notice doesn't specify anything beyond a status; I have not heard separately from the Court. (First I heard of the hearing was the same notice you received.) I know U.S. Probation is working on the Pre-Sentence Investigation report. I suspect the Court wants to check on the status. If I learn more, I will let you know.

(Apr. 30, 2011 Email from C. Duross to G. Morello with copies to B. Wiand and D. Pearlman, Ex. 12.) Put simply, ICE has received reasonable, accurate, and timely notice of *every public hearing* in these cases from the government and the Court. *See* 18 U.S.C. § 3771(a)(2). Indeed, while not required by the CVRA, the government has even made concerted efforts to coordinate the timing of hearings that were mutually convenient for ICE's counsel. (*See, e.g.*, Mar. 28, 2011 Email from C. Duross to B. Wiand, D. Pearlman, and G. Morello, Ex. 13.) In spite of the foregoing, ICE boldly claims before this Court that "the DOJ has failed and refused to provide appropriate notice and assistance to ICE." (Mem. at 20.) That assertion is simply false.

Second, counsel for ICE has attended *every hearing* in these cases, and more than that, ICE's counsel has spoken at *every hearing* in these cases. (*See, e.g.*, DE 20, DE 28.) Neither this Court nor Judge Seitz put any limitations on ICE's counsel in addressing the court to raise concerns. Clearly, then, ICE has been afforded the right to attend and to speak at public hearings in these cases, even where those hearings were not specifically for a change of plea or sentencing. *See* 18 U.S.C. §§ 3771(a)(3), (a)(4).

Third, ICE's counsel has also been afforded a reasonable opportunity to confer with counsel for the government about these cases. With the exception of a single letter, the government has responded to phone calls, emails, and letters from ICE's counsel. The government has provided copies of relevant documents when not available on PACER, has engaged in discussion about ICE's claimed victim status, and has provided periodic updates about the status of the cases. For example, after returning from an international trip, counsel for the government sent an email on a Sunday to ICE's counsel containing the criminal Informations, proposed plea agreements, and deferred prosecution agreement, which ICE's counsel said were needed for its then-ongoing civil trial against Alcatel-Lucent France in Costa Rica. (Jan. 30, 2011 Email from C. Duross to B. Wiand with a copy to D. Pearlman, Ex. 14.) Moreover, far from ignoring ICE's counsel on the issue of victim status, the government engaged counsel for ICE about this issue shortly after the case was filed:

> Thank you for your email. My apologies for not responding sooner. Your Federal Express package went to the U.S. Attorney's Office in Miami, which is where I used to work, so it had to be forwarded to me in Washington, D.C. Until receiving your email, I was unaware that Christian Sapsizian had been deposed in your matter. When we spoke at the beginning of September, you indicated that you had received an order for his deposition and said you would send it to me, but I never received it. During that conversation you also indicated that you would like notice of any hearing as ICE was a victim. I mentioned at that point that I had thought of ICE as a participant in the bribery scheme given the number of high-ranking corrupt officials at ICE, rather than a victim. When you disagreed, I asked that you send me your

> analysis of ICE's victim status to help me better understand the issue, but I never received anything. I am currently analyzing the issue and would welcome any insights you might be able to provide me in that regard. (Incidentally, I did look at ICE's opposition to the *forum non conviens* motion, but it was not illuminating on the issue of victim status, so I would still welcome your input.)
>
> Regardless of whether ICE is a victim, I am happy to provide you notice of any hearings. Regarding your request for a Victim Identification Number and Personal Identification Number, I checked with our victim/witness personnel, and they informed me that governmental entities do not receive numbers.[8] Incidentally, as you probably know, on Friday Judge Martinez issued an order, which I am attaching, to transfer the pending matter against the Alcatel-Lucent subsidiaries to Judge Seitz as a related matter to the Sapsizian and Valverde case. While I have not heard from the court, I imagine that a hearing will occur sometime in the next three weeks or so. Once I know, I will let you know.
>
> Hopefully we will both find a time to speak in the near future.

(Jan. 11, 2011 Email from C. Duross to B. Wiand, Ex. 15.) While the government may not agree with ICE's position, it does not mean the government did not confer with ICE.[9] *See* 18 U.S.C. § 3771(a)(5); *Acker*, 592 F.3d at 373 (rejecting request for mandamus relief where petitioners asserted right to be involved in government's plea negotiations). To the contrary, the government was

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[8] ICE repeatedly refers in its Petition to a DOJ "'policy' refusing to recognize foreign governments and their instrumentalities as "victims." (Pet. at 11.) ICE misunderstands the government's position. The government never stated that foreign governments or instrumentalities could never be victims, much less that that was Department policy. Rather, as this email makes clear, the government was merely saying that Victim Identification Numbers and PINs are not issued to foreign governments. The government reiterated this at the March 9th hearing. (DE 20 at 20.) But as this email makes clear, and as the government underscored at the March 9th hearing, regardless whether Victim Identification Numbers and PINs were going to be issued to ICE, the government would ensure that ICE's counsel was properly notified of all hearings, which it has done.

[9] In conferring with ICE's counsel as far back as September 2010, the government requested that ICE's counsel provide the government with a legal analysis of its claims regarding victim status to assist the government in evaluating those claims. Until ICE's instant petition and memorandum of law, ICE's counsel had provided no citations to legal authority to the government.

responsive and engaged, and it provided information and materials when requested. Moreover, the right to confer does not mean that the government must permit a victim a seat at the table during plea negotiations, in spite of ICE's claims of secret negotiations and exclusion.[10] (*See* Pet. at 11; DE 28 at 12.)

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[10] Section 3771(a)(5) of the CVRA provides victims with "[t]he reasonable right to confer with the attorney for the Government *in the case*." 18 U.S.C. § 3771(a)(5) (emphasis added). There is, however, no "case" until charges are filed, and thus no right to confer before then. The word "case" is a term of art that has long been understood to mean "a suit instituted according to the regular course of judicial procedure." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (Article III "case" or controversy); *see also Black's Law Dictionary* (6th ed.) 215 ("case" is a "general term for an action, cause, suit or controversy at law or in equity"). This general understanding applies to criminal proceedings. *See Chavez v. Martinez*, 538 U.S. 760, 766 (2005) (holding that a criminal "case" - as distinct from an investigation - "at the very least requires the initiation of legal proceedings"). Moreover, the statute's use of the definite article "the" in reference to the word "case" shows that "the case" implies a specific adversary proceeding rather than an indefinite investigation. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (use of definite article "the person" in 28 U.S.C. § 2242's provision regarding a habeas custodian signifies that there is usually only one proper custodian, and not several different ones). By contrast, ICE's apparent reading of Section 3771(a)(5) wrongly makes its use of "in the case" superfluous. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (court's duty is to "give effect, if possible, to every clause and word of a statute," and to avoid rendering terms superfluous). The government's interpretation, however, gives "in the case" effect and comports with the legislative history. *See* 150 Cong. Rec. S10910, S10911 (Oct. 9, 2004) (statement of Sen. Kyl) ("This right to confer does not give the crime victim any right to direct the prosecution. . . . Under this provision, victims are able to confer with the government's attorney about proceedings *after charging*.") (emphasis added). Congress is perfectly capable of distinguishing between an "investigation," on the one hand, and a "prosecution" or "case" on the other. *See* 18 U.S.C. § 3771(c)(1) (referring to both "investigation[s]" and "prosecution[s]"). If Congress intended for the right to confer to apply to "investigations," and not just "cases," it would have said so explicitly. Yet by not doing so, and indeed, by using the word "case" instead, Congress plainly meant something other than an investigation. While in *In re Dean*, 27 F.3d 391, 395 (5th Cir. 2008) (per curiam), the court stated that in the CVRA Congress made a "policy decision - which [courts] are bound to enforce - that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached," even where no charges have been filed, the opinion does not address the meaning or import of Section 3771(a)'s phrase "in the case." In fact, it omits it when quoting the statute. Accordingly, the government believes the better reasoning is that the CVRA does not confer any rights before a case is filed. *See In re W.R. Huff Asset Management*, 409 F.3d 555, 564 (2d Cir. 2005) ("Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.").

Fourth, this Court, the Probation Office, and the government have provided an opportunity to ICE to make its case regarding its right *vel non* to restitution in this matter. The Court specifically directed probation to prepare a report and ICE to provide information to the Probation Office on this issue: "I want to have the probation department look at it, evaluate it, have [ICE] file the appropriate motions or paperwork, and then I can make a determination under the statute." (DE 20 at 20.) The government made sure that the Probation Office was aware of ICE's assertion of victim status and claim to restitution, and the government provided the Probation Office with ICE's counsel's name and contact information on March 30, 2011 – two days after meeting with the Probation Office. The Probation Office subsequently contacted ICE's counsel regarding victim status and restitution. *See* 18 U.S.C. § 3664(c)(2). Put simply, ICE has also been afforded the right to pursue restitution, *as provided in law*, regardless of its status as a victim. *See* 18 U.S.C. § 3771(a)(6); *Acker*, 596 F.3d at 373 (finding no violation of CVRA where plea agreement made no provision for restitution).

Fifth, since these two cases were filed at the end of December 2010, the government and all of the judges who have presided over these cases have been diligent in moving these matters forward. The government, for example, moved to consolidate these two related cases before the same judge within days, and while it took longer than anticipated and there were two unexpected recusals, the cases were eventually transferred to this Court. (*See* DE 2. *See also* ALU DE 2.) Once this Court received these cases in March, this Court immediately set a hearing and moved this matter forward, all the while ensuring that ICE was provided an opportunity to make its case for victim status and for restitution. Again, ICE has been the beneficiary of these cases proceeding without unreasonable delay set forth under the CVRA, even if it is not a victim. *See* 18 U.S.C. § 3771(a)(7).

Sixth, as demonstrated above, ICE has been treated with fairness and with respect by this Court, the U.S. Probation Office, and the government. *See* 18 U.S.C. § 3771(a)(8). While ICE's counsel may not agree with the government's position on its claim to victim status and right to restitution, it does not mean that it has not been accorded the appropriate respect and fairness.

In spite of all of these aforementioned interactions and apparently unrestrained by the facts, ICE brazenly claims that "[n]one of these obligations [under Section 3771] were met or even attempted by the Department in connection with the criminal investigation and prosecution relating to Alcatel[-]Lucent." (Pet. at 14; Mem. at 1 ("the DOJ inexplicably continues to ignore its obligations to ICE under 18 U.S.C. § 3771").) But the facts make such claims ring hollow. ICE has benefitted from the very rights and privileges of a victim it claims it has been deprived of; this, regardless of whether ICE is, in fact, a victim. In the end, none of the rights accorded crime victims mandate that the government always agree with a putative victim, particularly in a situation such as that before the Court. It appears that the mere fact that the government questions the validity of ICE's victim status and purported right to restitution is grounds enough for ICE to accuse the government of all manner of impropriety, incompetence, malfeasance, and neglect. The record amply demonstrates that those assertions are simply not true. Accordingly, regardless of whether this Court deems ICE a victim, the Court should reject ICE's factual claims in its petition alleging that it has been deprived any rights under the CVRA.

III. Even If ICE Is Considered a Victim, ICE Should Not Be Awarded Restitution

The Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A, and the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, give federal courts the authority to order restitution for the victims of crimes. Both the MVRA and VWPA define a victim as "a person

directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2); 18 U.S.C. § 3663(a)(2). For the same reasons discussed above, ICE should not be granted victim status under either the MVRA or VWPA. Moreover, under either statute, restitution cannot be ordered here because the harm caused by the bribes paid is not subject to a non-speculative calculation and, even if somehow calculable, would unduly complicate and prolong the sentencing process. Not to mention, Defendant Alcatel-Lucent has already paid $10 million in reparations to the Costa Rican Government *for the exact same conduct*, and ICE as an organization has a pending civil claim for $73 million in damages against Alcatel-Lucent *for the exact same conduct* in Costa Rica. For these reasons, the Court should decline to order restitution be paid to ICE.

A. ICE Is Not a Victim Under MVRA or VWPA

As described above, ICE should not be permitted to recover restitution as a victim of the offense because ICE permitted the very criminal conduct at issue in the pending charges. In this way, ICE is akin to a co-conspirator, as a number of high-ranking ICE officials in significant positions to influence the policy decisions made by ICE, demanded and accepted bribes from Alcatel. In determining whether a victim is a "participant" under the VWPA and the MVRA, courts examine whether the purported victim participated in the offense for which the defendant was convicted. *See United States v. Ojeikere*, 545 F.3d 220, 222-23 (2d Cir. 2008) ("We have denied restitution where it has the effect of treating coconspirators as victims."); *United States v. Sanga*, 967 F.2d 1332, 1335 (9th Cir. 1992). In *United States v. Reifler*, the defendant pleaded guilty to committing securities fraud, wire fraud, and commercial bribery. 446 F.3d 65, 70 (2d Cir. 2006). The appeals court, in remanding on the issue of restitution, stated that "[a]lthough the precise issue

of the continued presence of coconspirators on the lists of 'victims' to whom restitution has been ordered was not raised by any of the parties to these appeals, any order entered under the MVRA that has the effect of treating coconspirators as 'victims,' and thereby requires 'restitutionary' payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*." *Id.* at 127.

In *Lazarenko*, in denying restitution to an alleged victim, the Ninth Circuit held that an individual who was "both a victim and a participant" of a money laundering scheme and who had "profited handsomely" from the conspiracy could not qualify as a "victim" under the restitution statutes. 624 F.3d at 1250-52. The court stated that co-conspirators should be treated differently than innocent victims. "Otherwise, the federal courts would be involved in redistributing funds among wholly guilty co-conspirators, where one or more co-conspirators may have cheated their comrades." *Id.* at 1250-51. The court further stated that "[o]nly in exceptional circumstances would Congress have intended that a co-conspirator to a crime be entitled to restitution." *Id.* at 1252.

Not surprisingly, courts are generally wary of restoring ill-gotten gains when awarding restitution. *See United States v. Martinez*, 978 F. Supp. 1442, 1453 (D.N.M. 1997) (refusing to order restitution payments from a woman who robbed an illegally-operated casino, reasoning that an order of restitution would have the effect of "lending its stamp of approval to the unlawful activity"). Awarding restitution to ICE would have the unwanted effect of rewarding the ICE entity for the pervasive illegal actions of its Board of Directors and other employees, in which ICE's complicity permitted it to occur in the first instance.

B. An Award of Restitution to ICE Would Be Entirely Speculative

Even if ICE was considered a victim, there is no reasonable way here to determine the amount of loss in a non-speculative manner. Because "'Congress intended that restitution be a compensatory remedy from the victim's perspective,'" *see United States v. Lange*, 592 F.3d 902, 907 (8th Cir. 2010) (quoting *United States v. Petruk*, 484 F.3d 1035, 1038 (8th Cir.2007)), "[a]n award of restitution must be based on the amount of loss actually caused by the defendant's conduct." *United States v. Liss*, 265 F.3d 1220, 1231 (11th Cir. 2001). In other words, "restitution is limited to 'the victim's provable actual loss.' " *Lange*, 592 F.3d at 907 (quoting *United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir.2008)). The burden of proving the amount of the victim's loss is borne by the government and must be proven by a preponderance of the evidence. 18 U.S.C. § 3664(e). While the amount of restitution need not be determined with exact precision and a reasonable approximation can pass muster in appropriate circumstances, calculations involving pure speculation will not meet the government's burden. *See United States v. Futrell*, 209 F.3d 1286, 1291-92 (11th Cir. 2000).

Here, the government does not believe that the amount of loss, if any, caused to ICE by the Defendant Subsidiaries' conduct is subject to a reasonable approximation. To the contrary, it would be purely speculative. As described above, corruption existed for a long period of time at the highest levels of ICE and was pervasive in the tender process at the organization. Indeed, there is significant reason to believe that Alcatel's competitors, including the previously-mentioned Swedish telecommunications company, were likewise paying bribes to the same or different ICE officials in seeking the same business Alcatel was seeking. Under those circumstances, it is simply not possible to determine what company would have won any particular bid and at what price. The entire system

was corrupt.[11] In other words, it is not possible to determine whether in a non-corrupt process Alcatel would have won the contracts on merit. In fact, some of the facts suggest that Alcatel's technology was newer than the Swedish company's. Therefore, it is not possible to determine what the harm was and what amount of loss, if any, was attributable to that harm. As a result, the government does not believe it could meet its burden of proving the loss, if any, to ICE by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e); *Liss*, 265 F.3d at 1231.

Where losses are incalculable, the defendant's gain cannot be used as a proxy for loss. *Chalupnik*, 514 F.3d at 754. Moreover, the amount of bribe payments paid to ICE officials should not be used to approximate the incalculable losses here.[12] *See United States v. Citarelli*, 187 F. Supp. 2d 244, 249 (D.N.J. 2002) (declining to use amount of bribes as amount of restitution and ordering no restitution to government agency where monetary loss was difficult discern); *see also United States v. Harvey*, 532 F.3d 326, 341 (4th Cir. 2008) (reversing order of restitution where

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[11] Even if the entire system was not corrupt, it is still not possible to unwind the bid-tender process and determine who would have won and at what price.

[12] Citing *United States v. McNair*, 605 F.3d 1152, 1221 (11th Cir. 2010), ICE argues that when bribe payments are added to the contract as a cost of doing business, the amount of the bribes should be recoverable by the victim as restitution. (Mem. at 6.) The *McNair* appeals court found that the "district court did not clearly err in finding that the contractors essentially recouped their bribe money by adding it back to their . . . contract bills as a cost of doing business with the County." *McNair*, 605 F.3d at 1221. Unlike in *McNair*, however, the bribe payments made by Alcatel and its subsidiaries were included as up-front fees and expenses. For each contract, a form called a Forecast of Sales Expenses ("FSE") was prepared to document approval of the expense of using a sales and/or marketing consultant. The FSE identified the estimated monetary value of the contract and specified the precise amount or percentage to be paid to each consultant or agent (*i.e.*, money that was coming out of the profit). In deciding whether to approve the payments, the Alcatel executives were primarily concerned with how the payments would affect the company's overall gross margin on the contract. Thus, unlike the district court's assessment in *McNair*, the government's investigation did not reveal that the company added the amount of the bribes into the contracts with ICE.

district court erroneously used gain to approximate amount of actual loss and remanding to "determine whether the amount of loss can be calculated"). ICE cites various cases in support of its argument that courts have been flexible in awarding restitution for losses directly and proximately resulting from criminal conduct. (Mem. at 7.) In those cases, however, it was possible for the respective courts to determine quickly what the harm was and what amount of loss was attributable to the harm.[13] In contrast, there is no reasonable way to determine the amount of loss to ICE in a non-speculative manner. As such, because the amount of the loss would be purely speculative, an order of restitution here would not be appropriate.

IV. Trying to Determine Restitution Would Complicate and Unduly Prolong the Sentencing Process to a Degree That Outweighs Any Need to Provide Restitution

Even if it was somehow possible to unwind the corrupted tender process, neither the MVRA nor the VWPA support ordering restitution here, as the process would be deeply complex and involve significant delays in the sentencing process. The MVRA does not apply "if the court finds, from facts on the record, that . . . determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need

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[13] In *United States v. Kamuvaka*, 719 F. Supp. 2d 469, 479 (E.D. Pa. 2010), a health care fraud matter, the court stated that the "questions of whether the loss amount is ascertainable, and, if so, how much the restitution should be, need not long detain us." The court knew the total amount of the contract entered into between the City of Philadelphia and a private contractor, and simply had to determine the percentage of time that the employees of the contractor actually appeared for work. In *United States v. Gordon*, 393 F.3d 1044, 1051-57 (9th Cir. 2004), a stock embezzlement case, the court's primary task was to determine the dates that the stock was embezzled in determining an accurate restitution figure. In *United States v. Scott*, 2009 WL 983032 at * 1 (2d Cir. 2009), the defendant stole his clients' assets from three retirement accounts. In calculating the restitution amount, the court simply had to determine the value of the stolen funds plus the subsequent gains lost as a result of the theft. *Id*. This is a relatively simple task where the court could simply determine how the various investments had performed since the thefts.

to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3); *see* S. Rep. No. 104-132, at 19, reprinted in U.S.C.C.A.N. 924, 932 ("It is the committee's intent that highly complex issues related to the cause or amount of victim's loss not be resolved under the provisions of mandatory restitution."); *see also United States v. Bengimina*, 699 F. Supp. 214, 218 (W.D. Mo. 1988) (declining to provide restitution where determination of restitution would have required a lengthy satellite litigation concerning whether defendants were responsible for destroying ongoing prospects of bankrupt corporation).[14] Here, the undue delay and complications, which would be substantial, far outweigh the need for restitution (assuming it could even be calculated), particularly given the prior reparations to the Republic of Costa Rica and the ongoing civil litigation by ICE in Costa Rica over the same conduct.

The instant cases resulted from an investigation that spanned more than six years and multiple continents, and it involves a substantial number of documents and witnesses, many of whom are in different countries. Even if ICE was designated a victim in spite of the facts and circumstances delineated above (which by itself would require a thorough analysis of documents by the Court and Probation Office), trying to determine actual loss, if any, to ICE would require a hearing lasting weeks, if not months. Indeed, the same conduct has been the subject of six years of civil litigation in Costa Rica and a year-long civil trial between ICE and Defendant Alcatel-Lucent in Costa Rica in which more than 60 witnesses testified and scores of Spanish-language documents

[14] Likewise, under the VWPA, "[t]o the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order." 18 U.S.C. § 3663(a)(1)(B)(ii).

were admitted in evidence.[15] This would unnecessarily complicate and delay sentencing, and such a result would run counter to the MVRA and VWPA.

In *Acker*, the Sixth Circuit addressed a similar situation involving a packaged ice company that had been charged with conspiring to suppress and eliminate competition in the packaged ice business in Michigan. 596 F.3d at 370-72. After the Antitrust Division of the Department of Justice filed a plea agreement with the company, nine consumers and one business claimed that they were victims of the crime under the MVRA in that they had paid inflated prices for ice. *Id*. The petitioners also filed a separate civil suit in federal court against the packaged ice company. *Id*. at 371. After the district court imposed sentenced in the criminal action, it granted a temporary stay of the formal entry of judgment to allow the petitioners to seek mandamus relief in the Sixth Circuit. *Id*. The petitioners argued that the district court refused to recognize them as crime victims under the MVRA. The Sixth Circuit held that whether the petitioners were "directly and proximately harmed" by the actions of the packaged ice company "is an issue that is largely beside the point, because we conclude that the district court afforded them the status of crime victims. That is, the petitioners were allowed a full opportunity for participation. That included their appearance through

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[15] In October 2004, ICE filed a civil lawsuit against Alcatel-Lucent France in which it sought approximately $73 million in damages for the exact same conduct that is the subject of this U.S. criminal action. (Hernandez Decl. attached to ICE's state court filing, Ex. 16.) In August 2007, ICE also initiated an administrative proceeding in the Tribunal Contencioso Administrativo y Civil Hacienda (the Tribunal of Contentious Administrative and Civil Treasury) against Alcatel-Lucent France for breach of one of the three contracts that is the subject of the underlying criminal charges before this Court. In April 2010, ICE also filed a civil RICO lawsuit in Florida state court, which was recently ordered dismissed as the judge directed the case be pursued in the courts of Costa Rica, indicating that the courts of Costa Rica are the proper forum for adjudication of the case. (*El Instituto Costarricense de Elec. v. Alcatel Lucent (SA)*, 13-2010-CA-025859-0000-01 (Miami-Dade County Jan. 18, 2011) (orders of dismissal and denial of rehearing), Ex. 17.)

counsel at the arraignment, at the plea hearing, and at sentencing." *Id*. at 372. The petitioners further objected that the plea agreement made no provision for restitution in deference to the pending civil suit they had filed. They sought to vacate the plea agreement, direct the district court to reopen the proceedings, and be permitted to participate as a party to the renegotiation of a plea agreement that would include provisions for restitution. *Id.* at 373. The Sixth Circuit rejected petitioners claims: "Upon review, we cannot conclude that the district court abused its discretion in accepting the agreement. . . . The district court reasonably concluded that the difficulty of determining the losses claimed would so prolong and complicate the proceedings that any need for restitution would be outweighed by the burden on the sentencing process." *Id.*

As in *Acker*, ICE has been afforded the status of crime victim and is seeking restitution based on damage claims that are deeply complex at best. *See also Reifler*, 446 F.3d at 127-39 (remanding and recommending application of the complexity exception because of difficulty in ascertaining whether victims were actually participants ineligible for restitution); *United States v. Collaradeau*, 2005 U.S. Dist. LEXIS 45020 (D.N.J. Apr. 28, 2005) (need to provide restitution is outweighed by burden on sentencing process where determination of victims' losses would require further adjudication of issues and would prolong already lengthy sentencing process). Like *Acker*, the legal and evidentiary issues surrounding ICE's claims are broad and complicated. In ICE's civil lawsuit in Costa Rica, ICE claimed damages of about $73 million, which it reiterated in Miami-Dade state court last year before those claims were dismissed. (Exs. 16-17.) Now, however, ICE suggests that its damages may be "approaching $400 million." (Mem. at 18.) While ICE has provided no justification for the increase in its damages claim, what is telling is the basis upon which ICE

principally claims losses: *complex civil contract damages*. ICE makes all kinds of civil contract claims:

- Alcatel obtained "lucrative contracts with obligations it never satisfied, services it never rendered, and hardware that was inferior to what was promised or never delivered (*id*. at 6);
- Alcatel left ICE with "an unfinished and largely inoperable telecommunications system" (*id*.);
- Alcatel "had supplied inferior equipment causing ICE to bear the substantial additional expense of procuring those services from other providers" (*id*. at 6-7);
- Alcatel provided "inferior services and equipment" that led to ICE experience and continuing to experience "interruption and inoperability" (*id*. at 7);
- "What Alcatel ultimately did provide was inferior and failed to perform as specified under the contract" (*id*. at 13);
- "ICE had to purchase additional equipment and remedial services to ameliorate the widespread deficiences" (*id*. at 13-14); and
- "ICE was forced to procure products and services as a result of inferior and defective equipment supplied by Alcatel" (*id*. at 16.

And ICE apparently also wants restitution for its attorneys' fees. (Mem. at 7.) When this list of alleged damages for which ICE now seeks restitution is reviewed, it becomes readily apparent that evaluating these claims by the Court would not result in a mini-trial, but instead a full-blown trial that could last weeks (if not months), involve countless witnesses (many of whom would be coming from foreign jurisdictions), numerous experts (such as networking engineers, system integration experts, telephony and technology specialists, accountants, foreign law experts, forensic accountants, auditors, economic analysts, and market consultants to name a few), and scores of exhibits (many of which will be in Spanish and highly technical in nature). The best evidence of this is the fact that six years of litigation and a year-long trial on these exact same issues resulted in a Costa Rican court recently denying ICE's damages claims without reaching the merits. (Apr. 27,

2011 Prelim. J. by Crim. Ct. of the 2d Jud. Cir. at 6, Ex. 18.) Such a complicated, uncertain, and long journey is simply not justified here.

Moreover, in assessing whether the need for restitution is outweighed by the complications and delay caused to the sentencing process, this Court should also consider the fact that: (1) Alcatel-Lucent France has already paid the Costa Rican Government $10 million in reparations, which marked the first time in Costa Rica's history that a foreign corporation agreed to pay the government damages for corruption (Exs. 1-2); (2) ICE has a civil case against Alcatel-Lucent France for damages (Ex. 16); (3) ICE has pursued damages through an administrative proceeding in Costa Rica (n.15); and (4) ICE has already had its day in court in Miami-Dade state court (Ex. 17).[16] In other words, in determining the "need" for restitution, this Court can reasonably consider whether other legitimate avenues of redress exist for ICE.

Besides the complexity and delay attendant to such a restitution proceeding, it is important to understand the damages claimed by ICE and their purported relationship to the charged conduct. Significantly, based upon the holding in *Hughey v. United States*, 495 U.S. 411, 413 (1990), the Eleventh Circuit in evaluating a restitution claim held that the "district court is authorized to order restitution only for the loss caused by the specific conduct underlying the *offense of conviction*." *United States v. Cobbs*, 967 F.2d 1555, 1558 (11th Cir. 1992) (per curiam) (emphasis added); *see United States v. Young*, 953 F.2d 1288, 1289 (11th Cir. 1992) ("A court therefore exceeds the scope

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[16] Incidentally, a series of Supreme Court cases over the past decade has made clear that federal courts should seek to avoid becoming involved in largely foreign disputes. *See Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010) (refusing to permit U.S. courts to become arbiter of largely foreign disputes where foreign governments are well equipped to handle such matters); *Small v United States*, 544 U.S. 385, 388-89 (2005) (Court has "adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.").

of its authority under the VWPA when it orders restitution for *uncharged offenses*." (emphasis added)); *United States v. Stone*, 948 F.2d 700, 704 (11th Cir. 1991) ("[W]e hold that a restitution order under the VWPA may not exceed the loss attributable to the *specific conduct that is the basis of the offense of conviction*." (emphasis added)). For example, "When the offense involves making a false statement, the inquiry to determine loss must focus on the amount of loss related to the false statement.... The task of the district court is to determine the amount of loss that is attributable to [the defendant's] criminal conduct." *United States v. Wilson*, 980 F.2d 259, 262 (4th Cir.1992). The sentencing court "may not authorize restitution even for like acts significantly related to the crime of conviction." *Young*, 953 F.2d at 1289.

In *United States v. Apex Roofing of Tallahassee, Inc.*, the Eleventh Circuit vacated and remanded an order of restitution where the defendants were ordered to pay restitution to the Navy because they lied on certifications submitted to the Navy to get progress payments. 49 F.3d 1509, 1510-11 (11 Cir. 1995). The defendants objected saying that there had been no loss to the Navy in spite of the guilty pleas for violating 18 U.S.C. § 1001. *Id*. The Eleventh Circuit agreed with the defendants finding that the defendants' criminal conduct was unrelated to any loss that the Navy may have suffered, that the Navy did not appear to have sustained any loss whatsoever, that the district court speculated in its restitution analysis, and that an award of restitution to the Navy would be a "windfall." *Id*. at 1512-14. While the *Apex* case concerned the VWPA, its logic and reasoning applies to the instant matter with equal force to the MVRA. Even assuming that Defendant Alcatel-Lucent and the Defendant Subsidiaries would not have won business with ICE absent bribery, it is not clear that there is any loss sustained by ICE. While ICE raises a series of contract damages concerning the quality of products and sufficiency of services, these do not appear to be directly

connected to the charged offenses. Thus, in addition to the complex and lengthy challenge of establishing these alleged losses, it is not entirely clear whether, at the end of that complicated and lengthy process, these claimed damages, even if proved, would be sufficiently connected to the charged conduct to merit an award of restitution. For this additional reason, the Court should decline ICE's invitation to award restitution here.

At the end of the day, this is a criminal matter involving bribery in which some of the highest-ranking members of ICE solicited bribes and in which ICE bears responsibility for its complicity. In short, restitution should not be used as a subterfuge for civil contract claims regarding whether a supplier provided appropriate services and quality products under a contract. ICE's lack of success to date in two different venues should not mean that ICE should be allowed to convert these claims into a subject of this criminal matter. For this additional reason, restitution is not appropriate here.

CONCLUSION

WHEREFORE, given ICE's complicity in the corruption, the lack of a non-speculative loss amount, the complications and delay attendant to any restitution hearing, seeking restitution for complex civil contract issues, and the other recourse available to – and being pursued by – ICE in Costa Rica, the Court should decline ICE's invitation to consider ICE a victim and to award restitution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court, defense counsel, and ICE's counsel using CM/ECF on May 23, 2011.

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