UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.: 11-12707 G

Southern District of Florida Docket No.:
10-CR-20906-COOKE

In re: Instituto Costarricense de Electricidad,

Petitioner,

vs.

United States District Court for the Southern District of Florida,

Respondent;

United States of America vs. Alcatel-Lucent France, S.A., Alcatel-Lucent Trade International, A.G., Alcatel Centroamerica, S.A.,

Additional Respondents/Real Parties In Interest

PETITION FOR WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Petitioner, Instituto Costarricense de Electricidad ("**ICE**"), by and through undersigned counsel and pursuant to Fed. R. App. P. 26.1, submits this Certificate of Interested Persons and Corporate Disclosure Statement. ICE is a party in interest in the proceedings below and states that there is no parent corporation or publicly held corporation that owns 10% or more of its stock. The following persons and entities are disclosed pursuant to 11th Cir. R. 21.1-1.

1. Honorable Cooke, Marcia G.
2. Brombacher, Randolph
3. Govin, James
4. Guerra, George L.
5. Maglich, Jordan D.
6. Morello, Gianluca
7. Pearlman, Dominique H.
8. Saavedra, Damaso
9. Alcatel Centroamerica, S.A.,
10. Alcatel-Lucent, S.A.
11. Alcatel-Lucent France, S.A.
12. Alcatel-Lucent Trade International, A.G.
13. Instituto Costarricense de Electricidad (the victim)

14. Saavedra, Pelosi, Goodwin & Hermann, A.P.A.

15. Wiand Guerra King P.L.

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NOTICE OF RELATED PROCEEDINGS

ICE filed two mandamus proceedings directed at substantively identical criminal cases pending in the United States District Court for the Southern District of Florida ("**District Court**"). One case is styled *U.S. v. Alcatel-Lucent, S.A.* (Case No.: 10-CR-20907-COOKE) and names a parent corporation, Alcatel Lucent, S.A., as the defendant ("**Parent Defendant**"). The other is styled *U.S. v. Alcatel-Lucent France, S.A., et al.* (Case No.: 10-CR-20906-COOKE) and names three subsidiaries of Parent Defendant as defendants ("**Subsidiary Defendants**", and collectively with Parent Defendant, "**Defendants**"). ICE is filing this petition in both mandamus proceedings.[1]

* * *

I. STATEMENT OF RELIEF SOUGHT

ICE respectfully petitions this Court pursuant to the Crime Victims' Rights Act ("**CVRA**"), 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, and Fed. R. App. 21, for a writ of mandamus directing the District Court to recognize ICE is a "crime victim" under the CVRA of Defendants' crimes and to afford it all rights the CVRA guarantees to crime victims, including restitution. ICE requests this Court: (1) find ICE is a victim under the CVRA; (2) find ICE is entitled to

[1] ICE is also initiating parallel appeals from orders in those two cases. ICE will move to consolidate the parallel appeals with the applicable mandamus proceedings and to treat this petition as ICE's initial brief in those appeals.

restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A ("**MVRA**"); (3) find that, at a minimum, ICE is entitled to restitution in the amount of $17,387,405.74, representing bribes paid by Defendants to "win" business from ICE; (4) find ICE's reasonable right to confer was violated; (5) find the complexity exception to awarding restitution inapplicable; and (6) direct the District Court to vacate Subsidiary Defendants' guilty pleas and Parent Defendant's Deferred Prosecution Agreement ("**DPA**") and hold an evidentiary hearing to determine additional restitution to which ICE is entitled.

II. ISSUES PRESENTED

1) Whether the District Court erred by denying ICE victim status under the CVRA.

2) Whether the District Court erred in denying ICE restitution.

III. STATEMENT OF THE CASE

A. Statement Of Facts[2]

This is an action for a writ of mandamus ordering the District Court to

[2] Pursuant to Fed. R. App. P. 21(a)(2)(C), ICE has also submitted a Record. Citations to the Record are "(T__)", signifying the Tab number or letter assigned each document and, as necessary, the relevant exhibit numbers or letters and page or paragraph numbers. Record citations in regular font refer to the record in ICE's petition from Case No. 10-CR-20906 (the tabs in that record are denominated in numbers), and record citations in italicized font refer to the record in petition from Case No. 10-CR-20907 (the tabs in that record are denominated in letters).

recognize that ICE[3] is a victim of Defendants' crimes. The Informations filed by the Department of Justice ("**DOJ**") against Defendants[4] demonstrate ICE was directly and proximately damaged by their criminal conduct when they conspired to bribe six individuals formerly associated with ICE, in return for awarding Defendants telecommunications contracts worth $303 million. (T1 ¶¶16, 29, 39-47, 51; *TA ¶¶29, 39-47, 51, 53*) Other than acceptance of bribes by those individuals, who were promptly terminated and prosecuted, and are now incarcerated, nothing in the Informations indicates ICE was in any way a participant in Defendants' crimes. (T1 ¶¶13, 16; *TA ¶¶13, 16*)

For decades, in Costa Rica and more than 19 other countries Defendants conducted business through an organized system of corruption and bribery.[5] (T1 ¶29; *TA ¶29*). Defendants used "consultants" to bribe decision makers in return for

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[3] ICE is an autonomous Costa Rican legal entity that provides electricity and telecommunications services throughout Costa Rica. ICE is managed by a seven-member Board of Directors that oversees management in a similar fashion to boards of other large corporations. ICE has over 15,000 employees, and its employees and directors are subject to a strict ethics code. (T23 Ex. 1 ¶8; *TS, Ex. 1 ¶8*)

[4] Parent Defendant is an international telecommunications conglomerate that operates through subsidiaries, including Subsidiary Defendants. Its shares are traded on the New York Stock Exchange and its executive offices are located in France and New Jersey. Last year, Defendants reported annual revenues exceeding $21 billion. (T10 Exs. 22-31; *TG Ex. 16-13*)

[5] Defendants have admitted their corrupt business practices and all other allegations in the Informations. (T3 ¶11; T4 ¶11; T5 ¶11; *TE ¶2*)

telecommunications contracts. (T1 ¶¶29, 36, 38; *TA* ¶¶*29, 36, 38*). The "consultants" were approved by Defendants' senior executives. (T1 ¶¶8, 31-33; *TA* ¶¶*31-34, 36*) In Costa Rica, Subsidiary Defendants funneled money to three "consultants," which used the money to induce six individuals affiliated with ICE to award Defendants telecommunications contracts valued at $303 million. (T1 ¶¶16, 39-51; *TA* ¶¶*39-53*) The money funneled to those "consultants" to pay bribes amounted to $17,387,405.74 paid between June 2000 and October 2003. (T1 ¶¶85-127; *TA* ¶¶*39-53*) None of that money was received by ICE. (T23 Ex. 1 ¶13; *TS Ex. 1 ¶13*) Defendants' corrupt activities combined with the dishonest and criminal acts of these six ICE officials, who exploited their positions for personal gain, caused ICE massive losses. (T23 Ex. 1 ¶13; *TS Ex. 1 ¶13*)

Defendants' scheme was revealed in 2004 by Costa Rican media after Edgar Valverde Acosta ("**Valverde**"), the then President of a Subsidiary Defendant, admitted bribing Costa Rica officials, including the then-incumbent President of Costa Rica, three ICE board members, and three ICE management-level employees. (T1 ¶¶10, 48; *TG Ex. 34*) ICE first learned of these individuals' criminal acts at that time, and they were promptly terminated. (T23 Ex. 1 ¶11; *TS Ex. 1 ¶11*) Further, all were prosecuted with ICE's support. (*Id. ¶12*)

Valverde's admission spawned investigations in the United States and France. (T8 6:18-25) Defendants engaged in a massive cover-up, including by

vehemently denying corporate involvement or knowledge, initiating an illusory internal "investigation," and suing certain employees, including Valverde, alleging they were rogue and defrauding the company. (T10 ¶¶13-14; *TG Ex. 34*) Defendants now have admitted those accusations were false. It was not until late 2006, when another of Defendants' executives, Christian Sapsizian ("**Sapsizian**"), was arrested and subsequently cooperated with DOJ, that Defendants had no choice but to begin cooperating. (T1 ¶9; *TE ¶4*). Only when Sapsizian led DOJ to the buried bones – making Defendants' guilt undeniable – did Defendants admit responsibility. (T3; T4; T5; T8 7:7-9; T10 ¶17; T32 ¶4; *TE* ¶4)

In 2007, DOJ charged Sapsizian and Valverde with conspiring to violate and violating the Foreign Corrupt Practices Act ("**FCPA**") for participating in Defendants' scheme and, in particular, for their conduct targeting ICE. (T10 ¶17; *TG Ex. 27*) The same DOJ counsel in these cases brought that case, also in the District Court. (T10 Ex. 22; *TG Ex. 22*) These cases are part of the same investigation and prosecution. In fact, DOJ moved below to transfer these cases to the same judge who presided over Sapsizian and Valverde's case.[6] (T2 ¶5; *TB ¶5*) Although DOJ began investigating these matters in 2004 and initiated the first case

[6] In DOJ's own words, "a substantial part of the criminal information in the instant matter[s] involves the Costa Rica bribery allegations that gave rise to the charges against Sapsizian and Valverde ... [and the latter case] substantially overlaps with the conduct charged in the instant case." (T2 ¶4; *TB ¶4*)

in 2007, DOJ has never contacted ICE to make a factual inquiry or determine whether it was proximately harmed by Defendants. (T23 p.10; *TS p.10*) Only after DOJ reached settlements with Defendants and initiated these cases, and ICE repeatedly told DOJ that it had been damaged, did DOJ provide ICE with notice of procedural events or hearings. (T23 p.10; *TG Ex. 45-48*). By then, ICE was already receiving notices of hearings from the court due to its counsel's efforts (T23 p.10; TG ¶20) and these cases were substantively complete. Parent Defendant had already entered into the DPA and each Subsidiary Defendant had entered into Plea Agreements ("**Plea Agreements**") pursuant to Fed. R. Crim. P. 11(c)(1)(C). (T23 p.10; *TG ¶¶20-21*)

In February 2010, Defendants announced settlements with DOJ. (T10 Ex. 39, *TG Ex. 39*) ICE's lawyers promptly contacted DOJ to convey it was a victim and trigger crime victim rights procedures. (T10 Ex. 43-49; T23 Ex. 2; *TG Exs. 43-49, TS Ex. 2*). DOJ indicated it did not consider ICE a victim, apparently believing the conduct of six individuals (out of over 15,000 individuals associated with ICE) who benefited personally should be imputed to the company. (T10 Ex. 46; T23 Ex. 2; *TG Ex. 46; TS Ex. 2*) This conclusion was reached without any conference between DOJ and ICE. (T23 Ex. 2; *TS Ex. 2*) DOJ has always vigorously opposed providing ICE any meaningful victims' rights. (T20; *TO*)

B. Course Of Proceedings Below

On December 27, 2010, DOJ filed an Information charging the Subsidiary Defendants with one-count of conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371, including by violating the anti-bribery, books and records, and internal controls provisions of the FCPA, and an Information charging Parent Defendant with violating the internal controls and books and records provisions of the FCPA. (T10 Ex. 17; T3; T4; T5; *TG Ex. 17; TE; TX; TY; TZ*) In the Rule 11(c)(1)(C) Plea Agreements, Subsidiary Defendants agreed to plead guilty to the Information. (T3; T4; T5; *TE; TX; TY; TZ*) The Informations and Plea Agreements detail that ICE was a target of Defendants' crimes. (*Id.*)

On May 2, 2011, ICE filed a Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement, with a supporting legal memorandum and evidentiary appendix. (T10; T11; *TG; TH*) DOJ and Defendants filed oppositions; ICE replied and filed more evidence, including a declaration by Valverde; and a hearing was held on June 1, 2011. (T18; T20; T21; T22; T23; T24; *TN; TO; TR; TS; TT*) No evidence was taken at the hearing (T30; *TV*) and the District Court never announced any findings of facts or conclusions of law (T30; *TV*). Instead, the District Court simply stated that it "thought" it would be difficult to "figure out the behavior of who was the

victim and who was the offender" and that "essentially" Defendants and ICE occupied a "co-conspirator relationship," and thus ICE was not a victim, and it further appeared to state that even if ICE was a victim, complexity barred an award of restitution. (T30 52:3-53:14; *TV 52:3-53:14*). The Plea Agreements were then accepted, judgments entered, the DPA approved, and ICE timely filed this petition and notices of appeal. (T25; T26; T27; T28; T29; *TV*).

C. Standard Of Review

1. Under The Plain Language And Remedial Design Of The CVRA, ICE Is Entitled To Ordinary Appellate Review

The CVRA states that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Ordinarily, the issuance of a writ of mandamus is discretionary. *In re BellSouth Corp.*, 334 F.3d 941, 979 (11th Cir 2003). The CVRA, however, overrules conventional mandamus standards by directing "[t]he court of appeals *shall take up and decide such application forthwith....*" 18 U.S.C. § 3771(d)(3)(emphasis added). As explained by the CVRA's Senate co-sponsor, the CVRA involves "*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of his rights ...." 150 Cong. Rec. S4262 (Apr. 22, 2004)(statement of Sen. Feinstein)(emphasis added); *see* Moore's Fed. Prac. 3d § 321.14[1] (2007)("[U]nder the CVRA, the victim need not make the usual

threshold showing of extraordinary circumstances to obtain mandamus relief ....").

Consistent with this legislative history, this Court previously afforded crime victims ordinary appellate review of a CVRA mandamus petition. *See In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008). This Court explained the pertinent question was not whether to exercise its discretion (as would be the case with an ordinary mandamus petition), but rather the mixed substantive question of fact and law regarding the petitioners' status as "victims" under the CVRA. *Id.* It then resolved the question without deference to the district court, thus applying ordinary appellate review (as other Circuits recognized). *See U.S. v. Monzel*, 2011 WL 1466365, *3 (D.C. Cir. Apr. 19, 2011)(noting that *In re Stewart* "grant[ed] [a CVRA] petition without asking whether [a] victim had a clear and indisputable right to relief" as required by deferential mandamus review).

Three other Circuits follow the same approach. *See In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005)(under plain language of CVRA, mandamus petition "need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus"); *Kenna v. U.S.D.C., C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) ("The CVRA creates a unique regime that ... contemplate[s] routine interlocutory review of district court decisions denying rights asserted under the statute."); *In re Walsh*, 229 Fed. Appx. 58, *2 (3d Cir. 2007)(CVRA makes "mandamus relief ... available

under a different, and less demanding, standard" than applies to ordinary mandamus petitioner)[7] This is the approach intended by Congress. *See* 157 CONG. REC. S3608 (June 8, 2011)(statement of Sen. Kyl)("§ 3771(d)(3) was intended to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed under ordinary standards of appellate review.").[8]

2. ICE Is Entitled To *De Novo* Review Of Whether It Is A Victim

Under ordinary appellate review, whether ICE is a "victim" under the CVRA is a pure legal issue that this Court reviews without deference to the District Court. *See e.g.*, *U.S. v. Brock-Davis*, 504 F.3d 991, 996, 998-99 (9th Cir. 2007)(question of whether entity was a "victim" under restitution statute reviewed *de novo*); *U.S. v. De La Fuente*, 353 F.3d 766, 771 (9th Cir. 2003)(same).

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[7] Four Circuits, however, have held CVRA mandamus petitions are subject to the ordinary :clear and indisputable error" standard. *See In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Acker*, 596 F.3d 370 (6th Cir. 2010); *Monzel*, 2011 WL 1466365 at *3. The first three of those cases, however, did not consider the legislative history or purpose of the CVRA. And all four are inconsistent with *In re Stewart*.

[8] Even if the Court decides not to afford CVRA mandamus petitions ordinary appellate review, ICE is entitled to such review because it has timely filed notices of appeal and shortly will move to consolidate those appeals with these proceedings – the same approach used by this and other Courts faced with parallel mandamus petitions and appeals on CVRA and other issues. *See Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1052 (11th Cir. 2008)(granting motion to consolidate mandamus petition with appeal), aff'd, 130 S.Ct. 599 (2009); *In re Siler*, 571 F.3d 604 (6th Cir. 2009)(allowing victim to proceed by way of appeal where both mandamus petition and appeal filed).

Importantly, irrespective of the standard applied, ICE has satisfied it.

IV. STATEMENT OF WHY THE WRIT SHOULD ISSUE

A. The District Court's Conclusion That ICE Is Not A Victim Is Not Supported By Law Or Record Evidence

The District Court concluded ICE was not a "victim" because it "thought" ICE was a "co-conspirator." That conclusion, however, is not supported by record evidence or applicable law. Rather than relying on those proper bases and reaching factual findings and conclusions of law, the District Court summarily accepted the unsupported argument of DOJ and Defendants to conclude that ICE was not a victim. As shown below, ICE is a victim under both the CVRA and the MVRA because: (1) the record evidence establishes that ICE (*i.e.*, the corporation) was directly and proximately harmed by Defendants' crimes and (2) under applicable law, the conduct of the six former ICE individuals who accepted Defendants' bribes cannot be imputed to ICE.

1. The Record Evidence Does Not Support The District Court's Conclusion That ICE Is Not A Victim

The District Court erred when it concluded ICE was not a victim because "the behavior of the quote-unquote victim and the behavior of the Defendant here are closely intertwined" and (T30 52:11-12; *TV 52:11-12*) "I think you have, even though not a charged conspirator coconspirator relationship, that's essentially what went on here … that basically it was 'Bribery Is Us'." (T30 52:3-19; *TV 52:3-19*).

That conclusion was not supported by any record evidence. To the contrary,

the record evidence established that ICE was not a co-conspirator or otherwise involved in Defendants' crimes. It also did not support the District Court's characterization of ICE as "Bribery Is Us." (T30 53:19; *TV 53:19*) In relevant part, that evidence showed the bribes were not disclosed by the recipients, and when those payments surfaced, ICE promptly terminated and prosecuted the recipients. (T23 Ex. 1 ¶¶8, 9, 12; *TS Ex. 1 ¶¶8, 9, 12*). That evidence also showed that ICE had a longstanding policy prohibiting acceptance of gratuities, which was incorporated in an ethics code in 2002. (T23 Ex. 1 at ¶8; *TS Ex. 1 ¶8*).

The District Court, however, ignored the evidence and instead relied solely on unsupported arguments of DOJ and Defendants. (T30; *TV*) They argued ICE was corrupt and thus a "participant" in the crimes (T18 p.4; T20 p.6; *TN p.4; TO p.6*)(arguing that "itself as an organization is also responsible"), and based their argument on the following: (1) the corporate position of the former ICE individuals who accepted bribes and the alleged escalation of those individuals' demands; (2) DOJ's recounting of hearsay statements supposedly made to it by Sapsizian; (3) a statement of one of the six former ICE individuals who accepted bribes; (4) a newspaper article; and (5) two other instances of improper gratuities accepted by ICE employees. (T20 pp. 8-12, Exs. 5, 6; *TO, pp. 8-12, Exs. 5, 6*). As discussed below, none of these items supported the District Court's conclusion that ICE was not a victim.

Neither DOJ Nor Defendants Submitted Any Evidence Relating To Sapsizian.

Much of DOJ and Defendants' argument that ICE was "involved" in Defendants' crimes was based on purported statements by Sapsizian. Yet, they submitted no evidence whatsoever relating to Sapsizian, and instead relied exclusively on DOJ counsel's argument about purported statements by Sapsizian. That was not "evidence" upon which the District Court could base any decision.

In any event, those supposed statements did not support the District Court's conclusion. In relevant part, DOJ claimed that according to "Sapsizian, corruption at ICE had existed for a long time" (T20 p.8; *TO p.8*) because, according to DOJ, Sapsizian claimed he was solicited for a bribe by an unidentified ICE official in the 1980s (T20 p.8; *TO p.8*); he lost a bid in the 1990s (DOJ did not specify if this bid was for ICE business or if it was lost because of bribes paid by competitors)(*id.*); and he "believed" and "suspected" some of the recipients of the bribe recipients also received bribes from competitors (T20 p.9; *TO p.9*). At worst, these representations by DOJ merely show that some of the same six former ICE individuals who received bribes from Defendants also may have received them from others, that Sapsizian was solicited for a bribe by an unidentified ICE official approximately 20 years before Defendants paid bribes to "win" ICE business, and that Sapsizian also may have lost a contract bid by failing to pay a bribe. These isolated instances, even if true and even if supported by record evidence – which

they were not – do not support a conclusion that ICE was a "co-conspirator."

The News Article Does Not Show That ICE Was A "Co-Conspirator"

DOJ also relied on a news article when contending ICE participated in Defendants' crimes. (T20 Ex. 6; *TO Ex. 6*) As an initial matter, DOJ's reliance on a newspaper, rather than results of any investigation by it, reflects that DOJ either did not adequately investigate this matter or, more troubling, that investigation revealed ICE was not a participant.[9] In any event, the article did not support a conclusion that ICE was a co-conspirator.

That article concerns reported irregularities found during an ICE internal audit. (T20 Ex. 6; *TO Ex. 6*) However, putting aside the article is pure hearsay, it contains very little detail, and, at a minimum, does not have sufficient specifics to support the District Court's conclusion that ICE was a co-conspirator of Defendants' crimes. Indeed, instead of supporting that conclusion, it undermined it by demonstrating ICE's efforts to detect and rectify irregularities, in that instance through a reported internal audit. (*Id.*)

Two Other Alleged Instances Of Bribery
Do Not Show ICE Was A "Co-conspirator"

DOJ also relied on two other episodes of gratuities paid to ICE employees to support argue corruption at ICE was widespread. DOJ's "proof" for one such

[9] DOJ never contacted ICE to investigate or otherwise corroborate its position that ICE was "responsible." (T23 p.9; *TS p.9*)

episode – involving former ICE employee Alvaro Retana – was a news article that merely concerns a "questionable trip," focuses on Retana's lack of comments to the press, and discusses ICE's investigation, including appointment of an oversight body. (T20 Ex. 5; *TO Ex. 5*) The article does not even indicate Retana did anything wrong; it merely discusses ICE's investigation and Retana's refusal to comment to the media. (*Id.*) Rather than showing ICE was a co-conspirator, this too demonstrates another instance in which ICE took prompt investigative action.

The other episode is recounted in a 2010 press release by UK authorities. That release includes almost no detail about payments to ICE employees, and instead notes that admitted payments were made to individuals associated with an insurance company. (T20 Ex. 4; *TO Ex. 4*). In any event, ICE individuals connected with that matter were charged criminally and sued civilly by ICE. (T23, Ex. 1 ¶11; *TS Ex. 1 ¶11*) Again, rather than showing ICE was a co-conspirator, DOJ's submissions reflect efforts by ICE to address improprieties. (T23 Ex. 1 ¶¶11, 12; *TS Ex. 1 ¶¶11, 12*)

Jose Antonio Lobo's Statement Does Not Show ICE Was A "Co-conspirator"

DOJ also relied on an unsworn statement by Jose Antontio Lobo (one of the six former ICE individuals who accepted Defendants' bribes) ("**Lobo**") to Costa Rican authorities as the purported "best evidence of the corruption that existed at ICE during this time frame." (T20 p. 11, Ex. 7; *TO p.11, Ex.7*). But rather than

showing "deep corruption," Lobo's statement merely showed that Hernan Bravo (another of the six former ICE individuals who accepted Defendants' bribes) ("**Bravo**") had bribes paid to Lobo by two entities which obtained contracts from ICE and that Costa Rica's then President (Miguel Angel Rodriguez) and another individual not associated with ICE (Alfonso Guardia) pressed Lobo to collect money from Defendants. (*Id.*) This purported supporting evidence simply showed that, again, individuals who received bribes from Defendants in derogation of their obligations to ICE, also received bribes from other entities, and that outsiders not associated with ICE pressed them to collect money from Defendants. Both Bravo and Lobo were terminated by ICE and prosecuted, consistent with ICE's intolerance for breaches of its ethics code. (T23 Ex. 1¶8; *TS Ex. 1*¶8).

Lobo explained in the statement that he had a "perception" that "a kind of culture" had developed internationally in the "private contracting world" of companies "develop[ing] policies of giving gifts to senior executives and representatives of companies that are potential clients ... to guarantee access to those markets under competitive conditions favorable to rival companies." (*Id.*) Lobo added, "I think that this practice has been transferred in a certain way to Costa Rica" and "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." (*Id.*) This merely conveyed Lobo's "perception" that entities like Defendants had developed policies to bribe senior executives of potential customers, and that ICE had been a target of those efforts. That "perception" provided no basis to conclude ICE was Defendants' co-conspirator.

2. As A Matter Of Law, ICE Is A Victim Under Both The CVRA And The MVRA

a. The CVRA and MVRA define "victim" identically

The CVRA broadly defines "victim" as "a person [or entity] directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). The MVRA also broadly defines "victim" as "a person [or entity] directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," including an offense involving as an element a scheme, conspiracy, or pattern of criminal activity. 18 U.S.C. § 3663A(a)(2); *U.S. v. Jackson,* 1998 WL 344041, *2 (6th Cir. 1998)(MVRA definition of "victim" originated in 1990 amendment to VWPA); *U.S. v. Jennings*, 2000 WL 32005, *4 (7th Cir. 2000)(" MVRA's broad definition of 'victim' encompasses all individuals harmed during the course of the scheme, conspiracy, or pattern of criminal behavior…."). Under this broad definition of "victim," courts may award restitution to all individuals defrauded by a defendant's "entire scheme" or conspiracy offense, and not just to those defrauded by the specific offense to which

a defendant admits guilt. 18 U.S.C. § 3663A.[10]

b. ICE is a "victim" because it was directly and proximately damaged by Defendants' conduct

The Informations detail Defendants' conspiracy, including the use of bribes to "win" $303 million worth of contracts from ICE. (T1 ¶¶82-139; *TA ¶¶29-31*). The Informations frequently refer to ICE, and although ICE is not denominated a "victim", it is clear that it was both a target and victim of Defendants' scheme. The scheme, the contracts, and the subsequent unraveling of the scheme directly and proximately damaged ICE. (T10 ¶10; *TH p.2*)

An entity is a "victim" when its employees accept bribes for their own benefit to sway the entity's decisions. Here, no record evidence reflects any benefit to ICE. To the contrary, ICE submitted evidence and legal authority establishing that it was directly and proximately harmed by Defendants' crimes (T10 pp.5-7; T23 Ex.1; *TG pp.5-7; TH; TA Ex. 1*), and neither DOJ nor Defendants

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[10] *U.S. v. Bold*, 412 F. Supp. 2d 818, 827 (S.D. Ohio 2006); *U.S. v. Ross,* 210 F.3d 916 (8th Cir. 2000)("[R]estitution may be ordered for criminal conduct that is part of a broad scheme to defraud, even if the defendant is not convicted for each fraudulent act in the scheme."); *U.S. v. Liner,* 435 F.3d 920, 926 (8th Cir. 2006)("So long as the indictment details a broad scheme ..., the district court may order restitution to victims who suffered from Defendant's criminal activity beyond what was described with particularity in the indictment."); *U.S. v. DeRosier*, 501 F.3d 888, 897 (8th Cir. 2007); *U.S. v. Thomas*, 2007 WL 1999898,*2 (11th Cir. 2007)("Because the loss was reasonably foreseeable as the result of acts done in furtherance of the conspiracy, the district court did not err in ordering restitution [under MVRA].").

contested that evidence. Instead, they merely argued that ICE was a "co-participant" and thus should be denied victim status. (T20 pp.6-13; *TO pp.6-13*). As discussed above and below, neither the law nor the facts supported that argument.

c. As a matter of law, the conduct of the six former ICE individuals who accepted Defendants' bribes cannot be imputed to ICE

Aside from not being supported by record evidence, the District Court's conclusion that ICE was Defendants' co-conspirator was not supported by law. Although the District Court provided no legal reasoning for its conclusion, apparently it believed the conduct of individuals associated with ICE who accepted bribes should be imputed to ICE. That belief, however, is not based in law.

An agent's authority to act in that capacity is terminated when the agent ceases to act for the principal' benefit and instead acts for its own benefit. Restatement (Second) of Agency § 396(b); *Apollo Techs. Corp. v. Centrosphere Indus. Corp.*, 805 F. Supp. 1157, 1197 (D.N.J. 1992). An agent's conduct cannot be imputed to its principal when the agent is acting in its own interests and adversely to the principal's interests. *See In re Phoenix Diversified Inv. Corp.*, 439 B.R. 231, 242 (S.D. Fla. 2010)(when "agent's misconduct is calculated to benefit the agent and harms the corporation, the agent has forsaken the corporation and acts only for himself"); *LanChile Airlines v. Conn. Gen. Life Ins.*, 759 F. Supp.

811, 814 (S.D. Fla. 1991); *Munroe v. Harriman*, 85 F.2d 493, 495 (2d Cir. 1936)("Where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency...."); *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2d DCA 2003).

The District Court ignored this when it concluded that ICE itself, rather than only its handful of former personnel who accepted bribes for their own benefit, was involved in Defendants' crimes. The record evidence established those actions of three former directors and three former employees (out of over 15,000 directors and employees) were solely for those individuals' benefit and provided ICE no benefit; indeed, they harmed ICE. (T10 pp.6-7; *TH pp.7-9*). The few individuals who received bribes were fiduciaries with responsibilities to ICE, and they breached those duties for their personal gain. The law is clear that agents who accept bribes or kickbacks operate for their own benefit and to the detriment of their principals. *See U.S. v. Gamma Tech Ind., Inc.,* 265 F.3d 917, 926 (9th Cir. 2001)(contractor was victim of conspiracy to provide and receive kickbacks); *Skilling v. U.S.*, 130 S. Ct. 2896, 2926-27 (2010)("When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty, he in effect is defrauding the employer of a lawful right."); *U.S. v. Liu*, 200 Fed. Appx. 39 (2d Cir. 2006)(bank whose official accepted bribes was

victim); *U.S. v. Gaytan*, 342 F.3d 1010, 1012 (9th Cir. 2003)(city whose former official accepted bribes was a victim).[11]

In stark contrast to Defendants' corporate involvement in the scheme and relationships with agents, no record evidence showed that ICE had knowledge of the scheme or of its former employees' or directors' conduct, that it knowingly participated in it, or that bribery was part of ICE's method of doing business. (T23 Ex. 1 ¶7; *TS Ex. 1 ¶7*). In fact, the record evidence established the bribes were kept secret by the recipients and when news of them surfaced, rather than concealing them like Defendants, ICE took prompt action, immediately terminated those individuals, and had them prosecuted. (T23 Ex. 1 ¶11; *TS Ex. 1 ¶11*) It also established that ICE was damaged and derived no benefit as the bribes were paid exclusively for the agents' benefit. (T23 Ex. 1 ¶7; *TS Ex. 1 ¶7*). Further, it established that receipt of payments from suppliers was then and always has been inconsistent with ICE's policies (and, since 2002, part of its code of ethics) (T23 Ex. 1 ¶¶7, 8; *TS Ex. 1 ¶¶7, 8*), and that all individuals who breached such policies were terminated and/or prosecuted. (T23 Ex. 1 ¶11; *TS Ex. 1 ¶11*) In short, as a matter of law, ICE was not a co-conspirator or otherwise involved in Defendants'

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[11] *See also U.S. v. Lovett,* 811 F.2d 979, 985 (7th Cir. 1987); *U.S. v. George,* 477 F.2d 508, 513 (7th Cir. 1973); *In re Salem Mills, Inc.,* 881 F. Supp. 1109, 1116-17 (N.D. Ill. 1995); *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 575 (7th Cir. 2004); *U.S. v. Rybicki*, 354 F.3d 124, 139 (2d Cir. 2003); *U.S. v. McNair*, 605 F.3d 1152 (11th Cir. 2010).

criminal activities. *See U.S. v. Sanga,* 967 F.2d 1332, 1335 (9th Cir. 1992).

B. In Any Event, The CVRA Does Not Contain An Exemption For "Co-Conspirators"

Even if record evidence and applicable law supported a conclusion that ICE was Defendants' "co-conspirator" – which it did not – that matter is irrelevant to whether ICE is a "victim" under the CVRA.[12] Congress included no exemption blocking "co-conspirators" from the CVRA's protections. Instead, Congress broadly applied the CVRA's protections to any "person directly and proximately harmed as the result of the commission of a Federal offense...." 18 U.S.C. § 3771(e)(1). Courts should "not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite." *Myers v. TooJay's Mngmt. Corp.*, 2011 WL 1843295, *7 (11th Cir. 2011).

Further, the Informations did not identify ICE as a co-conspirator or as otherwise having any responsibility for Defendants' scheme. That should have been the end of the matter. As the Court has explained, the proper way to analyze

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[12] Notably, the definition of "victim" does not consider the morality or culpability of the victim, and even when a victim plays a role in a defendant's crimes, courts have found restitution appropriate. *See U.S. v. Ojeikere*, 545 F.3d 220, 222-23 (2d Cir. 2008); *Sanga*, 967 F.2d at 1334. In instances where courts refused to recognize individuals or entities as victims as a result of their conduct, such a determination involved a fact-intensive inquiry. *See U.S. v. Lazar*, 2011 WL 988862, *3 (D. Mass. 2011); *U.S. v. Lazarenko*, 624 F.3d 1247, 1252 (9th Cir. 2010); *U.S. v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006).

CVRA "victim" issues is: "[F]irst, we identify the behavior constituting 'commission of a Federal offense.' Second, we identify the direct and proximate effects of that behavior on parties other than the United States. If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA." *In re Stewart*, 552, F.3d at 1285. The behavior constituting a federal offense was Defendants' bribery scheme; that scheme directly and proximately harmed ICE; and thus ICE was a "victim." The District Court's decision to limit the CVRA was simply without any legal basis.

C. The MVRA, Not The VWPA, Governs Bribery Cases Like These

To make restitution discretionary rather than mandatory, Defendants contended below the Victim and Witness Protection Act ("**VWPA**") applied instead of the MVRA. (T18, p.3-4; *TN, pp. 3-4*). This contention has no legal support. But even if the VWPA applied, restitution would still be warranted.[13]

The MVRA applies to any "offense against property under [Title 18] …, including any offense committed by 'fraud or deceit'." 18 U.S.C. § 3663A(c)(1)(A)(ii). The MVRA governs these proceedings for two independent reasons. First, the MVRA "applies to all offenses … involving 'fraud or deceit'."

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[13] *See U.S. v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998)(awarding restitution for guilty pleas to conspiracy charges); *U.S. v. Gamma Tech Ind., Inc.*, 265 F.3d 917, 926 (9th Cir. 2001); *U.S. v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991)(awarding restitution under VWPA); *U.S. v. McNair*, 605 F.3d 1152, 1219 (11th Cir. 2010)(same); *U.S. v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1989)(same).

U.S. v. Singer, 2005 WL 2605400 (11th Cir. 2005)(emphasis added). These cases involve such offenses. Defendants admitted they engaged in "fraud or deceit" because, in part, they "knowingly falsified" their books and records, including by "drafting sham" business agreements, "mischaracterizing" bribes as legitimate expenses, preparing "false invoices," and entering into sham "business consulting agreements." (T1 ¶121; *TA ¶121*) Indeed, courts have universally applied the MVRA to the conspiracy offense to which Subsidiary Defendants pled guilty.[14] Notably, in a recent prosecution in the District Court for violations of the same statute implicated here, committed against a similar party as ICE, restitution was ordered after defendant pled guilty to conspiracy to commit crimes for which FCPA violations was an objective. *See U.S. v. Diaz*, No. 09-cd-20346-JEM, Doc. 37 (S.D. Fla. Aug. 5, 2010).

Second, the MVRA governs because the underlying offenses are Title 18 "offenses against property." "Offenses against property" are those "in which physical or tangible property, including money, is taken ... by theft, deceit or fraud." *U.S. v. Cummings*, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002). By inducing ICE to buy Defendants' products and services with bribes, Defendants "took" ICE's property by "theft, deceit or fraud." This matter is governed by the MVRA,

[14] *See U.S. v. Quarrell*, 310 F.3d 664, 677 (10th Cir. 2002); *U.S. v. Futrell*, 209 F.3d 1286, 1290 (11th Cir. 2000).

not by the VWPA.

D. ICE Is Entitled To Restitution, And At Least Part Of The Restitution Amount Has Already Been Determined

"[T]o put a nail in this coffin," the District Court held – also with little explanation and no record or legal support – that even if ICE was a victim it would not be entitled to restitution. (T30 53:3-17; *TV 53:3-17*) The District Court concluded this matter would be too complex for restitution. That conclusion also is error under applicable law and record evidence. Courts may decline restitution to a victim under the MVRA if the court finds from the "facts on record" that:

> (B) 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 to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3). No record evidence supported the District Court's conclusion.

1. The District Court Erred In Concluding The Complexity Exception Would Preclude Restitution

ICE submitted to the U.S. Probations Officer (who forwarded to the District Court) a concise Declaration of Victim Losses ("**ICE Loss Declaration**") showing restitution was not speculative. (T33; *TAA*); *see U.S. v. Peterson*, 538 F.3d 1064, 1077-78 (9th Cir. 2008)(court's reliance on declaration and report of losses when measuring restitution was proper). The declaration showed the amount of bribes ($17,387,405.74), which was already in the record below, as a component of

restitution. (*Id.*) Other components are similarly straightforward and calculated with certainty, such as costs of undelivered equipment, professional fees incurred, and other itemized discrete costs incurred by ICE.[15]

In response, neither DOJ nor Defendants submitted anything or cited any pertinent case. Instead, they relied on unsupported assertions that determining restitution would require (1) "a hearing lasting weeks, if not months," with countless witnesses, numerous experts, and scores of exhibits; and (2) "unwinding the corrupted tender process." (T20 pp. 24, 27; *TO pp. 24, 27*). These assertions were fabrications. Despite obligations to use "best efforts" to accord ICE victim rights, DOJ did not investigate ICE's losses (or other effects on ICE of Defendants' crimes). 18 U.S.C. § 3771(c)(1). Without an appropriate investigation, DOJ had no basis to claim that ICE's losses were too speculative or complex to measure.

Similarly, the District Court had no basis to agree with those claims. It should have strived to "reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving

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[15] Although DOJ bore responsibility for establishing victim losses for restitution, a victim like ICE may "prove up its own claim for restitution...." *Gamma Tech Ind.*, 265 F.3d at 924; *U.S v. Cloud*, 872 F.2d 846, 855 (9th Cir. 1989). Further, "determination of ... restitution amount is by nature an inexact science." *U.S. v. Teehee,* 893 F.2d 271, 274 (10th Cir. 1990); *Futrell*, 209 F.3d at 1291-92; *U.S. v. Matos*, 611 F.3d 31, 45 (1st Cir. 2010); *U.S. v. Ahidley,* 486 F.3d 1184, 1189 (10th Cir. 2007); *U.S. v. Jackson,* 155 F.3d 942, 949 n.3 (8th Cir. 1998).

fairness to the victim," ICE. *Bold*, 412 F. Supp. at 829-30. ICE streamlined the restitution process, yet the District Court declined to order restitution based on perceived, but unsubstantiated, complexity or speculation.[16] *U.S. v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006)(court abused discretion by relying on perceived complexity to decline restitution under MVRA).

2. At A Minimum, The District Court Erred By Not Awarding Restitution In The Amount Of Bribes

A victim is entitled to restitution in the full amount of its losses. 18 U.S.C. § 3664(f)(1)(A). Here, there is a category of restitution that as a matter of law is recoverable and which requires no calculations at all: the amount of bribes paid by Defendants to "win" ICE's contracts. The evidence established the bribe amount was $17,387,405.74, which was conceded by all parties and reflected in ICE's Loss Declaration. (T33; *TAA*) In connection with those bribes, ICE entered into contracts with Defendants totaling $303 million. (T1 ¶¶46-47, 51; *TA ¶¶46-47, 51*) Every dollar paid by Defendants as bribes deprived ICE of the honest services of bribed personnel. *See U.S. v. Woodard*, 459 F.3d 1078, 1087 (11th Cir. 2006);

[16] Courts have awarded restitution in cases more complex than these. *See U.S. v. Gordon*, 393 F.3d 1044, 1054-55 (9th Cir. 2004)(noting "sophisticated analysis in determining the restitution amount"); *Bold*, 412 F. Supp. 2d at 829 ("[C]ourts should not ... refuse to award restitution ... simply because calculating an award may present complications."); *U.S. v. Catoggio*, 326 F.3d 323, 328 (2d Cir. 2003) ("[p]roceeding with restitution in this admittedly complex case."); *U.S. v. Hand,* 863 F.2d 1100, 1104 (3d Cir.1988)("Difficulties of measurement ... should not bar restitution....").

U.S. v. Carter, 217 U.S. 286, 305-06 (1910)(when public official acquires ill-gotten benefit, government suffers losses in that amount). As a matter of "common sense," money paid as a bribe to procure a commercial contract is added to the price of that contract. *McNair*, 605 F.3d at 1219, 1221. The District Court thus erred by failing to award, at a minimum, restitution in the amount of the bribes.

3. The District Court Also Erred By Failing To Address Other Measures Of Restitution Sought By ICE

The District Court's blanket conclusion that restitution would be too complex is belied by awards in other cases for the same categories of losses sought by ICE. Courts have identified, among others, the following bases for restitution: (1) the supply of inferior and over-priced products and services; (2) losses from business interruption; and (3) expenses for participating, investigating, prosecuting, and attending criminal proceedings.[17] ICE's Victim Loss Declaration concisely set forth the losses suffered in each of these categories. Yet, the District Court made no specific findings with respect to these measures of losses, simply concluding in cursory fashion that determining restitution would be too complex. This was error.

E. ICE's CVRA Right To Reasonably Confer With Government Attorney Was Violated

The District Court erred by failing to recognize DOJ violated ICE's rights

[17] *See, e.g.*, 18 U.S.C. § 3663A(b)(4); *U.S. v. Kamuvaka*, 719 F. Supp. 2d 469 (E.D. Pa. 2010); *U.S. v. Gordon*, 393 F.3d 1044, 1057 (9th Cir. 2004); *U.S. v. Scott*, 2009 WL 983032, *1 (2d Cir. 2009); *U.S. v. Donaghy*, 570 F. Supp. 2d 411, 433 (E.D.N.Y. 2008); *U.S. v. Amato*, 540 F.3d 153, 159 (2d Cir. 2008).

under the CVRA, including (i) the reasonable right to confer with DOJ's attorney and (ii) the right to reasonable, accurate, and timely notice. 18 U.S.C. § 3771(a)(2),(5). The District Court apparently accepted DOJ's contention that it afforded ICE all victims' rights even though it admittedly communicated with and provided notices to ICE's counsel only after reaching settlements with Defendants. (T20 pp.13-19; *TO pp.13-19*) ICE, however, was entitled to confer with DOJ before the settlements were reached. *See In re Dean*, 527 F.3d at 394-96; *Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d at 546 (D.N.J. 2009); *U.S v. Rubin*, 2008 WL 2358591 (E.D.N.Y. 2008); *U.S. v. Okun*, 2009 WL 790042 at *2 (E.D. Va. 2009); 18 U.S.C. § 3771(a)(5). Under the CVRA, victims have the "the[] right to confer with prosecutors when the Justice Department is negotiating pre-indictment plea agreements and non-prosecution agreements with defense attorneys...." 157 CONG. REC. S3608 (June 8, 2011)(statement of Sen. Kyl).[18]

Further, even assuming DOJ was correct and its duty to confer attached after filing a case, DOJ still failed to do that. This prosecution has been ongoing for four years, beginning in 2007 when DOJ filed a case against Sapsizian and Valverde for their participation in Defendants' scheme. (T10 Ex. 22; *TG Ex. 22*).

[18] *See* Atty. Gen'l Guidelines for Victim and Witness Assistance, Art. IV.A(2); B(2)(c) (May 2005)("At the earliest opportunity after the detection of a crime ... the responsible official ... shall identify the victims.... A victim has the reasonable right to confer ... about major case decisions ..., plea negotiations and pretrial diversion.") (emphasis added).

Yet, ICE was never contacted. (T23 pp.9-10; *TS pp.9-10*). Even under DOJ's view that victim rights attach after a case is filed, it was obligated to confer with ICE years ago. DOJ ignored ICE until it repeatedly contacted DOJ to notify that it was a victim. (T23 Ex. 2 ¶¶7,9,14; *TS Ex. 2 ¶¶7,9,14*). By then, these cases were substantively complete because the settlements were finalized in December 2010. In short, ICE was not "notified of the ongoing plea discussions" or afforded the right "to communicate meaningfully with the government ... *before* a [plea] deal was struck." *In re* Dean, 527 F.3d at 395, 396.

DOJ failed to use its "best efforts" to gather information to present to the District Court on whether restitution is appropriate. Further, DOJ reached Rule 11(C)(1)(c) plea agreements with Defendants, which by their terms prevented an award of restitution. DOJ's failure to confer with ICE in accordance with CVRA requirements and its decision to strike a settlement that foreclosed victims' rights was a blatant violation of its duties under the CVRA. DOJ did this while contending that such rights would be too time-consuming to recognize and consideration of damages would be too complex. The District Court accepted this, and ICE is left with no adequate remedy absent issuance of a writ of mandamus pursuant to the CVRA. *See Monzel,* 2011 WL 1466365 at *10 ("Since enactment of the CVRA, every circuit to consider the question has held that mandamus is a crime victim's only recourse for challenging a restitution order.").

Respectfully submitted, this 15th day of June, 2011.

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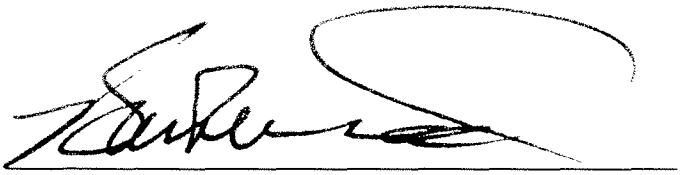

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