UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 11-12716-GG *consolidated with* Case No. 11-12802-GG

UNITED STATES OF AMERICA, Plaintiff/Appellee,

versus

ALCATEL-LUCENT, S.A., etc., *et al.*, Defendants-Appellees.

INSTITUTO COSTARRICENSE DE ELECTRICIDAD, Interested Party-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

INITIAL BRIEF OF INTERESTED PARTY-APPELLANT, INSTITUTO COSTARRICENSE DE ELECTRICIDAD

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CERTIFICATE OF INTERESTED PERSONS

Appellant by and through undersigned counsel and pursuant to Fed. R. App. P. 26.1, submits this Certificate of Interested Persons and Corporate Disclosure Statement. Appellant is a party in interest in the proceedings below and 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. 26.1-1.

1. Alcatel Centroamerica, S.A.
2. Alcatel-Lucent, S.A.
3. Alcatel-Lucent France, S.A.
4. Alcatel-Lucent Trade International, A.G.
5. Brombacher, Randolph
6. Cassell, Paul G.
7. Honorable Cooke, Marcia G.
8. Duross, Charles E.
9. Gaboury, Mario T.
10. Gentin, Andrew
11. Govin, James
12. Guerra, George L.
13. Heller, Dominique E.
14. Instituto Costarricense de Electricidad (the victim)

15. Maglich, Jordan D.
16. Meyer, Robert
17. Morello, Gianluca
18. Rotker, Michael A.
19. Saavedra, Damaso
20. Saavedra, Pelosi, Goodwin & Hermann, A.P.A.
21. Sale, Jon
22. Sale & Weintraub, P.A.
23. Weinstein, Martin
24. Wiand, Burton W.
25. Wiand Guerra King P.L.
26. Willkie Farr & Gallagher LLP

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STATEMENT WITH REGARD TO ORAL ARGUMENT

Oral argument is desired and should be heard because the substance of this appeal raises important constitutional issues about crime victims' rights, which are matters Congress has emphasized must be protected by Courts. Argument is also particularly appropriate in this case because the Court has carried the issue of whether it has jurisdiction over this appeal, and that issue is the subject of differing treatment among the Circuits. (Dkt. 7/26/2011, 8/5/2011) This Court has never before addressed this jurisdictional question under the present circumstances and, in fact, explicitly limited the scope of its ruling in *United States v. Franklin*, 792 F.2d 998 (11th Cir. 1986), to not apply to the circumstances of this case. No other binding law addresses the precise issue before the Court, namely, whether a *de facto* intervenor in the proceedings below may maintain a direct appeal under the Crime Victims Rights Act. Accordingly, oral argument would be of benefit to the Court when determining these matters.

I. JURISDICTIONAL STATEMENT

The District Court possessed original jurisdiction under 28 U.S.C. § 1345 because the Department of Justice (**"DOJ"**) commenced the action. This Court has jurisdiction under 28 U.S.C. § 1291 because the final orders under review came from the District Court. On June 1, 2011, the District Court's final order denying Instituto Costarricense de Electricidad's ("**ICE**") request for relief as a victim was announced from the bench. Acceptance of Defendants' Deferred Prosecution Agreement (**"DPA"**) and judgments of guilt were entered the same day. ICE timely filed its notice of appeal on June 10, 2011.

II. STATEMENT OF THE ISSUES

> Whether ICE's due process rights were violated when the District Court adjudicated ICE a "co-conspirator" in the absence of a criminal charge, evidentiary hearing, or sufficient evidence and denied it victim status under the Crime Victims Rights Act (**"CVRA"**), 18 U.S.C. § 3771, thereby nullifying congressionally guaranteed rights specified in that statute.

III. STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

On December 27, 2010, DOJ filed Informations in the U.S. District Court for the Southern District of Florida (**"District Court"**) charging Alcatel-Lucent, S.A. ("**Parent Defendant**") with violating the Foreign Corrupt Practices Act (**"FCPA"**), 15 U.S.C. § 78dd-1 *et seq*., and charging certain of its subsidiaries, Alcatel-Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel

Centroamerica, S.A ("**Subsidiary Defendants**"), with conspiracy to violate provisions of the FCPA.[1] (V1 Dkt.1)[2] The Informations alleged – and Defendants admitted that− for decades, Defendants perpetrated a global scheme to obtain telecommunication business by bribing foreign decision makers and officials in more than 20 countries. (*Id*.) ICE, an autonomous state-owned entity that provides telecommunication services throughout Costa Rica, was a victim of Defendants' scheme. (V1 Dkt.1¶13)

On January 4, 2011, the undersigned contacted DOJ on behalf of ICE to advise that ICE was a victim of the conduct alleged in the Informations and request a Victim Identification Number (**"VIN"**) and Personal Identification Number (**"PIN"**). (F2 Dkt.57 Ex. 2) In response, DOJ asserted ICE was a government entity and, therefore, not entitled to a VIN. (*Id*.) DOJ also stated it "thought of ICE as a participant in the bribery scheme," rather than a victim. (*Id*.) ICE

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[1] Parent Defendant and Subsidiary Defendants are referred to collectively as "**Defendants.**"

[2] The case number below against Parent Defendant was 10-cr-20907 and the one against Subsidiary Defendants was 10-cr-20906. The District Court prepared a record in case number 10-cr-20906 consisting of two volumes of pleadings, three volumes of transcripts, and two accordion folders. Citations to the record are "(V_ Dkt._)" or "(F_ Dkt. _)," which refer to the volume number or folder number, respectively, followed by the docket entry number and, as necessary, specific exhibits, page, or paragraph numbers. As the record in case 10-cr-10907 is nearly substantively identical to the one in Case 10-cr-20906, this only cites to the record in the latter case.

explained it was not, in fact, a "foreign government" and also elaborated on how, rather than being a "participant," it was victimized by Defendants' scheme. (*Id*.)

On February 22, 2011, DOJ filed Plea Agreements with the Subsidiary Defendants. (V1 Dkt.10,11,12) The District Court held a status conference on March 9, 2011. (V3 Dkt.20) ICE appeared at the status conference and advised the District Court that it was a victim and that DOJ believed otherwise. (*Id.* at 4:2-5; 18:4-19:3) Finding there was "disagreement about who the victim is," the District Court ordered a "probation report" and informed ICE that it could make a presentation to probation. (*Id.* at 18:21-19:7; 20:1-4)

On May 2, 2011, ICE formally intervened in the lower proceedings by filing a Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) (**"Petition"**), seeking to be recognized as a victim under the CVRA that is entitled to mandatory restitution under the Mandatory Victims Rights Act, 18 U.S.C. § 3663A, (**"MVRA"**). (F1 Dkt. 22; V2 Dkt.24) ICE's counsel notified the U.S. Probation Office that it was filing the Petition and that ICE would submit an affidavit itemizing its victim losses. (F2 Dkt.57 Ex. 2) ICE subsequently prepared and submitted to probation its Declaration of Victim Losses (**"Victim Losses Declaration"**). (***See* Exhibit A**)[3]

[3] ICE has moved this Court to correct the record on appeal to include (1) the probation report that was prepared at the District Court's direction and (2) all other related materials which probation submitted to the District Court, including the Victim Losses Declaration. As that motion remains pending at the time of this

A change of plea hearing was held on June 1, 2011 at which counsel for ICE, DOJ, and Defendants presented argument. (V2 Dkt.25, 58, 61, 75) Importantly, no evidence was taken and the District Court never announced any findings of facts or conclusions of law. (V5 Dkt.80) Instead, from the bench the District Judge stated she "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. Specifically, the District Court's ore tenus ruling stated:

> I think there's only one issue that I need to determine and all else flows from there, and that's whether or not ICE, ICE, whatever would be the way of pronouncing the acronym, would be a victim here. I don't think it is, and I will say why….First and foremost, I think that victim offender status here is so closely intertwined that to try to figure out the behavior of who was the victim and who was the offender would be difficult. Secondly...I think that given the nature of the corporate conduct in this area, it seems, based upon the findings and the things that have been filed in this case, that the behavior of the victim and the behavior of the quote-unquote victim and the behavior of the defendant here are closely intertwined. I see that from the pervasiveness of the illegal activity, the constancy of the illegally [sic] activity and the consistency over a period of years. I think you have, even though not a charged conspirator coconspirator relationship, that's essentially what went on here; that given the high-placed nature of the criminal conduct within the organization, the number of people involved, that basically it was "Bribery Is Us," meaning that

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filing, ICE is attaching the Victim Losses Declaration as Exhibit A. If this Court denies ICE's motion, this Court may disregard the attached Exhibit, which provides additional support for the argument in Section 2.B.4 of this brief but does not affect the other arguments.

> everybody was involved in it. Even though you didn't know specifically, it's enough to say that the principals were involved here. In saying that, I have to say that despite the representation of ICE, I think even though the Government was not obliged to, it treated them with appropriate informational respect in regard to this case and what they should know.

(V5 Dkt.80 p51:19-52:25).

ICE appealed and also filed two identical Petitions for Writ of Mandamus ("**Mandamus Petitions**") under the CVRA (one in case number 10-cr-20906 and the other in 10-cr-20907), which this Court *sua sponte* consolidated, along with an extensive record consisting mostly of evidence submitted by ICE showing it is a victim under the CVRA. Pursuant to the CVRA, appellate courts must resolve mandamus petitions within 72 hours. 18 U.S.C. § 3771(d)(3). ICE moved to waive the 72-hour requirement in light of the substantial record it submitted (Consolidated cases 11-12707 and 11-12708, Dkt. 6/16/2011) but within the 72-hour period, a two-judge Panel denied the motion to waive and Mandamus Petitions (Consolidated cases 11-12707 and 11-12708, Dkt. 6/17/2011). The issues raised in this appeal were not raised in the Mandamus Petitions.[4]

B. Statement Of The Facts

Defendants have admitted that for decades, they conducted business through

[4] DOJ and Defendants moved to dismiss this appeal arguing this Court lacked jurisdiction, and ICE opposed those motions. (Dkt. 7/8/11, 7/14/11, 7/18/11, 7/26/11) This Court decided to carry those motions with the case. (Dkt. 10/17/11).

a scheme of corruption by hiring "consultants" to funnel bribes to decision makers in return for telecommunications contracts. (V1 Dkt.1 ¶29) A small portion of Defendants' scheme occurred in Costa Rica between approximately 2000 and 2004, and targeted and victimized ICE. (V1 Dkt.1¶¶ 39-53) In Costa Rica, Defendants admittedly funneled $17,387,405.74 to "consultants" to bribe six individuals affiliated with ICE (out of approximately 15,000 people affiliated with ICE) to award Defendants contracts valued at $303 million. (V1 Dkt.1 ¶¶16, 39-51, 85-127) ICE (i.e., the corporation) received none of the bribe money. (F2 Dkt.57 Ex. 1 ¶13) Defendants' criminal activities, combined with the dishonest acts of six rogue ICE individuals, who exploited their positions for personal gain, caused ICE direct and proximate losses. (*Id.*; Ex. A)

Defendants' scheme was revealed in 2004 when the then-President of a Subsidiary Defendant, Edgar Valverde Acosta (**"Valverde"**), admitted bribing the incumbent President of Costa Rica and ICE's six rogue individuals. (V1 Dkt.1 ¶¶10, 48; F1 Dkt.22 Ex.21 p24:10-15, Ex.23 p255:2-8, Ex.30 p31:10-12) ICE first learned of these individuals' criminal acts at that time; they were promptly terminated and then prosecuted with ICE's support. (F1 Dkt.22 Ex.34; F2 Dkt.57 Ex.1 ¶¶11, 12) Valverde's admission spawned investigations in the United States and France. (V3 Dkt.20 p6:18-25) In turn, 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, as a cover alleging they were rogue. (F1 Dkt.22 ¶¶13-14; F1 Dkt.22 Ex.38) In late 2006, however, when another of Defendants' executives, Christian Sapsizian (**"Sapsizian"**), was arrested and began cooperating with DOJ, Defendants were left with no choice but to cooperate. (V1 Dkt.1 ¶9; F1 Dkt.22 Ex.30 p13:20-22). Prosecution of this matter actually began in 2006 when DOJ charged Sapsizian and Valverde, Defendants' agents, with aiding and abetting Defendants' violations of the FCPA in connection with their scheme's activities in Costa Rica. (V1 Dkt.2 ¶¶1,2,4,5) Although DOJ's investigation began in 2004, and DOJ initiated the first case in 2006, in derogation of its obligations under the CVRA, DOJ never contacted ICE, whether to inquire about events, or to determine whether it was harmed by Defendants' conduct.[5] (F2 Dkt.57 Ex. 2 ¶¶7-9).

[5] The CVRA provides victims the "right to reasonable, accurate, and timely notice of any public court proceeding … involving the crime . . . of the accused," the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing…." and the "reasonable right to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(2),(4),(5). Thus, DOJ was obligated to contact ICE no later than 2006 when it indicted Sapsizian and Valverde. But even putting that to the side, it had to contract ICE before it settled these cases with Defendants. Crime victims have the right to confer *before* settlement is reached when the DOJ is negotiating pre-indictment plea agreements. *See In re Dean*, 527 F.3d 391, 394-96 (5th Cir. 2008); *U.S. v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 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); 157 CONG. REC. S3608 (June 8, 2011)(Victims have the "the[] right to confer with prosecutors when the Justice Department is negotiating

Defendants have now admitted their criminal conduct. In February 2010, Defendants announced settlements with DOJ, which were made publically available in December 2010. (F1 Dkt.22 Ex.31) Subsidiary Defendants agreed to plead guilty to the Informations. (V1 Dkt.10, 11, 12) The Informations and Plea Agreements establish that ICE was a target of Defendants' crimes (VI Dkt.1, 10, 11, 12), and ICE was directly and proximately damaged by Defendants' bribery of six individuals formerly associated with ICE.[6] (V1 Dkt.1 ¶¶16, 29, 39-47, 51) Although those individuals accepted bribes (and they were promptly terminated by ICE and prosecuted, and are now incarcerated), nothing in the Informations accuses ICE of any wrongdoing, let alone that it was Defendants' co-conspirator. (V1 Dkt.1 ¶¶13, 16) ICE's lawyers contacted DOJ in January 2011 to convey that ICE was a victim and trigger victim rights procedures. (F2 Dkt.57 Ex. 2 ¶¶7-9) DOJ declined to consider ICE a victim, believing the conduct of those six individuals (out of over 15,000 associated with ICE) should be attributed to the principal whom they had defrauded. (F1 Dkt.22 Ex. 46; F2 Dkt.57 Ex. 2¶ 17)

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pre-indictment plea agreements and non-prosecution agreements with defense attorneys....")(statement of Sen. Kyl). DOJ did not do that either.

[6] The payment of bribes alone constitutes direct and proximate injury to ICE. *See U.S. v. McNair*, 605 F.3d 1152, 1221-22 (11th Cir. 2010); *U.S. v. Gamma Tech Ind., Inc.*, 265 F.3d 917 (9th Cir. 2001); *U.S. v. Gaytan*, 342 F.3d 1010, 1011 (9th Cir. 2003).

C. Standard Of Review

Whether the District Court's conduct below violated ICE's constitutional due process rights is reviewed for plain error. *U.S. v. Remy*, 386 Fed. Appx. 908, fn.1 (11th Cir. 2010). Plain error requires: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* To the extent this Court's review involves a legal interpretation made by the District Court, the review is *de novo. U.S. v. Smith*, 343 Fed. Appx. 441, 442 (11th Cir. 2009) ("When an issue presented involves a legal interpretation, review is *de novo*.").[7]

IV. SUMMARY OF THE ARGUMENT

The CVRA conferred on ICE property rights, which are covered by the U.S. Constitution's due process protections. These property rights were violated without due process for three independent reasons: (1) because ICE was denied victim status in the absence of a meaningful hearing; (2) because the District Court adjudicated ICE a "co-conspirator" when ICE was never even accused of a crime or afforded the due process protections given to criminal defendants who are

[7] The determination of whether one is a "victim" under the CVRA is a pure legal issue that is reviewed 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" reviewed *de novo*); *U.S. v. De La Fuente*, 353 F.3d 766, 771 (9th Cir. 2003)(same).

charged with crimes; and (3) because ICE was adjudicated a co-conspirator in the absence of any supporting evidence, let alone sufficient evidence for a reasonable trier of fact to reach such a conclusion. Accordingly, the District Court committed plain error and reversal is required.

V. ARGUMENT

A. ICE Is Entitled To Due Process Protections

The Due Process Clause states, "no person shall be … deprived of life, liberty, or property without due process of law." U.S. Const. Amend. V. These protections extend to foreign corporations. *See e.g., Intern'l Shoe Co. v. Wash. Office of Unemployment Compensation and Placement*, 326 U.S. 310 (1945); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418-19 (1984). ICE is an autonomous foreign corporation and, though state owned, it is not a foreign government or an agent of the Costa Rican government. (F1 Dkt. 22 Exs.1,3,5,7) As such, ICE is entitled to due process protections.[8]

[8] In *Republic of Argentina v. Weltover, Inc*., the U.S. Supreme Court "assum[ed] without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause." 504 U.S. 607, 619 (1992). Subsequently, the D.C. and Second Circuits concluded foreign states and their "agents" are not "persons" entitled to due process rights. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Rep.*, 582 F.3d 393, 400 (2d Cir. 2009). This Circuit has declined to "determine the precise constitutional status of a foreign sovereign." *S & Davis Int'l v. The Rep. of Yemen*, 218 F. 3d 1292, 1304-05 (11th Cir. 2000)). However, *Frontera* distinguished foreign states and their agents from autonomous

The requirements of procedural due process apply to the deprivation of interests encompassed by the Fifth and Fourteenth Amendments. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1972). The terms "liberty" and "property" are construed as "broad and majestic terms," and "[p]roperty interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 570-71. Property interests are not created by the Constitution; rather, they are "defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577; *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 926 (11th Cir. 1982)("A property interest in a benefit may be established through…construction of statutes and regulations which define…the interest asserted."); *Qian v. Shinseki*, 747 F. Supp. 2d 1362, 1367 (S.D. Fla. 2010)(considering due process rights by construing federal statutes).

Property interests may take many forms. *Roth*, 408 U.S. at 576. Of relevance here, entities have a protected property interest in statutory rights even if they have not demonstrated they, in fact, fall within the statutory terms of

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state-owned foreign corporations. 582 F.3d at 401. ICE is not a foreign state or agent of a foreign state, but is a state-owned entity that is operationally and financially autonomous. (F1 Dkt. 22 Exs.1,3,5,7) Accordingly, the holdings reached by the D.C. and Second Circuit do not change the conclusion that ICE enjoys due process protections.

eligibility. *Id*. at 579 ("The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.") (citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) ("Such benefits are a matter of statutory entitlement for persons qualified to receive them. There termination involves state action that adjudicates important rights.")). To determine whether due process protections apply, courts look to the nature of the interest at stake. *Roth*, 408 U.S. at 571. Here, the interest at stake is the entitlement to statutory rights afforded "victims" like ICE under the CVRA.

1. Crime Victims Have Constitutionally Protected Property Interests Under The CVRA.

In October 2004, Congress passed the CVRA to give crime victims a series of enforceable "rights" in the federal criminal justice process. 18 U.S.C. § 3771(a). Congress designed the CVRA to be "the most sweeping federal victims' rights law in the history of the nation." Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 582 (2005). The CVRA states in relevant part:

> A crime victim has the following ***rights***:
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding… involving the crime…of the accused.

* * *

(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.

* * *

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

* * *

(b) Rights afforded.--

(1) … The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

18 U.S.C. § 3771(a)(5),(6),(8)(emphasis added); 18 U.S.C. § 3771(b)(1). Under the CVRA, federal courts are tasked with ensuring crime victims are provided the enumerated rights. 18 U.S.C. §3771(b)(1) ("In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in [the CVRA]."). If the district court denies a right asserted by a victim, reason for the denial must be clearly stated on the record and the victim can seek review in the courts of appeals. 18 U.S.C. 3771(d)(3) ("If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith within 72 hours…."). In short, a crime victim has protected property interests in the rights enumerated in the CVRA. *Jeffries*, 678 F.2d at 926 (due process interest may be established through the construction of statutes and regulations which define the interest asserted).

2. ICE Is A Crime Victim Under The CVRA And Was Entitled To Due Process Before Its Protected Property Rights Were Withheld.

Although ICE need not demonstrate it was a "victim" under the CVRA to have a constitutionally protected property interest in the statute's enumerated rights, *Roth*, 408 U.S. at 579, ICE did, in fact, establish it was a victim as a matter of law. 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). Here, ICE was directly and proximately harmed by Defendants' crimes. ICE's evidence and legal argument established it was directly and proximately harmed by Defendants' bribery scheme, therefore, a victim under the CVRA. (F1 Dkt.22 pp5-7; F2 Dkt.57 Ex.1; Ex. A); *McNair*, 605 F.3d at 1221-22. Indeed, the Informations detail Defendants' conspiracy and its use of bribes to the individuals associated with ICE to "win" $303 million worth of contracts from ICE. (V1 Dkt.1¶¶82-139). An entity is a "victim" when its affiliated individuals are bribed to sway the entity's decisions to the detriment of the entity. Agents who accept bribes or kickbacks operate for their own benefit and to the detriment of their principals.[9] (city whose former official accepted bribes was victim).[10] No record

[9] Indeed, as a matter of law, 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

evidence below reflected any benefit to ICE from the bribes, and neither DOJ nor Defendants contested the evidence and legal authority submitted by ICE showing it was a victim because it was directly and proximately harmed by Defendants' crimes. The District Court simply did not address it. *See In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) ("If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA.") Accordingly, ICE established below that it was a crime victim entitled to all statutory rights afforded by the CVRA.

B. ICE's Due Process Rights Were Violated

1. ICE Was Deprived Of A Meaningful Opportunity To Be Heard.

The "central meaning of procedural due process" is the right to "notice" and an opportunity to be heard "at a meaningful time and in a meaningful manner."

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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). Neither the District Court, DOJ, nor Defendants addressed this well-established legal principle.

[10] *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).

Fuentes v. Shevin, 407 U.S. 67, 82 (1972). The "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Goldberg*, 397 U.S. at 263; *Eldridge*, 424 U.S. at 332 ("The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society."). As explained by the U.S. Supreme Court:

> [I]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Goldberg, 379 U.S. at 270-71.

Here, the District Court recognized that ICE's status as a victim was disputed. Indeed, that is why it ordered a probation report. (V3 Dkt.20 at 18:21-19:7; 20:1-4) Ultimately, DOJ's and Defendants' contention that ICE was a participant in Defendants' crimes was adopted by the District Court even though no evidence (record or otherwise) supported that contention. However, the District Court did not hold an evidentiary hearing (and it instead relied on <u>argument</u> by DOJ's and Defendants' counsel to conclude ICE was a "co-conspirator"). By failing to hold an evidentiary hearing, the District Court deprived ICE of statutorily guaranteed rights and plainly erred. Since the District Court acknowledged there was a disputed question as to ICE's victim status, due

process required holding an evidentiary hearing and giving ICE an opportunity to confront and cross-examine adverse witnesses. *Goldberg*, 379 U.S. at 270-71.

This was especially necessary here because in the absence of any record evidence to support the District Court's conclusion (as detailed below in Section II.B.3), the only possible source of information upon which the District Court could have relied to conclude that ICE was a "co-conspirator" was the probation report and related materials provided at the District Court's direction. Specifically, DOJ and Defendants submitted information to probation relating to ICE's victim status, which was used to formulate the report considered by the District Court – yet ICE was not permitted access to that information. (V5 Dkt.80 p5:8-24; 6:3-21)

An evidentiary hearing was particularly necessary here also because of Defendants' and DOJ's motives. As stated by the U.S. Supreme Court:

> Certain principles have remained relatively immutable . . . where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue . . . it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice . . . .

Goldberg, 379 U.S. at 270-71. Here, DOJ and Defendants had material adverse interests in ensuring ICE was denied victim status. Defendants' interest was monetary: the avoidance of payment of restitution under the MVRA. DOJ's

interest was expediency and "saving face." Not only was DOJ focused on concluding this matter, as evidenced by its unusual use of Rule 11(c)(1)(C) plea agreements with Defendants, [11] but it wanted to avoid the embarrassment of having ICE declared a victim since: (1) DOJ had begun its prosecution of these matters in 2006 with Sapsizian and Valverde, yet had failed to contact ICE in violation of the CVRA, 18 U.S.C. § 3771(a)(2)(4),(5); and (2) more broadly, DOJ had never tried to gather information from or otherwise communicate with ICE even though Defendants' victimization of ICE played a prominent role in DOJ's cases against Sapsizian, Valverde, and Defendants. Further, finding ICE was a crime victim entitled to restitution under the MVRA would likely have invalidated the Rule 11(C)(1)(c) plea agreements altogether, which by their terms precluded restitution.[12] In short, both DOJ and Defendants had reason to submit to the U.S. Probation Office whatever argument possible to preclude a finding of victim status thus making an evidentiary hearing on ICE's victim status all the more critical. Accordingly, by failing to have an evidentiary hearing, ICE was denied a

[11] The terms of a Rule 11(c)(1)(C) plea agreement must be either excepted in full by the District Court, or rejected. Such pleas "bind the court once the court accepts the plea." Fed. R. Crim. P. 11(c)(1)(C).

[12] Incredibly, DOJ and Defendants disagreed over whether the Plea Agreements allowed the District Court to order restitution. (V4 Dkt.28 at 7:15-22) Defendants said no and DOJ said yes, although it equivocated. (Id.) This is notable because although according to DOJ, it and Defendants intensely negotiated the Pleas Agreements over some time, they were not in agreement over a material term such as restitution.

meaningful opportunity to be heard and the District Court committed plain error.

2. ICE Was Adjudicated Guilty Of A Crime Even Though It Was Never Charged.

It is a clear violation of due process to convict a person (or entity) of a crime not charged. *De Jonge* v. *State of Oregon*, 299 U.S. 353, 361 (1937) ("Conviction upon a charge not made would be a sheer denial of due process."); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960)(same), *receded from on other grounds*; *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); *Stirone v. U.S.*, 361 U.S. 212 (1960); *see also Poremski v. McNeil*, 2008 WL 1836691, *3 (M.D. Fla. 2008).

Although ICE was never charged with a crime, let alone as Defendants' "co-conspirator," the District Court found it was a co-conspirator, and on that basis found ICE was not a victim under the CVRA.[13] This ad hoc adjudication by the

[13] As an aside, ICE's purported role as a "co-conspirator" does not disqualify it from being a victim because Congress included no exemption blocking "co-conspirators" from the CVRA's protections. The plain language of the CVRA excludes only those "accused of the crime" from victim status. 18 U.S.C. § 3771(d)(1)(a) ("[a] person ***accused*** of the crime may not obtain" relief.) ICE was not "accused" of any crime or indicted. 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); *U.S. v. Sanga*, 967 F.2d 1332, 1334 (9th Cir. 1992). Further, when courts have refused to recognize individuals or entities as victims as a result of their conduct, such a determination has involved

District Court violated ICE's due process rights. The Informations did not identify ICE as a co-conspirator or as otherwise having any responsibility for Defendants' crimes. As such, ICE was denied the due process protections afforded to criminal defendants, notice of the crime charged, the right to face its accuser, the right to examine the evidence against it, and the right to be tried by a jury. Yet ICE incurred the stigmatization and damage of a criminal conviction by being held to be a "co-conspirator" and being denied victim status and restitution. This too counted as plain error.

3. ICE Was Adjudicated Guilty In The Absence Of Sufficient Evidence.

Even setting aside the plain error discussed above, the record evidence in the District Court did not support a conclusion that ICE was a co-conspirator. The Due Process Clause protects against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Jackson*, 443 U.S. at 315 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970)). Indeed,

> The standard of proof beyond a reasonable doubt [ ] plays a vital role in the American scheme of criminal procedure, because it operates to

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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). Such a factual inquiry is precisely what is lacking in this case.

> give concrete substance to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. [ ] At the same time by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.

Id. (internal citations omitted). A "meaningful opportunity to defend, if not the right to a trial itself, presumes [ ] that a total want of evidence to support a charge will conclude the case in favor of the accused." *Id.* at 314. Thus, "[n]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof − defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id*. at 316.

Here, the District Court concluded it "thought" ICE was a "co-conspirator", and on that basis denied ICE victim status. The District Court effectively adjudicated ICE a criminal without finding anything beyond a reasonable doubt, or even making any findings of fact. *See e.g.*, *De Jonge*, 299 U.S. at 363 (discussing a case in which "the defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes"); *U.S. v. Thevis*, 84 F.R.D. 47, 50 (N.D. Ga. 1979) (criminal case in which four conspiracies were charged involving four individuals and two corporations). Indeed, there was no legal basis or factual record supporting that conclusion. So ICE, without being formally charged, was made to "suffer the onus of a criminal conviction" despite the lack of proof beyond

a reasonable doubt of all essential elements of the crime of conspiracy.

The District Court premised its adjudication of ICE as a co-conspirator – and hence its determination that ICE was not a victim – on the fact that it "thought" ICE was a "co-conspirator" and "even though not a charged conspirator coconspirator relationship, that's essentially what went on here … that basically it was 'Bribery Is Us'." (V5 Dkt.80 p52:3-19 (emphasis added)) As discussed below, this conclusion was based entirely on unsupported argument of DOJ and Defendants and not on record evidence. This was plain error because no reasonable trier of fact could have adjudicated ICE a co-conspirator beyond a reasonable doubt based on the record evidence.[14] (F2 Dkt.57 Ex. 1 ¶13; Ex. A)

Although ICE submitted evidence that it was *not* a co-conspirator,[15] the District Court improperly relied on unsupported arguments made by DOJ and

[14] In fact, there is no evidence supporting the District Court's "thought" that ICE, *the entity*, was a "co-conspirator." *See* 11th Cir. Pattern Jury Instr. 13.1 (defining 'conspiracy' as "agreement by two or more people to commit an unlawful act" and requiring proof of four distinct elements). The District Court was also wrong as a matter of law because the conduct of the six rogue ICE personnel in accepting bribes cannot be imputed to ICE. *In re Phoenix Diversified Inv. Corp.*, 439 B.R. at 242; *LanChile Airlines*, 759 F. Supp. at 814.

[15] ICE submitted *evidence* in the form of sworn declarations and court testimony that established the bribes were not disclosed by the recipients, and when those payments surfaced, ICE promptly terminated and assisted with the prosecution of the recipients. (F2 Dkt.57 Ex.1 ¶¶8, 9, 12) ICE also put forth *evidence* establishing a longstanding policy prohibiting acceptance of gratuities, which was incorporated in an ethics code in 2002. (F2 Dkt.57 Ex.1 ¶8)

Defendants, including argument about what the evidence would purportedly show, even though none of that supposed evidence was filed or made a part of the record. (V5 Dkt.80) This plainly erroneous approach was abundantly clear from an analysis of the purported "evidence" relied upon by DOJ, Defendants, and the District Court. Specifically, DOJ and Defendants argued ICE was corrupt and thus a "participant" in the crimes (V2 Dkt.46 p4; F2 Dkt.45 p6) (arguing that ICE "itself as an organization is also responsible"), and based their argument entirely on the following: (1) DOJ's recounting of hearsay statements supposedly made to it by Sapsizian; (2) a newspaper article concerning an internal audit by ICE; (3) newspaper articles of two other instances of improper gratuities accepted by ICE employees; and (4) a statement of one of the six former ICE individuals who accepted bribes. (F2 Dkt.45 pp8-12, Ex. 5, 6). As discussed below, some of these items are not even "evidence" and none of them – individually or collectively – would allow a reasonable trier of fact to find beyond a reasonable doubt that ICE – *i.e.*, the corporation − was Defendants' criminal co-conspirator.

Although DOJ and Defendants Heavily Relied On Purported Statements Of Sapsizian, Neither Of Them Submitted Any Evidence Of Those Statements.

Much of DOJ and Defendants' argument that ICE was a participant 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's counsel's argument about purported statements by him. That was not "evidence" upon which the District Court could base any decision, and thus it plainly erred.

But even putting that to the side, those supposed statements did not support the District Court's "thought" that ICE was a co-conspirator. In relevant part, DOJ argued that according to "Sapsizian, corruption at ICE had existed for a long time" (F2 Dkt.45 p8) because Sapsizian claimed he was solicited for a bribe by an unidentified ICE official sometime in the 1980s (*id*.); 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 accepted by anyone)(*id*.); and he "believed" and "suspected" some of the recipients of Defendants' bribes also received bribes from Defendants' competitors. (F2 Dkt.45 p9 (emphasis added)) At worst, these representations by DOJ of what Sapsizian said 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 establish beyond a reasonable doubt that ICE (again, the corporation) 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. (F2 Dkt.45 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[16] or, more troubling, that investigation revealed ICE was not a participant. 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. (*Id*.) 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, it undermined it by reflecting 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

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[16] Indeed, had DOJ adequately investigated this matter, logically it would have interviewed, or at least attempted to interview, Mike Quigley, the President of the Americas Region of Parent Defendant who was in charge of the Latin America sub-region where the most relevant portion of Defendants' world-wide bribery scheme occurred. Yet, Mr. Quigley stated to the press that "[t]he Securities and Exchange Commission and the US Department of Justice did not seek to interview me. . . ." Natalie Apostolou, Telecoms, http://www.theregister.co.uk/2011/05/15/alcalu_quigley_hotwater/ (May 15, 2011).

argue corruption at ICE was widespread. DOJ's "proof" for one such episode – involving former ICE employee Alvaro Retana – was, once again, 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. (F2 Dkt.45 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. (F2 Dkt.45 Ex.4). In any event, ICE individuals connected with that matter were charged criminally and sued civilly by ICE. (F2 Dkt.57 Ex. 1 ¶11) Again, rather than showing ICE was a co-conspirator, DOJ's submissions reflect efforts by ICE to address improprieties. (F2 Dkt.57 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 (**"Lobo"**) (one of the six former ICE individuals who accepted Defendants' bribes) to Costa Rican authorities as the purported "best evidence of the corruption that existed at ICE during this time frame." (F2 Dkt.45 p11, Ex.7). But rather than showing

"deep corruption" and supporting the District Court's conclusion, 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. None of this supports any conclusion that ICE was a co-conspirator.[17] Both Bravo and Lobo were terminated by ICE and prosecuted, consistent with ICE's intolerance for breaches of its ethics code. (F2 Dkt.57 Ex.1 ¶8).

Further, 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

[17] An agent who accepts bribes in derogation of his obligations to his principal act outside the scope of the employment relationship and his conduct may not be imputed to the principal. *Gamma Tech Ind., Inc.,* 265 F.3d 926; *Skilling v. U.S.*, 130 S. Ct. 2896, 2926-27 (2010); *Gaytan*, 342 F.3d at 1012.

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.

In short, the District Court relied on argument to conclude that ICE was a co-conspirator and thus not a victim of Defendants' crimes. The little evidence submitted by DOJ or Defendants did not establish that conclusion beyond a reasonable doubt, let alone support it in any way. To the contrary, those items largely showed ICE's efforts to root out any reported improprieties and hold those responsible accountable for their actions. As a result, ICE's due process rights under the CVRA as a victim entitled to mandatory restitution under the MVRA were also violated by the District Court's unsupported adjudication of ICE as a co-conspirator.

4. The District Court's Denial Of ICE's Right To Restitution Was Plain Error.

The MVRA obligates courts to award restitution to victims when a defendant is convicted for certain delineated crimes, including those to which Subsidiary Defendants pled guilty. 18 U.S.C. § 3663A. When denying ICE the right to restitution, the District Court held:

> Merely because damages exist, what would be considered restitution, does not mean that restitution flows from it. Given what has gone on in other jurisdictions, the ability for this Court to accurately, within a reasonable amount of time, and by that I don't mean lengthy months of hearings as to what the damages would be, in which country, how would they flow, how would the Court ascertain that, and I don't think that this is the kind of case, even though the [FCPA] might allow it in other cases for which restitution can be allowed, there's no victim that was damaged here in the sense that something needs to be restored or made whole. So for that reason, ICE's petition to be treated for victim status and to be awarded restitution in this matter is denied.

(V5 Dkt.80 p53:4-17). There was no evidence to support the District Court's conclusion in this regard either. To the contrary, as ICE showed below, the record evidence already supported a discrete restitution amount to which ICE is entitled. Specifically, as a matter of law, ICE is entitled to the amount of bribes paid by Defendants to the individuals associated with ICE, which amount is in the Informations and admitted by Defendants. *McNair*, 605 F.3d at 1221-22. That amount forms the floor on restitution to which ICE is entitled, and contrary to the District Court's ruling, requires no time or analysis to award to ICE. Additionally,

the Declaration of Victim Losses is undisputed evidence of other categories of damages incurred by ICE as a direct and proximate result of Defendants' crimes, and further establishes that calculating restitution in this matter would be neither difficult nor complex.

VI. CONCLUSION

The District Court's violations of ICE's due process rights constituted plain error in that, in the absence of a charged crime, it adjudicated ICE a criminal based on argument and in the absence of an evidentiary hearing or evidence sufficient to establish the crime of co-conspiracy beyond a reasonable doubt. The District Court's conclusion affected substantial rights − protected property interests in the rights enumerated in the CVRA, including the right to restitution under the MVRA. The District Court's action in depriving a crime victim of statutorily guaranteed rights under these circumstances seriously affected the fairness, integrity, and public reputation of judicial proceedings. Accordingly, this Court should: reverse the District Court's ruling; award restitution in the amount of the bribes, which Defendants have admitted and which is recoverable by ICE as a matter of law; award additional amounts of restitution based on the undisputed Victim Losses Declaration; and remand this matter for additional proceedings to determine the whether by ICE id entitled to any additional restitution as a result of Defendants' criminal conduct.

VII. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,332 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 Pt. Times New Roman font.

Respectfully submitted, this 12th day of December, 2011.

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CERTIFICATE OF SERVICE

I certify that on December 12, 2011, a true and correct copy of the foregoing has been furnished to the following via Email and United States mail:

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EXHIBIT A

PROB 72
(7/96)

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF FLORIDA

Declaration of Victim Losses

United States	)	
v.	)	
Alcatel-Lucent, S.A.	)	
Alcatel-Lucent France, S.A.	)	Case Numbers 10-20907-Cr-Cooke
Alcatel-Lucent Trade	)	and
International, AG	)	10-10906-Cr-Cooke
Alcatel Centroamerica, SA	)	

I, **Guillermo Saenz Ramirez**, residing at **100 Metros al Este de la Iglesia de Ladrillo en San Francisco de Guadalupe**, declare that **Instituto Costarricense de Electricidad ("ICE")**, which has its principal place of business at **Avenida las Americas 400 metros oeste de la agencia Nissan, Distrito Mata Redonda, Canton Central, Provincia San Jose**, is victim in the above-referenced cases and according to a **preliminary analysis**, I believe that ICE is entitled to restitution in the total amount of $ 160.323.532,26.

The corruption and bribery underlying this case which was intended to procure business for Defendants from ICE took place from at least 2001 to 2004. Those bribes enabled Defendants to "win" a number of contracts to supply ICE with telecommunications equipment and services. Those contracts included one to establish a 400,000-line mobile telecommunications system in Costa Rica (the "GSM Contract"), which was valued at approximately $149.5 million; one to supply equipment for ICE's fixed network, which was valued at approximately $44 million; and another one to supply additional equipment for ICE's fixed network, which was valued at approximately $109.5 million.

		Description of Loss	Amount of Loss
I	ILLEGAL PAYMENTS CHARGED TO I.C.E.		
	Alcatel Bribes		$17,387,405.74
II	FEES & COSTS INCURRED		
	Undelivered Equipment	ICE was billed and paid for 19.2 km in roads, Alcatel only completed 12.23 km in roads.	$13,609,904.08
	Delayed Lease Payment Charge	Alcatel was suppsed to deliver 254 RBS by 12/02 at which time ICE would begin making lease payments. Alcatel fell short by 84 units that were eventually delivered four months later. Alcatel and ICE agreed to delay the first lease payment until completion by ALcatel, however the Leasing Agent charged ICE additional finance charges over those four months.	$455,243.70
	Professional Fees	Alcatel sued ICE following ICE's termination of the contract. ICE incurred the cost of engaging technichal personnel to to assist in its defense of the matter.	$102,060.00
	Exercise Of Purchase Option	Because of Alcatel's failure to meet the contract requirements, ICE terminated the contract but was forced to purchase the Alcatel equipment at the stated residual value. Had ICE failed to do so,the equipment would have reverted to Alcatel and eliminated ICE's ability to provide service to its customers.	$13,000,000.00
	Location Identification Service	The GSM Contract required implementation of a platform that would identify a phone's location within a 250 meter margin of error. (i.e., a location-based services platform).The system attempted by Defendants was off by several kilometers and attempts to implement a working location service were abandoned by Alcatel.	$792,039.30
	Advertising/Public Relations	In the wake of the revelation of Alcatel's corruption, ICE was forced to expend monies to dispel any misimpression that the subject misconduct included persons at ICE other than those bribed by Alcatel.	$226,089.47
III	LOST INCOME		
	Insufficient Coverage	Alcatel agreed to provide 95% coverage in 384 locations but 206 of those and 7 highway sections identified in the contract never met the contractual requirement. ICE initiated formal resolution procedures seeking a refund of $59,349,301.65 for failure to meet those requirements and Alcatel reponded by proposing the delivery $65,275,775.54 in additional equipment (i.e. 115 additional towers) and servces. The agreement was never executed but the amount claimed by ICE was not disputed by Alcatel.	$59,349,301.65
	Rate Reduction	During the term of the Alcatel contract, ICE sought a base rate increase of C400 per month per subsrciber. The Costa Rican Utility Regulators rejected the rate increase finding that the GSM service provided by ICE (through the Alcatel system) was so poor that it warranted a decrease in the existing rate. The Regulators thus decided to penalize ICE by reducing the base rate charge from C3000 to C2900.	$51,900,195.05
IV	FINES		
	Fines charged for non-fulfillment	The GSM Contract imposed specified fines for certain failures to meet specified network quality thresholds. Defendants did not meet a number of these requirements.	$3.501.293,27
	Preliminary Total:		$160.323.532.26

ICE is in the process of finalizing its analysis of the losses it suffered as a result of Defendants' criminal conduct, and will submit a final Declaration of Victim Losses as soon as possible.

(*Check if appropriate*)

___ I have been compensated by insurance or another source with respect to all or a portion of my losses in the amount of $_____. The name and address of my insurance company the claim number for this loss is as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on

_____ day of _____, 2011.

GUILLERMO SÁENZ R 2000 9657

(*Print name and phone number*)

(*Signature*)