UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-CR-20907-COOKE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALCATEL-LUCENT, S.A.,

Defendant.
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DEFENDANT'S OPPOSITION TO INSTITUTO COSTARRICENSE DE ELECTRICIDAD'S PETITION FOR RELIEF PURSUANT TO 18 U.S.C. § 3771(d)(3) AND OBJECTION TO PLEA AGREEMENTS AND DEFERRED PROSECUTION AGREEMENT AND SUPPORTING MEMORANDUM OF LAW

Defendant Alcatel-Lucent, S.A. ("ALU") hereby opposes El Instituto Costarricense de Electricidad's ("ICE") Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement ("Petition") and supporting Memorandum of Law ("Brief") (collectively, "Motion"). In its Motion, ICE claims that it is entitled to restitution as part of these proceedings and that the agreements reached by the parties are not in the interests of justice and should be rejected by the Court.

ICE's Motion for restitution should be denied for two independent reasons. First, ICE is not entitled to restitution because it was a participant in the conduct underlying the offense to which Defendant's subsidiaries—Alcatel-Lucent France, S.A. ("Alcatel CIT"), Alcatel-Lucent Trade International AG ("Alcatel Standard"), and Alcatel Centroamerica, S.A. ("ACR") (collectively "subsidiary-defendants")—will be pleading guilty. As is the case with the Defendant, we have every reason to believe that the individuals principally responsible for the misconduct are no longer employed by ICE. However, the fact remains that ICE was a co-participant in the crime, and as such, is ineligible for restitution under the applicable federal statutes.

Second, the Court should reject ICE's Motion because a determination of restitution would unduly complicate and prolong the sentencing process. ICE made similar claims for damages in criminal proceedings that just concluded in Costa Rica. There, the court held that ICE had failed to sufficiently plead its purported damages and must instead bring civil claims against the defendants to seek recovery for its alleged damages. This Court should similarly decline to attempt to adjudicate ICE's damages claims, the resolution of which is more suited to a civil trial than a criminal sentencing proceeding.

Finally, the Court should reject ICE's objection to the Plea Agreements and the Deferred Prosecution Agreement ("DPA").[1] The resolution reached by the parties after a five-year investigation and lengthy plea negotiations is a fair one, is in the interests of justice, and should be accepted by the Court.

ARGUMENT

I. Any Order of Restitution in This Case Is Left to the Sound Discretion of the Court

Generally speaking, a determination of restitution in a federal criminal case is governed by a three-part statutory scheme comprised of the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(e), the Victim and Witness Protection Act ("VWPA"), *id.* § 3663, and the Mandatory Victim Restitution Act ("MVRA"), *id.* § 3663A. The CVRA grants certain enumerated rights to "crime victims" who are harmed "as a result of the commission of a Federal offense or an offense in the District of Columbia." *Id.* § 3771(e). Persons afforded "crime victim" status under the CVRA are entitled to several rights, among them "[t]he right to full and timely restitution *as provided in law*." *Id.* § 3771(a)(6) (emphasis added). Thus, the CVRA does not create an independent right of restitution, but "'merely protects the right to receive restitution that is provided for elsewhere.'" *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 458 (D.N.J. 2009) (quoting *In re Doe*, 264 F. App'x 260, 262 n.2 (4th Cir. 2007)).

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[1] ICE cites no authority for the proposition that a purported victim has a right to challenge a DPA. The applicable statutes authorize restitution only "when sentencing a defendant *convicted* of an offense." 18 U.S.C. §§ 3663(a)(1)(A), 3663A(a)(1) (emphasis added). By definition, a deferred prosecution agreement means there has been no conviction.

The two statutes potentially creating a right to restitution for ICE are the VWPA and MVRA. The VWPA, which provides for discretionary restitution, applies to all offenses arising under Title 18, except those reserved for mandatory restitution in the MVRA. *See* 18 U.S.C. § 3663(a)(1)(A); *Atlantic States*, 612 F. Supp. 2d at 482 ("The VWPA (discretionary restitution statute) applies to all offenses arising under Title 18, as well as other specified statutes, except those carved out for mandatory treatment in the MVRA."). The MVRA, on the other hand, applies only to three types of offenses: (1) crimes of violence; (2) offenses against property under either Title 18, or under section 416(a) of the Controlled Substances Act, including any offense committed by fraud or deceit; and (3) offenses described in section 1365 of Title 18, related to tampering with consumer products. 18 U.S.C. § 3663A(c)(1)(A)(i-iii) (2010). Thus, the MVRA applies here only if the offense of conviction—conspiracy to violate the Foreign Corrupt Practices Act ("FCPA")—constitutes "an offense against property."

ICE strenuously argues that the MVRA applies here. In large measure, whether the MVRA or VWPA applies here is irrelevant because the principal grounds against restitution here—namely, (i) that as a co-participant in the crime, ICE is not entitled to restitution and (ii) that the Court should decline to order restitution here because of the complexity of the issues underlying any restitution determination—apply equally under the VWPA and the MVRA. *See United States v. Lazarenko*, 624 F.3d 1247, 1249 n.2 (9th Cir. 2010) (explaining that there is no material difference between the VWPA and the MVRA, apart from the mandatory nature of the MVRA, and noting that the court's analysis of a co-participant's inability to recover restitution under the MVRA applies equally to the VWPA); *United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006) (equating the complication exceptions of the VWPA and the MVRA). Thus, the particular statute under which the analysis is conducted is, to a large extent, irrelevant.

In any event, to Defendant's knowledge, no court has ever held that a violation of the FCPA or conspiracy to violate the FCPA constitutes an offense against property. Moreover, the Eleventh Circuit has expressly declined to hold that bribery more generally constitutes "an offense against property" or otherwise comes under the MVRA. *United States v. McNair*, 605 F.3d 1152, 1221 n.107 (11th Cir. 2010) ("We *sua sponte* note there is a potential issue of whether bribery is 'an offense against property' covered by § 3663A(c) and whether the MVRA

applies to bribery crimes. 18 U.S.C. § 3663A(c). Nothing herein should be read as implying the answer to that question."), *cert. denied*, 131 S. Ct. 1600 (2011); *see also United States v. Huff*, 609 F.3d 1240, 1247 (11th Cir. 2010) (relying, in a case involving both wire fraud and bribery offenses, on the wire fraud offense to satisfy the "offense against property" prong of the MVRA). The Eleventh Circuit has, however, upheld an order of restitution under the VWPA for a defendant convicted of bribery and conspiracy to commit bribery. *McNair*, 605 F.3d at 1216-24.

Moreover, other courts that have examined the question have analyzed bribery cases under the VWPA instead of the MVRA. *See United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 920-26 (9th Cir. 2001) (analyzing a case involving a kickback scheme under the VWPA); *United States v. Vaknin*, 112 F.3d 579, 582 (1st Cir. 1997) (analyzing a case involving bank bribery under the VWPA). Accordingly, the Court's determination of the instant Motion is governed by the VWPA.

II. As a Co-Participant in the Crime, ICE Is Not Entitled to Relief

Absent extraordinary circumstances, "a participant in a crime cannot recover restitution." *Lazarenko*, 624 F.3d at 1252; *see also United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006) (holding that to permit co-conspirators to recover restitution would be "an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*"). In determining whether a purported victim was a "participant" under the federal victims' protection statutes, courts examine whether the victim took part in the offense for which the defendant was convicted. *See Reifler*, 446 F.3d at 127; *United States v. Ojeikere*, 545 F.3d 220, 222-23 (2d Cir. 2008).

Here, ICE readily admits that former members of its top management took part in the criminal conduct, and the government's key witness admitted that ICE's former officials solicited the bribes that were ultimately paid by Alcatel, S.A. or its subsidiaries ("Alcatel"). In its Motion, ICE admits that five of its former directors and senior management accepted bribes from Alcatel. *See* Pet. ¶¶ 10-12; Br. at 1, 12-14. In fact, at least three of seven former members of ICE's board of directors were directly involved in Alcatel's misconduct by accepting corrupt payments: José Antonio Lobo Solera; Joaquin Alberto Fernández Alfaro; and Hernán Victor

Bravo Trejos. In addition, Guido Sibaja Fonseca, the advisor to the then Executive President of ICE, Pablo Cob, was also accused of taking a "reward" from Alcatel. Compl. ¶ 22, *Procuraduría General de la Republica de Costa Rica v. Alcatel CIT* (Nov. 25, 2004) (Expediente No. 04-006835-647-PE (109-04)) (Ex. 1). And at least one other unidentified "ICE Official" is alleged to have accepted corrupt payments from Alcatel. *See United States v. Alcatel-Lucent France, S.A.*, No. 1:10-CR-20906, Plea Agreement, Statement of Facts ¶ 48 (S.D. Fla. Feb. 22, 2011). Several of these individuals have been criminally prosecuted in Costa Rica for their conduct and sentenced to terms of imprisonment. *See* Pet. ¶ 12; Br. at 13-14. Furthermore, the Government's key cooperator, Christian Sapsizian, stated that former ICE officials—not Alcatel—initiated the bribery scheme by soliciting bribes from Alcatel and the other telecommunications companies vying for the contracts. *See* Status Conference Tr. 22:4-11, May 11, 2011 (hereinafter "Tr.").

Just as Alcatel is responsible, ICE itself is responsible for the ICE-Alcatel bribery scheme because its top management, including several members of its board of directors and senior officers, actively participated in the bribery. *See Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. NLRB*, 735 F.2d 1384, 1395 (D.C. Cir. 1984) (holding that union was properly held responsible for actions of its highest officers in accepting kickbacks). ICE's own responsibility here is bolstered by one of the cases it cites, *Williams Electronic Games, Inc. v. Garrity*, 366 F.3d 569 (7th Cir. 2004). There, the court concluded that the employer in question was an innocent victim because the employer did not know, and was not negligent in failing to know, of the misconduct of a single employee. *Id.* at 575-76. But unlike the *Garrity* case, the conduct at issue in this case was not confined to a single rogue employee. Instead, it implicated many individuals at the highest levels of ICE's management under circumstances where the corporation did nothing to impose controls to prevent it until after the fact.

To award ICE restitution under the victims' protection statutes in this case would be to permit ICE to deny its responsibility for instigating and perpetuating the corrupt conduct in Costa Rica. Because courts uniformly find that participants in criminal schemes may not recover restitution under the crime victims' protection statutes, ICE's claim for restitution here should be

rejected.[2]

III. Granting ICE's Motion Would Unduly Burden the Sentencing Process

Under the VWPA, a court may decline to order restitution where "complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims." 18 U.S.C. § 3663(a)(1)(B)(ii). The Senate Report addressing passage of the VWPA notes that "[t]he Committee added this provision to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages owed the victim." S. Rep. No. 97-532, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2537. Similarly, under the MVRA, a court may decline to order restitution where "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)(B).

This "complication exception" calls for "a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *United States v. Kones*, 77 F.3d 66, 68-69 (3d Cir. 1996). Here, granting ICE's Motion would require the Court to reject the Plea Agreements in full and resolve numerous complex issues of fault, damages, and

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[2] ICE correctly points out that foreign governments may be considered victims under the crime victim statutes. But the cases on which ICE relies to support that proposition merely reflect the distinction courts draw between victims and participants in a criminal scheme. *See, e.g., Pasquantino v. United States*, 544 U.S. 349 (2005) (holding that the Canadian government, which was not a participant in the defendant's scheme to defraud Canada of tax revenue, was a victim under the MVRA); *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011) (holding that the South African government, which did not participate in the illegal export and trade of shellfish from South Africa, was a victim under the MVRA), *petition for cert. filed*, 79 U.S.L.W. 3594 (U.S. Apr. 4, 2011) (No. 10-1208). Thus, although ICE cites a battery of cases which hold that various types of governmental institutions can be victims under the restitution statutes, none of these entities was a co-participant in the defendant's crime, and thus they are inapplicable. *See, e.g., United States v. Watlington*, 287 F. App'x 257 (4th Cir. 2008); *United States v. Phillips*, 477 F.3d 215 (5th Cir. 2007); *United States v. Brock-Davis*, 504 F.3d 991 (9th Cir. 2007); *United States v. Washington*, 434 F.3d 1265 (11th Cir. 2006); *United States v. Paquette*, 201 F.3d 40 (1st Cir. 2000); *United States v. Bogart*, 490 F. Supp. 2d 885 (S.D. Ohio 2007).

foreign law. When facing such issues, it is appropriate to apply the complication exception. *See e.g.*, *id.* at 71 (affirming the district court's refusal to award restitution where determining the amount of restitution would have required prolonged and complicated proceedings to resolve disputed issues of fault and causation); *United States v. Fountain*, 768 F.2d 790, 802 (7th Cir. 1985) (declining to order restitution where amount was in dispute and determination of amount would have required unduly burdensome and complicated calculation).

A. Restitution Would Require Rejecting the Parties' Agreements

Granting ICE restitution would result in undue complication and prolongation of the sentencing process because it would force the court to reject the Plea Agreements between the subsidiary-defendants and the DOJ, which followed a five-year investigation and a lengthy negotiation process. Further, rejection of the Plea Agreements would scuttle the DPA, because that agreement was reached "[i]n consideration of . . . the guilty pleas by Alcatel-Lucent's wholly owned subsidiaries." DPA ¶ 14. The Plea Agreements now before the Court have been submitted "pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure." *See United States v. Alcatel-Lucent France, S.A.*, No. 10-CR-20906, Plea Agreements between the United States and Alcatel Centroamerica, S.A., Alcatel-Lucent France, S.A., and Alcatel-Lucent Trade International, A.G (S.D. Fla. Feb. 22, 2011). Under Rule 11(c)(1)(C), the parties may "agree that a specific sentence . . . is the appropriate disposition of the case," and that "such a recommendation or request binds the court once the court accepts the plea agreement." *See* Fed. R. Crim. P. 11(c)(1)(C). Thus, if the Court accepts the proffered Plea Agreements, it will be bound by the "specific sentence" contemplated in those Agreements. *Id.*; *see also United States v. Dean*, 80 F.3d 1535, 1539 (11th Cir. 1996) ("One important distinction between 'B' pleas and 'A' or 'C' pleas is that only 'B' pleas may be modified."), *modified*, 87 F.3d 1212 (11th Cir. 1996). Moreover, "[r]estitution is deemed an aspect of the defendant's sentence." Fed. R. Crim. P. 11 advisory committee's note (1985) (citing S. Rep. No. 97-532, at 30-33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536-39). As a result, a court could not accept a Rule 11(c)(1)(C) plea and then order restitution not authorized by the agreement. *See United States v. BP Products North America, Inc.*, 610 F. Supp. 2d 655, 724 n.49 (S.D. Tex. 2009) (accepting a Rule 11(c)(1)(C) plea agreement that did not provide for restitution and noting that, although

restitution is available for the crimes at issue, "the terms of the plea agreement, which this court cannot alter, but only accept or reject, do not provide for . . . restitution"). Thus, if restitution is not specified as part of the sentence in a Rule 11(c)(1)(C) plea agreement, it cannot be imposed.[3]

For example, in *United States v. Simon*, the court held that it could not award restitution that was not contemplated as part of a Rule 11(c)(1)(C) plea agreement because to do so would violate the defendant's due process rights. *United States v. Simon*, No. CR-08-0907, 2009 WL 2424673, at *3-4, *7 (N.D. Cal. 2009). The plea agreement in that case specified a term of supervised release and a fine not exceeding $15,000. *Id.* at *1. In response to a restitution request filed by a purported victim, the court analyzed whether it could order restitution. After determining that, despite a reference to "restitution" in a boilerplate provision, the plea agreement did not contemplate restitution, the court concluded that ordering restitution would violate the notice and due process requirements of Rule 11.[4] *See id.* at *2-4 (citing *United States v. Whitney*, 838 F.2d 404 (9th Cir. 1988)). The court explained that Rule 11 requires a court to advise a defendant of the maximum possible penalty for the crime, including the court's authority to order restitution, before accepting a guilty plea. *Id.* Accordingly, the court accepted the plea agreement, sentencing the defendant to the agreed-upon term of supervised release and $15,000 fine. *Id.* at *1.

Here, the sentences agreed upon by the subsidiary-defendants do not include restitution. The agreed-upon sentence in each of the Plea Agreements provides that each of the subsidiary-defendants will pay a $500,000 fine (recognizing that the remainder of the fine as calculated under the Sentencing Guidelines, $90.5 million, would be paid by the Defendant under its DPA) and a $400 special assessment; there is no provision whatsoever for restitution. *See* Plea Agreements between the United States and Alcatel Centroamerica, S.A., Alcatel-Lucent France,

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[3] ICE concedes this point, having stated that "[W]e have a form of plea here that's an up or down plea on its own terms. If [the Court] accept[s] that plea on its own terms . . . there will be no restitution to any victim." Tr. 13:21-25.

[4] The court noted that it could have ordered restitution up to the maximum amount of the fine ($15,000) agreed by the parties in the plea agreement, as long as the total amount of the fine and restitution did not exceed the agreed-upon maximum penalty of $15,000. *See Simon*, 2009 WL 2424673, at *4.

S.A., and Alcatel-Lucent Trade International, A.G., ¶ 15. The single reference to restitution in the Plea Agreements falls in a boilerplate preliminary paragraph on the timing and manner of payment, which states that "[t]he Defendant agrees that any fine or restitution imposed by the Court will be due and payable within ten (10) business days of sentencing, and the Defendant will not attempt to avoid or delay payments." *See* Plea Agreements between the United States and Alcatel Centroamerica, S.A., Alcatel-Lucent France, S.A., and Alcatel-Lucent Trade International, A.G., ¶ 8. And a single reference to restitution found in boilerplate language is insufficient to conclude that the parties contemplated restitution. *See Simon*, 2009 WL 2424673, at *4.

Disputed Rule 11(c)(1)(C) agreements have been found to permit restitution only where the language of the agreement "plainly evince[s]" an intent that restitution be included. *See United States v. Anderson*, 545 F.3d 1072, 1079 (D.C. Cir. 2009), *cert. denied*, *Anderson v. United States*, 129 S. Ct. 2445 (2009). Here, not only is restitution not part of the agreed-upon sentence, but each of the Plea Agreements contains a merger clause stating that "[t]his document states the full extent of the agreement between the parties. There are no other promises or agreements, express or implied." Plea Agreements between the United States and Alcatel Centroamerica, S.A., Alcatel-Lucent France, S.A., and Alcatel-Lucent Trade International, A.G., ¶ 22. Therefore, restitution cannot be interpreted to be a part of the sentence agreed upon by the DOJ and the subsidiary-defendants. *See United States v. Garcia*, 698 F.2d 31, 36 (1st Cir. 1983) (rejecting restitution where plea agreement was silent on restitution and contained a merger clause).

Because the subsidiary-defendants' Plea Agreements are submitted pursuant to Rule 11(c)(1)(C), and because the Plea Agreements do not include restitution, the Court cannot both accept the Plea Agreements and order restitution.[5]

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[5] ICE relies heavily on three FCPA cases to support its assertion that the Court should order restitution. *See* Br. at 10 (citing *United States v. Diaz*, No. 09-cr-20346 (S.D. Fla. 2010); *United States v. F.G. Mason Eng'g, Inc. and Francis G. Mason*, Cr. No. B-90-29 (D. Conn. 1990); and *United States v. Kenny Int'l Corp.*, Cr. No. 79-372 (D.D.C. 1979)). But in each of those cases, the parties contemplated restitution as part of the plea agreement. *See United States v. Diaz*, No. 09-cr-20346 (S.D. Fla. 2010); *United States v. F.G. Mason Eng'g, Inc. and Francis G. Mason*, Cr. No. B-90-29 (D. Conn. 1990); *United States v. Kenny Int'l Corp.*, Cr. No. 79-372

B. Granting ICE's Petition Would Require the Court to Resolve Complex Issues Better Reserved to Civil Suits

Courts routinely employ the "complication exception" to the restitution statutes where a determination of restitution would require resolution of complex issues better reserved to civil lawsuits. Here, ICE claims an astounding $400 million in restitution for "[contractual] obligations . . . never satisfied, services . . . never rendered, and hardware that was inferior to what was promised or never delivered." Br. at 6, 18. ICE claims it received "an unfinished and largely inoperable telecommunications network," "inferior equipment," and "business interruptions and related losses." *Id.* at 6-7. In fact, ICE seeks restitution for all damages that were "a direct and proximate result of defendant's criminal conduct." *Id.* at 6.

This is precisely the sort of the claim for restitution that prompted Congress to include the "complication exceptions" in the VWPA and MVRA. "Nothing in the legislative history [of the VWPA] evidences an expectation that a sentencing judge would adjudicate, in the course of the court's sentencing proceeding, all civil claims against a criminal defendant arising from conduct related to the offense." *Kones*, 77 F.3d at 69. In this case, issues such as profits, costs, value of equipment provided, value of competing bids, and comparisons to other available equipment would all need to be resolved as part of adjudicating ICE's claim. This would require extensive discovery, expert testimony, and a prolonged hearing. Given the international scope of the alleged misconduct and the Costa Rican, French and Swiss nationalities of the parties involved, foreign discovery and expertise would also be required. Congress has made clear "that the sentencing phase[s] of criminal trials [should] not become fora for the determination of facts and issues better suited to civil proceedings." S. Rep. No. 104-179, at 18 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 931. Complex issues of damages and restitution are better left to civil proceedings than criminal cases. *See United States v. Ferguson*, 584 F. Supp. 2d 447, 457-58 (D. Conn. 2008).

(D.D.C. 1979). Moreover, because the amount of restitution had already been set out expressly in the plea agreements, the respective courts did not have to engage in any determination of the identity of victims or the amount of restitution owed. *See Diaz*, No. 09-cr-20346; *Mason*, Cr. No. B-90-29; *Kenny*, Cr. No. 79-372. In contrast, here, the Government and the subsidiary-defendants have not contemplated restitution as part of their Plea Agreements. And as discussed *infra* in section III.B, a simple calculation of the amount of restitution is not possible here.

Indeed, ICE's recent attempt to obtain damages from Alcatel CIT as part of the just-concluded criminal proceedings in Costa Rica failed for this very reason. After the ICE-Alcatel bribery scheme became public, the Costa Rican Prosecutor's Office indicted several individuals on charges of aggravated corruption, unlawful enrichment, simulation, fraud and other crimes. In connection with this criminal case, ICE brought a civil claim against Alcatel CIT seeking "moral damages" to compensate ICE for harm to its reputation resulting from these events and "material damages" to compensate ICE for the alleged overpricing it was forced to pay under its contract with Alcatel. The trial on the criminal case, including all related civil claims, began in April 2010. Following a year-long trial, the Costa Rican tribunal rendered its verdict on all claims on April 27, 2011. However, the tribunal rejected the damages claim brought by ICE. *See* Tribunal Penal del Segundo Circuito Judicial, San Jose, Costa Rica [Criminal Court of the Public Treasury of the Second Judicial Circuit in San Jose, Costa Rica] Apr. 27, 2011, No. 04-6835-647-PE, 6 (Ex. 2). The tribunal concluded that ICE had failed to sufficiently plead its purported damages and that ICE would have to re-file its claim as a civil suit against Alcatel CIT.

This Court should reach the same conclusion. In enacting the VWPA, Congress expected that any "entitlement to restitution could be readily determined by the sentencing judge based upon the evidence he had heard during the trial of the criminal case or learned in the course of determining whether to accept a plea and what an appropriate sentence would be . . . . The kind of case that Congress had in mind was one in which liability is clear from the information provided by the government and the defendant and all the sentencing court has to do is calculate damages." *Kones*, 77 F.3d at 69 (citing S. Rep. 97-532, *reprinted in* U.S.C.C.A.N. 2515, 2536-37, which the *Kones* court notes discusses "a case where the victim of a purse snatching suffered a broken hip"). Here, however, ICE is requesting the Court hold a mini-trial to resolve complex issues of purported damages related to allegedly substandard equipment, services never delivered, and business interruptions and related losses. These types of damages claims are better left to a civil lawsuit.

C. ICE Has Little Need for Restitution Because It Has Other Legal Remedies

ICE is currently pursuing several civil actions against Alcatel in Costa Rica for the same alleged injuries for which ICE now seeks restitution. In particular, ICE has multiple suits pending in Costa Rica that involve overpayment and provision of substandard equipment and services as a result of corrupt payments. In one suit, ICE sought compensation of $71.6 million for harm to ICE's reputation and for damages resulting from alleged overpricing (this is the just-concluded case with respect to which the Costa Rican tribunal rejected ICE's claim as part of the criminal proceedings and suggested ICE bring a civil lawsuit for its purported damages). In a separate action, ICE commenced an administrative proceeding to terminate its contract with Alcatel CIT in connection with which ICE claimed compensation of $78.1 million for damages and lost income. A $15.1 million performance bond on the contract has been ordered held in escrow by the Supreme Court of Costa Rica pending final resolution of the case.

Moreover, on April 30, 2010, shortly after the Defendant publicly disclosed that they had entered into agreements in principle with the DOJ and SEC, ICE filed a complaint in Florida's Eleventh Judicial Circuit for Miami-Dade County. The complaint named as defendants the subsidiary-defendants and the Defendant in this case, and alleged that these entities had operated a RICO enterprise that caused injury to ICE. The defendants moved to dismiss on *forum non conveniens* grounds, arguing that Costa Rica was a more convenient forum for adjudicating this claim. The court agreed, and dismissed the case (although ICE has appealed). In so holding, the court held that ICE could re-file its Florida claims in Costa Rica. Although Costa Rica does not have a RICO statute, Costa Rica does recognize claims similar to those made by ICE in the Florida litigation, and allows claims for money damages arising from bribery, illicit enrichment, and other crimes and torts. Such damages are precisely what ICE is alleging it should be compensated for in both the Florida litigation and the criminal settlement in front of this Court. Indeed, as a condition of dismissal on *forum non conveniens* grounds, the defendants were required to make certain stipulations that would facilitate ICE's ability to re-file its claims in Costa Rica. For example, the defendants stipulated that they would accept service of process of a complaint filed in Costa Rica and that such a complaint would be deemed to be filed on the same date as the Florida complaint for statute of limitations purposes. Furthermore, the

defendants stipulated that certain materials from the Florida action would also be available to ICE in a re-filed Costa Rican action.

The availability of these legal remedies in Costa Rica further shifts the balance in favor of the complication exception because it reduces ICE's need for restitution. This is particularly true given the significant advantages to resolving ICE's claims in Costa Rica, rather than here, as reflected in the Florida court's dismissal of ICE's RICO claim on grounds of *forum non conveniens*. The vast majority of witnesses are in Costa Rica, including current and former ICE employees, Alcatel employees, consultants, Costa Rican officials, and bank officers. Order at 3, *El Instituto Costarricense de Electricidad v. Alcatel-Lucent, S.A.*, No. 10-25859 (Fla. Cir. Ct. Jan. 18, 2011) (Ex. 3). The availability of legal recourse in Costa Rica dramatically undercuts ICE's need for restitution in an American criminal case relative to the burdens that litigating a claim of restitution would impose. *See* 18 U.S.C. § 3663(a)(1)(B)(ii).[6]

IV. The Parties' Resolution Is a Fair One and Should Be Accepted by the Court

ICE argues that the Plea Agreements and the DPA should be rejected because they fail to satisfy "fundamental requirements of the law," and are therefore not "in the best interests of

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[6] In addition, ALU has already paid $45.4 million in disgorgement and prejudgment interest to the SEC. *See SEC v. Alcatel Lucent, S.A.*, No. 1:10-CV-24620, Final Judgment (S.D. Fla. Dec. 30, 2010). The SEC's regulations provide that the SEC shall distribute disgorged funds to those aggrieved by a defendant unless it would be unreasonable to do so. *See* 17 C.F.R. § 201.1100 *et seq.*; *see also SEC v. Lorin*, 869 F. Supp. 1117, 1129 (S.D.N.Y. 1994). In the event that the SEC finds that distribution is not justified, it may direct the funds to the United States Treasury ("Treasury"). *See* 17 C.F.R. § 201.1102(b); *SEC v. Bhagat*, No. C-01-21073, 2008 WL 4890890 (N.D. Cal. Nov. 12, 2008) (granting the SEC's motion to distribute disgorged funds to the Treasury). Here, the SEC made a motion asking the court to approve the transfer of the funds to the Treasury, which the court granted. *See SEC v. Alcatel Lucent, S.A.*, No. 1:10-CV-24620, Plaintiff's Notice of Filing Consent of Defendant Alcatel-Lucent, S.A. and Motion for Entry of Final Judgment § V (S.D. Fla. Dec. 30, 2010); *id.* Final Judgment § V. An entity that is not a party to the case, but nonetheless may have an interest in the outcome, may object to the SEC's proposed disposition of the disgorged funds. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 77 (2d Cir. 2006). While the SEC may either order distribution of the disgorged funds or direct the funds to the Treasury, the court ultimately decides what equitable remedy is appropriate. ICE failed to object to the proposed Final Judgment and failed to appeal the entry of the Final Judgment.

justice" and do not "serve the public's interest." Br. at 14.[7] ICE's counsel's allegations reflect, at best, a misunderstanding of the record, and at worst, a gross distortion of the record. The proposed settlement is in accordance with the law, and is consistent with the DOJ's Principles of Federal Prosecution of Business Organizations[8] and the U.S. Sentencing Guidelines ("Guidelines"). The proposed resolution was reached after considered and extended negotiations, a full analysis of the facts and circumstances, and a comprehensive review of the aggravating and mitigating factors. "In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order." U.S. Sentencing Guidelines Manual § 6B1.2(c) (2010).

In support of its argument, ICE lists several perceived deficiencies, the first of which is that "a single count of conspiracy" is insufficient to reflect the actual offense. Br. at 15. But Alcatel's proposed resolution can hardly be summarized in such an incomplete manner. The agreed-upon resolution includes:

- A total criminal fine of $92 million—one of the largest fines ever for a violation of the FCPA—apportioned as follows: $90.5 million to be paid by the parent company ALU, and $500,000 each to be paid by Alcatel CIT, Alcatel Standard, and ACR.
- A three-year deferred prosecution agreement, under which ALU is charged with violations of the books and records and internal controls provisions of the FCPA.

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[7] ICE claims that a court has the discretion to reject a plea if it is not in the interests of justice according to *Government of the Virgin Islands v. Walker*, 261 F.3d 370 (3d Cir. 2001). ICE's reliance on *Walker*, however, is misplaced. In that case the court found that the trial court had "exceeded all conceivable limitations of propriety" by interfering in plea negotiations and essentially punishing the defendant for exercising his constitutional rights. *Id.* at 376. In this case there is no evidence, or even an allegation, of such judicial misconduct that would render the Plea Agreements contrary to the interests of justice.

[8] U.S. Dep't of Justice, United States Attorneys' Manual §§ 9-28.100 to 9-28.1300 (2008).

- Guilty pleas by each of the aforementioned subsidiaries to conspiracy to violate the FCPA's anti-bribery, books and records, and internal controls provisions.
- A continuing obligation to provide full, complete, and truthful cooperation to the DOJ and SEC and other domestic and foreign law enforcement agencies.
- The first-ever imposition of a corporate compliance monitor over a French company. The monitor's term will be three years, during which the monitor will conduct a review of ALU's FCPA policies, procedures, and compliance, and will prepare periodic reports on his reviews to be furnished to the French Ministry of Justice and, ultimately, to the DOJ and SEC.
- The implementation of numerous other remedial measures—some of which have been adopted at ALU's own initiative.[9]
- And finally, a related resolution with the SEC, under which the company is enjoined from any further violations of the FCPA and has paid disgorgement of illicit profits and prejudgment interest totaling $45.4 million.

Based on the foregoing, when considered as a whole, the proposed settlement is clearly in the interest of justice.

ICE also claims that the Plea Agreements are "based on flawed methodology for determining the appropriate sentencing guidelines." Br. at 15. However, in reaching the overall criminal penalty reflected in the DPA, the parties adhered strictly to the 2010 edition of the Guidelines. Specifically, ICE claims that "the DOJ has chosen to use the Alcatel Defendants' pecuniary gain as the metric for calculating the base offense level, despite the explicit instruction in U.S.S.G. § 2B1.1 that the base offense level should be calculated using the victim's loss." Br.

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[9] Most notably, ALU ultimately determined that the risk of corruption inherent in using sales agents and consultants was too great. On its own initiative and at a substantial financial cost, ALU determined as a matter of company policy to no longer use third party sales agents or consultants in conducting its worldwide business. In November 2008, the company announced its extraordinary decision to phase out the use of sales agents and consultants by the end of 2010. Since the announcement, ALU has fulfilled its pledge to end all such third party relationships. DOJ has acknowledged that this commitment is an unprecedented remedial action and a bold compliance statement from ALU's most senior executives.

at 16. However, the comments to the Guidelines state that if loss cannot be determined, the gain that resulted from the offense shall be used as an alternative measure of loss. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(B) (2010). Here, the loss of honest services, or even the damages purportedly suffered by ICE (even assuming *arguendo* that ICE is a victim), cannot be readily determined, and under such circumstances, calculating the offense level based on the gain that resulted from the offense is appropriate. *See United States v. McMillan*, 600 F.3d 434, 458-60 (5th Cir. 2010) (upholding the trial court's decision applying U.S.S.G. § 2B1.1 to calculate defendants' offense level based on their gain from the offense in a wire and mail fraud case, because the amount of loss the defendants caused could not reasonably be determined), *cert. denied*, 131 S. Ct. 504 (2010).

ICE claims that ALU's proposed settlement agreements should be rejected because they do not punish any "Officers or Directors" of the Defendant or subsidiary-defendants. Br. at 17. But whether and to what extent any individuals may be criminally prosecuted does not impact the appropriateness of any resolution with the companies. Additionally, after the allegations in Costa Rica were publicized, Alcatel began to take disciplinary action against the employees responsible for the conduct, up to and including termination of their employment. Currently, virtually all of the individuals who were substantially involved in prior misconduct either are no longer employed by the companies or have been disciplined. The disciplinary actions taken by the companies resulted in significant management changes in a number of countries worldwide.

ICE also claims that the proposed resolution should be rejected because it seeks to avoid "mandatory and routine pre-trial services." Br. at 17-19. In fact, the Court has ordered a presentence investigation and report. In any event, even if the Court had not, Federal Rule of Criminal Procedure 32(c)(1)(A)(ii) permits the Court to impose a sentence without the preparation of a presentence report if the Court finds "that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record." *See, e.g., United States v. Latner*, 702 F.2d 947, 949-50 (11th Cir. 1983) (finding that the trial court did not abuse its discretion in imposing a sentence without the benefit of a presentence report, where there was sufficient record information to enable the court to make a fair sentencing determination). This includes cases where the defendant enters a

plea pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). *See, e.g.*, *United States v. Brown*, 557 F.3d 297, 300-01 (6th Cir. 2009) (affirming a sentence following an 11(c)(1)(C) plea without a presentence report, finding that the plea agreement, along with discussions that the district court judge had with counsel, constituted "sufficient information . . . to 'exercise its sentencing authority meaningfully'"), *cert. denied*, 129 S. Ct. 2884 (2009). Consistent with § 6A1.1(a)(2) of the Guidelines, the information contained in the record of this case—including the Information, the Plea Agreements, and the Statement of Facts—is sufficient to enable the Court to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553 without a presentence investigation or report. This would allow the Court to consolidate the entry of the pleas and sentencing into one proceeding, and to conduct the plea and sentencing hearings of all of the Defendants in one proceeding, as the parties request. *See, e.g.*, Plea Agreement between the United States and Alcatel-Lucent France, S.A., ¶ 17.

Finally, ICE claims that ALU "continue(s) to violate" the DPA. Br. at 19. In support of this proposition, ICE relies on statements made by Alcatel CIT's counsel in the context of criminal proceedings in Costa Rica. Specifically, ICE claims that "Alejandro Batalla, an attorney representing Alcatel-Lucent entities, appeared in Court in Costa Rica and flatly denied any criminal responsibility by Alcatel-Lucent companies, claiming instead that all responsibility for the bribery and corruption that occurred in Costa Rica was the responsibility of Christian Sapsizian and Edgar Valverde." Pet. at 15. In point of fact, however, during his closing arguments, Batalla made clear that ALU acknowledged its liability, and accordingly, had settled its civil case with the Costa Rican Office of the Attorney General on behalf of the Costa Rican government. ICE's Exhibit X at 2 (Closing Remarks of Alejandro Batalla) (Feb. 17, 2011), *Restitution Civil Suit Against Alcatel CIT S.A.*, File No. 04-006835-647-PE (109-04) (Nov. 25, 2004). Furthermore, any statement made by Batalla has to be understood in the context of Costa Rican law, which does not recognize corporate criminal liability. The Costa Rican system follows the Roman law rule of "*societas delinquere non potest*" (corporations cannot commit crimes). *See* Costa Rica C. PEN. §§ 16, 17 (Ex. 4). Moreover, under Costa Rican law, in terms of civil liability, corporations are jointly and severally liable for the criminal acts of their employees. *Id.* § 106 (Ex. 4). Therefore, any statement from ALU or its representatives blaming

Sapsizian or Valverde would serve no purpose either to disavow criminal or civil responsibility for their actions.

In any event, the DPA states that: "[t]he decision whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be imputed to Alcatel-Lucent for the purpose of determining whether they have breached this Agreement shall be at the sole discretion of the Department. If the Department determines that a [breach occurred], the Department shall so notify Alcatel-Lucent, and Alcatel-Lucent may avoid a breach of this Agreement by publicly repudiating such statement(s) within five (5) business days after notification." DPA ¶ 21. The Department has not determined that the DPA has been breached. In any event, following the statements made by Batalla in the litigation, the company issued a statement once again accepting responsibility for its actions in Costa Rica, thereby curing any theoretical breach of the agreement that may have occurred.[10]

V. Conclusion

Awarding restitution to ICE in this case would be contrary to the interests of justice, given its role as a participant in the misconduct. ICE's request also places an excessive burden on this Court, by essentially requiring a trial on several factual and legal issues that would be best adjudicated in a civil trial in Costa Rica. Because ICE has multiple potential remedies outside of these criminal settlement proceedings, ICE's need for restitution is outweighed by the burden it would place on the Court.

WHEREFORE, for all of the foregoing reasons, the Defendant respectfully urges the Court to deny ICE's petition for relief, and overrule its objections to the Plea Agreements and the

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[10] In a statement issued at the conclusion of the Costa Rican litigation referenced by ICE in its Petition, ALU said that "[t]he company takes responsibility for and regrets what happened and the impact on individuals, institutions and the people of Costa Rica." Samuel Rubenfeld, *Former Costa Rican President Sentenced to Prison Over Alcatel Bribery*, WALL ST. J. BLOG (Apr. 28, 2011, 1:58 AM), http://blogs.wsj.com/corruption-currents/2011/04/28/former-costa-rican-president-sentenced-to-prison-over-alcatel-bribery. This statement was just one of many issued by ALU since the announcement of the settlements accepting full responsibility for these actions. *See, e.g.*, Alcatel-Lucent Press Release, *Alcatel-Lucent Welcomes the Settlements with U.S. Authorities Regarding Previously Reported Violations of Foreign Corrupt Practices Act* (Dec. 27, 2010) ("We take responsibility for and regret what happened and have implemented policies and procedures to prevent these violations from happening again.").

DPA.

May 23, 2011

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 23, 2011 a true and correct copy of the foregoing, including exhibits, was served via transmission of Notices of Electronic Filing generated by CM/ECF on all counsel or parties of record on the Service List below.

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