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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case 10-20906-CR-COOKE

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

**ALCATEL-LUCENT FRANCE, S.A.,
ALCATEL-LUCENT TRADE INTERNATIONAL, A.G.,
ALCATEL-CENTROAMERICA, S.A.,**

Defendants.

COURTROOM 11-2

MIAMI, FLORIDA

JUNE 1, 2011

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**TRANSCRIPT OF CHANGE OF PLEA AND SENTENCING
BEFORE THE HONORABLE MARCIA G. COOKE
UNITED STATES DISTRICT JUDGE**

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Reporter's Certificate 66

14:27:07 1 **MR. MARCHENA:** All rise. Court is in session. Please
14:27:10 2 come to order.

14:27:11 3 Judge, we have our change of plea, followed by
14:27:14 4 sentencing, on Case Numbers 10-20906 and 10-20907, USA v.
14:27:24 5 Alcatel-Lucent France, S.A., et al.

14:27:26 6 **THE COURT:** Ivan, we do have to take care of one matter
14:27:29 7 before we go to the plea.

14:27:32 8 **MR. MARCHENA:** Yes, Judge.

14:27:32 9 **THE COURT:** For the record, appearing on behalf of the
14:27:35 10 United States?

14:27:35 11 **MR. DUROSS:** Charles Duross on behalf of the United
14:27:37 12 States, Your Honor. Joining me at counsel table is Andrew
14:27:40 13 Gentin.

14:27:41 14 **THE COURT:** And appearing on behalf of Alcatel-Lucent
14:27:43 15 France, Alcatel-Lucent Trade International, and
14:27:48 16 Alcatel-CentroAmerica?

14:27:50 17 **MR. SALE:** Good afternoon, Your Honor. Jon Sale of
14:27:54 18 Sale & Weintraub, together with Martin Weinstein and Robert
14:27:57 19 Meyer of Willkie Farr. They've been admitted *pro hac vice*, Your
14:27:58 20 Honor.

14:28:00 21 **THE COURT:** Okay.

14:28:00 22 **MR. WEINSTEIN:** Your Honor, with me is the General
14:28:02 23 Counsel of Alcatel-Lucent, Mr. Steven R. Reynolds. He was not
14:28:04 24 the General Counsel at the time the events took place, but he
14:28:06 25 has been the General Counsel of the company since the early part

14:28:10 1 of 2007, and he has been authorized to appear on behalf of all
14:28:13 2 of the entities named in the charges and the charging documents
14:28:18 3 today, Your Honor.

14:28:19 4 **THE COURT:** So will he be the entity entering a plea on
14:28:22 5 behalf of all three corporate individuals?

14:28:23 6 **MR. WEINSTEIN:** Yes, Your Honor.

14:28:24 7 **THE COURT:** Okay. I'm going to ask you all to sit for
14:28:26 8 a moment, please.

14:28:26 9 Mr. Duross, we do have one thing that I must discuss
14:28:29 10 before we proceed to the plea and that's the matter that we put
14:28:33 11 off last time concerning victim status for ICE, and can you
14:28:42 12 proceed to that argument, please?

14:28:43 13 ICE has asked to be treated as a victim in these
14:28:46 14 proceedings and since that is precluded by the plea agreement in
14:28:52 15 this case as I understand it, that matter has to be resolved
14:28:55 16 before I can determine whether or not I'm going to accept the
14:28:58 17 plea; is that correct?

14:28:59 18 **MR. DUROSS:** I believe everyone will probably agree
14:29:01 19 with that, Your Honor.

14:29:02 20 **THE COURT:** Okay. So let's proceed to that issue
14:29:07 21 first.

14:29:18 22 **MR. DUROSS:** Thank you, Your Honor.

14:29:19 23 The last time that we were before the Court, I believe,
14:29:21 24 was May 11th. At that point in time ICE had filed a petition
14:29:30 25 objecting to the plea agreements, also objecting to the deferred

14:29:35 1 prosecution agreement, and they raised three issues principally.
14:29:38 2 One was the sufficiency of the resolutions as a whole, arguing,
14:29:44 3 in essence, that they were too lenient and also they didn't
14:29:49 4 include restitution to ICE as a crime victim.

14:29:54 5 Number two, they argued that they were a crime victim
14:29:58 6 under the Crime Victim Rights Act; and, number three, they
14:30:00 7 argued that they were entitled to restitution under --

14:30:04 8 **THE COURT:** Well, let's start with the first one
14:30:06 9 because obviously, if they're not a crime victim, then that
14:30:09 10 resolves the other issues, does it not?

14:30:11 11 **MR. DUROSS:** It does, Your Honor.

14:30:12 12 **THE COURT:** Okay. The Government contends that it's
14:30:14 13 not. Can you tell me why?

14:30:15 14 **MR. DUROSS:** Yes, Your Honor. Your Honor, as the
14:30:17 15 Government laid out in its brief, and since May 11th, the
14:30:21 16 Government filed a response to that petition and memorandum of
14:30:25 17 law as did the defendants in this case.

14:30:28 18 **THE COURT:** I have it at Docket Entry Number 43.

14:30:31 19 **MR. DUROSS:** Yes. And so, Your Honor, the Government
14:30:33 20 laid out in some detail its concern with calling ICE a victim in
14:30:40 21 this case. There were a number of different factors, but I will
14:30:43 22 just summarize for the Court and rely on our pleadings in
14:30:46 23 general to address those facts in detail.

14:30:52 24 But suffice it to say that, first, it appears that the
14:30:56 25 corruption existed at ICE for a number of years prior to the

14:31:01 1 conduct at issue here. I say that because our principal
14:31:05 2 cooperator in the case, Christian Sapsizian, who's a former
14:31:09 3 Alcatel CIT employee and who had been involved in the
14:31:14 4 telecommunications industries in Costa Rica for a number of
14:31:17 5 years back into the 1980s, had discussed issues of corruption
14:31:21 6 dating back into the 1980s.

14:31:24 7 But beyond that, Your Honor, and I think probably most
14:31:26 8 importantly, as we stressed at the May 11th hearing, nearly half
14:31:29 9 of the board of directors of ICE were recipients of bribes in
14:31:35 10 this case. Mr. Sapsizian detailed to the Government the
14:31:43 11 solicitation for bribes as well as the payment of bribes to a
14:31:46 12 number of different ICE officials.

14:31:49 13 And so, while certainly ICE stresses that it's a large
14:31:53 14 company, a state-owned company, and there are only so many
14:31:59 15 people that are charged here, involved here with the corrupt
14:32:02 16 activity, we would point out that they were the most senior,
14:32:05 17 most significant, and the people that made the decisions within
14:32:08 18 the company.

14:32:08 19 **THE COURT:** Mr. Duross, and this may be an unfair
14:32:11 20 comparison, but if I were to use an area which I know you're
14:32:16 21 familiar with, the Medicare fraud area, and let's say that there
14:32:21 22 was a corrupt person inside that allowed certain payments to be
14:32:26 23 made, or something like that, and then someone is convicted, it
14:32:29 24 doesn't prevent the Court from ordering restitution back to the
14:32:34 25 Medicare program, does it not?

14:32:37 1 **MR. DUROSS:** No, it does not, Your Honor. But most of
14:32:39 2 those Medicare cases, Your Honor, involve the doctor gatekeepers
14:32:43 3 who don't work for Medicare permitting those kinds of bogus
14:32:49 4 bills to be passed on to Medicare.

14:32:52 5 I think it would be more akin to a situation where if
14:32:56 6 you were at a hospital at which most of the managing board of
14:32:59 7 that hospital was engaged in Medicare fraud and then that
14:33:04 8 hospital showed up and said it was a victim, I think that would
14:33:08 9 be more akin here.

14:33:09 10 **THE COURT:** There might be restitution made payable to
14:33:11 11 Medicare, but not to the hospital.

14:33:12 12 **MR. DUROSS:** Correct. Now, there is an interesting
14:33:16 13 issue, and it is not a simple one, which is, in spite of all the
14:33:23 14 facts that I've laid out in our brief, and there are obviously
14:33:26 15 more, I think the most salient of those, Your Honor, is that the
14:33:30 16 evidence that the Government has uncovered and laid out in its
14:33:34 17 brief is that not just the companies before Your Honor were
14:33:37 18 involved in paying bribes at ICE, but other companies were
14:33:42 19 paying bribes at the same time, including, Your Honor, a Swedish
14:33:48 20 company, Ericsson, which was competing with Alcatel for the
14:33:53 21 business.

14:33:54 22 So you have this situation that's occurring in which a
14:33:57 23 bunch of people are all paying bribes to a variety of folks, and
14:34:03 24 it is a difficult situation because from an agency
14:34:06 25 perspective -- and I think this is the point that ICE raises --

14:34:10 1 is that because the bribe recipients at ICE were doing it for
14:34:15 2 their own benefit, ICE can't be held responsible.

14:34:19 3 But at some point that agency argument must fail
14:34:23 4 because you could imagine, Your Honor, a circumstance in which a
14:34:27 5 company from top to bottom, every member of the board, everybody
14:34:30 6 is in on it, everybody knows what's going on, but because
14:34:33 7 they're all receiving bribes themselves, the company could show
14:34:36 8 up and say they're a victim.

14:34:39 9 And so, when it gets to that level of management, that
14:34:43 10 level of control -- and, in fact, we cited an audit report in
14:34:46 11 2003, that talked about the lack of internal controls at the
14:34:50 12 company -- we think that that is deeply troubling when it comes
14:34:57 13 to finding ICE as a victim here, Your Honor.

14:35:00 14 I would say this, which is while under the agency
14:35:05 15 argument that ICE makes to this Court it would be difficult and
14:35:10 16 a challenge, I confess, to charge under those circumstances --
14:35:15 17 assuming we had jurisdiction over ICE, which we don't, but
14:35:19 18 assuming that we could charge them, that would be a challenge
14:35:22 19 from a criminal prosecution standpoint.

14:35:24 20 But in evaluating victim status, one of the factors
14:35:28 21 that the Court needs to evaluate is the proximate harm and that,
14:35:33 22 I think, is probably best addressed most recently, Your Honor,
14:35:36 23 in a decision that came down last week from the Costa Rican
14:35:40 24 Court that evaluated these very facts in a trial that lasted
14:35:44 25 over a year.

14:35:46 1 In coming to its judgment in denying ICE its request
14:35:50 2 for damages, it found that ICE was at least in part responsible
14:35:54 3 for the conduct and it delved deeply into this issue, Your
14:36:00 4 Honor, because it got to sort of the issue of proximate harm.
14:36:03 5 Who was really responsible for what was really going on? Who's
14:36:06 6 the victim here?

14:36:06 7 So I don't think that they're a victim based on the
14:36:10 8 facts, but I don't think that this Court needs to resolve that
14:36:16 9 issue in order to accept these plea agreements and reject the
14:36:21 10 request for restitution.

14:36:23 11 The reason why I say that, Your Honor, is there's a
14:36:25 12 case in the Sixth Circuit that in many ways is similar to the
14:36:29 13 case here. It was an antitrust case called *Acker* and it was an
14:36:34 14 antitrust case in which a company called Arctic Glacier was
14:36:40 15 making packaged ice, the kind that you would go and, I guess,
14:36:43 16 pick up at the food and beverage store to keep your beverages
14:36:46 17 cool on a Saturday, and they were engaged in cartel behavior.
14:36:51 18 So, they were involved in price fixing the cost of that ice.

14:36:58 19 They had reached a resolution with the antitrust
14:37:01 20 division of the Department of Justice and that plea agreement --
14:37:03 21 the charges in the plea agreement were posted and some
14:37:07 22 downstream recipients of the ice, so the mom and pop stores that
14:37:12 23 weren't buying it directly from Arctic Glacier, made an
14:37:13 24 appearance and said that they were victims and they wanted
14:37:15 25 restitution.

14:37:16 1 In that case, Your Honor, the Court said, well, it's an
14:37:21 2 open question whether you're a victim for different reasons than
14:37:24 3 here, Your Honor. In that case the question was from a
14:37:28 4 proximate -- from an economic analysis perspective, could the
14:37:33 5 harm be traced to the end users, the ones who weren't buying it
14:37:39 6 directly from the company engaged in the antitrust behavior.

14:37:43 7 And so the Court said, without reaching that issue,
14:37:45 8 leaving that as an open issue, I'm going to find that the Crime
14:37:50 9 Victim Rights Act, the different elements of it have been met in
14:37:55 10 that case and therefore made it a nonissue.

14:37:59 11 The Sixth Circuit agreed with that and the Sixth
14:38:02 12 Circuit found that it was largely beside the point whether or
14:38:04 13 not the alleged victims were, in fact, victims and didn't need
14:38:09 14 to reach that issue. Instead, the Court looked to find whether
14:38:13 15 or not those alleged victims had actually received the rights
14:38:18 16 under the Crime Victim Rights Act, and it found that it had.

14:38:22 17 So in our pleading, Your Honor, we walked through the
14:38:25 18 Crime Victim Rights issue and what we did was we laid out what
14:38:28 19 the rights were and then we walked through how those rights had
14:38:32 20 been met.

14:38:34 21 ICE, in its pleadings, had made some fairly vitriolic
14:38:39 22 comments about never hearing from the Government and we'd never
14:38:42 23 made any effort to comply with those obligations, and we set
14:38:45 24 forth in fairly good detail, Your Honor -- I don't think we need
14:38:49 25 to go into it now -- the notice, timely, accurate and reasonable

14:38:54 1 notice of the hearings, the fact that at all of the hearings
14:38:59 2 ICE's counsel has been present, has never been excluded from
14:39:02 3 court, has had an opportunity at every hearing, every hearing to
14:39:06 4 date, I guess with the exception of the arraignment this
14:39:08 5 morning, to address the Court.

14:39:14 6 There has been control between the Government and ICE's
14:39:19 7 counsel and that the Government and the Court and the Probation
14:39:24 8 Office have all permitted ICE to make its case for restitution.
14:39:28 9 And as a result of that, all of those things, that ICE had been
14:39:31 10 treated with fairness, dignity and respect through this process.

14:39:39 11 As a result of that, Your Honor, we believe that any
14:39:40 12 rights that ICE might be entitled to if they were considered a
14:39:43 13 victim have been met, and under the *Acker* standard then, the
14:39:46 14 Court need not necessarily wrestle with the more difficult issue
14:39:50 15 of ICE and whether they're a victim based on agency issues, but
14:39:54 16 we are troubled by, obviously, the past conduct, not saying that
14:39:58 17 ICE is not a much changed company today.

14:40:01 18 So that is, I think, the key, Your Honor. I will just
14:40:07 19 raise this one issue, which is in response to our walking
14:40:12 20 through the different rights and the fact that the Government
14:40:15 21 has met those rights under the CVRA, there was a right of
14:40:22 22 conferral. And in response to that, it seems as though ICE has
14:40:25 23 now focused its argument on the fact that prior to the filing of
14:40:29 24 the Indictment in this instance that the Government did not
14:40:35 25 confer with ICE's attorneys or ICE itself, and they hang their

14:40:41 1 hat principally on a case called *In re Dean* which is out of
14:40:45 2 the Fifth Circuit.

14:40:46 3 Now, for a whole number of different reasons that we
14:40:50 4 addressed, I think, in a fairly lengthy footnote, we don't
14:40:53 5 believe, and it's the Department of Justice's position, that the
14:40:58 6 Crime Victim Rights Act does not create a right of conferral
14:41:04 7 prior to the filing of charges.

14:41:06 8 We think it's obvious from the face of the statute, if
14:41:09 9 the Court were to look at that particular section, it says to
14:41:12 10 speak to the attorney for the Government in "the" case and the
14:41:19 11 use of the definite article "the" suggests that it's not during
14:41:24 12 the investigation; it's once the charges are filed.

14:41:27 13 *In re Dean*, it does hold differently, but I would
14:41:31 14 point out to the Court that in that case it was assumed that
14:41:35 15 there was a prefiling right of conferral, and we believe that
14:41:39 16 the better logic and wisdom is with a case called *Huff Asset*
14:41:44 17 *Management* which was in the Second Circuit and involved the
14:41:49 18 Adelphia Cable Company and the Regis family, and we think that
14:41:53 19 that was better decided, that there is no right prior to the
14:41:55 20 filing of charges to discuss plea negotiations and the like.

14:42:01 21 So that's the issue on victim status. And just
14:42:05 22 briefly, Your Honor, I'll just touch on restitution, which is
14:42:10 23 even if ICE is a victim, it just does not seem possible to
14:42:16 24 determine restitution in this case for two principal reasons:

14:42:21 25 1. What occurred here involved a corrupt tender

14:42:28 1 process, so bribes were paid in order to win business. As I
14:42:31 2 just described earlier, Your Honor, the whole system had issues.

14:42:37 3 One of the directors testified to receiving other
14:42:39 4 bribes from two different companies around the same time,
14:42:43 5 including being involved with yet another director who was doing
14:42:45 6 the same thing.

14:42:47 7 So in a tender process that's been corrupted, this
14:42:52 8 Court is required to actually have a nonspeculative, reasonable
14:42:57 9 estimation of damages, actual loss to the victim. In fact,
14:43:02 10 there was a case, *United States v. Huff*, in which the
14:43:06 11 restitution award was reversed and remanded, vacated and
14:43:11 12 remanded, I should say, Your Honor, by the Eleventh Circuit
14:43:12 13 because the Eleventh Circuit found that the District Court did
14:43:16 14 not lay out all the specific facts to get to the actual loss
14:43:21 15 dollar amount.

14:43:22 16 I don't see how it would be possible, as many hours in
14:43:26 17 the day that there are, for this Court to unwind a transaction
14:43:30 18 that occurred over a decade ago in some instances, to figure out
14:43:34 19 who would have won that bid in that corrupt tender process and
14:43:42 20 at what price. It's just not possible. I don't see how it's
14:43:44 21 possible to do it.

14:43:46 22 The second point, Your Honor, is in order to try to do
14:43:50 23 that, to even try to accomplish that, the Court would delve into
14:43:55 24 a level of complexity and a process that would so prolong
14:44:01 25 sentencing that neither the Mandatory Victim Restitution Act nor

14:44:06 1 the Victim Witness Protection Act would require the Court do
14:44:10 2 that.

14:44:11 3 It's very specific in both statutes, both restitution
14:44:15 4 statutes, that the Court, if it is unduly complex, it would
14:44:20 5 unduly prolong the sentencing process, need not engage in that
14:44:25 6 if it outweighs the need for restitution.

14:44:28 7 We make that very clear, I think, Your Honor, in our
14:44:31 8 brief. If the Court were to simply review some of the damages
14:44:34 9 that are claimed by ICE here, they talk about things like
14:44:40 10 network problems and whether something was delivered or not
14:44:43 11 delivered or whether services were appropriately rendered and
14:44:49 12 whether products were good products or bad products.

14:44:52 13 Now, for a whole separate reason, I think that those
14:44:55 14 are commercial damages claims that are sort of parading as a
14:45:00 15 restitution issue. I think that that would be very difficult to
14:45:05 16 do. I don't know how it would be possible for us to try to
14:45:08 17 figure out whether or not Alcatel delivered a good product to
14:45:13 18 ICE and whether they used it properly.

14:45:15 19 That's a civil action, a commercial dispute between two
14:45:18 20 sophisticated entities that's actually playing itself out in a
14:45:23 21 Costa Rican court right now.

14:45:24 22 So, Your Honor, the short answer -- I think I said it
14:45:28 23 was going to be a short answer awhile ago. The short answer,
14:45:31 24 Your Honor, is the Government does not believe that ICE is a
14:45:35 25 victim based on the facts laid out in our brief.

14:45:38 1 We think that it would be very troubling indeed if they
14:45:42 2 were to be deemed a victim, but the Court need not decide that.
14:45:45 3 The Court need only find that their rights under the Crime
14:45:49 4 Victim Rights Act have been afforded to them, which we believe
14:45:53 5 that they have.

14:45:54 6 Moreover, Your Honor, even if they are considered a
14:45:57 7 victim, under the restitution statutes this Court cannot deliver
14:46:03 8 a speculative loss amount and the Court need not make complex
14:46:08 9 and unduly lengthy proceedings, engage in unduly lengthy
14:46:14 10 proceedings, in order to try to determine it.

14:46:16 11 I think the best evidence, Your Honor, of how complex
14:46:19 12 this would be, besides the fact that there are now nine lawyers
14:46:23 13 representing ICE, they filed pleadings that have more than 1,300
14:46:28 14 pages of exhibits and the Court's order, findings of fact and
14:46:33 15 conclusions of law in Costa Rica, following six years of
14:46:35 16 litigation and a whole year-long trial, was 2,000 pages and they
14:46:39 17 said that they couldn't determine what the damages were six
14:46:45 18 years later. One-year trial, 2,000 pages, they couldn't figure
14:46:50 19 it out.

14:46:51 20 So from that perspective, Your Honor, I think that
14:46:53 21 restitution is not warranted here and outweighs the need -- I
14:46:57 22 should say that the complexity and the delay outweigh the need
14:47:01 23 for restitution here.

14:47:01 24 **THE COURT:** Let me hear from ICE and then I'll be
14:47:04 25 prepared to rule.

14:47:09 1 **MR. WIAND:** Okay. Your Honor, I am Burt Wiand and I
14:47:13 2 represent Instituto Costarricense de Electricidad. With me
14:47:14 3 today is my colleague, Gianluca Morello, and Jordan Maglich.
14:47:15 4 Also with us here today is Julietta --

14:47:16 5 **THE COURT:** Counsel, microphone, please.

14:47:18 6 **MR. WIAND:** Okay. Also with us here today is Julietta
14:47:19 7 Bajarano who is the director of the Instituto legal division for
14:47:20 8 ICE. That's essentially General Counsel for the company. She
14:47:34 9 has that position now. She had that position from 2000 to 2004.
14:47:40 10 Also with us here is Oman Calderón who is another attorney for
14:47:55 11 ICE who has participated in the criminal proceedings in Costa
14:47:55 12 Rica where all of the individuals who are involved with the
14:47:59 13 bribery scandal there, due in part to the activities of ICE,
14:48:05 14 were brought to justice.

14:48:07 15 I'd like to start out by talking a little bit how we
14:48:10 16 got here, and as this Court is aware, this case involves
14:48:17 17 worldwide corruption. In 2004, the tip of the iceberg appeared
14:48:23 18 when it was uncovered that there was a bribery scandal going on
14:48:27 19 at ICE.

14:48:29 20 There was prompt termination of the individuals
14:48:33 21 involved, and there was prompt prosecution of those individuals.
14:48:36 22 It has, indeed, gone on for a long time, but all of those
14:48:42 23 individuals involved in that were brought to justice. There was
14:48:45 24 prompt action by the company to get rid of them, and the
14:48:51 25 allegations of the Justice Department with respect to this nest

14:48:55 1 of whatever it calls at ICE, based upon newspaper articles and
14:49:01 2 the comments of criminals who were bribing the people at ICE,
14:49:05 3 is, frankly, false.

14:49:07 4 The evidence before you is the affidavit of
14:49:11 5 Ms. Bajarano and an affidavit from ICE's then president, ICE
14:49:20 6 Costa Rica, Mr. Valverde, who was the individual who was
14:49:24 7 directing the activities for Alcatel in Costa Rica, that said
14:49:27 8 other than the individuals who participated in the bribery
14:49:30 9 scandal at issue at ICE, he knew of no way that anybody else
14:49:35 10 could have known about that.

14:49:37 11 Now, when this scandal came out, Alcatel denied all
14:49:42 12 wrongdoing and filed actions against Edgar Valverde and
14:49:48 13 Christian Sapsizian charging that they were rogue employees and
14:49:53 14 acted alone.

14:49:54 15 They denied any responsibility for what occurred there,
14:49:57 16 saying it was an individual action, which we now know was a
14:50:01 17 worldwide orchestrated program of corruption through this
14:50:04 18 company.

14:50:05 19 In 2006, Christian Sapsizian, who had essentially been
14:50:10 20 a low-level bag man that went around and established contracts
14:50:15 21 with the various, what they called consultants in various
14:50:20 22 countries throughout Latin America, was arrested going through
14:50:27 23 Miami as a material witness. He quickly became a cooperating
14:50:33 24 witness for the Government, and he laid out all of the facts of
14:50:35 25 what went on, the fraudulent system of documents that were

14:50:40 1 utilized by Alcatel. He listed twenty companies that were
14:50:50 2 involved.

14:50:50 3 In 2007, Sapsizian pled guilty to conspiracy and aiding
14:50:53 4 and abetting the Foreign Corrupt Practices Act violations that
14:50:56 5 were violations of Alcatel.

14:50:58 6 At that time he was charged with bribery and also money
14:51:04 7 laundering. The documentation indicates the countries involved
14:51:10 8 were Chile, Costa Rica, Honduras, Mexico, Brazil and Belize.
14:51:17 9 The primary focus was, of course, Costa Rica and ICE was the
14:51:22 10 company whose directors and employees were bribed, and it's
14:51:25 11 obvious from the allegations in that case, which are very
14:51:30 12 similar to the one that's before you now, that those are the
14:51:34 13 same cases.

14:51:36 14 Indeed, the Government, at that time, indicated that
14:51:40 15 that case was leading to this one, and that Mr. Sapsizian had
14:51:45 16 been the individual who had unburied the bones, essentially, and
14:51:50 17 that they couldn't have handled the case without him.

14:51:52 18 Indeed, when Judge Seitz sentenced him, she indicated
14:51:56 19 because of his cooperation, which is the greatest she had seen
14:52:00 20 in her history on the bench, she also stated that in light of his
14:52:04 21 cooperation, she forgave him on behalf of the people of the United
14:52:11 22 States.

14:52:12 23 The Government acknowledged that he brought down this
14:52:16 24 scheme. Alcatel had not come forward to that point, and
14:52:22 25 finally, because of the evidence Sapsizian brought forward, they

14:52:26 1 changed their tact and decided that they were now going to
14:52:31 2 cooperate.

14:52:36 3 During the entire period of time of the Sapsizian
14:52:39 4 pleading and process, conviction, sentencing, there was never
14:52:44 5 any notice provided to ICE or anybody with ICE. It's also
14:52:50 6 important for the Court to know that prior to today, the
14:52:56 7 Government has never reached out to ICE for any information of
14:53:00 8 any kind.

14:53:01 9 We have also filed a letter from the Costa Rican
14:53:04 10 prosecutors that indicated that the Government never asked the
14:53:08 11 Costa Rican prosecutors to provide any information from ICE.
14:53:11 12 So, thus, the Government comes before you and says these are all
14:53:15 13 bad people, but they don't have any evidence of it except the
14:53:18 14 people who have bribed them who are trying to get out from under
14:53:21 15 the gun and saying, well, it was really them.

14:53:23 16 I suggest logic tells us that that's not an
14:53:25 17 unreasonable thing to think someone in that situation would say.
14:53:30 18 At any rate, this was not some rampant thing going on at ICE.

14:53:37 19 Now, Sapsizian was sentenced to 30 months. He has
14:53:42 20 since been released. During the course of that proceeding
14:53:48 21 before he was released, I sent letters to Judge Seitz and asked
14:53:53 22 her if we could participate in any further proceedings in that
14:53:56 23 case. She didn't think there were going to be any.

14:53:59 24 Mr. Sapsizian's lawyer had told me that he believed
14:54:02 25 that the Government was going to file a motion to have him

14:54:05 1 released early based upon his cooperation as soon as this
14:54:08 2 Alcatel case was filed.

14:54:11 3 Having been advised of that, I talked with the
14:54:18 4 Government and asked for information about Mr. Sapsizian, about
14:54:22 5 his release time, things of that nature that a victim is
14:54:26 6 entitled to know. I was told I could be provided with no
14:54:29 7 information.

14:54:29 8 **THE COURT:** Well, that's because you were assuming the
14:54:31 9 fact not in evidence, that you were the victim.

14:54:34 10 **MR. WIAND:** Judge, I think that --

14:54:37 11 **THE COURT:** I think you're throwing a lot of stones in
14:54:41 12 Mr. Duross's direction, but if he has acted in what he thinks is
14:54:46 13 the appropriate way under the statute, I don't think it's
14:54:49 14 appropriate for ICE to treat him in that manner.

14:54:54 15 **MR. WIAND:** Your Honor, I don't -- I understand that
14:55:00 16 Mr. Duross says that there's been a calculated decision not
14:55:06 17 to -- for some reason that ICE is not a victim.

14:55:10 18 I would submit to the Court that if you read the
14:55:13 19 plethora of case law, that conclusion is very, very hard to
14:55:15 20 reach. I think, Judge, that there is actually information in
14:55:19 21 the public sector from people at the Department of Justice that
14:55:22 22 indicate why that decision was made and it was not because of
14:55:27 23 the things that the Justice Department --

14:55:30 24 **THE COURT:** Then, what is it?

14:55:31 25 **MR. WIAND:** Well --

14:55:34 1 **THE COURT:** I've read Mr. Duross's filing, it seems to
14:55:36 2 be -- you know, my decision will be announced in a minute -- but
14:55:42 3 it doesn't seem to be made without thought and analysis of the
14:55:48 4 statute involved.

14:55:49 5 **MR. WIAND:** Your Honor, if I might, the Department of
14:55:54 6 Justice had in place a policy with respect to dealing with these
14:56:04 7 foreign companies, and that policy was, as indicated by Mark
14:56:13 8 Mendelsohn, the former chief of the Foreign Corrupt Practices
14:56:18 9 Act, that there is grave danger that you're returning money to
14:56:23 10 people that took bribes in the first place. The last thing one
14:56:28 11 wants to do is to fuel corruption in the name of fighting it.

14:56:39 12 Then William Jackson, his former assistant, states
14:56:45 13 that, we've thought at DOJ from time to time about giving
14:56:49 14 restitution, giving money to some of these governments. The
14:56:57 15 problem is most -- by definition, you're talking about corrupt
14:57:02 16 governments, so we decided it really wasn't the way to go.
14:57:05 17 Maybe in some FCPA cases it's okay, in others it's not, but as a
14:57:11 18 matter of course DOJ does not do it that way.

14:57:16 19 Judge, I submit to you that's how we got here, was the
14:57:19 20 fact that DOJ doesn't do it that way even though the CVRA says
14:57:24 21 you have to.

14:57:28 22 Now, from 2007 until today, there has been no
14:57:34 23 significant contact from the Department of Justice with ICE to
14:57:41 24 inquire about any substantive matters. At one point in time
14:57:46 25 Mr. Duross asked me for my views with respect to why we were a

14:57:50 1 victim. I provided him a letter that laid out the basic tenets
14:57:54 2 of why I believe we are a victim and I included with that a
14:57:57 3 50-page brief and 1,300 pages of documents supporting it. I was
14:58:02 4 told that this didn't have anything to do with the issue.

14:58:08 5 Then we continued to ask the Department of Justice for
14:58:12 6 their position with respect to this issue of why we were not a
14:58:16 7 victim. On two occasions we submitted letters in that regard.
14:58:20 8 Those letters were not responded to.

14:58:23 9 And then it was not until we filed our petition that we
14:58:29 10 indeed got a response from the Department of Justice as to what
14:58:32 11 their view was on this issue.

14:58:35 12 In that regard, we had previously contacted the
14:58:40 13 Probation Department. We've contacted others in order to try to
14:58:45 14 get some status in order to be considered a victim so that,
14:58:50 15 pursuant to this statute, we could assert the rights that
14:58:55 16 Congress guaranteed to my clients.

14:59:00 17 Now, it's important that, Judge, that we note that with
14:59:05 18 respect to the inquiries by the Department of Justice or any
14:59:09 19 communication, at no time were we ever asked any questions with
14:59:16 20 respect to what harm ICE had had, nor were we asked what role
14:59:22 21 ICE had in the bribery conduct.

14:59:25 22 So the Department of Justice, pursuant to the Victim
14:59:36 23 Rights Act, has the responsibility to use its best efforts to
14:59:40 24 determine these things and it did not.

14:59:45 25 In all, there have been five individuals -- six

14:59:50 1 individuals from ICE out of 16,500 employees prosecuted. These
14:59:56 2 were the people that were revealed to have been involved in this
15:00:00 3 scandal, and these people have been brought to justice.

15:00:04 4 The Justice Department has also suggested that since
15:00:09 5 that time there have been three other individuals, or two other
15:00:13 6 individuals who have been involved in corrupt transactions. All
15:00:19 7 of those officials are no longer with the company. They have
15:00:23 8 been terminated and/or prosecuted and on some occasions they
15:00:27 9 have been required to pay back funds to ICE.

15:00:30 10 ICE has had procedures in place throughout this period
15:00:34 11 of time, as indicated in the affidavit of Ms. Bajarano, that
15:00:41 12 advise the employees that any such corrupt conduct was illegal
15:00:45 13 and any incident of that that has been brought up by the
15:00:49 14 Department of Justice, we have demonstrated that it was promptly
15:00:53 15 and thoroughly dealt with.

15:00:54 16 Now, with respect to this matter, my client has
15:01:04 17 suffered significant damage. The Government has determined that
15:01:09 18 this damage was because of inequality in a bidding process. We
15:01:15 19 have submitted that information. We didn't mention that.

15:01:18 20 What we mentioned is that through this process and the
15:01:23 21 bribing of individuals who fostered the acceptance of this
15:01:29 22 contract, and through the bribing of the individuals who
15:01:32 23 monitored and accepted the goods as they came in, that this
15:01:36 24 company did not receive what it bought.

15:01:41 25 And the Court should understand that with respect to

15:01:43 1 the major purchase, \$149 million worth of TSM lines, that this
15:01:49 2 purchase was financed, my client had to pay for it and then it
15:01:53 3 was never delivered because, in part, of this bribery scandal,
15:01:58 4 and we have detailed for the Probation Office how these matters
15:02:04 5 work out, and I think that we have laid them out fairly
15:02:09 6 detailed.

15:02:10 7 Now, it's important to note that after Sapsizian's
15:02:21 8 conviction it was announced in January 2010, not 2011, but in
15:02:27 9 2010, by Alcatel that it had reached these three plea agreements
15:02:32 10 and the deferred prosecution agreements, and they announced in
15:02:34 11 their disclosure the specified amounts of the fines and what the
15:02:39 12 relief was going to be. So, this agreement was reached 16
15:02:44 13 months ago, 17 months ago, and it was not filed until December
15:02:50 14 of this year [sic].

15:02:56 15 Then, it was not initially moved forward for a couple
15:03:00 16 of months after that, but albeit that was because Judge Seitz
15:03:04 17 had a conflict and it moved from judge to judge and fortunately
15:03:10 18 or unfortunately for you, Judge, it landed here.

15:03:19 19 Now, with respect to the deal that has been struck and
15:03:25 20 the documents that are before the Court, I submit to you that
15:03:31 21 these documents and the agreements under the CVRA are not
15:03:40 22 agreements that can be entered, and we have requested you to
15:03:45 23 reject the deal, to determine that we are a victim, and to
15:03:52 24 enforce at an appropriate time our rights as a victim.

15:03:59 25 With respect to rejecting the deal, we think that you

15:04:06 1 should consider the following: You should consider whether it's
15:04:10 2 appropriate for you to accept a deferred prosecution agreement
15:04:14 3 in this case. You should consider whether or not the agreements
15:04:21 4 are appropriate and whether the penalties are appropriate, which
15:04:25 5 we submit they are not, and we submit that you should consider
15:04:28 6 whether or not there's been a failure to comply with the CVRA
15:04:32 7 and a failure to provide mandatory restitution.

15:04:35 8 Indeed, we agree, Judge, that our view of this
15:04:41 9 transaction is that if it goes forward and it is accepted as an
15:04:49 10 11(c)(1)(C) plea that there can be no restitution. I think this
15:04:57 11 was dealt with in such a way that it attempted to avoid this and
15:05:04 12 had it not been for ICE clawing its way into this case, it would
15:05:10 13 have gone forward that way.

15:05:11 14 Now, let's talk about the deferred prosecution
15:05:14 15 agreement. First, Judge, I think the standards that the Court
15:05:17 16 needs to look to in order to determine whether or not this
15:05:21 17 should be accepted are those that are laid out by the Department
15:05:25 18 of Justice itself in the McNulty Memo.

15:05:29 19 The McNulty Memo lays out a series of considerations
15:05:35 20 that should be considered as to whether or not these should go
15:05:39 21 forward. Accepting this kind of deal is totally within the
15:05:42 22 discretion of the Court.

15:05:43 23 First, one should look at the nature and seriousness of
15:05:47 24 the offenses. I submit to you that the nature and seriousness
15:05:49 25 of these are an international, worldwide conspiracy of

15:05:53 1 corruption that went on for decades. It is an extremely serious
15:05:56 2 case.

15:05:57 3 Was it persuasive within the corporation? Judge, the
15:06:01 4 documents and the information that we filed with this Court
15:06:03 5 indicated that there was an entire system of management of these
15:06:07 6 corrupt practices that went through subsidiaries and ended up
15:06:12 7 with an executive of the company in Switzerland who approved and
15:06:17 8 documented all of these contracts in a worldwide coordinated
15:06:21 9 manner.

15:06:22 10 Was there a history of similar conduct? I think the
15:06:25 11 20-year history of this conduct certainly indicates that there
15:06:28 12 is not much credit there.

15:06:31 13 Timely and voluntary disclosure and cooperation:
15:06:36 14 Alcatel was drug kicking and screaming to justice in this case
15:06:41 15 and repeatedly denied and filed diversionary actions to avoid
15:06:50 16 any recognition of its responsibility in these matters.

15:06:54 17 Have there been any remedial actions? There have not
15:06:59 18 been. Alcatel has fought tooth and nail with respect to
15:07:05 19 avoiding any remedial action or any amelioration of its wrongs.
15:07:16 20 I think counsel and the Department reflected that there was a
15:07:21 21 settlement with the Government of Costa Rica and that they paid
15:07:25 22 \$10 million.

15:07:27 23 I think, Judge, you need to understand what that was
15:07:29 24 all about. That was part of the criminal proceeding in Costa
15:07:32 25 Rica where the people of Costa Rica are allowed to seek what's

15:07:37 1 called moral damages. Companies can seek moral damages, too.
15:07:44 2 Alcatel settled with the Government of Costa Rica for \$10
15:07:47 3 million, and part of the agreement was that the Government of
15:07:52 4 Costa Rica acknowledge that there was a lack of wrongdoing on
15:07:55 5 behalf of the Alcatel.

15:07:57 6 A \$70 million settlement was proposed to ICE which was
15:08:01 7 rejected because ICE chose not to accept language that indicated
15:08:06 8 that ICE -- I mean that Alcatel had not engaged in any
15:08:08 9 wrongdoing.

15:08:10 10 And any representation of that settlement with the
15:08:14 11 Government of Costa Rica is clearly inaccurate and it is
15:08:18 12 documented in the exhibits we filed and the affidavit of
15:08:22 13 Ms. Bajarano.

15:08:22 14 Now, with respect to the collateral consequences, there
15:08:29 15 appear to be none. The adequacy of the prosecution of
15:08:34 16 individuals: Judge, this was a crime that nobody did. It's
15:08:40 17 solely the corporate entity and primarily subsidiaries are
15:08:45 18 taking the brunt of this.

15:08:47 19 This was an international corrupt organization that ran
15:08:54 20 for 20 years by the evidence before this Court and nobody did
15:08:58 21 it. The only person who has been brought to justice is
15:09:03 22 Christian Sapsizian, the man who unveiled the evidence and
15:09:09 23 brought this case forward.

15:09:15 24 With respect to the civil regulatory remedies
15:09:19 25 available, I would have to say there are some. If you add those

15:09:22 1 up -- maybe there's 9 or 10 -- there's only one that in this
15:09:28 2 situation should even get half a consideration of why this
15:09:31 3 should go forward.

15:09:33 4 In addition, Judge, I think it's very important for you
15:09:35 5 to be aware that Alcatel continues to deny responsibility and at
15:09:40 6 the same time it comes before this Court acknowledging its
15:09:44 7 wrongdoing, it has a lawyer in Costa Rica who is standing up and
15:09:47 8 saying the company is blameless, and it was solely the fault of
15:09:53 9 Sapsizian and Valverde with respect to what occurred there.

15:09:58 10 The plea agreements before you, Judge, prove that that
15:10:00 11 is not true and the deferred prosecution agreement specifically
15:10:05 12 provides that Alcatel cannot make those statements, and they are
15:10:09 13 already making them and the ink is hardly dry on the agreements
15:10:16 14 themselves and, Judge, you haven't even put your ink on it.

15:10:19 15 Now --

15:10:20 16 **THE COURT:** Anything else, counsel?

15:10:22 17 **MR. WIAND:** Yes, ma'am.

15:10:24 18 With respect to the penalty that is suggested in these
15:10:26 19 agreements, I submit to you, Judge, that it is inappropriate
15:10:29 20 because, one, it does not include restitution, and it does not
15:10:34 21 reflect the crimes that are involved here.

15:10:36 22 Those crimes would include money laundering, wire
15:10:38 23 fraud, mail fraud, racketeering. Those crimes have not been
15:10:43 24 mentioned.

15:10:45 25 And further beyond that, Judge, if you look at the

15:10:48 1 calculation of the penalty itself in this matter, you would find
15:10:53 2 that it is based upon a 2D1 base level of 6 rather than a base
15:11:00 3 level of 2C1.1 that would indicate a base level of 12.

15:11:06 4 If you then take the Government's numbers with respect
15:11:10 5 to what they say, the offense involved more than one bribe would
15:11:17 6 add 2. The value of the benefit received was 20 to 50 million.
15:11:23 7 That's based upon what's in the papers. The offense involved a
15:11:26 8 public -- a high-level official. That's a plus 4. You come up
15:11:29 9 to 40.

15:11:30 10 That indicates that the base fine is \$72.5 million.
15:11:34 11 You use the Justice Department's and Alcatel's multiplier and
15:11:39 12 you come up with a fine range of \$130,500,000 to \$261,000,000.
15:11:48 13 Those are calculations that are, I think, clear with respect
15:11:53 14 to the nature of the crime, that being bribery, and the wrong
15:12:02 15 section was applied with respect to these crimes.

15:12:04 16 Further, Judge, I think we need to look at what's being
15:12:09 17 done here. There is a \$92 million fine to be paid.
15:12:16 18 Alcatel-Lucent had revenues of \$21.2 million last year. In the
15:12:19 19 last ten years they had revenues of almost \$200 billion.

15:12:26 20 The amount of this fine is extremely low compared to
15:12:30 21 that, especially when it's included -- there's no inclusion of
15:12:34 22 restitution. If you look at the *Exxon Valdez* cases or the *BP*
15:12:43 23 cases, there fines of similar amounts have not been accepted
15:12:48 24 without significant restitution, and in the *BP* case we all know
15:12:54 25 that's billions.

15:12:55 1 Now, also this --

15:13:01 2 **THE COURT:** Counsel, can you begin to sum up, please?

15:13:03 3 I've read the pleadings.

15:13:05 4 **MR. WIAND:** All right. I will go more quickly, Judge.

15:13:11 5 With respect to the CVRA, I think that I would like to
15:13:14 6 explain, Judge, that the right to confer that we were denied, I
15:13:18 7 think, is the most important. We have specified the others, but
15:13:21 8 with respect to conference, that means something other than,
15:13:24 9 "I'm sorry you're not a victim. I'm not going to talk to you."

15:13:28 10 In that situation how can the Government come before
15:13:31 11 this Court and say that there are no damages or what the nature
15:13:33 12 of the damages are or any of those kind of things that are
15:13:37 13 necessary in order to go forward with the plea when they've
15:13:39 14 never asked? And they have never asked.

15:13:43 15 Then they come to this position here and they say,
15:13:48 16 "Well, we don't have any information on that, essentially, and
15:13:52 17 therefore there can't be any restitution." That's not the best
15:13:55 18 efforts for anybody, Judge. That's a situation where a victim
15:13:59 19 entitled to restitution is not being provided with the rights of
15:14:04 20 the CVRA.

15:14:06 21 We are a victim under the MVRA. That is someone who is
15:14:12 22 damaged by direct or proximate -- directly or proximately
15:14:21 23 damaged by the conduct and when it involves a scheme as it does
15:14:25 24 here, it's any conduct within that scheme.

15:14:28 25 We have cited a tremendous number of cases to the Court

15:14:31 1 with respect to the fact that we should be a victim. There are
15:14:38 2 but two arguments that have been made. One of them is that this
15:14:42 3 conviction does not involve property.

15:14:46 4 I don't know how that can really flow, I mean, if we
15:14:49 5 look at property, we've got \$18 million in bribes. We've got
15:14:53 6 \$400 million in contracts, and we've got contract rights which
15:14:57 7 are property rights.

15:14:59 8 Further, this case clearly involves fraud and deceit.
15:15:03 9 It involves the making of false books and records. It involves
15:15:06 10 the bribing of people. If you look at 1341 and the *Schilling*
15:15:11 11 case that is clearly fraudulent conduct, and under the MVRA,
15:15:17 12 that is clearly conduct that we are entitled to compensation
15:15:22 13 for.

15:15:22 14 The second thing is we are a participant. I think I've
15:15:26 15 been through that a bit, Judge, and I don't think I need to go
15:15:29 16 through the facts on that, but I think I do need to go through
15:15:32 17 the cases.

15:15:33 18 Note in what's been filed with you, Judge, that the
15:15:34 19 Government has come up with no case -- no case -- that supports
15:15:39 20 their position that someone in ICE's position should not be
15:15:45 21 given victim status and restitution.

15:15:48 22 They cite several cases. *Lazarenko*. In *Lazarenko*,
15:15:53 23 where restitution was denied, the individual was named as a
15:16:02 24 coconspirator in the action. With respect to *Reifler*, it was
15:16:07 25 the same case, they were giving money to nominees of the

15:16:12 1 mobsters who were indicted in the scheme and were indicted and
15:16:15 2 convicted in the case.

15:16:16 3 I submit that if you look at *Ojeikere*, that case is
15:16:19 4 actually very helpful to us. Then they cite Local 418 which is
15:16:26 5 an NLRB case that indicated that where the individuals who
15:16:31 6 received the bribes were acting with the authority and on behalf
15:16:35 7 of the union, that they could be responsible for it.

15:16:39 8 They didn't cite to you *International Longshoremen v.*
15:16:43 9 *NLRB*, a case that reviewed that, and indicated that you had to
15:16:49 10 have authorized action on behalf of an agent. You had to have
15:16:53 11 them acting for the benefit of the entity and/or the conduct had
15:16:57 12 to be ratified.

15:16:58 13 It is clear that none of that occurred here, and I
15:17:01 14 suggest to you, Judge, that there is a case called *Kamuvaka* that
15:17:08 15 is cited to the Court that relates to Medicare, which you
15:17:10 16 brought up, in Pennsylvania where the entire office apparently
15:17:14 17 of the City of Philadelphia that was doing this was involved in
15:17:18 18 this scheme, and the Court indicated in that case that because
15:17:23 19 this was a governmental entity, that it was appropriate even if
15:17:28 20 a majority of these people were involved in the scheme that
15:17:30 21 restitution be paid to the City of Philadelphia.

15:17:33 22 So -- and then, finally, Judge, I would like you to
15:17:36 23 look at the *Williams* case, *Williams Gaming* case, which analyzes
15:17:41 24 this agency relationship, and that case clearly indicates that
15:17:45 25 in connection with a situation such as this, where you would

15:17:49 1 have a few people within a company, a situation as the
15:17:55 2 Government has argued that maybe ICE was negligent in not
15:17:59 3 stopping these people, that if that was the case, that
15:18:03 4 negligence is of no merit, and that they still could not be
15:18:12 5 found liable based upon the unauthorized acts of a few
15:18:15 6 individuals within a corporation.

15:18:18 7 As I said, you know, we presented to the Court evidence
15:18:24 8 here that this was not clearly known throughout ICE. The
15:18:27 9 Government has submitted some newspaper articles.

15:18:30 10 Since we are a victim, then I want to step to what
15:18:35 11 rights we have. I talked about the rights in the notice that we
15:18:42 12 are entitled to. I talked about the rights to confer that are
15:18:47 13 very meaningful rights, and I would suggest to you that one
15:18:51 14 cannot ignore *Dean*, a Fifth Circuit case, that is on point on
15:18:55 15 this issue.

15:18:56 16 None of the cases cited by the Government are on point
15:19:00 17 with respect to this issue and also you'll find that *Dean* is
15:19:06 18 also favorably cited by *Rubin* and -- the *Rubin* case and the *Okun*
15:19:11 19 case that we have provided to you.

15:19:14 20 Now, also under the CVRA, the best efforts on behalf of
15:19:18 21 the Government are required. I think I've gone through the fact
15:19:21 22 that these best efforts were not exercised by the Government and
15:19:29 23 there was no attempt to gather information with respect to the
15:19:33 24 plight of ICE or with respect to any factual basis upon which
15:19:38 25 the Department made its determination.

15:19:40 1 Coming before this Court without having done that,
15:19:43 2 Judge, does not satisfy the standard of best efforts to look out
15:19:48 3 for victims who are victims of Title 18 crimes. It's the
15:19:54 4 Government's obligation to use its best efforts to get that
15:19:58 5 information and to communicate with the victims. That has not
15:20:02 6 occurred in this situation.

15:20:06 7 It is obvious, if you look at the Sapsizian case, if we
15:20:13 8 hadn't started coming before this Court, we would have gotten no
15:20:16 9 notice and we would not be here.

15:20:19 10 Mr. Duross is correct that at a point in time, after we
15:20:23 11 were already getting electronic notices due to the efforts of
15:20:27 12 Judge Seitz, he did agree to provide us notice of hearings and
15:20:32 13 he has done that. He has also always been polite. But with
15:20:35 14 respect to giving us any meaningful benefit of the Department of
15:20:39 15 Justice, who has the obligation to investigate these matters and
15:20:43 16 bring them before the Court and prove them to the Court, he's
15:20:45 17 done nothing.

15:20:50 18 Now, the fact that this has failed and the appropriate
15:20:54 19 evidence has not been brought before this Court to resolve this
15:20:57 20 matter, this plea, I submit to you, cannot be entered under the
15:21:01 21 CVRA. It is inappropriate from the point of view of the
15:21:14 22 computation of the fines. It is inappropriate with respect to
15:21:18 23 the nature of the actions, and it does not provide any of the
15:21:25 24 remedial appropriate relief that is necessary.

15:21:35 25 Now, two other things that I want to go through

15:21:37 1 quickly, Judge, and I'll try. The other reasons they say you
15:21:40 2 can't have restitution, this is too complicated. Your Honor,
15:21:46 3 those are nice words, but there has to be something behind them.
15:21:51 4 What does complicated mean and what does it mean in the context
15:21:55 5 of this situation?

15:21:55 6 I invite Your Honor's attention to *United States v.*
15:21:59 7 *Cataggio*. In that case there was \$192 million of restitution
15:22:04 8 and 10,000 victims. The Court found a way to get it done. In
15:22:09 9 *U.S. v. Cienfuegos*, the complexity of restitution and the
15:22:13 10 availability of more suitable forum is no reason to decline an
15:22:18 11 order for restitution.

15:22:19 12 *United States v. Brennan* is similar and *United States*
15:22:21 13 *v. Mueffelman* had restitution of 326 victims and the Court found
15:22:28 14 that those cases are complex and it could clearly go forward
15:22:32 15 with restitution.

15:22:33 16 Then I submit to you, Your Honor, you should examine
15:22:36 17 *U.S. v. Dolan*, a recent Supreme Court case, wherein the United
15:22:41 18 States Supreme Court reviewed the 90-day time frame with respect
15:22:45 19 to completing restitution. In that case the United States
15:22:50 20 Supreme Court said that that time frame was not a bar to
15:22:57 21 restitution and that where Courts needed to do so, made a
15:23:02 22 determination restitution was appropriate, they could take the
15:23:05 23 appropriate steps to go forward and make those determinations.

15:23:09 24 Moreover, the procedures in Title 18 that relate to how
15:23:15 25 restitution is going to be determined clearly indicate, where

15:23:17 1 matters have some complexity, that they can be referred to a
15:23:21 2 Magistrate or a Master for resolution. Those are statutory
15:23:26 3 provisions and the obvious purpose of them is that restitution
15:23:32 4 should go forward.

15:23:36 5 Now, with respect to delay in this case is another
15:23:43 6 thing that's been cited why we shouldn't have restitution. As I
15:23:46 7 said, *Dolan* indicates that's not a reason for doing that and I
15:23:52 8 think *Gamma Tech* is also one that indicates that also.

15:23:58 9 But at any rate, Judge, in this case it's a red
15:24:03 10 herring. This agreement was reached 16 months ago, and it was
15:24:07 11 not filed with the Court for a 16-month period. And now it's
15:24:12 12 filed and while nobody's come to ask about the harm, ask about
15:24:17 13 what the information is relating to ICE's participation or
15:24:23 14 nonparticipation in any conduct, now all of a sudden there's a
15:24:27 15 rush and we have to get the plea entered and the sentence done
15:24:33 16 today when the rights relating to victims' rights are clearly
15:24:38 17 being violated.

15:24:42 18 Alcatel has noted and the Government has noted that
15:24:50 19 there have been other litigation and suggested that maybe other
15:24:54 20 litigation would be the appropriate way to resolve this. I
15:24:57 21 submit to you, Judge, that under 3664(f)(1)(B), the statute
15:25:06 22 specifically says that no other potential source of recovery
15:25:10 23 shall be considered in awarding restitution.

15:25:14 24 There's another provision that said if we recover from
15:25:17 25 some other source, that that can be an offset; but with respect

15:25:24 1 to the restitution to which we're entitled, the law is clear
15:25:31 2 that whatever litigation is going on -- I'm not going to go into
15:25:36 3 depth into that because, you know, it would just take time, but
15:25:39 4 what's been represented to you is not accurate with respect to
15:25:43 5 the litigation.

15:25:44 6 Specifically, the claims for moral damages in Costa
15:25:49 7 Rica were referred to civil court and the action that's been in
15:25:55 8 the United States, there's been no merits determination on it,
15:26:00 9 and we presently have a ruling on forum non conveniens pending
15:26:06 10 in the Court of Appeals. So, there has been no action of
15:26:09 11 anybody with respect to any of these claims, determining that
15:26:10 12 they are not valid or that damages are not real.

15:26:15 13 So I sort of get down to the end, which I'm sure you're
15:26:18 14 happy about, that this plea and its acceptance and the DPA would
15:26:27 15 be inconsistent with justice as I've outlined. The penalties
15:26:30 16 are inadequate and wrong. The victims' rights have not been
15:26:37 17 guaranteed nor has there been any provision or opportunity for
15:26:43 18 restitution if this plea is accepted.

15:26:48 19 And I think that, you know, that last point was one
15:26:52 20 that I was unclear on with respect to the restitution because
15:26:56 21 when we were before the Court the last time, Mr. Duross
15:26:59 22 indicated that he believed that the plea contemplated
15:27:03 23 restitution and Alcatel indicated that it did not.

15:27:08 24 I leave it to the drafters to figure out what the
15:27:11 25 agreement meant, but in one situation, if it does not constitute

15:27:16 1 and does not envision restitution, it is illegal. If it does,
15:27:23 2 it's quite clear that Alcatel's position and its understanding
15:27:29 3 of the agreement that it does not include restitution and
15:27:32 4 therefore, since it's an 11(c)(1)(C) plea, it would be a
15:27:37 5 violation of due process to Alcatel if it went forward in its
15:27:41 6 present form and restitution is considered in that plea.

15:27:46 7 Judge, we ask for the following: We ask that the plea
15:27:49 8 be rejected. We ask that you find that we are a victim. We ask
15:27:55 9 that the Justice Department be ordered to use its best efforts
15:28:02 10 to attempt to gather information relating to harm and victim
15:28:07 11 status and that we be able to present evidence of the harm
15:28:13 12 directly to the Court or the determiner without the intervention
15:28:18 13 of the Department of Justice.

15:28:20 14 We believe that an award of restitution is clearly
15:28:23 15 appropriate, and based on all those things, Judge, we would ask
15:28:27 16 you to reject the plea as it is presented because it does not
15:28:32 17 meet the appropriate standards as I have outlined.

15:28:35 18 **THE COURT:** Thank you, sir.

15:28:36 19 **MR. WIAND:** Thank you very much for your time.

15:28:38 20 **THE COURT:** Counsel, I'm going to ask that you all
15:28:40 21 remain seated. I had a three o'clock calendar call, and I'm
15:28:43 22 going to take care of those matters now.

23 Ivan.

24 [There was a recess while the Court considered other matters
25 judicial.]

1 AFTER RECESS

2 [Proceedings in this cause resume at 4:19 p.m.]

16:19:36 3 **THE COURT:** All right. We're back on the record in
16:19:38 4 United States v. Alcatel, et al.

16:19:41 5 Mr. Duross, can you give just a brief comment on the
16:19:43 6 remarks from counsel for ICE, please? And then I can proceed
16:19:48 7 with my rulings on this matter and if I have any more questions.

16:19:52 8 The basic issue seems to be: You said they're not a
16:19:56 9 victim. You've treated them sort of in a quasi-victim way.
16:20:01 10 They disagree that maybe you haven't and that, essentially,
16:20:05 11 you've made a bad policy decision, judgment call, and it's
16:20:10 12 against the great weight of the legal evidence. That's how I
16:20:12 13 would sum it up.

16:20:13 14 So, if you can respond because I think, unless they're
16:20:16 15 a victim, nothing else -- I confer that status, nothing else
16:20:20 16 matters.

16:20:20 17 **MR. DUROSS:** Correct, Your Honor.

16:20:25 18 In terms of our argument in a nutshell, we don't think
16:20:28 19 they're a victim, but even if they are a victim, they've
16:20:30 20 actually received all the rights under the current Victim Rights
16:20:33 21 Act, and because of that, regardless of their status, the Court
16:20:37 22 doesn't need to actually make that decision and say, "Oh, you're
16:20:41 23 a victim or you're not a victim. Just say regardless of whether
16:20:44 24 you're a victim or not" --

16:20:45 25 **THE COURT:** Well, I think the victim confers at least

16:20:49 1 one very special right, and that's the right that counsel seems
16:20:52 2 to be most concerned about, and that's the right to restitution.

16:20:55 3 Their argument against your complexity, no specificity,
16:21:00 4 is, "Your Honor, there's no reason to rush." I mean, I know
16:21:03 5 we've done this before, but until recently, we all thought that
16:21:07 6 you had only 90 days to determine what the restitution amount
16:21:10 7 is.

16:21:10 8 The Supreme Court has sort of given us a little time
16:21:15 9 leeway, so we would now have time to calculate these complex
16:21:19 10 restitution damages.

16:21:21 11 **MR. DUROSS:** True, though whether or not the 90-day --
16:21:25 12 the fact that the 90 days is not jurisdictional in nature
16:21:28 13 doesn't mean that the complexity prong of both the Mandatory
16:21:31 14 Victim Restitution Act and the Victim Witness Protection Act,
16:21:36 15 either one of those, isn't still at play and something that the
16:21:39 16 Court should make a decision on.

16:21:41 17 So let me take one step back and just say in terms of
16:21:45 18 their rights under the Crime Victim Rights Act, when it comes to
16:21:48 19 restitution, it actually says their right to restitution as
16:21:53 20 provided in law, and so it's not a right to just restitution.

16:21:57 21 You could be a crime victim and not entitled to
16:22:00 22 restitution, even if you thought you were entitled to it,
16:22:04 23 because what happens is this Court is required to make a
16:22:11 24 finding, specific findings of fact, to say this is what your
16:22:14 25 actual loss is. And if the Court can't do that or the process

16:22:18 1 by which the Court would try to reach that would be so complex
16:22:22 2 and cumbersome the Court need not do that.

16:22:25 3 So, even under the Crime Victim Rights Act, regardless
16:22:29 4 of whether they're a victim, regardless, they have had all of
16:22:33 5 their rights met is our position in our brief and, I think,
16:22:37 6 borne out by the facts, Your Honor.

16:22:40 7 If I could address a couple of issues quickly because I
16:22:45 8 think there are a few things that need to be corrected on the
16:22:49 9 record. First, there's apparently some letter in Spanish that
16:22:52 10 was submitted in a reply brief last Friday by ICE, from the
16:22:58 11 Attorney General's Office that they say we never asked for
16:23:01 12 anything from Costa Rica concerning ICE.

16:23:06 13 I imagine that the person at the Attorney General's
16:23:09 14 Office that was responding to that wasn't aware of a March 20,
16:23:12 15 2007 MLAT request sent by our Office of International Affairs
16:23:17 16 which is obviously not a public document. It's not something
16:23:21 17 that we share as part of our internal investigation, but I'm
16:23:24 18 happy to share it with the Court in camera and ex parte, but it
16:23:28 19 specifically makes record requests regarding ICE, including the
16:23:34 20 Board of Directors.

16:23:34 21 So, I think they're just simply mistaken when they
16:23:37 22 suggest that we didn't ask for those records. And we did, by
16:23:41 23 the way, receive significant amounts of records, Your Honor.

16:23:45 24 The issue about supposedly the 16-month delay, ICE has
16:23:51 25 repeated that a number of times, both in their briefs and

16:23:54 1 earlier today, and I think it's important to understand: There
16:23:56 2 is a significant distinction between the public filing by a
16:24:02 3 publicly traded company that they've reached an agreement in
16:24:06 4 principle and therefore a material event has occurred by which
16:24:08 5 they feel obligated under securities regulations to make a
16:24:12 6 disclosure regarding an agreement in principle and that
16:24:15 7 agreement actually being completed.

16:24:18 8 I can tell the Court it wasn't as though -- it was not
16:24:22 9 the case, not just though. It was not the case that there was
16:24:26 10 an inked deal that everybody had sitting in front of them and
16:24:29 11 they sat on it for however many months, you know, twelve months
16:24:34 12 and then filed it at the end of December. Not true.

16:24:36 13 There were a lot of negotiations. As the Court, I'm
16:24:38 14 sure, is well aware, the devil is in the details, and there were
16:24:42 15 significant, hard-fought negotiations going on throughout last
16:24:46 16 year. In fact, one of the significant events that the Court
16:24:49 17 should be aware of and we cite in our plea agreement, something
16:24:53 18 we're quite proud of, is that we've arranged for an independent
16:24:57 19 corporate monitor for the company.

16:24:59 20 This is French company, Your Honor, and there's only
16:25:02 21 been one other situation in which an independent corporate
16:25:06 22 monitor -- essentially like a corporate probation officer if you
16:25:09 23 will -- has been assigned to a French company, and there are
16:25:14 24 very significant issues with regard to what's known as the
16:25:18 25 blocking statute in France.

16:25:20 1 It prohibits the sharing of economic data outside of
16:25:22 2 the Country of France, and there were significant concerns on
16:25:26 3 the part of Alcatel-Lucent that if they were to have an
16:25:32 4 independent corporate monitor reporting to the Department of
16:25:35 5 Justice and the Securities and Exchange Commission, there could
16:25:39 6 be an interpretation that that monitorship was in violation of
16:25:42 7 French law.

16:25:43 8 So you can just imagine sort of going out of the frying
16:25:46 9 pan into the fire. They're trying to resolve criminal matters
16:25:49 10 in the United States only to find themselves on the other side
16:25:51 11 of a criminal investigation in France. That was a serious
16:25:55 12 issue. It was not one taken lightly.

16:25:58 13 There were negotiations with a variety of different
16:26:02 14 French agencies in France throughout 2010, that ultimately led
16:26:08 15 to a high-level meeting in October 2010, between the Ministry of
16:26:13 16 Justice and Department of Justice officials, and it wasn't until
16:26:17 17 December 2010, that I was able to meet with the French
16:26:21 18 Magistrate Judge designated to act as an intermediary for the
16:26:25 19 corporate monitor in Paris to discuss with him how the process
16:26:29 20 was going to work.

16:26:30 21 It was once that was completed, Your Honor, that we
16:26:32 22 filed these papers in December 2010.

16:26:35 23 **THE COURT:** What about the argument that somehow the
16:26:36 24 defendants haven't owned up to responsibility in another
16:26:42 25 jurisdiction which would already put them in violation of a

16:26:45 1 negotiated plea here?

16:26:46 2 **MR. DUROSS:** Your Honor, the citation that they're
16:26:49 3 actually talking to is not actually the plea agreement; it's the
16:26:51 4 deferred prosecution agreement.

16:26:52 5 I don't know that they actually have standing to raise
16:26:54 6 the issue, but I think -- since the Court's asking, I think it's
16:26:56 7 an important one to address, which is our deferred prosecution
16:26:59 8 agreement has as one of the provisions that the company cannot
16:27:03 9 take a factual position different than that which they are
16:27:08 10 agreeing to as part of the deferred prosecution agreement.

16:27:10 11 The reason why that's really important, Your Honor, is
16:27:12 12 you could see, sort of Day 1, the corporation agrees to a series
16:27:15 13 of facts and, Day 2, they're out there issuing press releases
16:27:19 14 saying that they were innocent, and it would cause us a great
16:27:22 15 deal of issue with whether or not they're accepting
16:27:26 16 responsibility, et cetera, so there's this provision that
16:27:28 17 exists.

16:27:29 18 The provision, however, Your Honor, within the deferred
16:27:32 19 prosecution agreement, does permit the company and its duly
16:27:37 20 authorized representatives to make legal arguments in cases, for
16:27:41 21 example, whether the statute of limitations applies, whether a
16:27:47 22 company is as a technical matter guilty or liable or what have
16:27:51 23 you, but they can't contest the facts.

16:27:54 24 It is my understanding, at least from the response from
16:27:57 25 Alcatel-Lucent -- obviously, I'm not a party to the litigation

16:27:59 1 that's going on in Costa Rica -- was that the arguments that
16:28:02 2 were made were in the context of that.

16:28:05 3 I am evaluating that. If for some reason that turns
16:28:09 4 out to be they are making inconsistent statements, then it could
16:28:14 5 be deemed to be a violation of the deferred prosecution
16:28:16 6 agreement and we would have to deal with it at that point and
16:28:19 7 decide whether it mandated -- you know, qualified as a breach
16:28:23 8 and whether or not the prosecution would, in fact, be deferred
16:28:27 9 after that.

16:28:29 10 There are just a couple of other issues, Your Honor.
16:28:31 11 The remediation, ICE says that there's been none by the company.
16:28:37 12 I don't know how they would know that one way or the other.
16:28:39 13 We've been the recipient of a number of presentations by the
16:28:41 14 company on their remediation efforts. It has been substantial.

16:28:45 15 We, in fact, laid that out in our brief. I don't know
16:28:48 16 that I need to go into a great deal of detail about that;
16:28:50 17 however, I will say that the company is a different company
16:28:53 18 today and I don't say that lightly.

16:28:55 19 We're the ones that were actually, you know, pursuing
16:28:58 20 this investigation fairly aggressively. The company merged in
16:29:02 21 late 2006, so it really is literally a different company in many
16:29:06 22 respects and has new management, a new code of conduct and
16:29:11 23 compliance program and internal controls, so it is different and
16:29:14 24 we've laid that out.

16:29:17 25 Just a couple of other things. Racketeering charges,

16:29:21 1 the FCPA can't be a predicate act. No one held accountable? We
16:29:25 2 have charged two people here from Alcatel. One person was
16:29:29 3 charged in Costa Rica, and nobody has been charged in France.

16:29:33 4 We have jurisdictional limitations. This is a French
16:29:37 5 company paying bribes in Costa Rica. We can't just charge
16:29:40 6 anybody. I know people may think that we think that, but there
16:29:44 7 are requirements for, you know, instrumentalities of interstate
16:29:48 8 commerce, conduct occurring within the United States.

16:29:51 9 There are a whole series of different things and so
16:29:53 10 whether or not the Department of Justice decides that it has the
16:29:59 11 jurisdiction to charge, I think, a French national working in
16:30:05 12 Switzerland for a French company paying bribes in Costa Rica is
16:30:09 13 a complex matter, and I think it's giving short shrift by ICE's
16:30:12 14 counsel that just suggests we just let everybody go.

16:30:15 15 When ICE's counsel was walking through the McNulty
16:30:18 16 Memo, which, by the way, is no longer the operative memo for the
16:30:22 17 principles of federal prosecution of business organizations, I
16:30:25 18 kept thinking how is this all applied to ICE, pervasiveness, how
16:30:30 19 long it lasted, you know, who was held accountable as he walked
16:30:34 20 through those, and I think it was not lost on me.

16:30:36 21 In terms of legal analysis, I do need to point this
16:30:39 22 out. ICE's counsel suggests that they provided me 1,300 pages
16:30:44 23 worth of analysis on their victim status. No, that's not
16:30:49 24 actually what happened.

16:30:50 25 He sent to me a copy of a pleading for their state

16:30:53 1 court case, their state court RICO Florida case against Alcatel,
16:30:57 2 in which they were fighting the forum non conveniens motion
16:31:01 3 between Alcatel which they ultimately lost.

16:31:04 4 It had nothing to do -- it had nothing to do with the
16:31:08 5 Crime Victim Rights Act. It wasn't cited. They didn't have
16:31:12 6 cases about it. They didn't talk about the Mandatory Victim
16:31:17 7 Restitution Act, the Victim Witness Protection Act. They didn't
16:31:21 8 talk about any of that.

16:31:22 9 He sent me something that they had in another case and
16:31:26 10 so, again, there are sort of a series of different things -- I'm
16:31:28 11 not going to walk through them all -- that I don't think
16:31:31 12 accurately reflect what's going on.

16:31:34 13 What I do think it shows, however, Your Honor, is this
16:31:36 14 is a massive commercial dispute between two sophisticated
16:31:40 15 entities: Alcatel on the one hand and ICE on the other. It
16:31:44 16 concerns the providing of goods and services between a French
16:31:50 17 company operating in Costa Rica and a Costa Rican company buying
16:31:54 18 those services.

16:31:54 19 I don't know, and I don't know that the Court would
16:31:57 20 know even after a full-blown trial lasting a year with more than
16:32:01 21 60 witnesses and all kinds of highly technical documents in
16:32:05 22 Spanish, whether someone provided a network that was suitable,
16:32:09 23 whether someone provided services that were appropriate, and I
16:32:14 24 don't honestly know, Your Honor, what that has to do with the
16:32:18 25 bribery allegations in this case.

16:32:22 1 The bribes were to get the contract. How they
16:32:25 2 performed on those contracts, our case doesn't go there and
16:32:28 3 that's why we talked about some of those Eleventh Circuit cases
16:32:31 4 talking about that the restitution needs to be for the crime of
16:32:36 5 conviction, not just for anything tangentially related.

16:32:39 6 So, Your Honor, in terms of what needs to get resolved,
16:32:46 7 first, the Government would request that the Court accept the
16:32:50 8 three guilty pleas.

16:32:51 9 We believe and I think that the record has shown that
16:32:55 10 these three guilty pleas are substantial. They do do justice.
16:32:59 11 They promote respect for the law. They provide deterrence. A
16:33:05 12 \$92 million fine in our case, plus \$45 million in disgorgement
16:33:13 13 to the SEC, already paid, and \$2 million paid to the Republic of
16:33:19 14 Costa Rica for reparations, already paid.

16:33:23 15 So we're talking about a \$147 million resolution. It
16:33:28 16 is one of the largest resolutions in the history of the Foreign
16:33:34 17 Corrupt Practices Act in its existence for more than about 33
16:33:37 18 years.

16:33:38 19 It's a substantial case, and this is a substantial
16:33:44 20 resolution. It includes an enhanced compliance program and the
16:33:47 21 required retention of an independent corporate monitor.

16:33:50 22 For those reasons, Your Honor, we would respectfully
16:33:54 23 request that the Court accept these three guilty pleas pursuant
16:33:59 24 to 11(c)(4).

16:34:03 25 Second, we would ask the Court delay the period during

16:34:06 1 which the prosecution is deferred -- I'm sorry, order that the
16:34:11 2 period of delay during which the prosecution is deferred by the
16:34:14 3 Department of Justice under the written deferred prosecution
16:34:17 4 agreement with defendant Alcatel-Lucent for the purpose of
16:34:20 5 allowing defendant Alcatel-Lucent to demonstrate its good
16:34:24 6 conduct be excluded in computing the time within which the trial
16:34:29 7 of the events as charged in the Information must begin under
16:34:32 8 Title 18 United States Code § 3161(h)(2).

16:34:38 9 Lastly, Your Honor, we would ask respectfully that the
16:34:41 10 Court deny ICE's petition to victim status, both because they
16:34:46 11 are not a victim and because to the extent that they are a
16:34:50 12 victim, their rights have been -- have been, Your Honor --
16:34:53 13 afforded them under the Crime Victims Rights Act of 18 USC 3771.

16:35:00 14 Finally, Your Honor, the Government requests
16:35:02 15 respectfully that ICE's petition for restitution be denied:

- 16:35:07 16 1. Because it's entirely speculative, and;
16:35:10 17 2. It's vastly overly complex and would unduly delay
16:35:15 18 the sentencing process that we already described and shown
16:35:18 19 the Court with everything already to date.

16:35:21 20 The last thing I want to just point out, Your Honor, is
16:35:24 21 the restitution statute, there's a disagreement about which is
16:35:29 22 the right one to apply here. There's the Mandatory Victim
16:35:31 23 Restitution Act which Mr. Wiand was referring to, and there's
16:35:36 24 actually something known as the Victim Witness Protection Act.

16:35:40 25 Mandatory is mandatory. The other one is discretionary

16:35:45 1 which depends on -- the Court would be required to evaluate the
16:35:48 2 defendant's ability to pay. It's -- quite candidly, Your Honor,
16:35:53 3 it's an open issue. The Eleventh Circuit has not reached a
16:35:55 4 decision as to whether the MVRA versus the VWPA applies in the
16:36:01 5 bribery context. It's had a couple of opportunities to address
16:36:04 6 it and has chosen not to, so it's not necessarily an easy
16:36:08 7 question one way or the other.

16:36:11 8 What I would say is that because both of those
16:36:14 9 statutes, both of them, have the same provisions regarding the
16:36:21 10 witness standard and the complexity prong, whether it be under
16:36:26 11 the MVRA or the VWPA, this Court should deny the petition for
16:36:32 12 restitution because determining the complex issues of fact
16:36:36 13 related to ICE's claimed losses would complicate and prolong the
16:36:40 14 sentencing process to a degree that the need to provide
16:36:43 15 restitution to ICE, assuming arguendo that ICE is a victim and
16:36:47 16 was able to prove the loss, is outweighed by the burden on the
16:36:52 17 sentencing process.

16:36:52 18 **THE COURT:** Thank you.

16:36:54 19 I think there's really only one issue that I have to
16:36:57 20 determine and all else -- I think I've heard from everyone,
16:37:00 21 counsel; I've had pleadings and arguments -- I think there's
16:37:03 22 only one issue that I need to determine and all else flows from
16:37:06 23 there, and that's whether or not ICE, ICE, whatever would be the
16:37:11 24 way of pronouncing the acronym, would be a victim here. I don't
16:37:15 25 think it is, and I will say why, and I think most of it has been

16:37:20 1 outlined by counsel for the United States but I am going to go
16:37:24 2 through it.

16:37:25 3 First and foremost, I think that victim offender status
16:37:32 4 here is so closely intertwined that to try to figure out the
16:37:36 5 behavior of who was the victim and who was the offender would be
16:37:41 6 difficult.

16:37:42 7 Secondly -- excuse me just a second, counsel -- also I
16:38:05 8 think that given the nature of the corporate conduct in this
16:38:09 9 area, it seems, based upon the findings and the things that have
16:38:12 10 been filed in this case, that the behavior of the victim and the
16:38:18 11 behavior of the quote-unquote victim and the behavior of the
16:38:22 12 defendant here are closely intertwined. I see that from the
16:38:27 13 pervasiveness of the illegal activity, the constancy of the
16:38:34 14 illegally activity and the consistency over a period of years.

16:38:38 15 I think you have, even though not a charged conspirator
16:38:41 16 coconspirator relationship, that's essentially what went on
16:38:45 17 here; that given the high-placed nature of the criminal conduct
16:38:49 18 within the organization, the number of people involved, that
16:38:54 19 basically it was "Bribery Is Us," meaning that everybody was
16:39:00 20 involved in it. Even though you didn't know specifically, it's
16:39:03 21 enough to say that the principals were involved here.

16:39:09 22 In saying that, I have to say that despite the
16:39:14 23 representation of ICE, I think even though the Government was
16:39:18 24 not obliged to, it treated them with appropriate informational
16:39:23 25 respect in regard to this case and what they should know.

16:39:27 1 Because I find that ICE is not a victim, I don't necessarily
16:39:33 2 need to reach the issue of restitution, but I will because I
16:39:37 3 think it's important to put a nail in this coffin.

16:39:43 4 Merely because damages exist, what would be considered
16:39:47 5 restitution, does not mean that restitution flows from it.
16:39:51 6 Given what has gone on in other jurisdictions, the ability for
16:39:57 7 this Court to accurately, within a reasonable amount of time,
16:40:01 8 and by that I don't mean lengthy months of hearings as to what
16:40:08 9 the damages would be, in which country, how would they flow, how
16:40:11 10 would the Court ascertain that, and I don't think that this is
16:40:16 11 the kind of case, even though the Foreign Corrupt Practices Act
16:40:22 12 might allow it in other cases for which restitution can be
16:40:25 13 allowed, there's no victim that was damaged here in the sense
16:40:27 14 that something needs to be restored or made whole.

16:40:30 15 So for that reason, ICE's petition to be treated for
16:40:35 16 victim status and to be awarded restitution in this matter is
16:40:38 17 denied.

16:40:39 18 Counsel for the United States, are you prepared to
16:40:41 19 proceed with the guilty plea in this matter?

16:40:43 20 **MR. DUROSS:** We are, Your Honor.

16:40:44 21 **THE COURT:** Counsel for Alcatel, are you prepared to
16:40:47 22 proceed in this matter?

16:40:48 23 **MR. WEINSTEIN:** With pleasure, Your Honor.

16:40:49 24 **THE COURT:** And who will be taking the oath on behalf
16:40:51 25 of all three entities, Alcatel-Lucent Trade International,

16:40:58 1 Alcatel-Lucent France and Alcatel-Lucent CentroAmerica?

16:41:00 2 **MR. WEINSTEIN:** Your Honor, may I present the General
16:41:02 3 Counsel of Alcatel-Lucent, Mr. Stephen R. Reynolds.

16:41:04 4 **THE COURT:** I'd ask the clerk to please swear
16:41:06 5 Mr. Reynolds.

6 [The witness was duly sworn by Mr. Marchena.]

16:41:14 7 **MR. MARCHENA:** Please state your full name and spell
16:41:15 8 your last name for the record.

16:41:17 9 **THE WITNESS:** Stephen R. Reynolds, R-e-y-n-o-l-d-s.

10 **BY THE COURT:**

16:41:22 11 Q. Sir, where were you born?

16:41:23 12 A. I was born in Orange, New Jersey, Your Honor.

16:41:26 13 Q. How old are you?

16:41:27 14 A. I am 52 years old.

16:41:27 15 Q. How far did you go in school?

16:41:29 16 A. I went to undergraduate in Princeton, New Jersey and I went
16:41:33 17 to Fordham Law School. I graduated with a J.D. in 1983.

16:41:37 18 Q. And are you a citizen of the United States?

16:41:38 19 A. I am, Your Honor.

16:41:40 20 Q. Sir, have you had any drugs or alcohol prior to coming to
16:41:42 21 this hearing today?

16:41:43 22 A. I have not, Your Honor.

16:41:44 23 Q. Have you ever been treated for a drug or alcohol addiction?

16:41:47 24 A. I have not, Your Honor.

16:41:48 25 Q. Have you had an opportunity to confer with your counsel in

16:41:52 1 order to authorize the guilty plea on behalf of the three
16:41:55 2 corporations that I named before?

16:41:57 3 A. Yes, I have.

16:41:57 4 **THE COURT:** And I suppose I should ask: Counsel, has
16:42:01 5 he been given authorization by the appropriate Boards of
16:42:04 6 Directors to enter guilty pleas on behalf of these three
16:42:08 7 entities?

16:42:09 8 **MR. WEINSTEIN:** Yes, he has, Your Honor.

16:42:12 9 **BY THE COURT:**

16:42:12 10 Q. Now, sir, have you had, on behalf of the corporate entities,
16:42:15 11 a chance to review the Informations filed in this case?

16:42:18 12 A. I have, Your Honor.

16:42:18 13 Q. And have you fully discussed these Informations with your
16:42:22 14 attorney, including possible defenses, if your corporate
16:42:25 15 entities had decided to go to trial?

16:42:28 16 A. Yes, I have, Your Honor.

16:42:29 17 Q. And after discussing this with your counsel, it is your wish
16:42:32 18 on behalf of your corporations to enter guilty pleas in this
16:42:36 19 matter?

16:42:37 20 A. It is, Your Honor.

16:42:38 21 **THE COURT:** Counsel for the United States, what are the
16:42:42 22 counts of the various Informations? We are kind of doing this
16:42:45 23 jointly for all three entities.

16:42:48 24 **MR. DUROSS:** Yes, Your Honor. Each of the three
16:42:52 25 criminal Informations charges a single conspiracy count, so

16:42:56 1 there is a single count for each Information, and it charges a
16:42:59 2 conspiracy count with three objects. Those three objects are to
16:43:02 3 violate the antibribery provisions of the Foreign Corrupt
16:43:05 4 Practices Act, to violate the books and records provisions of
16:43:11 5 the FCPA, as well as the internal controls, to circumvent the
16:43:15 6 internal controls provision of the FCPA.

16:43:19 7 **THE COURT:** Those are criminal Case Numbers 20906 and
16:43:21 8 20907, correct?

16:43:25 9 **MR. DUROSS:** I'm sorry, Your Honor, my mistake. There
16:43:28 10 are two cases. One Information for the three subsidiaries
16:43:32 11 charges a single conspiracy to violate the FCPA and those three
16:43:37 12 objects I was just discussing and that is 20906.

16:43:40 13 There is a second criminal Information, and that is
16:43:42 14 against the parent corporation, and that is a two-count charge
16:43:47 15 for substantive violations of the internal controls provisions
16:43:51 16 as well as the books and records provisions.

16:43:53 17 **MR. WEINSTEIN:** Your Honor, the 06 incorporates the
16:43:58 18 three subsidiaries for which there is each one count.

16:44:04 19 **THE COURT:** And 907?

16:44:08 20 **MR. WEINSTEIN:** That is the deferred prosecution
16:44:09 21 agreement which is deferred as of today, so that is against the
16:44:13 22 parent. This is not the subject of the Rule 11 colloquy right
16:44:16 23 now.

16:44:17 24 **THE COURT:** Okay. I just need to make sure.

16:44:18 25 **MR. DUROSS:** I'm sorry. I just want to make sure that

16:44:19 1 we are all speaking about the same thing. There is a single
16:44:22 2 information in 20906. It charges three corporate subsidiaries
16:44:28 3 with a single count. They all conspired.

16:44:30 4 Just so it is clear, they each played a role in the
16:44:33 5 conspiracy so each corporate subsidiary is charged in a single
16:44:37 6 count together.

16:44:38 7 **MR. WEINSTEIN:** We are in accord. That's correct, Your
16:44:40 8 Honor.

16:44:40 9 **THE COURT:** Everybody is in agreement, but there is no
16:44:42 10 plea being offered in 907, correct?

16:44:45 11 **MR. DUROSS:** That is correct, Your Honor. This is the
16:44:46 12 prosecution that the Government has an agreement to defer.

16:44:52 13 **BY THE COURT:**

16:44:52 14 Q. Now, sir, on behalf of the entities in this matter, is that
16:44:55 15 your understanding of the plea agreement in this case?

16:44:58 16 A. It is, Your Honor.

16:44:58 17 Q. Other than what has been stated in the plea agreement, has
16:45:01 18 anyone promised you anything else not mentioned on the record?

16:45:04 19 A. They have not, Your Honor.

16:45:04 20 Q. Has anyone threatened you to have you plead guilty?

16:45:06 21 A. They have not.

16:45:07 22 Q. Anyone forcing you to plead guilty?

16:45:09 23 A. They have not.

16:45:10 24 Q. Other than the criminal charges that you face, has anyone
16:45:12 25 told you that something bad would happen to you?

16:45:14 1 A. No, they have not.

16:45:15 2 **THE COURT:** Counsel for the United States, what are the
16:45:16 3 terms of the plea agreement in regard to the three entities in
16:45:21 4 this matter?

16:45:24 5 **MR. DUROSS:** Those three plea agreements with regard to
16:45:28 6 the three corporate subsidiaries in 20906 involve the three
16:45:34 7 subsidiaries agreeing to plead guilty, and they are all agreeing
16:45:39 8 to pay the \$500,000 fine, and I believe there is also a special
16:45:49 9 assessment, Your Honor.

16:45:57 10 **THE COURT:** It's a special assessment of \$400.

16:46:00 11 **MR. DUROSS:** That is correct, Your Honor. It's in
16:46:01 12 Paragraph 14. The defendants all are agreeing to waive appeal.

16:46:07 13 **BY THE COURT:**

16:46:07 14 Q. Sir, is that your understanding of the plea agreement in
16:46:09 15 this case?

16:46:10 16 A. It is, Your Honor.

16:46:10 17 Q. Has anyone promised you anything else not mentioned on the
16:46:14 18 record or contained in these three plea agreements?

16:46:18 19 A. No one has, Your Honor.

16:46:23 20 Q. Now, sir, do you also understand that in regard to this case
16:46:26 21 you are waiving your right to appeal?

16:46:28 22 A. I do, Your Honor.

16:46:29 23 Q. And you understand that by waiving your right to appeal, you
16:46:32 24 are waiving your right to appeal the sentence or any other legal
16:46:36 25 arguments that may be available to you as a result of this plea

16:46:40 1 of guilty?

16:46:40 2 A. I do, Your Honor.

16:46:45 3 **THE COURT:** Now, sir, do you understand that you are
16:46:48 4 pleading guilty on behalf of these entities? Mr. Duross, is
16:46:52 5 this to a felony offense?

16:46:54 6 **MR. DUROSS:** Yes, it is, Your Honor.

16:46:56 7 **THE WITNESS:** Yes, I understand that, Your Honor.

16:46:57 8 **BY THE COURT:**

16:46:57 9 Q. Do you understand that by pleading guilty, you are waiving
16:47:00 10 and giving up your right to a trial?

16:47:02 11 A. I do, Your Honor.

16:47:03 12 Q. Now, I should tell you that by waiving and giving up your
16:47:05 13 right to a trial, you are giving up your right to the following
16:47:08 14 things: Your right to be presumed innocent and the Government
16:47:11 15 would have to prove your guilt beyond a reasonable doubt; the
16:47:15 16 right to have the assistance of an attorney who would be able to
16:47:18 17 see, hear and cross-examine the witnesses against you; the right
16:47:21 18 to the issuance of subpoenas, as we say in the law, compulsory
16:47:26 19 process that requires people to come to court and testify in
16:47:29 20 your case; and you are also giving up your right not to testify
16:47:33 21 unless you chose to do so and the jury could not draw any
16:47:37 22 negative or adverse inference because you did not testify.

16:47:40 23 Sir, do you understand that because you are pleading
16:47:43 24 guilty on behalf of these three entities, you are giving up all
16:47:47 25 of these rights and there will be no trial?

16:47:51 1 A. I do, Your Honor.

16:47:52 2 **THE COURT:** Counsel for the United States, what would
16:47:54 3 the Government have been prepared to prove had this matter
16:47:57 4 proceeded to trial?

16:47:58 5 **MR. DUROSS:** Your Honor, the Government would have been
16:48:01 6 prepared to prove beyond a reasonable doubt that there were
16:48:04 7 three wholly-owned subsidiaries that conspired with each other
16:48:08 8 and others to violate the Foreign Corrupt Practices Act, that is
16:48:11 9 as described in detail in the statement of facts which are
16:48:13 10 attached as Exhibit 3 to the three plea agreements.

16:48:16 11 The three wholly-owned subsidiaries conspired to pay
16:48:18 12 bribes to foreign officials in Costa Rica, Honduras, Malaysia
16:48:23 13 and Taiwan to obtain or retain business and at least part of
16:48:25 14 that conduct occurred within the territory of the United States
16:48:27 15 and through the use of, means or instrumentality of interstate
16:48:31 16 commerce.

16:48:35 17 **BY THE COURT:**

16:48:36 18 Q. Sir, do you agree with the facts or recitation as made by
16:48:39 19 the prosecutor?

16:48:40 20 A. Yes, I do, Your Honor.

16:48:41 21 Q. On behalf of Alcatel-Lucent Trade International, A.G. how do
16:48:46 22 you plead.

16:48:46 23 A. I plead guilty, Your Honor.

16:48:47 24 Q. On behalf of Alcatel-Lucent France, S.A. how do you plead?

16:48:50 25 A. Guilty, Your Honor.

16:48:51 1 Q. On behalf of Alcatel-Lucent CentroAmerica, how do you plead?

16:48:54 2 A. Guilty.

16:48:55 3 **THE COURT:** It is the finding of the Court that in this
16:48:57 4 case the defendants are competent and capable of entering
16:49:02 5 informed pleas, each of the corporations are aware of the nature
16:49:05 6 of the charges and the consequences of the pleas, and the pleas
16:49:07 7 are knowing and voluntary, supported by an independent basis in
16:49:11 8 fact containing each of the essential elements of the offense.

16:49:14 9 I now find each of the defendants in criminal Case
16:49:22 10 Number 10-20906 guilty of the offenses charged in the
16:49:27 11 Information.

16:49:27 12 Counsel, I understand that this is a plea and immediate
16:49:31 13 sentence in regard to this matter and what was determined in the
16:49:36 14 plea agreement.

16:49:37 15 **MR. DUROSS:** That's correct, Your Honor.

16:49:38 16 **MR. WEINSTEIN:** That's correct, Your Honor.

16:49:39 17 **THE COURT:** Counsel for the defendants, have you had an
16:49:41 18 opportunity to review the presentence reports prepared in regard
16:49:45 19 to this case?

16:49:45 20 **MR. WEINSTEIN:** Yes, Your Honor.

16:49:46 21 **THE COURT:** Do you have any additions, deletions or
16:49:49 22 corrections that you wish to make?

16:49:50 23 **MR. WEINSTEIN:** We have previously sent Mr. Jenkins a
16:49:53 24 correspondence dealing with the issue of the victim statute but
16:49:57 25 since that issue has been ruled upon by the Court, we will let

16:50:01 1 our correspondence stand for the record, so nothing further,
16:50:03 2 Your Honor.

16:50:03 3 **THE COURT:** Thank you. Counsel for the United States,
16:50:05 4 do you have anything to add?

16:50:06 5 **MR. DUROSS:** No, Your Honor.

16:50:10 6 **THE COURT:** Counsel for defendant, does your client
16:50:13 7 have anything to say, or do you have any argument before I
16:50:15 8 proceed to sentence in regard to this matter?

16:50:17 9 **THE WITNESS:** No, Your Honor.

16:50:20 10 **MR. WEINSTEIN:** I agree, Your Honor.

16:50:23 11 **THE COURT:** In regard to Docket Entry Number 10-20907,
16:50:29 12 in regard to Alcatel-Lucent Trade International, the Court
16:50:33 13 sentences the defendant as follows: Obviously since this
16:50:36 14 defendant is a corporate entity, there is no actual physical
16:50:42 15 sentence, so a fine will be imposed.

16:50:45 16 Pursuant to the Sentencing Reform Act of 1984, they are
16:50:48 17 sentenced to a term of one year probation on the one count
16:50:51 18 Information. They shall pay a fine in the amount of \$500,000.
16:50:55 19 That fine is payable immediately to the Clerk of the Court.

16:51:04 20 This order is being enforced by the Probation Office
16:51:07 21 and the U.S. Attorney's Office to monitor any change in ability
16:51:10 22 to pay which should not be an issue here. While on probation,
16:51:13 23 the defendant shall not commit any crime, federal, state or
16:51:17 24 local, comply with the standard conditions of probation that the
16:51:19 25 Court follows and the following special conditions:

16:51:23 1 The compliance plan requirement, the financial
16:51:27 2 disclosure requirement, the maintenance and retention of proper
16:51:31 3 business records requirement, the disclosure of criminal conduct
16:51:35 4 requirement, the nonvestiture of assets requirement and
16:51:40 5 permissible search. All are outlined in the presentencing
16:51:47 6 memorandum.

16:51:47 7 That is the same sentence that will be imposed in
16:51:50 8 Alcatel-Lucent France, S.A., and as to Alcatel CentroAmerica.
16:51:56 9 All the sentences shall run concurrent for all three defendants.

16:52:01 10 There is, however -- Mr. Jenkins, correct me if I am
16:52:05 11 wrong -- each entity shall pay the fine of \$500,000; is that
16:52:11 12 correct?

16:52:11 13 **THE PROBATION OFFICER:** That is correct, Your Honor.

16:52:12 14 **THE COURT:** The fine is also for Alcatel-Lucent France
16:52:15 15 and Alcatel CentroAmerica.

16:52:16 16 **MR. WEINSTEIN:** Your Honor, may I bring a matter to the
16:52:18 17 attention of the Court?

16:52:18 18 **THE COURT:** Yes.

16:52:19 19 **MR. WEINSTEIN:** Perhaps Mr. Duross can be of help. In
16:52:21 20 the ordinary context corporate probation could be something and
16:52:26 21 we believe it would be appropriate, but in this instance since
16:52:28 22 we do have the corporate monitor, I believe we agree with the
16:52:31 23 Government. I think the Government will agree that corporate
16:52:33 24 probation is duplicative and unnecessary in this instance.

16:52:37 25 **MR. DUROSS:** Your Honor, that's true. In the filing

16:52:40 1 that the Government made in its memorandum in support, I
16:52:44 2 indicated in Footnote 9 that the Government believes that in
16:52:47 3 light of the fact that each of the defendant subsidiaries has,
16:52:50 4 A, a compliance and ethics program currently through defendant
16:52:55 5 Alcatel-Lucent and has committed to making additional
16:52:58 6 enhancements under their respective plea agreements; and B, an
16:53:01 7 independent corporate monitor being imposed for a three-year
16:53:03 8 period under the deferred prosecution agreement; and, C, that
16:53:06 9 the fines and special assessments are to be paid within ten
16:53:09 10 days, each of the \$500,000 fines are supposed to be paid within
16:53:13 11 ten days of sentencing, a period of probation does not appear to
16:53:16 12 be warranted in this matter under United States Sentencing
16:53:19 13 Guidelines § 8D1.1, which lays out those different factors, Your
16:53:24 14 Honor.

16:53:24 15 **THE COURT:** What I will do, counsel, is I will suspend
16:53:29 16 or cut out any probation once I know the fines are paid and the
16:53:33 17 monitoring program is in place. So if you submit a motion to me
16:53:36 18 in ten days, to the Probation Department obviously as well, I
16:53:40 19 will suspend probation; but until that time, it does allow me to
16:53:44 20 monitor the case just to make sure, although I don't think it
16:53:48 21 should happen, but that's what I'm going to do.

16:53:50 22 **MR. WEINSTEIN:** Your Honor, may I also for the record,
16:53:52 23 it may be that the Court made this clear, but the \$500,000 are
16:53:57 24 offset against the amount that the parent is going to be paying,
16:54:00 25 so it is not duplicative.

16:54:02 1 **THE COURT:** Is that in the plea agreement, counsel?

16:54:04 2 **MR. DUROSS:** It is in the deferred prosecution
16:54:06 3 agreement that it will be offset by the amount of money paid by
16:54:09 4 the subsidiaries.

16:54:13 5 **THE COURT:** All right. Counsel, you have waived your
16:54:14 6 right to appeal; however, I will say for the record that
16:54:16 7 pursuant to the Federal Rules of Criminal Procedure, the
16:54:19 8 defendant corporation has a right to appeal the sentence
16:54:21 9 imposed. Any notice of appeal must be filed within 14 days
16:54:25 10 after the entry of the judgment.

16:54:27 11 If you are unable to pay the cost of an appeal, you may
16:54:31 12 apply for leave to appeal in forma pauperis, but we are usually
16:54:35 13 not reading these in regard to corporate defendants, but that is
16:54:38 14 what the language normally is.

16:54:40 15 Anything further on behalf of the United States?

16:54:41 16 **MR. DUROSS:** Not with regard to 20906, Your Honor.

16:54:44 17 **THE COURT:** In regard to 20907?

16:54:48 18 **MR. DUROSS:** I will submit to the Court a proposed
16:54:52 19 order to, as I have indicated before, extend the time -- I
16:54:58 20 forgot what my language is -- extend the time of the Speedy
16:55:04 21 Trial Act, Your Honor. I can submit that within the next 24
16:55:08 22 hours.

16:55:08 23 What we would request, Your Honor, is that the period
16:55:10 24 of delay during which the prosecution is deferred, it is a
16:55:14 25 three-year deferred prosecution agreement, that that time be

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