UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**CRIMINAL NO. H-15-654**
	§	
ROBERTO ENRIQUE RINCON-FERNANDEZ,	§	
ABRAHAM JOSE SHIERA-BASTIDAS	§	

GOVERNMENT'S RESPONSE TO BARIVEN S.A.'S MOTION FOR RECOGNITION OF ITS RIGHTS AS A VICTIM AND ENTITLEMENT TO RESTITUTION

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SUMMARY OF ARGUMENT

The United States, by and through its attorneys, the Chief of the Fraud Section of the Criminal Division of the United States Department of Justice and the United States Attorney for the Southern District of Texas, hereby respectfully submits this response to third-party claimant Bariven, S.A. ("Bariven")'s Motion for Recognition of Its Rights as a Victim and Entitlement to Restitution. As explained more fully below, Bariven's motion should be denied in its entirety because, under the law, Bariven is ineligible for crime victim status under the Crime Victims' Rights Act, 18 U.S.C. § 3771, or restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, as it was complicit in the bribery and money laundering scheme that is the subject of these prosecutions. In addition, Bariven's motion for recognition as a victim under the CVRA independently fails because, as a state-owned instrumentality of the foreign sovereign of Venezuela, Bariven does not fall within the CVRA's definition of "crime victim." Bariven's attempt to seek victim status in these cases amounts to nothing more than a fishing expedition in the hope that it can gain access to sensitive and confidential information about the Government's ongoing investigation into bribery and corruption at Bariven and its parent, Petroleos de Venezuela, S.A. ("PDVSA"). Because neither the CVRA nor the MVRA contemplate such relief, Bariven's motion should be denied.

NATURE AND STAGE OF THE PROCEEDINGS

On November 30, 2016, third-party claimant Bariven filed six substantially identical motions, one as to each Defendant in five separate criminal cases pending before this Court,[1]

[1] At present, Bariven has filed motions seeking crime victim status in *United States v. Christian Javier Maldonado Barillas*, No. 4:15-cr-00635, *United States v. Jose Luis Ramos Castillo*, No. 4:15-cr-00636, *United States v. Alfonzo Eliezer Gravina Munoz*, No. 4:15-cr-00637, *United States v. Roberto Enrique Rincon Fernandez and Abraham Jose Shiera Bastidas*, No. 4:15-cr-00654, and *United States v. Moises Abraham Millan Escobar*, No. 4:16-cr-00009. Throughout this response, the Government will refer collectively to these individuals as "the Defendant." In addition,

seeking recognition as a victim and entitlement to restitution under the CVRA, 18 U.S.C. § 3771, and the MVRA, 18 U.S.C. § 3663A. In each of the five cases, the Defendants have pleaded guilty to one or more federal offenses, including conspiracy, violations of the Foreign Corrupt Practices Act ("FCPA"), money laundering, and false statements on a federal income tax return, in connection with a wide-ranging bribery and money laundering scheme involving PDVSA and Bariven. All of the Defendants are currently awaiting sentencing and, at present, their sentencing hearings are all set for July 14, 2017. On December 22, 2016, the Government filed a motion in each case, seeking to hold Bariven's motion in abeyance on the ground that Bariven's request for recognition as a victim and entitlement to restitution was premature and should be decided at the time of the Defendants' sentencing hearings.[2] On January 17, 2017, this Court issued a briefing schedule ordering responses to Bariven's motion to be filed by February 20, 2017.[3]

STATEMENT OF THE ISSUE

Whether a foreign state-owned enterprise is precluded from seeking recognition as a victim under the CVRA, 18 U.S.C. § 3771, and restitution under the MVRA, 18 U.S.C. § 3663A, where its employees and senior officers were actively involved in the bribery and money laundering schemes underlying the offenses of conviction to such an extent that corruption was pervasive within the entity and the entity must therefore be considered a participant in the scheme.

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the Government has announced charges and guilty pleas in two other related cases, *United States v. Juan Jose Hernandez Comerma*, No. 4:17-cr-00005, and *United States v. Charles Quintard Beech III*, No. 4:17-cr-00006. Although Bariven has not yet filed motions seeking similar relief in those cases, it has contacted defense counsel in those cases and stated its belief that it is a victim entitled to restitution.

[2] In its motion, the Government noted that it had agreed to reasonably confer with counsel for Bariven and provide notice of upcoming public court proceedings so as not to prejudice Bariven until the time that its motion was ripe for decision.

[3] Throughout this brief, the Government will refer to Bariven's Memorandum of Law in Support of its Motion for Recognition of Its Rights as a Victim and Entitlement to Restitution (Rincon Dkt. 96) as "Bariven Mot.," Bariven's Response to the Government's Motion to Hold Bariven's Motion in Abeyance (Rincon Dkt. 105) as "Bariven Resp.," and Bariven's Sur-Reply to the Government's Reply (Rincon Dkt.108) as "Bariven Sur-Reply."

STANDARD OF REVIEW

"[W]hether petitioners [under the CVRA] are victims of the criminal conduct as described in the [charging document] . . . is a mixed question of law and fact." *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (per curiam). "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. § 3664(e); *see also United States v. Danford*, 435 F.3d 682, 689 (7th Cir. 2006) ("Restitution is determined by the judge using the lower preponderance of the evidence standard.").[4]

The enforcement provision of the MVRA "allocates the various burdens of proof among the parties who are best able to satisfy those burdens and who have the strongest incentive to litigate the particular issues involved." *See United States v. Sheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998). The Fifth Circuit has observed that although "[i]t might appear to the casual observer that § 3664(e) places the burden of proof on the government on all issues relating to loss to the victim . . . the burden section of the statute only requires the government to establish 'the amount of loss sustained by [the] victim.'" *Id.* (quoting *United States v. Razo-Leora,* 961 F.2d 1140, 1146 (5th Cir. 1992)). In fact, the statute explicitly provides that "[t]he burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires." 18 U.S.C. § 3664(e). Accordingly, the Government submits that, as the movant here, Bariven should bear the burden of proof as to demonstrating that it is entitled to victim status under the CVRA and MVRA.

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[4] Bariven incorrectly states in its motion that the procedural posture of this proceeding is one where the Government is "mov[ing] to dismiss Bariven's motion for relief under the CVRA," and therefore the Court "must accept all factual allegations in the [motion] as true and draw all reasonable inferences in [Bariven's] favor." Bariven Mot. at 2 (citing *Jordan v. Dep't of Justice*, 173 F. Supp. 3d 44, 48 (S.D.N.Y. 2016)). The standard set forth in *Jordan*, a civil case, is inapplicable to the circumstances here, where Bariven has entered an appearance as a third-party movant in a criminal prosecution.

FACTUAL BACKGROUND

A. Bariven and PDVSA

Bariven is the procurement subsidiary of PDVSA, Venezuela's state-owned and state-controlled oil company. PDVSA falls under the supervision of the Venezuelan Ministry of Oil. According to the English-language website of PDVSA affiliate CITGO, the Venezuelan government is PDVSA's sole stockholder under the provisions of the Constitution of the Bolivarian Republic of Venezuela, and "represents the economic and political sovereignty exerted by the Venezuelan people over oil, their main energy resource." *PDVSA Profile*, Citgo, https://www.citgo.com/AboutCITGO/PDVSAprofile.jsp (last visited Feb. 20, 2017). PDVSA's "main objectives include fostering the socio-economic development of Venezuela, guaranteeing sovereignty over its natural resources, and serving and benefiting the Venezuelan people." *Id.* In furtherance of these goals, PDVSA's mandate expanded over time beyond oil production to encompass various social programs of the Venezuelan government, including building public housing and importing food. In turn, Bariven's procurement responsibilities expanded beyond oilfield equipment to construction supplies, military vehicles, and food. For example, Bariven's website states, as translated into English, "Bariven continues supporting the national industry and the people of Venezuela with the acquisition of 12 power generators for the Anonymous Company of Administration and Electrical Promotion (CADAFE); 6 asphalt plants and 3 crushers for the national asphalt program; 300 buses for The Miracle Mission; 50 tanker trucks for EPS; equipment and machinery for the Bolivarian University of Venezuela (UBV) and the cooperatives of the Return Face Mission, located in the endogenous Nuclear Development area." *Bariven*, PDVSA, http://www.pdvsa.com/index.php?tpl=interface.sp/design/readmenu-filiales.tpl.html&newsid_obj_id=3294&newsid_temas=20 (last visited Feb. 20, 2017). Bariven's website further provides, as translated into English, that "[t]hrough its activities, Bariven . . . contributes to the economic

and social development of the country." *Id.* Echoing this point, Bariven notes in its motion, "[a]s the procurement arm of the sixth largest oil and gas company in the world, Bariven's procurement activities provide it with considerable economic clout." Bariven Mot. at 2.

B. The Defendants' Criminal Proceedings

On December 10, 2015, Defendants Rincon and Shiera were indicted under seal on eighteen counts of conspiracy to violate the FCPA, substantive violations of the FCPA, conspiracy to commit money laundering, and substantive money laundering. The charges were premised on Defendant Rincon's and Defendant Shiera's roles in a scheme to corruptly secure energy contracts from PDVSA and its subsidiaries, including Bariven, by offering and paying bribes to a number of PDVSA and Bariven officials, including high-level officials, and then laundering the proceeds of the bribery scheme.

Prior to the indictment of Rincon and Shiera, Defendants Ramos, Maldonado and Gravina, each former PDVSA officials who accepted bribes from Defendants Rincon and Shiera and conspired to launder the proceeds of those bribery schemes, pleaded guilty before this Court under seal to conspiracy to commit money laundering.[5] Subsequent to the indictment of Defendants Rincon and Shiera, Defendant Millan, one of Defendant Rincon's and Defendant Shiera's co-conspirators in the PDVSA bribery scheme, pleaded guilty before this Court under seal to a criminal information charging him with one count of conspiracy to violate the FCPA.

On March 22, 2016, Defendant Shiera pleaded guilty to one count of conspiracy to violate the FCPA and commit wire fraud and one substantive FCPA count. On the same day of Defendant

[5] Defendant Maldonado pleaded guilty to one count of conspiracy to commit money laundering. Defendant Ramos pleaded guilty to two counts of conspiracy to commit money laundering, with one charge relating to the acceptance of bribes from Defendants Rincon and Shiera and one count related to the acceptance of bribes from a third individual. Defendant Gravina pleaded guilty to one count of conspiracy to commit money laundering and one count of making false statements on his federal tax return.

Sheira's guilty plea, this Court unsealed the charges against, and guilty pleas of, Defendants Ramos, Maldonado, Gravina, and Millan. On June 16, 2016, Defendant Rincon pleaded guilty to a superseding information charging him with one count of conspiracy to violate the FCPA, one substantive FCPA count, and one count of making false statements on his federal tax return.

During the months following the indictment of Defendants Rincon and Shiera, and the guilty pleas of all the Defendants, the Government's investigation into bribery at PDVSA and Bariven continued. On January 4, 2017, the Government filed two criminal informations charging Defendant Hernandez with one count of conspiracy to violate the FCPA and one substantive FCPA count and Defendant Beech with one count of conspiracy to violate the FCPA. On January 10, 2017, Defendants Hernandez and Beech appeared before this Court and pleaded guilty to the charges contained in the informations filed against them. At present, all the Defendants are scheduled to be sentenced on July 14, 2017.

The Government's investigation into corruption at PDVSA and Bariven remains ongoing. The details of the Government's investigation and the evidence gathered to date are highly sensitive and confidential and, accordingly, a summary of that evidence as it pertains to Bariven's motion is set forth in the Government's Addendum filed with the Court under seal and *ex parte*.

ARGUMENT

A. Bariven Is Not Entitled to the Rights of a "Victim" Under the CVRA or Restitution Under the MVRA Because It Was Complicit in the Illegal Conduct Underlying the Charges to Which the Defendants Pleaded Guilty

1. Because of Bariven's extensive participation in the bribery and money laundering schemes, it is precluded from being recognized as a victim

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense . . . ." 18 U.S.C. § 3771(e)(2)(A). Similarly, the MVRA defines a "victim" as "a person directly and proximately harmed as a result of the

commission of an offense for which restitution may be ordered . . . ." 18 U.S.C. § 3663A(a)(2). The MVRA further provides that its provisions apply in "all sentencing proceedings for convictions of, or plea agreements relating to" a variety of federal offenses, including, as pertinent here, "an offense against property under this title . . . including any offense committed by fraud or deceit . . . in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(c)(1).

Although these statutory provisions defining a victim as someone "directly and proximately harmed" do not expressly exclude any category of persons, several courts have concluded that significant policy reasons preclude those involved in criminal activity from being considered victims under the CVRA and MVRA. *See United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006) ("[A]ny order entered under the MVRA that has the effect of treating coconspirators as 'victims,' and thereby requires 'restitutionary' payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*.").

In *United States v. Lazarenko*, 624 F.3d 1247, 1252 (9th Cir. 2010), the Ninth Circuit held that "as a general rule, a participant in a crime cannot recover restitution." There, the individual seeking restitution was described by the court as "both a victim and a participant" of a money laundering scheme who had "profited handsomely" from the conspiracy. *Id*. at 1250. The Ninth Circuit concluded that, based on these facts, he could not qualify as a "victim" under the MVRA, because such a reading of the statute would be "absurd." *Id*. at 1251. The court reasoned that co-conspirators should be treated differently than innocent victims because "[o]therwise, the federal courts would be involved in redistributing funds among wholly guilty co-conspirators, where one or more co-conspirators may have cheated their comrades." *Id*. at 1250-51. In reaching its

conclusion, the Ninth Circuit relied on the Second Circuit's earlier opinion in *Reifler*, in which that court vacated a restitution order *sua sponte* after concluding that the list of putative victims submitted to the court included some of the conspirators and nominees of the securities fraud scheme. *See Reifler*, 446 F.3d at 126-27. The court in *Reifler* concluded that such individuals were not victims "within the meaning of the MVRA because they were instead coconspirators" and the district court's restitution order had to be vacated because it was "beyond the authority conferred by the MVRA." *Id.* at 132. Relying on both *Reifler* and *Lazarenko*, the Eleventh Circuit recently held that a corporation that admitted "to engaging in illegal fraud cannot be a 'victim' of the fraud for purposes of the CVRA and MVRA." *See In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1238-40 (11th Cir. 2014) (per curiam) (holding that a corporation could not seek restitution for the criminal acts of its top-level executives because doing so would be seeking restitution "for its own conduct").

Bariven is not the first state-owned entity to seek status as a victim and restitution in an FCPA prosecution. In 2011, French corporation Alcatel-Lucent and two of its subsidiaries resolved an FCPA investigation with the Government whereby the parent company agreed to enter into a deferred prosecution agreement and the subsidiaries agreed to plead guilty to a criminal information charging them with conspiracy to violate the anti-bribery, books and records, and internal controls provisions of the FCPA in connection with bribes they had paid to employees of Instituto Costarricense de Electricidad ("ICE"), a state-owned Costa Rican telecommunications company in order to secure contracts from ICE. In the proceedings before the district court, ICE filed a petition objecting to the proposed deferred prosecution agreement and plea agreement and seeking recognition as a victim pursuant to the CVRA on the same grounds as here; specifically, that ICE was a victim of the bribery scheme carried out by certain of its employees and by Alcatel-

Lucent. The district court denied ICE's request for victim status, finding, as a factual matter, that ICE was complicit in the criminal conduct. The Eleventh Circuit denied ICE's mandamus petition, holding that the district court had not clearly erred when it found that ICE "actually functioned as the offenders' coconspirator," based upon the district court's finding of "pervasive, constant, and consistent illegal conduct conducted by the 'principals' (i.e. members of the Board of Directors and management) of ICE". *See In re Instituto Costarricense de Electricidad*, No. 11-12707-G, at *2 (11th Cir. June 17, 2011).[6] In considering ICE's petition, the district court and Eleventh Circuit confronted a factual scenario on all fours with the one presented by Bariven's claim here. Respectfully, this Court should reach the same decision.

The conclusions reached by the Second, Ninth and Eleventh Circuits that those involved in the criminal activity under investigation are not entitled to claim victim status is further supported by guidelines promulgated by the Department of Justice. *See* U.S. Dep't of Justice, Attorney General Guidelines for Victim and Witness Assistance (2012) (hereinafter "AG Guidelines").[7] The AG Guidelines provide that "[a] person who is culpable for or accused of the crime being investigated or prosecuted should not be considered a victim for purposes of the rights and services described in the AG Guidelines. The determination of whether a person is culpable should be based on the facts and circumstances known at the time of investigation, prosecution, or

[6] Neither the district court's ruling nor the Eleventh Circuit's order denying ICE's mandamus petition are published. *But see United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1304 (11th Cir. 2012) (per curiam) (summarizing the procedural history of the petition and mandamus decision in ICE's related direct appeal of the district court's decision and noting that the mandamus panel "concluded that the District Court 'did not clearly err in finding that [ICE] actually functioned as the offenders' coconspirator. The district court identified the pervasive, constant, and consistent illegal conduct'" by members of ICE's board and management).

[7] Although the AG Guidelines are not binding on this Court, other courts have relied on them for guidance in interpreting the CVRA. *See, e.g.*, *United States v. Kasper*, 60 F. Supp. 3d 1177, 1178 (D.N.M. 2014).

post-conviction, and should be reevaluated as additional facts and circumstances become known." *Id.* at 11.

To be sure, courts have recognized that there may be circumstances in which those who have engaged in misconduct generally may still be considered victims, so long as their wrongdoing was not part of the same subject matter as the accused. *See United States v. Ojeikere*, 545 F.3d 220, 222-23 (2d Cir. 2008) ("We hold that restitution under the MVRA may not be denied simply because the victim had greedy or dishonest motives, where those intentions were not in *pari materia* with those of the defendant."); *see also Lazarenko*, 624 F.3d at 1249 ("[I]n the absence of exceptional circumstances, a co-conspirator cannot recover restitution." (emphasis added). *But see United States v. Martinez*, 978 F. Supp. 1442, 1453-54 (D.N.M. 1997) (declining to order defendant to make restitution for armed robbery of illegal Indian gaming casino even though casino's illegal operation was unrelated to the defendant's offense of conviction). The cases that have invoked the "exceptional circumstances" exception involve factual scenarios radically different from those present in this case. *See, e.g.*, *United States v. Sanga*, 967 F.2d 1332, 1335 (9th Cir. 1992) (holding that smuggled alien was a victim because "any criminal complicity in the conspiracy which [she] might bear stopped at the point at which she became the object of, rather than a participant in the criminal goals of the conspirators"); *see also* AG Guidelines at 12 ("Victims of involuntary servitude or trafficking may be considered victims for purposes of the prosecution of those crimes despite any legal culpability that the victims may have for ancillary offenses, such as immigration or prostitution crimes."). The Government seriously doubts that Bariven can claim that its conduct puts it on par with a human trafficking victim forced into labor.

The reasoning of three circuits which have addressed this issue and guidance from the Department of Justice all lead to one conclusion here: because of Bariven's extensive participation

in the bribery and money laundering schemes charged in these related cases, it is precluded from being recognized as a victim under both the CVRA and MVRA. However, in light of the fact that the Government's investigation remains ongoing and the recommendation in the AG Guidelines that the "determination of whether a person is culpable . . . should be reevaluated as additional facts and circumstances become known," AG Guidelines at 12, should the Court conclude that there is currently insufficient evidence of Bariven's complicity in the crime to disqualify Bariven from victim status, the Government respectfully renews its request to hold Bariven's motion in abeyance until the factual record is more sufficiently developed.

2. Bariven's preclusion from victim status is not dependent on a showing that it is criminally liable for the bribery and money laundering scheme

Bariven's efforts to defend its status as a crime victim under the CVRA and MVRA despite its complicity in the bribery and money laundering scheme that is the subject of these prosecutions rests only on the premise that it cannot be held criminally liable for the offenses for which the Defendants were convicted because "none of [its employees'] criminal behavior may be vicariously attributed to Bariven." Bariven Mot. at 21. In so arguing, Bariven confuses the standard for what the Government must prove in order to convict a company of a criminal offense and what this Court must find in order to deny victim status under the CVRA and MVRA to an obvious participant in a criminal scheme. The fact that the Government has not yet charged Bariven with a crime in connection with the scheme or expressly identified it as an unindicted coconspirator in the charging documents filed against the Defendants in these cases is of no moment. Numerous courts that have considered this issue have concluded that, although formal designation as a coconspirator may be sufficient to preclude a party from seeing victim status, it is by no means a necessary predicate. *See, e.g.*, *United States v. Emor*, 850 F. Supp. 2d 176, 209

(D.D.C. 2012) ("[C]ourts have not limited the "coconspirator exception" to the MVRA to situations in which the victim/participant was indicted by the grand jury.").

Despite its name, the so-called "co-conspirator exception" exception to the MVRA adopted in *Lazarenko* and *Reifler* does not depend on the putative victim being convicted (or even charged) as a co-conspirator. Rather, victim status is denied to those who are merely shown to be "participants" in the offense. *See Lazarenko*, 624 F.3d at 1252 ("[A]s a general rule, a participant in a crime cannot recover restitution." (emphasis added)). To be sure, the Second Circuit's concern about the adverse effect that awarding restitution to "the perpetrators of the offense of conviction" would have on "the public reputation of . . . judicial proceedings," *Reifler*, 446 F.3d at 127, would be present regardless of whether or not the Government has charged and convicted the perpetrator seeking victim status. For this reason, a number of district courts have unequivocally held that this exception to the CVRA and MVRA applies regardless of whether the party seeking victim status has been formally charged or designated by the Government as an unindicted coconspirator in a charging document. *See, e.g.*, *United States v. Lazar*, 770 F. Supp. 2d 447, 451-52 (D. Mass. 2011), (holding that "restitution may not be ordered under the MVRA to a conspirator who participates in a fraudulent scheme with the same criminal intent as his or her coconspirators, whether or not the conspirator is formally charged as a defendant" reasoning that determination of victim status should not be "based solely on the fortuity of the government's charging decision").

In *United States v. Emor*, the court considered whether the nonprofit organization the defendant founded should be denied restitution under the "co-conspirator" exception. *See Emor*, 850 F. Supp. 2d at 209-10. In analyzing the issue, the court noted that "[i]n applying the coconspirator exception to the MVRA," the question was not whether the purported victim had been "indicted by the grand jury" for its misconduct. *Id.* Instead, the court explained that "courts

have conducted fact-specific inquiries into an alleged 'victim's' willingness as a participant in the scheme and whether he or she shared the same criminal intent as the defendant from whom restitution is sought." *Id.* at 210 (quoting *Lazar*, 770 F. Supp. 2d at 450). In evaluating whether the nonprofit organization was a "victim" under the MVRA, the court conducted no inquiry into whether the organization could be held criminally liable for the actions of its founder and executive or whether this individual's actions were taken with an intention to benefit the organization. Instead, the court discussed the fact that the defendant made no effort to conceal his criminal activities from other employees within the organization and that those other employees "often facilitated his theft of funds." *Id.* On those facts, the court held that the nonprofit was not a victim because "it fully sanctioned and participated in [the defendant's] fraudulent diversion of government-derived funds for his own benefit." *Id.* (emphasis added).

In addition, the state-owned Costa Rican telecommunications company that was denied victim status and restitution in the Government's FCPA settlement with Alcatel-Lucent was neither charged nor convicted for its role in the bribery scheme. In denying ICE's petition, the district court found that ICE "actually functioned as the offenders' coconspirator," yet neither the district court, nor the Eleventh Circuit in denying mandamus review, ever considered whether the "pervasive, constant, and consistent illegal conduct" by the management and Board of ICE was done with any intention to benefit ICE such that it could be held criminally liable under the principle of respondeat superior. *See In re Instituto Costarricense de Electricidad*, No. 11-12707-G, at *2. There is no reason that this Court should have to undertake such an unnecessary exercise here, particularly when it is not required by the numerous cases that have denied victim status and restitution to uncharged participants in a criminal scheme.

Moreover, whether the party seeking victim status is capable of being charged with the crime is similarly irrelevant. Although the reasoning of *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (per curiam), may limit the government's ability to charge foreign officials with conspiracy to violate the FCPA, that does not mean that foreign officials employed by Bariven, and indeed Bariven itself, were not involved in—and partially responsible for—the criminal conduct underlying the Defendants' convictions.[8] Nothing in the Fifth Circuit's decision in *Castle* suggests that the corrupt foreign officials or the state-owned organization for which they worked should be considered victims, much less entitled to restitution. The AG Guidelines confirm this point: "[I]ndividuals who are knowing and willful participants in an illegal tax shelter or other financial fraud are generally not considered victims of the crimes charged against the shelter or fraud promoters, even when the individuals are not criminally culpable for the charged crimes or any of the crimes under investigation." AG Guidelines at 12.

3. The Government can amply establish Bariven's corporate criminal liability

Should the Court believe, however, that a finding of corporate criminal liability on Bariven's part is necessary to preclude it from seeking victim status under either the CVRA or the MVRA, the evidence gathered to date as part of the Government's ongoing investigation more than adequately demonstrates that the actions of numerous Bariven employees and senior executives can be imputed to Bariven under the governing law to subject Bariven to criminal liability. The legal standards relevant to establishing corporate criminal liability are discussed

[8] Moreover, *Castle* does not preclude the Government from charging corrupt foreign officials with other crimes committed as part of the bribery scheme. As the convictions of Defendants Maldonado, Ramos, and Gravina demonstrate, the Government can—and does—charge foreign officials with laundering the proceeds of the bribery scheme.

below and a summary of evidence relevant to this issue is presented for this Court's consideration in the Government's Addendum filed with the Court under seal and *ex parte*.

In support of its argument that it cannot be held criminally liable as a co-conspirator of the Defendants, Bariven relies on the Fifth Circuit's decision in *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120 (5th Cir. 1962), and its statement of the law that "the corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility' through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer." *Id.* at 129 (footnotes omitted). The Government does not dispute that well-accepted standard. However, in claiming that it cannot be held vicariously liable for actions of its employees taken for "their own personal gain and financial benefit," Bariven Mot. at 21, Bariven ignores a critical aspect of the test for corporate criminal liability: an employee need only act to benefit the company *in part*. He or she may also be motivated, even primarily motivated, by the expectation of a personal benefit, but that does not immunize the company from liability. "To be acting within the scope of his employment, an agent must be 'performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation." *United States v. Automated Med. Labs.*, Inc., 770 F.2d 399, 407 (4th Cir. 1985) (quoting *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982)). The Eleventh Circuit has previously rejected the same misreading of *Standard Oil* that Bariven proffers to this Court. *See United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984) (characterizing as a misstatement of the law "that an agent had to be acting for the exclusive benefit of the corporation for corporate liability to exist."). There is no shortage of cases in which corporations have been held criminally liable for actions that benefit both the company and the employee. *See, e.g.*, *id.* (noting that "the criminal acts of [the company's] employees redounded

to the benefit of both the corporation (which received the revenues generated by the improper claims) and its employees (who received bonuses based on their sales volume)").[9]

Nor is Bariven correct when it suggests that it cannot be held criminally liable for the actions of its employees because it "suffered losses from systematic overcharging" or because its employees were "robbing Bariven blind," Bariven Mot. at 21. Such a proposition finds no support in the law. Numerous courts, including the Fifth Circuit, have held that there need not be proof of an actual benefit to the corporation and, in fact, it can still be held criminally liable even if the actions of its employees harmed the company. *See Standard Oil*, 307 F.2d at 128-29 ("The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse."); *see also Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945) ("We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact."). In fact, one court had observed that a company "could have benefitted and, thus, could be liable" even from an extortionate scheme in which it lost revenue. *See Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1313 (M.D. Fla. 2001) (noting a factual dispute as to whether employees could have been acting "to further the business interests" of the company even by offering lower prices that cost the company revenue because the pricing arrangement was designed to facilitate the transfer of business away from a distributor that was going out of business").

Although the Government does not believe that it is required to meet the standard of corporate criminal liability in order to disqualify Bariven from victim status under the CVRA or MVRA in light of *Lazarenko* and its progeny, the Government submits that the evidence described

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[9] The Eighth Circuit model criminal jury instructions Bariven relies upon in its motion expressly note that a jury need only find that "the agent[s] intended, at least in part, to benefit the corporation." *See* Bariven Mot. Ex. C at 2.

in the Government's *ex parte* Addendum is more than sufficient to demonstrate Bariven's corporate criminal liability under the applicable law described above.

B. Bariven Is Not Entitled to the Rights of a Victim Under the CVRA Because the CVRA's Definition of Victim Does Not Include a State-Owned Instrumentality of a Foreign Government

As noted above, the CVRA defines a crime "victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e)(2)(A). The Supreme Court has long held that when Congress uses the word "person" in a federal statute, absent some "affirmative showing of statutory intent to the contrary" there is a presumption that "'person' does not include the sovereign." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). That interpretative presumption is grounded in part on the language of the Dictionary Act, 1 U.S.C. § 1, which provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Numerous courts have concluded that the absence of government entities from the Dictionary Act's list of what qualifies as a "person" indicates that, absent some express provision to the contrary, Congress did not mean to include government entities, such as cities, states, the United States, or foreign nations, within the definition of "person." For example, in *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947), the Supreme Court observed the following with respect to the Norris-LaGuardia Act:

> The Act does not define "persons." In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provision, 1 U.S.C. § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

Id. at 275; *see also, e.g.*, *United States v. Errol D.,* 292 F.3d 1159, 1162-64 (9th Cir. 2002) (holding that the Bureau of Indian Affairs, as a government agency, was not a "person" under the Indian Major Crimes Act).

That interpretative presumption controls here. The text of the CVRA does not define "person" and contains no "affirmative showing of statutory intent," *Vermont Agency*, 529 U.S. at 781, to include foreign governments within its reach. Moreover, the context of the CVRA further suggests that its provisions were not meant to apply to powerful agencies of foreign governments with the ability to hire sophisticated counsel. The participatory and protective rights of the CVRA (*e.g.*, "[t]he right to be treated with fairness and with respect;" "[t]he right to be reasonably protected from the accused;" "[t]he right to reasonable, accurate, and timely notice of any public court proceeding . . . ") are more appropriately understood as protecting individuals, not agencies of foreign governments.[10] *See* 18 U.S.C. §3771(a)

The understanding that the CVRA's definition of "person" does not include sovereign entities like foreign governments and agencies is supported by the AG Guidelines which provide that "[n]either the federal government nor any state, local, tribal, or foreign government or agency thereof fall under the definition of crime victim for either mandatory services or court enforceable rights." *See* AG Guidelines at 12. Moreover, at least one district court has concluded, based on the Dictionary Act and the AG Guidelines, that a sovereign entity cannot be a "crime victim" under the CVRA. *See United States v. Kasper*, 60 F. Supp. 3d 1177, 1178-79 (D.N.M. 2014) (holding that a tribal government was not a crime victim for purposes of the CVRA); *see also In re Her Majesty the Queen in Right of Canada*, 785 F.3d 1273, 1277 (9th Cir. 2015) (per curiam) (noting

[10] Bariven itself underscores this point when it notes that it does not need the Government's help in obtaining information about "public court proceedings." *See* Bariven Resp. at 3.

the open question of whether a foreign sovereign "is a 'person' who may be a 'crime victim' under 18 U.S.C. § 3771(e)," but declining to reach the issue and denying restitution on other grounds).[11]

Bariven's status as an agency of a foreign government can hardly be questioned. Indeed, Bariven has represented itself to be a government entity in its filings in this case. *See* Bariven Memo. at 2 ("Bariven is a Venezuelan entity . . . ."). Moreover, other courts in unrelated civil actions have recognized Bariven's status as a Venezuelan government agency and instrumentality. *See Validsa, Inc. v. PDVSA Servs., Inc.*, 424 F. App'x 862, 864 n.2, 869, & 872 n.9 (11th Cir. 2011) (unpublished per curiam opinion) (describing Bariven as "an agency and instrumentality of the Bolivarian Republic of Venezuela, "an agency of a foreign government," and "an agency of a foreign nation").

Were Bariven to claim that its status as a state-owned instrumentality should be thought of more as a corporation that would fit within the definition of "person," as opposed to an arm of a foreign government, that argument would be unavailing. In other contexts, courts have repeatedly classified foreign state-owned instrumentalities as agents of a foreign government, not corporations. For example, the Foreign Sovereign Immunities Act ("FSIA") defines a "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a

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[11] The Government recognizes that sovereign entities can be, and have been, recognized as victims entitled to restitution under the MVRA. *See, e.g.*, *United States v. Zhang*, 789 F.3d 214, 216-17 (1st Cir. 2015) (holding that the IRS was an eligible victim under the MVRA and collecting cases). Although the definition of victim in the two statutes is similar, these decisions rest primarily on statutory language in a separate enforcement provision of the MVRA, 18 U.S.C. § 3664, that specifically references the possibility that the United States can be designated as a victim entitled to restitution. *See Zhang*, 789 F.3d at 216 (citing 18 U.S.C. § 3664(i)). That provision prompted those courts to determine that the ordinary *Vermont Agency* presumption against including sovereigns within the definition of "person" had been overcome. Indeed, the AG Guidelines recognize that although foreign governments cannot be a victim under the CVRA, "they may qualify for restitution under federal restitution statutes." AG Guidelines at 12; *see also Pasquantino v. United States*, 544 U.S. 349, 382 (2005) (Ginsburg, J., dissenting) (citing Government's position at oral argument that a restitution award to Canada under the MVRA was appropriate). These cases, however, do not have any bearing on the separate question of whether government entities, including a foreign government or instrumentality thereof, can be a crime victim under the CVRA.

foreign state." 28 U.S.C. § 1603(a). The statute then defines an "agency or instrumentality of a foreign state" to be "any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country." 28 U.S.C. § 1603(b); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 471 (2003) (noting that certain provisions of FSIA may be invoked "by a corporate entity that is an 'instrumentality' of a foreign state"). Bariven itself has been recognized as a "foreign state" for purposes of FSIA. *See Absolute Trading Corp. v. Bariven, S.A.*, 503 F. App'x 694 (11th Cir. 2013) (unpublished per curiam opinion) (noting that Bariven, as a wholly-owned subsidiary of PDVSA, is "deemed a 'foreign state'" under FSIA).

Similarly, the Supreme Court recently concluded that Amtrak, a corporation, was not "an autonomous private enterprise" for purposes of the nondelegation doctrine but rather a "governmental entity" in light of the fact that "Amtrak was controlled by the Government, is controlled by the Government, and operates for the Government's benefit." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S.Ct. 1225 (2015). The Court reached this conclusion despite the fact that Congress had declared that "Amtrak 'is not a department, agency, or instrumentality of the United States Government'" and that "Amtrak 'shall be operated and managed as a for profit corporation.'" *See id.* at 1231 (quoting 49 U.S.C. § 24301(a)(2) & (3)). Thus, any assertion that Bariven should be viewed as merely a corporation and not an agency of the Venezuelan government rings hollow in light of its own statements made in this litigation, the factual findings of other courts concerning Bariven's legal status, and Supreme Court case law in analogous

circumstances. That status as an agency of a foreign government precludes Bariven from seeking victim status under the CVRA.[12]

C. Bariven's Motion Is Aimed at Obtaining Sensitive, Non-Public Information, Which Poses Significant Risks to the Government's Investigation and Is Not Among the Rights Provided to Victims Under the CVRA

Bariven makes no attempt to conceal the true motive behind its desire to obtain "information known to the government." Bariven Resp. at 3. Indeed, Bariven acknowledges that it is currently involved in an international arbitration proceeding with Defendant Rincon and claims that the Government is somehow "putting Bariven in harm's way" by "doing nothing to stop [Rincon]."[13] The Fourth Circuit has explicitly rejected an attempt to use the CVRA to gain a tactical advantage in unrelated civil litigation. *See United States v. Moussaoui*, 483 F.3d 220, 234-35 (4th Cir. 2007) (holding that the CVRA does not support a victim's right to obtain documents from the Government for use in civil litigation). Even more troubling here, Bariven has more than simply a financial motivation to seek sensitive information about the Government's ongoing investigation; as an entity that was complicit in the scheme, Bariven's access to such information risks dropping non-public information about an ongoing investigation directly into the hands of

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[12] Should the Court conclude that its status as a state-owned entity precludes Bariven from relief under the CVRA, it may be appropriate for the Court to defer consideration of the other factual and legal issues implicated by Bariven's request for restitution under the MVRA. Indeed, Bariven itself has acknowledged that the Court need not decide whether it "is entitled to *restitution* at this time." Bariven Resp. at 2. Although there is currently more than sufficient evidence before the Court for it to deny Bariven's request for restitution under the MVRA on the basis that Bariven was a participant in the criminal scheme, *see* Parts A & B, *supra*, the Government does not object to postponing consideration of the restitution issue until the Defendants' sentencing hearings when the factual record is likely to be even further developed.

[13] It is hard to imagine what Bariven expects the Government to do to "stop" Rincon, as it goes without saying that the Government has no ability to enjoin a civil arbitration proceeding involving a criminal defendant, particularly one occurring in another country, nor does it have any ability to limit a criminal defendant's ability to pursue private litigation.

those being investigated, giving Bariven and its employees an unjustified and inappropriate preview of the Government's evidence. This Court should not permit such a result.

Bariven seeks to disguise its underlying motivations for confidential information by making inconsistent (and erroneous) claims as to the scope of the rights afforded to victims under the CVRA as well as mischaracterizing the charging documents in these cases. First, although Bariven continues to claim that it is not seeking "confidential information about the Government's ongoing investigations," its request for "information known to the Government that will assist Bariven to arrive at a more precise restitution figure and enable Bariven to continue to fully purge bad actors from the company," amounts to exactly that.[14] *See* Bariven Resp. at 3. For example, during a meeting with the Government before filing its motion and again in its sur-reply to the Government's request to defer resolution of this issue, Bariven specifically requested that the Government provide it with the names and positions of the foreign officials anonymized in the charging documents in these cases. The Government explained to Bariven that the nature of the investigation required that these individuals remain confidential, but Bariven persists in demanding disclosure of this sensitive information no matter the detrimental effect it may have on the Government's investigation.

Second, in its briefs filed with this Court, Bariven is inconsistent with respect to its request for information about potential plea agreements with criminal defendants. Bariven begins by stating that the Fifth Circuit's holding in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), that "victims generally have the right to be informed about plea negotiations and confer with the prosecutor

[14] The Government has repeatedly asked Bariven to provide a list of specific information or documents it is seeking in an effort to evaluate whether, in the spirit of compromise, the Government would be able to provide some information that, in its judgment, would not compromise the investigation. To date, Bariven has failed to respond to the Government's request.

about them before an plea agreement is reached" necessarily means that the Government is compelled to provide a victim with "sensitive, nonpublic information" about plea negotiations. Bariven Sur-reply at 5. Puzzlingly, however, one paragraph later, Bariven states that it "is not seeking sensitive information such as details about plea agreements." *Id.* Given Bariven's own inconsistencies in its requests for information, this Court should take no comfort in Bariven's assurance that it has no interest in interfering with the Government's investigation.

Furthermore, this Court should view Bariven's motion with skepticism because, in attempting to demonstrate why it has suffered direct and proximate harm as a result of the offenses of conviction, Bariven relies on a series of mischaracterizations of the Government's charging documents. For example, neither the indictment charging Rincon and Shiera nor the criminal informations charging Ramos, Maldonado, Gravina, Millan, Beech, and Hernandez make any reference to "occasions on which the Defendants furtively overcharged Bariven for various contracts and projects, and even billed Bariven for equipment not delivered and services not performed, or never completed at all." *Id.* at 20. The Government has made no such allegations, and the citations Bariven points to in furtherance of its assertion to the contrary provide no support for these allegations. To the extent that the charging documents refer to false invoices prepared for services never rendered, these were not invoices submitted to, or services supposed to be rendered for, Bariven. Rather, they were invoices submitted to Rincon's and Shiera's companies to falsely justify the bribe payments. These allegations, therefore, have no bearing on Bariven's victim status, and Bariven's "exhaustive internal investigation and forensic analysis" appear not to have yielded anything other than a distortion of the grand jury's and the Government's allegations and the defendants' admissions.

Finally, Bariven's misstatement of the law governing the rights afforded to victims under the CVRA further undermines its petition. Bariven accuses the Government of being "[un]willing to comply with its obligations under the CVRA" because, in an effort to preserve the integrity of its investigation, the Government has declined to provide confidential information about plea negotiations and other sensitive information to Bariven. Bariven's continued citations to *In re Dean* in support of its argument that the Government is in violation of the law are inapposite. In that case, there was no dispute that the individuals seeking mandamus relief, victims of an oil refinery explosion that "killed fifteen [people] and injured more than 170," were "victims" under the CVRA; the questions the Fifth Circuit were considering involved the scope of the rights to which the victims were entitled and when those rights attached. *Id*. at 392-95. Nothing in the Fifth Circuit's decision in *In re Dean* requires the Government to provide sensitive information or grand jury material to a putative victim when doing so would jeopardize an ongoing criminal investigation. The CVRA is quite clear that its provisions should not be read to interfere with the Government's prosecutorial decision-making. *See* 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.").

Facing a request similar to the one made by Bariven here, a district court declined to provide a party seeking victim status under the CVRA access to "the U.S. Attorney's investigative and discovery files as well as grand jury materials." *United States v. Hunter*, No. 2:07CR307DAK, 2008 WL 110488, at *1 (D. Utah Jan. 8, 2008). The court in *Hunter* recognized the significant risks such disclosure would have on the Government's investigation. *See id*. at *2 ("The court does not want to create a right not provided for by any statute which has the effect of interfering with or second-guessing the prosecution of on-going, active criminal matters. The court must

recognize that the government has a strong interest in maintaining the integrity of its prosecution file by not disclosing its contents to persons who are not a party to the action.").

CONCLUSION

WHEREFORE, it is respectfully requested that Bariven's Motion for Recognition of Its Rights as a Victim and Entitlement to Restitution be denied, or, in the alternative, held in abeyance until the factual record concerning Bariven's complicity in the bribery and money laundering schemes is sufficiently developed to enable the Court to determine whether Bariven should be precluded from seeking crime victim status or restitution in these cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 20, 2017, I electronically filed the foregoing response with the Clerk of the Court using the ECF/CM system for filing and service on all counsel of record.

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