UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
COMMONWEALTH EDISON,	)	
	)	
Defendant,	)	No. 20 CR 368
	)	
and	)	Judge John F. Kness
	)	
TIMOTHY J. HUFMAN,	)	
	)	
Third-party Movant.	)	

TIMOTHY J. HUFMAN'S REPLY BRIEF

The Motion to Establish Restitution Procedures,[1] contends that the government and ComEd (the "parties"), via the DPA,[2] unlawfully forfeit Hufman's *federal restitution rights*. The parties essentially admit the DPA's restitution forfeiture, but they argue the Court is *powerless* to stop their forfeiture because the Court has not entered a "conviction" in this case.

For its part, the government is silent about where it obtains the authority to trade away Hufman's restitution rights. Congress has stated unequivocally that the *Courts* decide whether to award restitution. The parties say a "conviction" is a

[1] Dkt. 21, hereinafter, "the Procedures Motion," the "Motion," or "TPM at ¶__."
[2] All acronyms set out in the Procedures Motion are likewise used in this reply.

condition precedent for restitution liability, but of course, so is a DPA admission and agreement to pay restitution a basis for liability. In any case, the *public consequences* of government plea agreement deals *can* be challenged in the district court says circuit precedent (*infra* pp. 7-10); plea deals *cannot* be used to produce un-remediable injustice, as the parties seem to imply. The CVRA allows Hufman to obtain his own attorney to advocate for restitution when the government defaults, as it did here. TPM at ¶ 39. Hufman petitions for the day in court the law gives him, with an adequate period of discovery.

Most immediately, the district must stop the DPA's implementation using the equitable constructive trust remedy (TPM at ¶¶ 48-50) to enjoin the $200 million DPA payment and use that money as a restitution fund. The government breached its fiduciary duties to Hufman and engaged in self-dealing by obtaining for *itself* a $200 million *civil* penalty (while telling Hufman to take a hike). However, federal law states victims *always* get paid first and the DPA turns the statutory priority of victim restitution on its head (*id*. at ¶¶ 34-7).

This Court is responsible for holding all accountable, including powerful entities like ComEd that benefit enormously from state-granted utility monopolies, and the Court can do so by enjoining this unfair DPA unless ***ComEd*** first addresses the victim restitution made necessary by its admittedly corrupt bribery scheme.

BACKGROUND

The Procedures Motion Generally. The focus of the Procedures Motion is the DPA and the harm it causes to Hufman and the other victims in this case. TPM at ¶18-24 & 42-44. The Motion further specifies the immediate remedy Hufman seeks—*i.e.,* a constructive trust (TPM at ¶¶48-50), and the ultimate relief he seeks: a civil restitution proceeding that would result in the adjudication of ComEd's federal restitution liability. TPM at ¶¶55-7. The Motion sets forth the district court's jurisdiction (TPM at ¶¶6-14); no one contests the court's subject matter jurisdiction.

The DPA Benefits to ComEd. The DPA conferred benefits on ComEd in at least three ways. On information and belief, the government dropped an "outside monitor" term from the DPA, and that saved ComEd and its parent Exelon millions of dollars[4] The DPA itself indicates the parties' calculation produced a "Guidelines" fine range of $240 to $480 million. TPM at ¶10. Based on that calculation, the parties agreed to a $40 million "discount off the bottom" for an end-of-day $200 million

[4] Presumably, ComEd can now monitor its own compliance with, among other things, its DPA promise to not pay the multimillion-dollar penalty with more victim/ratepayer funds. DPA at ¶10. Significantly, the DPA leaves open a loophole as to who will pay the $200 million fine. After language asserting that ComEd would not pay the fine through charges to its customers, it states that it "shall not seek or accept . . . reimbursement . . . from any other source than [its parent corporation] Exelon." DPA p. 8, ¶10. The agreement is silent as to whether Exelon can pass off the fine to ratepayers of other states where it provides electric service. TPM n. 3.

"penalty." *See infra* note 11. The DPA says that the discount is for ComEd's "substantial remediation and cooperation." *Id*.

The government admits that ComEd owes *federal criminal restitution*.[5] According to the government, the DPA reflects the parties' agreement "that the reasonably foreseeable anticipated benefits to ComEd from favorable state legislation it sought to impact [via the bribery scheme] exceeded $150 million." Govt Resp. at 10 (*citing* DPA at A-12). ComEd, however, contends the *opposite:* ComEd claims that the favorable legislation that it sought, "did not operate to the detriment of ComEd customers."[6] It is thus reasonable to infer that in the negotiations leading up to the final DPA, the parties *compromised* on a restitution term by not including a

[5] The government argues that despite ComEd owing federal criminal restitution, the issue is too *complex for the government* to figure out, a spurious contention addressed *infra* argument section B and C.

[6] ComEd Resp. at 11-12. The main thrust of the Motion is a host of CVRA violations. As a criminal defendant, ComEd has no CVRA rights. 18 U.S.C. § 3771(d)(1) ("A person accused of the crime may not obtain *any* form of relief under [the CVRA]"). ComEd's CVRA arguments are ill-informed as they are unbecoming. ComEd states, "the CVRA does not even apply until a defendant is convicted of an offense." ComEd Resp. at 11-12. Simply to read the panoply of rights the CVRA provides, quoted in full at note 7 of the Motion, *all* apply pre-conviction. ComEd's legally "distinguishing" the CVRA case of *In re Wild* case (cited at TPM ¶ 40) is risible. The victims in the notorious Jeffrey Epstein case (*i.e., In re Wild*) were denied CVRA relief essentially because the government *never lodged criminal charges in the district court* (as DOJ's Epstein "settlement" was made in state court). Hufman cited *In re Wild* for the simple, negative proposition that the government lodged charges against ComEd, and thus the CVRA protections for ComEd's victims arose and are extant.

restitution term in the DPA. In the end, the government gave ComEd millions (by relinquishing the outside monitor requirement), another $40 million civil penalty discount, *and* extinguished the victims' MVRA contingent interest in at least $150 million in restitution. The government did so in exchange for $200 million.

Mandatory Restitution is a Legal Fact. To Hufman's contention that the Seventh Circuit's *Gee* establishes a circuit rule that, all things being equal, a § 666 bribery charge and conviction *inevitably* results in civil restitution liability (TPM at ¶ 33)—the parties' briefs are silent. To Hufman's citation to DOJ's Justice Manual's implicit demand for a DPA restitution term (TPM at ¶¶ 28-29)—the parties are silent.

The August 17 Order. The district court ordered the parties to file briefs on an expedited basis to address "the Court's power to grant the relief the movant seeks." Dkt. 18 (8/17/20 Hr. Trans. at 10).

Notice to the Illinois AG. The Movant provided a copy of the Procedures Motion to the Illinois Attorney General. TPM at ¶3. Hufman also provided *substitute* CVRA notice of the DPA that the DOJ was required to provide but failed to provide to the Illinois Attorney General. DOJ failed further to act in conformity with other CVRA and MVRA victim rights provisions.

ARGUMENT

The Court has the power to grant the relief to which Hufman the state of Illinois are entitled. The immediate relief Hufman seeks—a constructive trust on

that certain fund of money ($200*mm*)—the Court can grant under the Seventh Circuit's *Pearson* decision based on the inequities the DPA produces. *Infra* section D. The ultimate relief Hufman seeks—the adjudication and satisfaction of Hufman's *federal* restitution rights using *federal* law[7]—the Court can grant under its original subject matter jurisdiction authority and general ability to resolve all matters related to the original subject of the litigation.[8]

The best way to understand this exercise of power in both instances is from the vantage point of the government, ComEd, and Huffman (and by extension that of the state of Illinois), and the respective contingent property interests each possessed before and after the formation of the DPA. The government, ComEd, and ComEd's

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[7] "[T]he Federal Rules of Civil Procedure provide fast and effective mechanisms for execution. . . to ensure that the judgment creditor's position is secured . . . [and also] protect[s] a judgment creditor's ability to execute on a judgment . . ." *Peacock v. Thomas*, 516 U.S. 349, 359 (1996).

[8] The parties have implicitly acknowledged the court's subject matter jurisdiction and thus its power to adjudicate claims concerning the DPA. *See O'Sullivan v. City of Chicago*, 396 F.3d 843, 859 (7TH Cir. 2005) (internal citations omitted) (*quoting AFL-CIO v. City of Cleveland*, 478 U.S. 501, 525 (1986) (a federal court is not merely a "'recorder of contracts;'" agreements put before a district court "must serve to resolve a dispute within the court's subject-matter jurisdiction"). Here, the Motion sets out the statutory basis for the court's subject matter jurisdiction. TPM at ¶¶ 6-14. Moreover, "once it acquires jurisdiction over a case and controversy properly before it, to adjudicate other claims sufficiently closely related to the main claim even though there is no independent basis for subject matter jurisdiction over the related claims." *Baylis v. Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988). Consequently, if the court decides Hufman has protectible federal property interests, it has the power to protect those interests.

victims each went into the DPA negotiations with contingent property interests, but the DPA extinguishes only the victims' interests, and they are the only party at the negotiations unrepresented by an attorney.

A. The DPA reflects bad-faith bargaining

The Justice Manual counsels a federal prosecutor to be "mindful that the United States Sentencing Guidelines generally require the [district court's] imposition of restitution when it is authorized by the law, and [the prosecutor] should not enter into agreements regarding restitution that would violate the Sentencing Guidelines (emphasis added)."[9] A line prosecutor has no authority to bargain away private property rights, but that is just what the parties purport to do here.

While the court's initial review of the DPA was justly guided by caution, now that the public and negative consequences of the DPA are manifest—the planned forfeiture of Hufman and the other victims' federal property rights worth millions of dollars—the Seventh Circuit has ruled that the public deeds are subject to judicial review. *In re United States*, 503 F. 3d 638, 641-2 (7th Cir. 2007). The Seventh Circuit explained that "judicial review of a prosecutor's discretionary choices is permissible. . . after the defendant has made a *prima facie* showing that impermissible considerations . . . have affected the prosecutor's decision," and in such case, "discovery into the prosecutor's decision-making processes may follow." *Id.*

[9] Justice Manual, § 9-16.320 (*citing* USSG § 5E1.1 and JM 9-27.400).

Entering the DPA negotiations, three distinct *contingent* financial interests were at stake: the government's (in pursuing punishment and restitution), the defendant's (in reducing its financial exposure), and the victim's (in obtaining restitution). Until trial and conviction (absent a settlement), the government would not be entitled to the payment of any fine; ComEd would not be compelled to pay anyone for its alleged criminal wrongdoing, but also would not know the extent of its liability; and the victim would not be able to enforce a right to restitution.

The terms of the DPA reflect the parties' hedging their bets against positions they might occupy if the Court entered a "conviction." ComEd's interest is alone monetary (because "ComEd" cannot be imprisoned). Moreover, ordinarily in a criminal proceeding the entry of a "conviction" simply marks the end of the "liability" phase and the beginning of the "sentencing" phase, which in turn would result in a judgment that would transform the contingent interests into vested interests.

Through the DPA, both the government and ComEd propose to settle their respective contingent financial interests. Hufman's financial interests, however, will be extinguished by eliminating his contingent right to restitution that would have otherwise vested had the matter proceeded to judgment. The vesting and protecting of the contingent interests of only two of the three parties is an act of bad faith depriving victims of the opportunity to vest their interests at time of trial.

In the instant case, the government supports a DPA that, contrary to its fiduciary duty to victims, (1) mandates that ComEd pays the government a *civil* penalty, before it pays Hufman *civil* restitution and (2) completely extinguishes Hufman's right to restitution. This court has the authority to prevent the government from benefiting from its self-dealing.

Despite the DPA's purported objective of dealing with ComEd's *criminal* liability, the agreement itself is understandable in its operation and consequences by reference to civil law and its related legal, equitable and contract-law principles.[10] As a corporation, ComEd will not be facing imprisonment for its criminal conduct. Thus, the only criminal punishment it will ever experience the financial burden of a "criminal fine"[11] or restitution. Accordingly, from ComEd and Exelon's vantage, their

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[10] It is the nature of the dispute that determines whether something is *substantively* "civil' or "criminal" and not necessarily the fortuity of whether an issue arises in a court-denominated "civil" or "criminal" case. *United States v. Santiago*, 826 F.2d 499, 502 (7th Cir. 1987) (holding that bail bond agreement arising in a criminal case is a dispute based on a contract and is *civil* allowing 60 days to appeal), and *United States v. Egan Marine Corp.*, 843 F.3d 674, 679 (7th Cir. 2016) (defendant's criminal conviction vacated; previous civil case entitling criminal defendant to vacatur because subsequent "criminal" case sought only money (fines and restitution) and therefore was "civil" in nature and barred by previous civil case.

[11] A "criminal fine" is legally distinct from a "civil penalty." See *United States v. Ursery*, 518 U.S. 267, 270 (1996) (considering whether in rem forfeiture constituted punishment for double jeopardy, answered "no"). A penalty is in the nature of "a remedial civil sanction, distinct from …. punishment for double jeopardy purposes." The distinction is properly set out in parts of the DPA. *See* DPA ¶ 10, which specifies that the $200 million "penalty" payment does not establish a maximum "fine" should ComEd breach the agreement and be subject to renewed prosecution.

liability is entirely *civil* because ComEd will suffer only the loss of money. These facts differentiate ComEd from the mill-run criminal case.

That said, with any defendant, a "conviction" is merely a demarcation point in procedure separating the "liability" phase from the "sentencing(punishment)" phase. With ComEd, liability is entirely civil. Here, the DPA allows the parties to avoid "conviction" and agreeing in principal as to liability and moving directly to the fixing of the liabilities, which liability fixing in the ordinary the *Court* administers. The restitution amount if disputed is a matter the *Court* determines.

Finally, and given that the stakes are essentially civil, the parties should be judicially estopped from arguing on the one hand, that Hufman cannot appear because a conviction is "necessary" before he and victims can assert their right to restitution, and on the other hand that the government could demand a civil penalty from the same defendant and a conviction is "not necessary." *See, e.g., Juza v. Wells Fargo Bank, N.A.*, 794 Fed. Appx. 529, 535 (7th Cir. 2020) ("Judicial estoppel is a doctrine of discretion that is intended to protect the integrity of the judicial process").

B. The VWPA, MVRA, and CVRA create pre-conviction rights to relief

Both ComEd and the government incorrectly assert that the Movant's CVRA and MVRA arguments do not establish his restitution rights absent a criminal conviction. They are wrong. Throughout most of the 19th and 20th centuries, victim restitution rights have evolved and strengthened. At the country's founding, "crime

victims played an important role in criminal prosecutions, often bringing their own 'private' prosecutions."[12] Then a long trend of victim rights being subordinated to the interests of a "public prosecutor," a role relatively unknown in England and to the Founders.[13] In 1982, Congress for the first time made victim restitution an independent element of a federal criminal sentence, and if the district court discretionarily ordered restitution, the victim acquired a judgment and other judgment creditor property rights that it could enforce inside or outside the federal criminal case, and it was a personal right.[14] In that regime, *the district court's* authority to award restitution was discretionary.

Using the previous example about contingent and vested rights, a victim could never acquire a vested right to restitution until the court's entry of judgment on the docket (and the event of jurisdictional import), because up to the point of the

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[12] "Crime Victim Rights" by the Honorable Paul G. Cassell (ret.), appearing as a chapter in volume 3 of "Reforming Criminal Justice" (E. Luna Ed. 2017), pp. 227-52 and especially nn. 3, 4 & 5 and accompanying text) (*citing inter alia Towards a Bicentennial Revolution in Criminal Justice*: *The Return of the Victim*, 18 Am. Crim. L Rev. 649 (1976).

[13] *Id.* and *see Crime and Punishment in American History*, pp. 29-30, nn. 28 & 29 and especially n. 29 (listing articles on historical development of the public prosecutor) by Lawrence M. Friedman (Basic Books 1993).

[14] Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-14, 3579-80 (1982) (VWPA); *see also United States v. Gomer*, 764 F.2d 1221, 1229 (7th Cir. 1985) (VWPA's legislative history shows Congress adopted restitution intending a civil remedy to improve the lot of victims was to be considered part of every sentencing).

sentencing hearing, the district court could decide to not award restitution for a variety of reasons, but inability to pay was the prime reason. *See, e.g., United States v. Day*, 418 F.3d 746, 757 (7th Circ. 2005) (comparing judicial obligations under both the discretionary VWPA regime and then under the Mandatory MVRA regime).

In 1996, not satisfied with the discretionary regime,[15] and over the judiciary's opposition,[16] Congress passed the Mandatory Victim Restitution Act that required the entry of a restitution judgment regardless of ability to pay.[17] The MVRA eliminated an "ability to pay" consideration, requiring imposition regardless and making restitution a closer analogue to civil money judgment. In any event with the MVRA's more predictable entry of a restitution increased the "expectancy" of a restitution judgment and lien. In turn, federal victims have experienced significantly

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[15] *See* Hearing on S. 173 (Mandatory Victim Restitution Act); Sen. Jud. Cttee 11/8/1995; Testimony of David Beatty, Director of Public Policy National Victim Center) (*available at* 1995 WL 11869373). This victim's rights advocate argued, "Our nation's long history of jurisprudence and legal tradition would seem to demand that victims be granted restitution as a matter of right. To leave the question as to whether a [restitution] debt is owed to the discretion of any individual criminal justice official is contrary to one of our nation's most basic notions of justice and fair play."

[16] *See Id.*, Statement of Judge Trump-Barry, United States District Judge, appearing on behalf of the Judicial Conference of the United States. Judge Trump-Barry expressed concern that mandatory restitution would be expensive, unproductive, and would "negatively impact the war on crime." Congress sided with the advocates of mandatory restitution, passing the MVRA just months later.

[17] Pub. L. 104-132, Title II, § 201, 4/24/1996, 110 Stat. 1227, codified principally in 18 U.S.C. §§ 3613, 3663, 3663A, and 3664.

increased standing to appear and assert their property interests in an eventual restitution judgment. *Fed. Ins. Co. v. United States*, 882 F.3d 348, 359 (2d Cir. 2018) (the MVRA's "procedural entitlements nevertheless have a significant effect on victims' ability to obtain restitution"). Moreover, when prosecutors continued to thwart restitution, as here, Congress passed the CVRA, which "confers standing on victims to seek restitution on their own behalf, rather than relegating them to bystander status while the government decides, for its own reasons and pursuant to its own strategy, whether, for whom, and in what amount to seek restitution." *Id.*

In this case, the prosecutor's failure to attend to duties imperils Hufman's property interests, and given that default in performance, Hufman must resume his traditional role as advocate for restitution. ***Cf.*** *United States v. Laraneta*, 700 F.3d 983, 985-6 (7th Cir. 2012) (allowing victim to appear in appear and defend restitution judgment after gov't defaulted).

When a victim has a "financial stake" in criminal litigation, "whether to allow victims of crime to intervene in criminal proceedings (rather than merely to be heard . . .) to be one of experience rather than power." *Id.* *Laraneta* stated that allowing intervention would mostly be "a recipe for disaster," but, then again, not one complicating, red-flag factor cited is present in Hufman's case. Moreover, because that case likewise had no "red flags," *Laraneta granted* non-party victims appeal status to defend an MVRA award they received in the district court and that the

defendant challenged on appeal. *Laraneta* reasoned from its facts that "[t]he case for intervention is most compelling when a person has a direct financial stake in a case and cannot be certain than any party has an interest in *defending* that stake." 700 F.3d at 986 (emphasis supplied). Hufman's case is *more* compelling than *Laraneta* because the government and ComEd are combining to *subvert* Hufman's stake.

C. Victims and restitution amounts are readily ascertainable

The government asserts that restitution is not available in this case as the victims of ComEd's bribery scheme are not readily ascertainable and that the restitution is too "complex" to calculate. Govt Resp., p. 9. This claim is without merit for two reasons. First, "complexity" gives an "out" if the *district court* should find that calculating loss would consume too many valuable resources. 18 U.S.C. § 3663A()(3)(B) (Restitution waivable *if the court* finds complexity prevents award). Moreover, the government and ComEd, who says no restitution is due are both arguing the substance of this matter on what is a Procedures Motion. Hufman submits the amount of losses is readily determinable by calculating excess profits generated through changes in each section of Illinois law that were obtained as a result of their admittedly illegal bribery scheme. For example, ComEd profits rose following passage of each of the laws in question. Each of those laws had specific sections that contributed to ComEd profitability. This information has been calculated by industry analysts and by the company itself. Reconstructing and verifying the illegally obtained profits will establish the victims' restitutionary amounts and priority in payment from that fund.

D. Constructive trust

Movant requested that the $200 million fine ComEd intends to pay to the government be placed in a court-created Victims' Restitution Fund to be held by the Clerk of the Court. TPM at ¶ 48-50. Essentially, that is a request that the $200 million be placed in a constructive trust until the losses sustained by ComEd's ratepayers are determined, so the court may thereafter enter appropriate orders providing for determination of payments to victims from the Fund.

A constructive trust is appropriate in these circumstances. The Seventh Circuit recently endorsed the use of a trust under similar circumstances. *Pearson v. Target Corp.*, Slip Op. in Case No. 19-3095, p. 20 (7th Cir. Aug. 6, 2020) (permitting class-action plaintiffs to assert constructive trust on their attorneys' million dollar "side deal" settlement fund). In *Pearson*, the Seventh Circuit explained that a "constructive trust has long been used as a remedy for unjust enrichment obtained from a fiduciary's breach of duty." *Id.* at p. 19. *Pearson* further explains the associated "accounting" remedy that creates the fund. *Id.* at 19-20. *Pearson* demonstrates that the district court has the authority to exercise constructive-trust and accounting powers and remedies under the facts of this case. Admittedly, the constructive trust to be placed on the $200 million DPA "penalty" payment does not automatically lead to a resolution of all issues before the court. An accounting proceeding will be

required to prove up the extent of the losses of ComEd's victims and the amount of restitution ComEd owes its victims.

CONCLUSION

For the foregoing and all those reasons set forth in the Procedures Motion, the Court should allow the Movant to appear and institute restitution procedures.

Respectfully submitted,

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