

# EXHIBIT “I”

**FILED**

RECEIVED  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

SEP 03 2008  
Sep 03 2008  
Judge Blanche M. Manning  
United States District Court

CLERK  
U.S. DISTRICT COURT  
07 cr 771

UNITED STATES OF AMERICA )  
v. ) No. 07CR 771  
)  
) Judge Blanche M. Manning  
NICHOLAS DELUCA )

**DEFENDANT NICHOLAS DELUCA'S SENTENCING MEMORANDUM**

**Introduction**

On September 4, 2008, the Defendant Nicholas DeLuca will be sentenced by your honor for mail fraud. He will stand before you a family man who four years ago accepted responsibility for his actions in this case and turned his life around. Counsel has attached a recent picture of Mr. DeLuca and his family. Counsel attaches the photo because, as the Court can see, the size of the family and the enormous expense of air travel prohibit them from flying from Tucson, Arizona, where they all live to attend the sentencing. Mr. DeLuca's brother, Delco Haden is planning to attend. Mr. DeLuca will speak of them in Court. It is for them and of course for himself that he turned his life around in 2004 and began to cooperate with the "victim" in this case, Motorola, and the FBI.

**The Offenses against Motorola and Defendant's cooperation**

Mr. DeLuca has admitted that he and a Harold Pick built radios and sold them on the internet using parts that they acquired from Motorola in such a way that they would ultimately not have to pay for them. In addition, Mr. DeLuca has pled here to a Michigan case in which he sold radios to a party in Grand Rapids that were ultimately altered by Mr. Pick to contain unauthorized "flash codes" which permitted them to operate on

restricted channels. The radios were actually sold to personnel of a fire department. Not only has he pleaded guilty, but he has also agreed to waive his right to indictment and to be charged in an information.

This case is unusual in that the principal actor in this scheme has escaped prosecution. Harold Pick has been allowed by the Government to go free, even though it acknowledged Peck's superior role in the offense and that it knew exactly where Peck is. The Government is letting Mr. Peck off the hook, putting the entire onus of this Criminal Prosecution on Mr. DeLuca. The Government is doing this in spite of the fact that Mr. DeLuca has been fully cooperating with the Government and Motorola in this and other matters since 2004. He has given depositions and made written declarations on countless occasions. He has provided the FBI with numerous tips as to internet frauds that he has encountered and in fact informed the FBI (with specific evidence) that Pick is still operating in the same way today.

He has aided Motorola in obtaining a civil judgment against Pick. Motorola has in fact agreed to waive and to release Mr. DeLuca from any restitution or civil liability acknowledging Mr. DeLuca's cooperation. A copy of the Settlement Agreement and General Release is attached hereto for the Court.

The Defendant has cooperated in this case and others with the Government as that term is used in considering whether to give sentencing credit when there is "cooperation" in a case. A signed cooperation agreement, however, does not exist in this case. Counsel is aware of Seventh Circuit law which in the absence of an agreement by the Government and a Motion to depart downward does not give the Defendant a "right" to credit. Nothing, however, prevents the Court from considering his attitude and cooperation in

the turning of his life around as far back as 2004 in fashioning a reasonable and just sentence in this case.

Much of the Defendant's recent cooperation has been under an express understanding with Brian Havey that he would receive a considerable downward departure. A draft plea agreement to that effect was tendered to the Defendant, but the Government for whatever its reasons decided to terminate the case with Mr. DeLuca and thus not give him credit for anything he had done. Mr. Havey simply closed his investigation, withdrew the cooperation agreement proposal on the grounds he had decided not to prosecute Pick and others and went to Afghanistan. His only statement to Counsel was that Motorola was OK with this and they were satisfied if he only convicted DeLuca. The agent's statement to the Probation Officer that Mr. DeLuca's cooperation was not of value is simply untrue. It was of considerable value if one chose to look at it and do some work. In the meantime, as Mr. DeLuca has documented to the agents, Mr. Peck continues on the internet.

**The Defendant receives 7 ½ years in Arizona for conduct in this case**

At the time Mr. DeLuca committed the offenses for which he has pled guilty before this Court, he was on probation in the State of Arizona after pleading guilty in 2000 for conduct in 1999 which frankly was somewhat similar to the offense conduct in this case. As a result of this case he faced probation revocation in Pima County (Tucson) Arizona. Those proceedings were instituted following and solely on the grounds of Mr. DeLuca's plea in this case.

The matter before your honor has been continued from time to time in order to position this matter in relation to the Arizona case so that your honor can consider and

hopefully rule that Mr. DeLuca's two cases can run in part or entirely together in order to achieve a just sentence. Both the Government and the Defendant knew that following Mr. DeLuca's plea here before this Court when he was on bond, he would be sentenced and taken into custody in Arizona thus necessitating his being brought on a writ to Chicago for sentencing. The objective was to give the Court the options as are set forth in paragraphs 457 through 564 of the Presentence Report.

Recently, on April 28, 2008, the Court in Arizona based solely on the conduct in this case and to the surprise of most, sentenced Mr. DeLuca to what is termed an "aggravated sentence" of 7½ years (90 months) in custody for violation of his probation. The Guideline Range in Federal Court as found by the Probation officer in her report and as recommended by the Government is 51 to 63 months. The Defendant's position is that the range should be considerably less (33to 41).

Nothing in this case would suggest that it would serve the ends of justice or any of the factors that this Court must consider in sentencing if Mr. DeLuca was to serve more than 90 months imprisonment for the conduct in this case. In fact the contrary would be true.

**There should be no restitution in this case pursuant to agreement with Motorola**

As a result of Mr. DeLuca's cooperation with Motorola following the execution of a search warrant by the FBI and employees of Motorola in 2004, Mr. DeLuca rendered substantial assistance to the FBI and Motorola. This resulted in a judgment of over a Million dollars against Peck and others. It also resulted in the Defendant, who thought Motorola's attorney was substantially representing his best interests in addition to Motorola's, giving depositions and written declarations and emails and statements, all of

which, while helping the Government and the FBI, incriminated him without any protection. These formed the basis of Mr. DeLuca's prosecution.

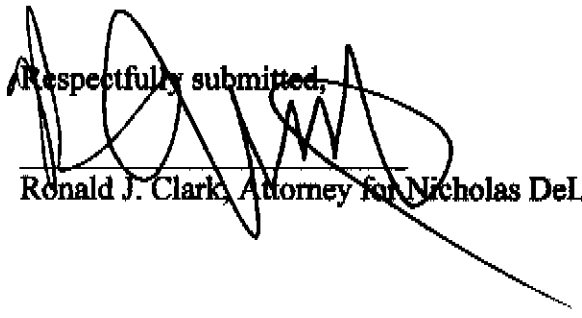
Motorola did sue Mr. DeLuca civilly for the monies that for the basis of the charges against him. That action was dismissed by Motorola in consideration of the above cooperation and pursuant to an agreement that Mr. DeLuca be released from any liability. A copy of the Agreement and the Dismissal are attached hereto. Counsel directs the Court to review Page 3, Paragraph 5, titled, "Release of Claims by Motorola."

In the light of this agreement and the actions of Mr. DeLuca, it would be contrary to law contrary to the express agreement and unjust to order Mr. DeLuca to pay any restitution as suggested by the PSI in this case. For some reason, the Officer makes no mention of this agreement, though it is believed she was aware of it.

#### Conclusion

Mr. DeLuca is serving the Arizona sentence and will in the Arizona system as in the Federal system serve 85 per cent of his time. The Government, through Mr. Brian Havey, the previous Assistant United States Attorney in this case who left the office to work in Afghanistan, agreed to the positioning of this case in relation to the Arizona case so that the Court could consider all sentencing options. In the current posture, the Defendant, through his counsel, urge that the Court impose a reasonable sentence at the low end or below the low end of the Guidelines, order that it run concurrently with the previously imposed and yet unserved Arizona sentence and that the State Institution be designated as the place where Mr. DeLuca is to serve his time.

It is respectfully urged that Mr. DeLuca does not have the funds to pay for a fine of for the costs of prosecution and confinement in this case. For the reasons set forth above there can be no order of restitution.

Respectfully submitted,  
  
\_\_\_\_\_  
Ronald J. Clark, Attorney for Nicholas DeLuca

Ronald J. Clark  
Attorney for Nicholas DeLuca  
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oldest daughters (28) wedding on 4/2007.

Files & Documents



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**SETTLEMENT AGREEMENT AND GENERAL RELEASE**

**THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE**

("Agreement") dated as of April \_\_, 2004 is made and entered into by and between Motorola, Inc. ("Motorola"), on the one hand, and Nicholas DeLuca ("DeLuca") on the other hand. (Motorola and DeLuca are referred to collectively herein as "the parties.")

WHEREAS, Motorola has filed a Complaint with the United States District Court for the District of Arizona, *Motorola, Inc. v. Nicholas DeLuca, et al.*, Case No. CIV04 128TUCRCC (the "Litigation"), asserting claims against DeLuca and other defendants (together, the "Defendants") for Violations of the Lanham Act 15 U.S.C. §§ 1114 and 1125, fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, unfair competition, and conspiracy, which Litigation is presently pending; and

WHEREAS, the parties hereto desire to compromise, resolve, settle and terminate any and all disputes that may exist between them;

NOW, THEREFORE, in consideration of the mutual undertakings set forth hereinafter, and other good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the parties hereto agree as follows:

1. Dismissal of the Litigation

Upon full execution of this Agreement and all related stipulations, upon entry of the Stipulated Permanent Injunction, upon the completion of DeLuca's oral testimony and execution of a written declaration pursuant to section 4 b., below, and upon Motorola's receipt of the documents subpoenaed from third parties in the Litigation, Motorola shall file the Request for Dismissal attached hereto as Exhibit "A," which shall dismiss with prejudice all claims asserted against DeLuca in the Litigation, and all claims against the other defendants without prejudice, with each party to bear its own costs and fees.

2. Stipulation to Judgment

Concurrently with the execution of this Agreement, the parties shall execute a Stipulation for Entry of Judgment ("the Stipulation") in the form attached as Exhibit "B," which

shall provide for entry of a judgment in the form attached to the Stipulation as its Exhibit "1" ("the Judgment") when and if DeLuca violates the terms of the Permanent Injunction referenced in paragraph 3 below, or otherwise breaches the terms of this Agreement, including but not limited to section 4, below.

3. Permanent Injunction

Concurrently with the execution of this Agreement, DeLuca and Motorola shall execute a Stipulation providing, *inter alia*, for the entry of a Permanent Injunction against DeLuca.

4. DeLuca's Representations and Warranties

DeLuca hereby represents and warrants the following:

a. All Motorola parts, components, radios, software and/or equipment, as well as the means of manufacturing, producing, distributing, acquiring, circulating, selling, offering for sale, advertising, promoting or displaying any Motorola product or service, including labels, packaging materials, containers, manuals and brochures ("Motorola goods") in his possession, or under his custody and/or control, have been seized by the United States government, and no Motorola goods remain in his possession, or under his custody and control as of the execution of this Agreement. If, at any time, DeLuca shall acquire possession, custody and/or control of any of Motorola goods, he shall, within forty-eight (48) hours of receipt, transfer such goods to counsel for Motorola;

b. Within three (3) business days of execution of this Agreement, DeLuca will provide oral deposition or other sworn testimony to Motorola, which shall consist of a full and complete disclosure of all of the facts and circumstances surrounding his conduct and activities as alleged in the Litigation, as well as those of all co-conspirators and/or third parties who are or were at any time engaged in the same or similar conduct ("the subject testimony"). Neither the original nor a copy of the transcription of the subject testimony shall be available to DeLuca, and shall remain the work product of counsel for Motorola. If necessary, DeLuca shall travel to Los Angeles, California for such deposition or testimony at his own expense. In addition, DeLuca shall, as requested, provide to Motorola sworn written statements or

declarations regarding the subject testimony within three (3) business days of request. Should it be requested of him at any time in the future, DeLuca will, upon reasonable notice, travel to any jurisdiction in the country to provide sworn testimony and or statements regarding the subject testimony. Should travel outside the State of Arizona or Southern California be necessary, Motorola agrees to reimburse DeLuca for: (i) one (1) economy class, round-trip airfare to and from such location; (ii) the cost of a budget hotel room for each day his testimony is required, and (iii) reasonable ground transportation to and from the airport and the location at which such testimony shall be rendered;

5. Release of Claims by Motorola

a. Upon filing of the Request for Dismissal pursuant to section 1, above, Motorola, together with its assigns, predecessors-in-interest, successors-in-interest, parents, subsidiaries, affiliates, agents, officers, directors, employees and attorneys, shall absolutely and forever release and discharge DeLuca from any and all claims, rights, demands, covenants, agreements, contracts, duties, obligations, responsibilities, representations, warranties, promises, liens, accounts, debts, liabilities, damages, expenses, attorneys' fees, costs and causes of action arising out of the Litigation and/or any of the factual circumstances alleged in the Litigation, whether at law or in equity, which Motorola may have or claim to have against DeLuca.

b. Motorola represents and warrants that it is the sole legal and beneficial owner of the claims that are the subject of this paragraph, that it has the sole and exclusive right and power to pursue such claims, that the releases provided in this paragraph are binding upon it and its present and past affiliates, agents, attorneys, directors, divisions, employees, officers, parents, representatives, subsidiaries, successors, privies and assigns, and that neither it nor they have transferred or assigned to any other person or entity, in whole or in part, any of such claims or any right to any recovery as a result of such claims.

c. This release shall apply to any possible recovery of monetary or other restitution from DeLuca in any criminal proceeding that may be pursued by the U.S. government. Specifically, Motorola agrees that it shall not file a "victim's statement" or other

document seeking recovery of monetary or other restitution in any criminal proceeding, absent a specific request from the government. Should the government request or require Motorola to file such a statement, Motorola will make every effort to inform the Court that it has settled its claims against DeLuca and the terms of this Agreement prevent it from seeking the recovery of monetary damages against him, other than as provided in the Stipulation.

d. Notwithstanding the above release, Motorola shall comply with any government subpoena or request for its cooperation or testimony in any criminal proceeding against DeLuca; however, Motorola shall, in connection with any such testimony, make every effort to inform the Court that it has settled its claims against DeLuca and that he has cooperated fully with the terms of this Agreement, provided that he has not breached this Agreement and Motorola has not applied for entry of the Stipulation;

6. Release of Claims by DeLuca

a. Upon execution of this Agreement, DeLuca absolutely and forever releases and discharges Motorola, together with its assigns, predecessors-in-interest, successors-in-interest, parents, subsidiaries, affiliates, agents, officers, directors, attorneys, employees, and shareholders (including specifically, without limitation, each and every one of its or their direct or indirect indemnitors and insurers), from any and all claims, rights, demands, covenants, agreements, contracts, duties, obligations, responsibilities, representations, warranties, promises, liens, accounts, debts, liabilities, damages, expenses, attorneys' fees, costs and causes of action arising out of the Litigation and/or any of the factual circumstances alleged in the Litigation, whether or not asserted, whether at law or in equity, which DeLuca may have or claim to have against Motorola.

a. Without limiting the generality of the foregoing, such release shall be effective as to any matter related to the negotiation, drafting or preparation of any substantive terms or provisions of this Agreement, whether known or unknown, anticipated or unanticipated, whether at law or in equity, which DeLuca may have or claim to have against Motorola.

b. DeLuca represents and warrants that he is the sole legal and beneficial owner of the claims that are the subject of this paragraph, that he has the sole and exclusive right and power to pursue such claims, that the releases provided in this paragraph are binding upon him and his present and past affiliates, agents, attorneys, employees, representatives, successors, privies and assigns, and that neither he nor they have transferred or assigned to any other person or entity, in whole or in part, any of such claims or any right to any recovery as a result of such claims.

7. Differences in Fact

The parties fully understand and agree that the assumptions and perceived circumstances upon which this Agreement is executed may be mistaken or otherwise in error. With such understanding and agreement, the parties expressly accept and assume the risk of facts being other than or different from its or their assumptions or perceptions as of any date prior to and including the date hereof; the parties fully agree that this Agreement shall be in all respects effective, and shall not be subject to termination, rescission or modification by reason of any mistaken or erroneous assumption or perceived circumstances.

8. No Representation

The parties acknowledge to one another that no promise, inducement or agreement not contained herein has been expressed or made to any of them in connection with this Agreement. DeLuca acknowledges that he has been informed by counsel for Motorola that they do not and cannot provide any advice or counsel whatsoever to him, and that he should retain his own counsel to advise him regarding his legal rights, the Litigation, this Agreement and related stipulations and their terms. DeLuca further acknowledges that he has nevertheless elected to proceed *pro per*.

9. Complete Agreement

This Agreement is intended by the parties as a final and complete expression of their agreement and understanding with respect to its subject matter. The terms of this Agreement are contractual, and may not be changed, modified, altered, interlineated or supplemented, nor may any covenant, representation, warranty, or other provision hereof be

waived, except by agreement in writing signed by the party against whom enforcement of the change, modification, alteration, interlineation, supplementation or waiver is sought.

10. No Assignment

The parties expressly represent and warrant that they have not assigned or transferred to any person, firm, corporation, partnership, association or other entity whatsoever any or all of the rights, duties or obligations embodied in this Agreement.

11. Non-Disparagement

Commencing as of the execution of this Agreement and continuing forever thereafter, DeLuca shall not make any disparaging, negative, detrimental or derogatory statements of any kind or nature to any person or entity, whether directly or indirectly, orally or in writing, about Motorola, its personnel, its policies, its employees, officers, directors, or agents, affiliates or subsidiary organizations.

12. Confidentiality

a. The following terms of this Agreement shall be maintained in confidence: (a) the absence of any monetary payment by DeLuca to Motorola pursuant to this settlement; (b) the amount of the Stipulation and Judgment; and (c) DeLuca's representations and warranties set forth in section 4, above (hereafter, "the confidential terms"). No party shall disclose the confidential terms to any third parties other than (a) its legal counsel; (b) its indemnitors and insurers and their legal counsel; (c) its accountants and auditors; (d) other persons to whom disclosure may be required by court order or law; or (e) as necessary to enforce this Agreement, the Stipulation and/or Judgment or any of their terms. The non-confidential terms set forth in this Agreement and the related stipulations, as well as the Permanent Injunction, shall not be confidential in any respect.

b. Should Motorola elect to issue a press release or otherwise publicize the settlement of the Litigation, Motorola shall provide DeLuca with a copy of such press release or statement five (5) business days before it is released to the public. While DeLuca shall have the opportunity to comment upon such release or statement, Motorola is not obligated to comply with any of DeLuca's requested modifications thereto. The parties agree that any press release

or public statement regarding the Litigation will recite the nature of the claims filed against DeLuca, and shall state that the parties have settled upon mutually agreeable terms, or words to that effect.

13. General Provisions

a. This Agreement has been arrived at after thorough bargaining and negotiation by the parties.

b. Except as otherwise provided in this Agreement, the parties agree to assume their respective costs, expenses and attorneys' fees incurred in connection with the Litigation and in negotiating and preparing this Agreement.

c. If it becomes necessary for any of the parties to engage an attorney (or attorneys) to enforce any one or more of the provisions of this Agreement, the prevailing party shall be entitled to recover its actual expenses, including but not limited to attorneys' fees and recoverable costs incurred in connection with such enforcement, in addition to any other relief to which it may be entitled.

d. The validity, construction, interpretation and legal effect of this Agreement and the rights, duties and obligations of the parties to this Agreement shall be interpreted, construed, performed and enforced in accordance with, and shall be governed by, the laws and judicial decisions of the State of Arizona and the United States. Motorola and DeLuca hereby agree that Tucson, Arizona will be forum for the resolution of any disputes arising out of or relating to this Agreement and that jurisdiction for resolution of such disputes and enforcement of this Agreement and any or all of its terms shall be vested in the United States District Court for the District of Arizona. Motorola and DeLuca further agree, consent and submit to the jurisdiction of such Court for the purpose of litigating any such dispute.

e. This Agreement shall be deemed to have been drafted jointly by the parties. Any uncertainty or ambiguity shall not be construed for DeLuca or against Motorola based upon the drafting or modification of any term by any party or its counsel.

f. This Agreement, as well as any or all of the supporting documents referenced herein, may be executed in counterparts.

*Copy*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written. Each of the undersigned hereby represents and warrants that he or she is duly authorized to execute this Agreement on behalf of the entity or person on whose behalf he or she is signing.

MOTOROLA, INC.

NICHOLAS DELUCA:

By: *[Signature]*

By: *[Signature]*  
Nicholas DeLuca

Title: Corporate VP & General Manager  
Radio Products and Services Division

Dated: April 2, 2004

Dated: 4/25, 2004



1 LAW OFFICES OF VINGELLI & ERRICO  
 2 MICHAEL J. VINGELLI (SB No. 002899, PCC No. 59684)  
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 33 North Stone Avenue, Suite 1800  
 4 Tucson, Arizona 85701  
 Telephone: (520) 791-0911  
 5 Attorneys for Plaintiff  
 MOTOROLA, INC.

6  
 7  
 8 UNITED STATES DISTRICT COURT  
 9 DISTRICT OF ARIZONA

11 MOTOROLA, INC., a Delaware  
 Corporation,

12 Plaintiff,

13 v.

14 NICHOLAS DELUCA an individual;  
 15 NICHOLAS DELUCA dba RADIO  
 DESIGN; THE DELUCA GROUP, a  
 16 California corporation; RADIO HUT  
 CORPORATION, a California  
 17 corporation; THE DELUCA GROUP dba  
 RADIO HUT CORPORATION; a  
 18 California corporation; RADIO  
 COMMUNICATIONS SYSTEM, INC.,  
 19 an entity of unknown type; INSTACOM  
 INDUSTRIES, an entity of unknown type;  
 20 EPW COMMUNICATIONS, INC., an  
 entity of unknown type; SHADOW  
 21 TEAM CORPORATION, a Nevada  
 corporation, and SHADOW TEAM  
 22 CORPORATION, an entity of unknown  
 type,

23 Defendants.

No. CIV04 128 TUCRCC

**REQUEST FOR DISMISSAL  
 PURSUANT TO FEDERAL RULE OF  
 CIVIL PROCEDURE RULE 41(A)(1)**

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff Motorola, Inc. ("Motorola") hereby dismisses with prejudice its claims against Defendant Nicholas DeLuca.

Plaintiff Motorola hereby dismisses without prejudice its claims against Defendants Nicholas DeLuca dba Radio Design, The DeLuca Group, Radio Hut Corporation, The DeLuca Group dba Radio Hut Corporation, Radio Communications System, Inc., Instacom Industries, EPW Communications, Inc., and Shadow Team Corporation.

All parties shall bear their own costs and fees.

Dated: April \_\_\_\_\_, 2004

Law Offices of Vingelli & Errico  
Michael Vingelli

By: \_\_\_\_\_  
Michael Vingelli  
Attorneys for Plaintiff