No. 10-3159

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Lawrence J. Acker, Brian W. Buttars, Linda Desmond, James Feeney, Ainello Mancusi, Ron Miastkowski, Perry Peka, Patrick Simasko, Wayne Stanford, and The Baron Group, Inc. d/b/a/ Baron's Ice House

Petitioners

-against-

United States District Court for the Southern District of Ohio,

Respondent.

PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

This petition is filed by victims who were overcharged when they bought packaged ice as the result of a nationwide customer and territory allocation conspiracy. One of these consumers is Lawrence J. Acker. Because this is a mandamus petition, the United States District Court for the Southern District of Ohio is technically the respondent. FED. R. APP. P. 21(b)(4).

This petition arises out of a criminal case currently being prosecuted in the United States District Court for the Southern District of Ohio styled as *United States v. Arctic Glacier International, Inc.*, Case No. 1:09-CR-149. Arctic Glacier International is an interested party to this petition. It is a domestic subsidiary of Arctic Glacier, Inc. and Arctic Glacier Income Fund. Arctic Glacier is alleged to have conspired with Reddy Ice and Home City. The criminal case has been handled by District Judge Herman J. Weber.

NOTICE OF RELATED PROCEEDING

In addition to filing this mandamus petition, the consumers are also seeking relief through a concurrently-filed, parallel appeal raising identical issues.

STATEMENT OF THE RELIEF SOUGHT

Petitioner Lawrence J. Acker, eight other persons and the Baron's Ice House respectfully petition this Court, pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, and Fed. R. App. P. 21, for a writ of mandamus directing the United States District Court for the Southern District of Ohio to:

1. Recognize them as "crime victims," under the CVRA, of the crime charged in *United States v. Arctic Glacier International Inc.*, Crim. No. 1:09cr149;

2. Order the district court to reject the proposed plea agreement proffered to it because it was negotiated in violation of their rights under the CVRA; and

3. Extend them all rights that are protected under the CVRA, such as the right to confer with prosecutors during plea negotiations and the right to access relevant parts of the pre-sentence investigation report.

ISSUES PRESENTED

Preamble:

The CVRA extends rights to all persons who have been "directly and proximately harmed as the result of the commission of a Federal offense . . . ." 18 U.S.C. § 3771(e). In its plea negotiations and guilty plea, defendant Arctic Glacier admits that it violated the Sherman Act by conspiring to restrain trade in Michigan. This enabled the conspirators to charge retailers more for their products, packaged

ice, than they could have obtained had there been no conspiracy. The retailers in turn passed the overcharge on to their customers, which included Petitioners.

The Government negotiated an agreement with defendant Arctic Glacier, setting the terms under which it would be permitted to plead guilty. Because those negotiations were conducted in secret, Petitioners had no opportunity to have a voice in the agreement's terms, which are in significant respect not favorable to petitioners.

The district court denied Petitioners application to vacate the plea agreement and require the government to give consideration to petitioners' concerns before renewing plea negotiations with defendants. In reaching this decision, the court refused to decide whether Petitioners' are "crime victims" under the CVRA, and apparently refused to consider Petitioners' objections to plea agreement under the apparent mistaken belief that Petitioners only have standing to object to restitution related issues.

I. The Crime Victims' Rights Act extends rights to all persons who have been "directly and proximately harmed as the result of the commission of a Federal offense . . . ." 18 U.S.C. § 3771(e). Defendant Arctic Glacier violated the Sherman Act by conspiring with its competitors to carve up various territories, one for each, and to refrain from competing with each other in the sale of packaged ice. One issue presented by this petition is whether the consumers who have paid

higher prices for packaged ice (the"petitioners" or "victims") sold by the defendant are "crime victims" of this Sherman Act offense under the CVRA.

II. The Government negotiated a plea agreement with defendant Arctic Glacier to plead guilty to a violation of the Sherman Act. The Government then filed a Criminal Information in the district court under seal, obtaining an ex parte sealing order to keep the agreement secret. Only much later did the Government provide any notice to the consumers of the defendant's crime and the plea agreement it had negotiated. Yet the CVRA guarantees crime victims the right, during the investigation of a crime, to notice of rights under the CVRA and an opportunity to confer with Government prosecutors about the case and about plea discussions. Another issue presented by this petition is whether the Government's refusal to notify the victims of the defendant's crimes and to confer with the victims before a final agreement had been concluded violated the CVRA.

III. The next issue presented by the petition is whether, in light of the Government's violations of the CVRA, the appropriate remedy is to set aside the plea that was negotiated in violation of the victims' rights as crime victims under the CVRA.

STATEMENT OF FACTS

This case arises out of a criminal conspiracy by defendant Arctic Glacier to divide with its competitors' territories for the sale of packaged ice. As alleged in the Criminal Information filed in this case, beginning January 1, 2001, and continuing until at least July 17, 2007, Arctic Glacier "entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, Michigan metropolitan area . . . in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)." Criminal Information, ¶ 2, Dkt. #1.[1] As a result of the conspiracy, numerous consumers suffered direct financial harm.

Petitioners Lawrence Acker, Wayne Stanford and Patrick Simasko purchased packaged ice at retail establishments throughout the country, including in southeastern Michigan and the Detroit, Michigan metropolitan area.[2] They paid more for packaged ice than they would have in the absence of the conspiracy. Indeed, record indicates that the price of packaged ice in Ohio near the Michigan

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1 As the Court is aware, the victims in this matter have had fewer than 48 hours to prepare this petition. As a result, citations in this petition are to the docket entries in the district court dockets (i.e., Dkt. #1), which are available through the PACER website. If the Court believes that a separate set of exhibits is required to rule on this petition, the victims respectfully request an opportunity to provide those exhibits.

2 The other individual petitioners purchased packaged ice at retail establishments, but not in Michigan, and the Baron Group is a Texas customer of Reddy Ice – the largest packaged ice producer in the country.

border increased, as a likely result of the conspiracy, from $0.99 per bag to as much as $2.09 per bag. Tr. __.[3]

At some time in approximately 2008, the Government and defendant Arctic Glacier began negotiating a plea agreement. After a plea agreement was reached, on September 10, 2009, the Government filed in the U.S. District Court for the Southern District of Ohio a one-count Criminal Information alleging a violation of the Sherman Act for Arctic Glacier's illegal restraint of trade in southeastern Michigan and the Detroit, Michigan area. Dkt. #1. Simultaneously, with filing that Criminal Information, the Government filed an ex parte motion to seal the Criminal Information, purportedly on grounds that the Government thought it "important that the Defendant's co-conspirators remain unaware of its cooperation." Dkt. #2 at 1-2. In its ex parte motion, the Government did not reveal to the Court that Arctic Glacier had already announced months earlier in press releases that it was cooperating with both federal and state antitrust investigators. *See* Arctic Glacier Income Fund's 2007 Annual Report at 4 ("We plan to cooperate with authorities in the course of the investigation.") (available on the company's website). That same day – apparently based on the Government's representation of

3 The transcript was unavailable at the time this petition was drafted. Citations in the form of "Tr. ___" reflect counsel's recollection of what transpired at the February 11, 2010 sentencing hearing. The victims respectfully request leave to supplement their petition with appropriate citations to the record when a transcript is completed.

a need for secrecy, the district court granted the Government's motion without offering any explanation, and sealed the criminal information. Dkt. #3. Of course, none of the victims were notified of these events or consulted by the Government.

On September 15, 2009, the district court set an arraignment and plea hearing to take the defendant's guilty plea – hearings that were to take place on October 1, 2009, later rescheduled for October 27. Dkts. #5, #7. For reasons not apparent in the record, on October 13, 2009, the Government filed a motion to unseal the Criminal Information, which was granted that same day. Dkts. #9, #10.

The first time the public could have learned of the plea agreement was on October 13, 2009. However, although publicly available, there would have been no reason for the public to know about plea agreement and arraignment unless someone was monitoring criminal cases filings related to Arctic Glacier.

The victims' counsel, however, fortuitously became aware of the filing. Dkt. # 14. The victims then promptly filed an emergency motion asserting their rights as crime victims under the CVRA. Dkt. #13. The motion explained their status as crime victims of the Arctic Glacier's crimes, and that the Government had failed in its obligations under the CVRA to provide the victims notice of their rights under the CVRA and to confer with them before reaching a plea agreement with the defendant.

On October 23, 2009, the Government filed a motion to establish an alternative procedure to notify all of the victims in the case. Dkt. #12. The motion explained that "the number of 'crime victims' directly and proximately harmed by the subject packaged-ice conspiracy would make it impracticable for the government to provide to each victim individual notices about every public court proceeding." *Id.* at 2.

On November 10, 2009, the district court arraigned Arctic Glacier, conducted a cursory colloquy with its corporate representative, and conditionally accepted its guilty plea pursuant to the plea agreement. Notably, two days *after* the arraignment (on November 12, 2009), the district court granted the government's motion to establish notification procedures pursuant to the CVRA. Dkt. #24. On that day, the district court also "granted in and denied in part," petitioners' motion. The order stated that "[t]he Court DENIES the request to deem any individuals "crime victims" . . . pending investigation by the United States Probation Department with input from the United States, the defendant, and representatives of the alleged victims." Dkt. # 25.

As part of the ordered investigation, the probation office prepared a pre-sentence investigation report ("PSR"). On December 30, 2009, the victims filed a motion to obtain access to limited parts of the PSR, including material dealing with the relevant offense conduct (i.e., information about the geographic scope of the

defendant's crime). Dkt. #27. The motion explained that counsel for the victims had met with Government counsel in an attempt to confer about this issue, but that the government had declined to provide any information on this subject. In response, the Government filed an objection to the motion, claiming that "[t]he United States has fulfilled its obligation to inform the Court of all of the defendant's relevant conduct," without indicating whether those disclosures included evidence of a nationwide conspiracy. Dkt. #29 at 3.

Unable to obtain further information, on February 1, 2010, the victims filed a lengthy motion seeking to have the district court reject the proposed plea agreement for procedural and substantive reasons. Dkt. #37. Among other things, with regard to procedural flaws, the victims asked that the agreement be rejected because of the Government's procedural failures to afford the victims their rights under the CVRA. With regard to substantive problems, the consumers objected that the plea agreement did not reflect the full, nationwide scope of Arctic Glacier's crimes; would interfere with efforts by the consumers and other victims of the offense to obtain restitution; and would wrongly bind the court to imposing an inappropriate sentence.

The victims also expressed concern that the defendant was insolvent and that it was pre-paying debt to reduce its ability to answer a civil judgment, and that because its parent is located in Canada, its income could be sent to Canada making

them exceedingly difficult for United States plaintiffs to reach. The victims observed that Arctic Glacier has a mountain of debt that matures in 2011 and is possibly without sufficient income to meet that obligation. *See* Dkt. #37 at 14.

The victims also pressed concerns about the fine in the plea agreement. The defendant Arctic Glacier International, Inc. is a domestic subsidiary of Arctic Glacier, Inc. and Arctic Glacier Income Fund. During the sentencing hearing, it was revealed, however, that the defendant gave the probation office only consolidated financial statements. (Tr. __) Those statements would be useless in determining the defendant's overall finances. Indeed, the government's ignorance reflected a lack of analysis or appreciation of the defendant's financial condition. During the sentencing hearing, the government attorney dismissed petitioners' concerns, stating that because Arctic Glacier does substantial business and has hard assets in the United States, it would be unable to evade a U.S. judgment. (Tr. __) But the government never discussed whether (1) those assets were encumbered or (2) whether the defendant's cash is all being sent upstream to Canada. If the government was in the dark about the defendant's finances, in all likelihood the probation office and the district court were in the dark as well. For this reason, the victims continued to seek access to relevant sections of the PSR.

At the conclusion of the hearing, however, the district court essentially rejected all of the victims' argument directly or indirectly. The district court first

denied their access to the PSR. The district court then expressly refused to decide whether they were "crime victims" under the CVRA, but also held that the "victims" were Arctic Glacier's customers in Michigan. The district court also repeatedly noted that petitioners were only properly before the court to be heard on restitution issues. The district court then made findings of that simply mirrored the plea agreement. Consistent with its view that petitioners were only properly before the court on restitution issues, the district court never addressed a single concern raised by the petitioners in its findings that were made prior to accepting the plea agreement.

REASONS FOR GRANTING THE WRIT

As will be demonstrated in a subsequent memorandum of law, the district court erred by:

a. Refusing to recognize petitioners as crime victims;

b. Not vacating the plea agreement for failure of the government to notify the victims before reaching the plea agreement and offering them an opportunity to confer with the government attorney in charge of the case; and

c. In light of its belief that petitioners can only raise issues related to restitution, the district court did not consider their objections to the plea agreement.

STANDARD OF REVIEW

I. UNDER THE PLAIN LANGUAGE AND REMEDIAL DESIGN OF THE CVRA, THE CONSUMERS ARE ENTITLED TO ORDINARY APPELLATE REVIEW OF THE CLAIMS IN THEIR PETITION.

Mr. Acker and the other victims come before the court through a provision in the CVRA specifically providing that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).[4] Because the CVRA is remedial legislation, this provision "should be construed broadly to effectuate its purposes." *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009).

Ordinarily, the "issuance of a writ of mandamus is discretionary," as the Court may withhold relief if it concludes that relief is not "appropriate under the circumstances." *In re Life Investors Ins. Co. of America*, 589 F.3d 319 (6th Cir. 2009). The plain language of the CVRA, however, specifically overrules conventional mandamus standards by directing that "[t]he court of appeals *shall take up and decide such application forthwith* . . . ." 18 U.S.C. § 3771(d)(3)

4 As its plain language indicates, the CVRA appellate review procedure is available not only to those who have previously been found to be "crime victims" but more broadly to those who are "movants" under the statute. *See, e.g., In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (reviewing under the CVRA appellate procedures a "crime victim" issue).

(emphasis added).[5] As explained by the CVRA's Senate co-sponsor, Senator Feinstein, the CVRA thus involves "*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of his rights by a trial court to the court of appeals . . . ." 150 CONG. REC. S4262 (April 22, 2004 (statement of Sen. Feinstein) (emphases added); *see also* MOORE'S FED. PRAC. 3D § 321.14[1] (2007) ("because Congress has chosen mandamus as the mechanism for review under the CVRA, the victim need not make the usual threshold showing of extraordinary circumstances to obtain mandamus relief").

Consistent with this clear legislative history, four circuits have held that it provides crime victims with the ordinary appellate review. The Second Circuit has explained that "[u]nder the plain language of the CVRA . . . Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief" under the CVRA, and that, therefore, "a petition seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005). The Ninth Circuit has

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5 The CVRA also directs that petitioners under the CVRA have a right to a decision within 72 hours. In a separate motion filed with this petition, they seek to waive their right conditioned on receiving other partial relief from the Court.

reached the same conclusion in *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006). The Circuit explained that the CVRA's plain language modifies many aspects of mandamus procedure to give crime victims a quick way to obtain appellate review:

> [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

Id. at 1017. The Third Circuit has also held that the CVRA makes "mandamus relief . . . available under a different, and less demanding, standard" than the ordinary mandamus petitioner would have to meet. *In re Walsh*, 229 Fed.Appx. 58 at *2 (3rd Cir. 2007) (citing and following the Second and Ninth Circuit decisions). And most recently, the Eleventh Circuit has granted a crime victims CVRA mandamus petition without requiring the victims to satisfy the heightened standard for mandamus relief. *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008).[6]

[6] This Court has found it unnecessary to resolve this issue in a previous CVRA case that reached it. *In re Simons*, 567 F.3d 800, 800 (6th Cir. 2009) (noting split of authority, but granting crime victim relief on the higher standard of review to avoid necessity for resolving question). *Cf. In re Siler,* 571 F.3d 604 (6th Cir. 2009) (allowing crime victim to proceed by way of appeal rather than mandamus). *But*

Even if the Court were to conclude that it will not review the victims' mandamus petition under ordinary appellate standards, the consumers would nonetheless be entitled to such review because they have already filed a timely notice of appeal in the district court and have, concurrently with this petition, moved to consolidate the appeal with this petition and to expedite a decision on the appeal -- the type of approach this court has taken in other cases involving a parallel mandamus petition/appeal on CVRA issues. *See In re Siler*, 571 F.3d 604 (6th Cir. 2009).

II. THE VICTIMS ARE "CRIME VICTIMS" OF ARCTIC GLACIER'S CONSPIRACY BECAUSE THEY HAVE BEEN DIRECTLY AND PROXIMATELY HARMED AS A RESULT OF THE CONSPIRACY CRIME.

Under the CVRA, the victims are "crime victims" of defendant Arctic Glacier's conspiracy to unreasonably restrain trade in packaged ice, as they were "person[s] directly and proximately harmed as result of" the conspiracy. 18 U.S.C. § 3771(e). They were directly harmed by Arctic Glacier's conspiracy because they were the ultimate targets of the conspiracy. Indeed, the essential purpose of the conspiracy was to force those who were buying ice from Arctic Glacier to pay higher prices. Put another way, thousands of consumers would have more money in their pockets today if Arctic Glacier had not committed its crime.

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see In re Antrobus, 519 F.3d 1123, 1124 (10th Cir. 2008); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008).

This Court should give liberal construction to the CVRA as remedial legislation, see In re Carter, 553 F.3d 979, 985 (6th Cir. 2009), and particularly to its definition of "crime victim." One of the Act's co-sponsors explained that the CVRA contains "an intentionally broad definition [of "crime victim"] because all victims of crime deserve to have their rights protected . . . ." 150 CONG. REC. S10912 (Oct. 9, 2004) (emphasis added).

The victims alleged below that they were "nine consumers and one business that paid too much for packaged ice as a result of Arctic Glacier's offense." Dkt. #31 at 1. The victims' injury from a loss of competition is evident from the Criminal Information itself. It explained that over a six year period, Arctic Glacier "and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, Michigan metropolitan area." Dkt. #1 at 2.

The existence of numerous crime victims of the conspiracy (obviously including those bringing this action) is further established by the actions of the Government and the rulings of the district court. On October 23, 2009, after it filed the Criminal Information in the district court, the Government filed a Motion to Establish Procedure for Crime Victim Notification. In its motion, the Government explained that it now had to follow its obligations under the CVRA to

give notice to crime victims of the pending plea agreement.[7] The Government went on to explain that "the number of 'crime victims' directly and proximately harmed by the subject packaged-ice conspiracy would make it impracticable for the government to provide to each victim individual notices about every public court proceeding." Dkt. #12 at 2. Arctic Glacier did not file any opposition to this motion.

During a hearing before the district court, the government attorney agreed that there were thousands of victims:

The Court:

> And that's what I guess I should understand today, is how many victims do we have?

Government Attorney:

> Your Honor, I think that it's fair to say that there are direct purchasers; there are indirect purchasers. There are people who have come forward to the department and have talked with us and provided us information, because we're always very interested in helping victims, and victims provide a very valuable piece of evidence for us going forward in our criminal case. To say – and I will defer in some ways to Mr. Majoras [defense counsel], but to say there that there are tens of thousands I think might be an understatement.

Tr. of Hearing Nov. 9, 2009, at 7.

Three days after this hearing, the district court apparently agreed with the Government's assessment that many victims existed and entered an order granting

the motion to provide notice to victims via the internet. The district court ruled that "rather than providing individual notices to the crime victims in this case," the notice to victims could be provided through the website http://www.usdoj.gov/atr. Dkt. #24 at 1. Obviously, there was no need to grant the motion if no "crime victims" existed. And proceeding in this fashion is consistent with the CVRA, which allows for creation of such notice procedure in mass victim cases. *See* 18 U.S.C. § 3771(d)(2). Plainly both the Government and the district court were proceeding in light of the obvious fact that victims were harmed by the conspiracy.

Here, because the consumers would not have been harmed "but for" Arctic Glacier's crime and because the loss was not too attenuated, they suffered "direct" harm from its crime within the meaning of that word in the CRVA. In cases involving the definition of "crime victim," courts of appeals have broadly interpreted the phrase "directly and proximately" harmed as meaning a harm that "would not have occurred but for the conduct underlying the offense of conviction" and that "the causal connection between the conduct and the loss is not too attenuated (either factually or temporally)." *See, e.g., United States v. Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007) (citing *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002). This statement came in the course of interpreting the Mandatory Victim Restitution Act (MVRA), which contains a virtually identical

definition of "crime victim" to that found in the CVRA[8] and appears to have served as the basis for drafting the CVRA.[9]

Under these principles, a defendant "directly and proximately" causes harm not simply through the elements of his offense but also from conduct that is causally related to it. The most recent courts of appeals case to consider an issue of who is a protected "crime victim" under the CVRA is *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008), in which the Eleventh Circuit reversed a district court which had held that various borrowers on loans were not protected victims under the CVRA. In *Stewart*, the Government had charged a defendant bank executive with a conspiracy to deprive a bank of its right to honest services from him. The executive had entered into a scheme to charge the borrowers two points on their loans, rather than the one point that the bank normally charged, pocketing the extra money. The district held that the only victim of the scheme was the bank, because it was the only entity mentioned in the Criminal Information. But the Eleventh Circuit disagreed, concluding that "[a]s a consequence of the increase in the mortgage brokerage fee, . . . petitioners became liable under their contract with the

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8 Compare 18 U.S.C. § 3663A("the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense . . . .") *with* 18 U.S.C. § 3771(e) ("the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense . . . .").

9 *See United States v. Hunter*, 2008 WL 53125 at *3 (D. Utah 2008); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victim's Rights Act*, 2005 BYU L. REV. 835, 857.

Bank for an extra one percent of their total loan, suffering direct and proximate harm." *Id.* at 1288. The Circuit went on to explain that "[t]he CVRA . . . does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime's commission." *Id.* at 1289.

Furthermore, persons can qualify as "victims" even though they are "one step removed" form the offense conduct. For example, in *United States v. Battista*, 575 F.3d 226 (2d Cir. 2009), the court found that the NBA was a "victim" even though its harm was more remote than that suffered by the consumers in this case. There, defendants conspired to bribe a referee to obtain confidential information for use in betting on games. 575 F.3d at 228.

The Court found that the NBA was "directly and proximately harmed" by Battista within the meaning of the VWPA – which has the same definition of victims as the CVRA -- as a result of his "crime of conspiracy to transmit wagering information." The court explained,

> Although Battista did not defraud the NBA directly, we conclude that the district court properly characterized the NBA

> as a "victim" under the VWPA because the NBA was harmed by the conduct committed during the course of the conspiracy to transmit wagering information, e.g., Battista's use of nonpublic information solely belonging to the NBA (conveyed to him by the co-conspirators) to place illegal wagers on its games. Moreover, we must look at Battista's "offense" of conspiracy, in which his criminal conduct encompasses not just his own acts but also those of his co-conspirators. By this standard, Battista's crime plainly harmed the NBA.

575 F.3d at 231-32 (citations omitted; emphasis added).

The Ninth Circuit has likewise approved VWPA restitution awards "that included losses at least one step removed from the offense conduct itself." *United States v. Gamma Tech Industries, Inc.*, 265 F.3d 917, 928 (9th Cir. 2001) (upholding, in conspiracy and mail fraud case, restitution based on victim's inability to use entire inventory of parts supplied by defendant because victim could not identify which parts were defective); *United States v. Koenig*, 952 F.2d 267, 274-75 (9th Cir. 1991) (upholding, in case involving conspiracy to produce and use counterfeit automated teller machine cards, restitution for the cost of reprogramming bank computers after defendants had stolen ATM account information). Victim status has also been found in even more attenuated circumstances such as injured bystanders to a bank robbery, *see, e.g., United States v. Washington*, 434 F.3d 1265 (11th Cir. 2006); *United States v. Donaby*, 349 F.3d 1046 (7th Cir. 2003), or an insurance company that had to pay for the loss of house caused by fire from a methamphetamine lab. *See United States v. Hackett*, 311

F.3d 989 (9th Cir. 2002).[10] Indeed, the Criminal Information itself states that "[t]he business activities of the defendant and co-conspirators that are the subject of this Information . . . substantially affected, interstate trade and commerce." Criminal Info. at ¶ 10.

III. THE GOVERNMENT VIOLATED THE CVRA BY NOT NOTIFYING PETITIONERS' COUNSEL OF THE PLEA NEGOTIATIONS AND NOT OFFERING THEM AN OPPORTUNITY TO CONFER

The CVRA gives crime victims rights during the investigation of a crime. The plain language of the CVRA extends victims' right to situations "in which no prosecution is underway." 18 U.S.C. § 3771(d)(3). Thus, the Act applies not simply to prosecutors but also to government agencies "engaged in the detection [and] investigation . . . of crime . . . ." 18 U.S.C. § 3771(c)(1). This position is consistent with Justice Department regulations under the CVRA, which explain that government officials "must advise a victim [about his rights under the CVRA] . . . at the earliest opportunity at which it may be done without interfering with an investigation." ." ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS

[10] The Government and defendant relied below on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that only direct purchasers from a conspirator can recovery monetary damages under section 4 of the Clayton Act. That holding was based on the administrative difficulties in apportioning damages and the risk of duplicative recovery for a violation of the Sherman Act. It says nothing about who is a victim for a Sherman Act offense. Indeed, Congress has recognized "[t]he economic burden of the antitrust violations [i]s borne by the consumer in the form of higher prices for goods." S. Rep. No. 94-803 at 39 (1976).

ASSISTANCE 23 (May 2005).

In a case analogous to this one, the Fifth Circuit has held that the CVRA extends rights to victims before charges have been filed. Analyzing the CVRA's structure, the Circuit concluded that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway." *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008).

In *In re Dean*, *supra*, 527 F.3d at 395, the Fifth Circuit held that the Government violated the CVRA when it failed to inform the victims the of plea negotiations and afford them an opportunity to confer. It specifically recognized Congress's "policy decision – which we are bound to enforce – that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached." It held that "the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain." *Dean* also recognized the obvious prejudice to victims from the failure to give them an opportunity to confer with the government before the plea agreement was entered:

> The unfortunate fact is that the plea agreement was reached without the victims' being able to participate by conferring in advance.... The victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal.... That is why we conclude that these victims should have been heard at an earlier stage.

527 F.3d at 395-396.

Here, the government knew of petitioners' counsel for some time – well before it reached the plea agreement – but did not notify them of the plea negotiations or arraignment. petitioners' counsel had already been appointed interim lead counsel for the indirect purchaser class in *In re Packaged Ice Antitrust Litig.*, MDL No. 1952, pending in the United States District Court for the Eastern District of Michigan. The government attorney in this case had participated in a status conference in that case and met Matthew S. Wild, Esq., one of petitioners' counsel, at that the status conference many months before plea negotiations with Arctic Glacier began. In this case, however, despite knowing petitioner's counsel and of petitioners, the government failed to contact them until *after* entering the plea agreement and never tried to notify them of the arraignment.[11]

IV. THE ONLY MEANINGFUL REMEDY FOR THE GOVERNMENT'S CVRA VIOLATION IS TO VOID THE PLEA AGREEMENT

[11] These facts distinguish the present case from *In re W.R. Huff Asset Management Co.*, 409 F.3d 555 (2d Cir. 2005). In *Huff*, the victims knew all about the criminal proceedings and no victim "alleged that [he had] asked the Government to confer . . . and was denied the opportunity to do so." 409 F.3d at 564. Thus, in light of that fact, the Second Circuit was entirely correct in concluding that the Government did not have to affirmatively go to the victims to seek their approval of a plea agreement. Here, of course, in stark contrast to *Huff*, the victims were given no advanced notice of the criminal proceedings and have strenuously alleged they were denied their right to confer.

The government has repeatedly violated the CVRA with full knowledge that such a violation has no consequences. The only way to give teeth to the CVRA is thus to void the plea agreement.

It is apparent that the U.S. Department of Justice's Antitrust Division has attempted (successfully it turns out) to keep the consumers and other victims of Arctic Glacier's crime in the dark about its criminal investigation. This practice is not an isolated occurrence, but rather appears to be the Division's standard way of doing business.

The record in this case suggests that a fortuitous accidental "glitch" led to the victims being informed about the criminal charges, in that a rescheduling of the hearing regarding taking the plea (Dkt. #6) meant that various unsealed documents were available in the public record for sufficient time to allow the consumers to file an objection before the district court definitively accepted the plea. The Government appears, however, to have successfully kept crime victims ignorant of its resolution of criminal cases in prosecutions of Arctic Glacier's three former executives and its co-conspirator Home City Ice. In each of those cases, the information was filed and maintained under seal until so late that no victims of the defendants' crimes could be present. *See United States v. Corbin*, 09-Cr-146, Docket # 1, 3, 5, 7, 9 and 15; *United States v. Larsen*, 09-Cr-147, Docket # 1, 3, 4, 8-10; *United States v. Cooley*, 09-Cr-148, Docket # 1, 3, 5, 7-15, *United States v.*

Home City Ice Co., 07-cr-140, Docket # 7-16 – all cases in the United States District Court for the Southern District of Ohio. Thus, in each of these criminal cases, the victims were not given any real opportunity to confer with the Government before a plea was reached or to appear at the initial arraignment and hearing regarding the plea to raise any concerns about it.[12]

In its zeal to keep the victims in the dark, the Government went to so far as to obtain an ex parte order to file the information under seal based on the misleading the Court. In its motion, the Government represented that confidentiality was necessary because "[i]n order to maximize the Defendant's cooperation, it is important that the Defendant's co-conspirators remain unaware of its cooperation." Dkt #3. Yet, the defendant had publicly disclosed its cooperation more than a year earlier. For example, the disclosed in its 2007 Annual Report (available on the company's website) that "[o]n March 5, 2008, we became aware that the Antitrust Division of the United States Department of Justice is conducting

[12] Counsel for the victims in this cases believes that the Antitrust Division of the U.S. Department of Justice employs the practice used in these cases in the Southern District of Ohio (secret plea negotiations, filing of sealed plea agreements, and a rapid arraignment and acceptance of the plea – all without any notification to crime victims) in most of its cases around the country. If the Government is invited to respond to this Petition, the Government can presumably share with this Court its general practice regarding filing sealed plea agreements and criminal informations in other districts and whether it notifies crime victims of the pending resolution of criminal charges or otherwise protects crime victims' rights under the CVRA.

an investigation into possible antitrust issues in the packaged ice industry. . . . We plan to cooperate with authorities in the course of the investigation."

The only effective remedy for these prejudicial violations is the obvious one of setting aside the plea agreement. The parties would then be free to proceed however they might choose – in a process that would respect victims' rights. Otherwise, the Government will be rewarded for its CVRA violations and misrepresentations to the district court to seal the record. The Government will know that it can ignore these obligations with impunity.[13]

The CVRA mandates that courts must enforce crime victims' rights, by directing that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1) (emphasis added). The district court simply did not ensure that victims were treated fairly, were given notice of their rights, and afforded their right to confer to confer with the Government. To remedy these errors, this Court should direct a new process – one not tainted by the ex parte order and subsequent violations of victims' rights. Precisely this sort of procedure was envisioned by the Senate sponsors of the CVRA, who concluded

[13] In *Dean*, *supra*, the Fifth Circuit declined to direct the district court to reject the plea agreement because it erroneously applied the heightened standard of review applicable to mandamus petitions generally, but for the reasons stated above, should not apply to CVRA mandamus petitions. Moreover, the *Dean* court was not faced with such repeated failures of the Government to comply with the CVRA in this case as well as the other related cases.

that to remedy violations of the CVRA, courts would "order[] those proceedings to be redone." 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). As commentators have recognized in discussing the CVRA, it directs that the appropriate remedy for violations of the Act is "voiding" the earlier, improper procedure and starting over again. *See* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 343. The Ninth Circuit has likewise suggested this approach to handling CVRA violations. *See Kenna v. U.S. District Court for C.D. Cal.*, 435 F.3d at 1017.

For all these reasons, the Court should enter an order directing the district court to reject the proposed plea. At a bare minimum, however, this Court should remand to the district court with instructions to consider the violations of the victims' rights as part of its decision in determining whether to accept the proposed Rule 11(c)(1)(C) plea. Rule 11 "vests district courts with considerable discretion to assess the wisdom of plea bargains." *In re Morgan*, 506 F.3d 705, 711 (9th Cir. 2007). "Of course, once the parties have themselves negotiated a plea agreement and presented that agreement to the court for approval, it is not only permitted, but expected, that the court will take an active role in evaluating the agreement." *United States v. Kraus*, 137 F.3d 447, 452 (7th Cir. 1998).

Part of any "active" calculation should include the fact that the proposed agreement was negotiated through a process that egregiously violated crime victims' rights. Where the process is so badly tainted by secret, ex parte proceedings that abridged victims' rights, the Court – and the public – can have no assurance that the resulting product is acceptable. This Court should at least direct the district court to consider that fact in the exercise of its Rule 11 authority to accept or reject the proposed agreement.[14]

CONCLUSIONS

For the reasons stated above, a writ of mandamus should issue directing the district court to vacate the plea agreement or directing the proceedings below be vacated and ordering the district court to reconsider all prior rulings.

[14] This Court should also direct the district court to reconsider all of its other rulings rejecting the consumers' motions, which appear to have been predicated on the district court's assumption that the consumers were not "crime victims" with protected rights under the CVRA and that their only cognizable interest was in restitution. In particular, the district court should be directed to reconsider its ruling that the victims were not entitled to access to limited portions of the PSR. This ruling becomes plainly erroneous when assessed against the consumers right to be "fairness" and to be "reasonable heard" at sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, their having previously consented to electronic service, a true and accurate copy of the foregoing Petition for a Writ of Mandamus Pursuant to The Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3), was served by email this 18th day of February, 2010, on:

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I further certify that a copy of same was hand delivered this 18th day of February, 2010 to:

Honorable Herman J. Weber
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