

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA)	Criminal No. 1:09CR0149
)	
Plaintiff,)	Judge Herman R. Weber
)	
v.)	
)	
ARCTIC GLACIER INTERNATIONAL, INC.,)	
)	
Defendant.)	

**VICTIMS' EMERGENCY MOTION FOR A DECLARATION UNDER THE CRIME
VICTIMS' RIGHTS ACT AND POSTPONEMENT OF THE ARRAIGNMENT, OR IN
THE ALTERNATIVE, POSTPONEMENT OF ACCEPTANCE OF THE PLEA
AGREEMENT**

The Baron Group, Inc. d/b/a/ Baron's Ice House, Lawrence J. Acker, Brian W. Buttars, Linda Desmond, James Feeney, Ainello Mancusi, Ron Miastkowski, Perry Peka, Patrick Simasko and Wayne Stanford ("Petitioners"), by and through their undersigned counsel, respectfully submit this emergency motion seeking the following relief:

- A declaration that they are "crime victims" under the Crime Victims Rights Act, 18 U.S.C. § 3771 (the "CVRA"), and entitled to the rights provided therein;
- Postponement of the arraignment of defendant Arctic Glacier International, Inc. ("Arctic Glacier"), now scheduled for October 27, 2009, for at least ten days, to allow Petitioners to gather facts concerning the criminal case and take other steps necessary to preserve their rights under the CVRA; or, *in the alternative*,
- Postponement of the Court's decision whether to accept or reject the plea agreement until after the Court and Petitioners learn the full scope and nature of the offenses,

and Petitioners are afforded sufficient time for the meaningful exercise of their CVRA rights.

The grounds for this motion are:

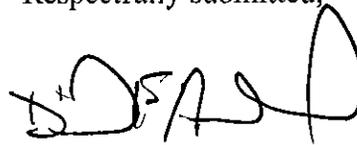
- Petitioners are “crime victims” under 18 U.S.C. § 3771(e) in that, as direct and indirect purchasers of packaged ice from Arctic Glacier or its co-conspirators, they have been directly and proximately harmed by the commission of the federal offense to which Arctic Glacier will plead guilty;
- The CVRA confers on such crime victims, *inter alia*: the right to be reasonably heard at any public proceeding involving a plea or sentencing; the reasonable right to confer with the attorney for the Government in the case; and the right to be treated with fairness;
- The government has not provided reasonably and timely notice of the arraignment. The government’s only attempt to notify the victims in this case was an announcement yesterday on the Antitrust Division’s website of the date, time and place of today’s arraignment. The plea agreement and information are still not posted;
- Petitioners have acted diligently. Upon learning of the arraignment through his own diligence on October 14, 2009, Petitioners’ counsel in a related civil case, Matthew Wild, immediately sought to confer with the government before taking any position in this case. The government attorney advised Mr. Wild that he would not be available until the following week. Because the arraignment was fast approaching, Mr. Wild wrote to the Court on October 15, 2009, asking that it be postponed. Mr. Wild learned on October 21, 2009 that his request was denied. The same day, the

government attorney was finally able to confer with Mr. Wild. Thus, Mr. Wild had five days to determine whether to intervene, retain local counsel and make this application;

- Despite the exercise of due diligence, Petitioners have thus far not been afforded a reasonable opportunity to gather facts and take other steps necessary for a meaningful exercise of their CVRA rights; and
- Arctic Glacier's proposed plea would be pursuant to Fed. R. Crim. P. 11(c)(1)(C), permitting the Court to accept or reject the plea, but not to impose a different sentence from that recommended by Arctic Glacier and the government. Thus, under the circumstances described above, for the Court to proceed with the arraignment as scheduled, and accept the plea, would deny Petitioners any meaningful opportunity to affect the plea agreement, the Court's decision making process or the sentence, and would eviscerate their rights under the CVRA.

A Memorandum in Support follows and a Proposed Order is attached. An affirmation supporting the factual assertions herein will be filed before the arraignment.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Petitioners have so far been deprived of their rights to participate in this case, guaranteed by the Crime Victims Rights Acts, 18 U.S.C. § 3771 (the “CVRA”).¹ They have been denied their right to confer with the government *before* the plea agreement was reached with the defendant and their right to reasonable and timely notice of the arraignment. Without a continuance or the Court’s deferral of acceptance of the plea agreement, Petitioners’ rights will be eviscerated.

The plea agreement was made pursuant to Fed. R. Crim. P. 11(C)(1)(c), which, if accepted, deprives the Court of all sentencing discretion. As a consequence, Petitioners will be deprived of any meaningful input into the plea or punishment if the Court proceeds with the arraignment or accepts the plea agreement. Moreover, the Court may never know the full scope and nature of Arctic Glacier’s criminal conduct, and may be denied the ability to make an informed judgment whether to accept the plea agreement, unless it gives the Department of Probation and Petitioners an opportunity to investigate the facts and present them and any objections to the Court.

The Court, Petitioners and the public have good reason to be concerned about the plea agreement. It calls for a fine of only \$9 million payable over five years even though the defendant Arctic Glacier International Inc. (“Arctic Glacier”) has spent more than \$10.2 million in legal fees and expenses in connection with the antitrust investigations and litigation. (*See* Arctic Glacier’s 2008 Annual Report at 52; Arctic Glacier’s Q2 for Period Ending June 30, 2009

¹ All references to the denial or undermining of Petitioners’ rights apply equally to other victims of Arctic Glacier’s offenses, who may not be aware of those offenses, the proposed plea agreement or any other aspect of the case. All references to the “victims” connote both Petitioners and the other victims. All of the victims’ rights are equally deserving of protection.

at 1). And on its face, the plea agreement does not call for probation or restitution. Moreover, Arctic Glacier, and all but three of its directors, officers and employees, receives transactional immunity under the plea agreement for all acts in furtherance of *the entire* antitrust conspiracy involving Arctic Glacier. (Plea Agreement at ¶¶ 16 and 17(a)). In contrast, Arctic Glacier’s proposed plea only admits to an artificially truncated offense – a conspiracy to allocate customers and fix prices limited to Southeastern Michigan.²

For these reasons, and for the additional reasons stated below, we respectfully urge the Court to postpone the arraignment in this case, or in the alternative, defer decision whether to accept or reject the plea and the plea agreement until after the preparation of a Presentence Investigation Report, and after Petitioners have had a fair opportunity to investigate the facts further and present specific objections to the plea agreement.

1. The Plea Agreement Artificially Truncates Arctic Glacier’s Conduct And Allows Arctic Glacier to Pervert the Criminal Justice System

Arctic Glacier’s actual criminal conduct is far more serious than the plea agreement reveals. Publicly available information reveals that for at least a 7-year period, Arctic Glacier, The Home City Ice Company (“Home City”) and Reddy Ice Holdings Inc. (“Reddy Ice”) operated under an illegal agreement to carve the entire United States (not just Southeast Michigan) into three exclusive territories, one for each, and refrain from competing with each other in the sale of packaged ice. The co-conspirators not only reaped enormous illegal profits from their victims, but also sought to cover-up their unlawful activities by attempting to intimidate and bribe the whistleblower, and have been accused by the whistleblower of violating the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c). *See McNulty*

² Notably, Arctic Glacier’s plea agreement is undated. Thus, the time period for which immunity attaches under the plea agreement remains a mystery.

v. Reddy Ice Holdings Inc., 2009 WL 2168231 at *5 (E.D. Mich. July 17, 2009) (“the RICO enterprise consist[s] of Arctic Glacier, Home City [and] Reddy Ice”).

Yet another reason to be concerned about the plea agreement is Arctic Glacier’s announced intention to use it as both a sword and a shield. Having dramatically minimized its criminal exposure and (it hopes) disclosure of the totality of its criminal conduct, Arctic Glacier plans to take unfair advantage of the situation in civil litigation brought by its victims by moving to dismiss the complaints for lack of sufficiently detailed allegations of their criminal conduct. And, it has stonewalled its victims, objecting to any discovery before its prospective (*i.e.*, unfiled) motion to dismiss is decided.

There are numerous other reasons to doubt the adequacy of the plea agreement. Petitioners should be afforded time to explore these and other deficiencies through the relief requested herein.

2. Petitioners’ Rights As Crime Victims Under the CVRA

Petitioners are “crime victim[s]” under the CVRA. The individual Petitioners are consumers of packaged ice at retail establishments throughout the country – some of whom made purchases in Southeastern Michigan. The corporate Petitioner purchased packaged ice directly from one of the Arctic Glacier’s co-conspirators. All of the Petitioners paid more for packaged ice than they would have in the absence of the conspiracy. Moreover, it is clear that the effect of the conspiracy continues to linger and will inflict harm each time they buy packaged ice in the future.

The CVRA uses a very broad definition of “crime victim” – broader than the definition upon which victims can seek relief under the federal and state antitrust laws. Under the CVRA, a crime victim is any person or entity who is “directly and proximately harmed as a result of the

commission of a Federal offense.” 18 U.S.C. § 3771(e). The monetary harm caused Petitioners satisfies this requirement.

Indeed, Arctic Glacier’s offenses have sufficiently harmed Petitioners to give rise to claims under a variety of federal and state laws with more stringent requirements than the CVRA. For instance, conduct similar to that covered by the plea agreement has been found to “constitute violations of both federal antitrust laws ... and the Michigan Antitrust Reform Act.” *In re Vitamins Antitrust Litig.*, 259 F. Supp.2d 1, 2 (D.D.C. 2003). Accordingly, the Petitioners are entitled to equitable relief under Section 16 of the Clayton Act (15 U.S.C. § 26) to avoid continuing harm from Arctic Glacier’s crimes. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 400 (3d Cir. 2000). They are also entitled to monetary damages under the Michigan Antitrust Reform Act (Mich. Comp. Law § 445.778(2)). *See, e.g., In re Vitamins Antitrust Litig., supra*, 259 F. Supp.2d at 2. As a direct purchaser, the corporate Petitioner, the Baron Group, Inc., is also entitled to treble damages under Section 4 of the Clayton Act. 15 U.S.C. § 15. Thus, Petitioners’ harm qualifies them as “crime victim[s]” under the CVRA.

3. Petitioners’ CVRA Rights

The CVRA “mak[es] victims independent participants in the criminal justice process,” *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1013 (9th Cir. 2006). As crime victims, Petitioners “may assert the rights described in subsection (a)” of the statute, including:

- “The right to reasonable, accurate and timely notice of any public court proceeding” (18 U.S.C. § 3771(a)(2));
- “The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding” (*id.*, § 3771(a)(4));

- “The reasonable right to confer with the attorney for the Government in the case” (*id.*, 3771(a)(5));
- “The right to full and timely restitution as provided by law” (*id.*, § 3771(a)(6)); and
- “The right to be treated with fairness,” (*id.*, § 3771(a)(8)).

The CVRA further provides that “the court shall ensure the crime victim is afforded the rights described in subsection (a),” *id.*, § 3771(b)(1), and that the government “shall make [its] best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” *Id.*, § 3771(c)(1).

Petitioners’ CVRA rights attached even before any proceedings were commenced. The CVRA provides that “[t]he rights described in subsection (a) shall be asserted ... if no prosecution is underway, in the district court” 18 U.S.C. § 3771(d)(3). Accordingly, the Fifth Circuit observed that “there are clearly rights under the CVRA that apply before any prosecution is underway.” *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008).

2. Petitioners’ CVRA Rights Have Already Been Violated

The Court should be especially solicitous of Petitioners’ CVRA rights going forward because they have already been violated. Initially, Petitioners were entitled to participate in plea negotiations. In *Dean*, *supra*, 527 F.3d at 395, the Fifth Circuit 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 failed to provide notice of the plea negotiations or the arraignment.³ Petitioners' counsel have 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 participated in a status conference in that case and met one of Petitioners' attorneys many months ago. In this case, however, despite knowing Petitioners' 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.

Fortunately, through Petitioners' counsel's diligence of regularly monitoring the docket in this case, Petitioners learned of the arraignment before it was too late. However, Petitioners should not have been required to take such extraordinary measures to protect their rights. The government was obliged to use its "best efforts" (*see* 18 U.S.C. § 3771(c)(1)) to provide them with "reasonable, accurate and timely notice" of the arraignment. *Id.*, § 3771(a)(2). So far, the government's only known attempt to notify the victims in this case was an announcement yesterday on the Antitrust Division's website of the date, time and place of today's arraignment.

³ We realize that the Information in this case was initially sealed. But so far as we can tell, nothing was sealed during plea negotiations, which undoubtedly were underway and resulted in an agreement before the Information was filed. Otherwise, the case would have been commenced by indictment rather than information. *Dean* and other authorities cited above show that Petitioners were entitled to be notified of and participate in those plea negotiations.

The plea agreement and information are still not posted.

3. Proceeding with the Arraignment Would Violate the CVRA

Proceeding with the arraignment today would violate the CVRA. Petitioners' counsel were given fewer than six days after the government attorney first became available to confer about the case to investigate the facts, evaluate and formulate their position and engage counsel in the Southern District of Ohio.⁴ This plainly is not "reasonable ... and timely" notice. 18 U.S.C. § 3771(a)(2). Petitioners will be deprived not only of their notice rights but also their "right to be reasonably heard," *id.*, § 3771(a)(4), and their "right to be treated with fairness," *id.*, § 3771(a)(8), should the Court proceed with the arraignment. Under the circumstances, Petitioners cannot be deemed to have been treated fairly or given a *reasonable* opportunity to be heard, particularly in a complex antitrust case that arose from a multi-year investigation.

The need to delay the arraignment is even more compelling because Arctic Glacier's plea is made pursuant to a Fed. R. Crim. P. 11(c)(1)(C) agreement. At a minimum, the Court should defer acceptance of the plea and plea agreement until after Petitioners have been given an opportunity to learn all the facts and present any objections or concerns that they might have to the Court.

It should be noted that even if the Court is inclined to deny this application, it should nevertheless adjourn the arraignment for ten days to allow Petitioners an opportunity to seek a

⁴ No delay can be attributed to Petitioners. Upon learning of the arraignment through his own diligence on October 14, 2009, Petitioners' counsel immediately sought to confer with the government before he took any position in this case. The government attorney advised Mr. Wild that he would not be available until the next week. In light of the fact that the government attorney was unavailable and the arraignment was fast approaching, Mr. Wild wrote to the Court on October 15, 2009 asking that the arraignment be postponed. Mr. Wild learned on October 21, 2009 that his request was denied. On that same day, the government attorney was finally able to confer with Mr. Wild. Thus, Mr. Wild had five days to determine whether to intervene, retain local counsel and make this application.

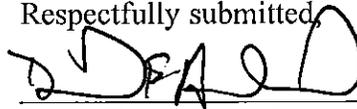
mandamus under 18 U.S.C. § 3771(d)(3). District courts should “postpone [proceedings] in cases where they deny a request by victims to exercise rights granted by the CVRA,” *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1018 n.5 (9th Cir. 2006), to allow the victims an opportunity to seek an mandamus. Indeed, both the Fifth and Ninth Circuits have stressed the importance of pausing criminal proceedings to allow victims the opportunity to litigate their claimed CVRA rights. They noted that the prejudice suffered from a CVRA violation could not be remedied by a “do-over.” *See Dean, supra*, 527 F.3d at 395-96. In *Kenna, supra*, 435 F.3d at 1018, the court noted that its “task in crafting an effective remedy would have been greatly simplified had the district court postponed [the] sentencing until petition for a writ of mandamus was resolved.”

In short, under these circumstances, to proceed with the arraignment as scheduled – to say nothing of accepting the plea – would deny Petitioners an opportunity to influence the agreement or the Court. Because they are entitled to an opportunity to do both, the relief requested herein should be granted.

4. **Conclusion**

For the reasons stated above, the Court should declare Petitioners to be “victims” under the CVRA, afford them all rights accorded by the CVRA and adjourn the arraignment, or in the alternative defer accepting the plea and plea agreement at the arraignment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing the Victims' Emergency Motion for a Declaration Under the Crime Victims' Rights Act and Postponement of the Arraignment, or in the Alternative, Postponement of Acceptance of the Plea Agreement has been served this 27th day of October, 2009, by email and regular U.S. Mail, on the following and at the following addresses:

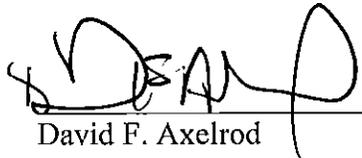
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA)	Criminal No. 1:09CR0149
)	
Plaintiff,)	Judge Herman R. Weber
)	
v.)	
)	
ARCTIC GLACIER INTERNATIONAL, INC.,)	
)	
Defendant.)	

ORDER

This matter has come before the Court on the Victims' Emergency Motion for a Declaration Under the Crime Victims' Rights Act and Postponement of the Arraignment, or in the Alternative, Postponement of Acceptance of the Plea Agreement, filed October 27, 2009. The Court having considered the matter and being duly advised in the premises, it is hereby ORDERED AND ADJUDGED that the motion should be, and the same is hereby GRANTED; and it is further

ORDERED that Petitioners herein shall be deemed "crime victims" under the Crime Victims' Rights Act, 18 U.S.C. § 3771 and entitled to the rights thereunder; and it is further

ORDERED that the defendant's arraignment herein, presently scheduled for October 27,

2009, shall be continued until _____, 20__ at _____ o'clock in the __.m.

SO ORDERED.

Herman R. Weber
United States District Judge