UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff v. ARCTIC GLACIER INTERNATIONAL, INC., Defendant.	:	Criminal No. 1:09cr149 HON. HERMAN J. WEBER

VICTIMS' OBJECTIONS TO PLEA AGREEMENT AND REQUEST THAT IT BE REJECTED

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TABLE OF CONTENTS

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INTRODUCTION

On November 10, 2009, the government and Arctic Glacier, International, Inc. tendered to the Court an undated plea agreement in which the company confesses to a "conspiracy to allocate customers of packaged ice sold in southeastern Michigan and the Detroit, Michigan metropolitan area." Plea Agreement ¶ 4(c). There is, however, substantial evidence that the conspiracy was not confined to that limited area, and in fact extended to a number of other states.[1]

By omitting offense conduct, the government and Arctic Glacier serve their mutual interest in having the Court accept their agreement, but neglect the victims' – and the public's – interest in full disclosure. Department of Justice ("DOJ") policy recognizes that public interest. Where, as here, charges are bargained away, "[i]t is ... doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal

[1] Prior papers have referred to a "nationwide conspiracy." That imprecise term may be misunderstood as asserting that the conspiracy touched all fifty states. For that reason, we will revise our terminology to argue that the conspiracy extended beyond southeastern Michigan, but not necessarily to every state.

activity giving rise to the prosecution." Antitrust Division Grand Jury Practice Manual ("Manual") at IX-17.[2]

The Court has good reason to be concerned about the Plea Agreement. It omits restitution for the victims in favor of a $9 million fine for the government. It confers nationwide transactional immunity on Arctic Glacier, but allows the company to confine its plea to southeastern Michigan. Were the conspiracy really limited to that region, Antitrust Division policy would impose the same geographic limitation on the scope of immunity. Additionally, the Plea Agreement minimizes the offense by omitting relevant conduct, would help the company evade restitution, ignores evidence of attempted obstruction and wrongly treats the company as if it has accepted responsibility. It therefore would deprive the Court of the ability to craft a sentence commensurate with the offense.[3]

The Plea Agreement suffers from these and many other defects. Therefore, on behalf of 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 Stafford ("the Victims"), we respectfully submit these objections to the Plea Agreement and urge that the Court reject it.[4]

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[2] Available at http://www.justice.gov/atr/public/guidelines/4371.htm.

[3] We also urge rejection of the Plea Agreement as the only effective remedy for the government's failure to contact the victims and confer before the agreement was reached. *See Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) ("the only way to give effect to Kenna's right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing"). *But see In re Dean*, 527 F.3d 391 (5th Cir. 2008) (declining to vacate plea agreement to remedy violation of CVRA right to confer).

[4] These objections do not constitute the Victims' objections to the Presentence Investigation Report, to which the Victims have not been afforded access. Should the Victims be given access to any portion of the report, they will seek a reasonable period in which to file appropriate objections.

We start with a preliminary matter. We take seriously the Court's concern, expressed at the arraignment, that for the Victims to object to the Plea Agreement may be unwise. Therefore, we first address that issue and demonstrate that this fear is unwarranted.

I. IF THE COURT REJECTS THIS PLEA AGREEMENT, THE PARTIES WILL LIKELY ENTER ANOTHER.

At the November 10, 2009 arraignment, the Court expressed its concern that we may be "killing the goose that may lay [our] golden egg." Nov. 10 Transcript at p. 111. As noted above, we believe that concern is unwarranted. The undersigned's lengthy experience in white collar criminal cases and the Antitrust Division's own manual suggest that the company will not simply abandon entering any plea agreement if the Court rejects this one.

First, the government must have had ample evidence of the conspiracy to cause the company to enter into the Plea Agreement. Some of this evidence is detailed below, though we believe there is much more that is known only to the company and the government. Additionally, as the Court knows, several former Arctic Glacier employees have pled guilty, with cooperation provisions in their plea agreements. For these reasons, the company is in no position to take this case to trial.

Furthermore, Arctic Glacier almost certainly incriminated itself while negotiating the Plea Agreement and its cooperation provision. Typically, the government declines to include a cooperation provision in a plea agreement unless it has good reason to believe the defendant can provide information about additional offenses by others. This virtually always includes further admissions of the defendant's own culpability.

This kind of information is normally provided in plea agreement interviews pursuant to a proffer agreement. *See* Manual at IX-13 ("whenever a plea agreement requires the defendant's cooperation, an interview with the defendant is usually necessary before the plea agreement becomes final"). As part of the ground rules for such interviews, the government "reserves the right to use leads, or otherwise make indirect use of any information developed during the interview, against the defendant, if no plea agreement is reached ...." *Id.*

Thus, for Arctic Glacier to make such a proffer would have required it to admit details of its conspiracy with Home City Company, Inc. ("Home City") and Reddy Ice Corporation ("Reddy Ice"). The proffer agreement would permit the government to use against the company incriminating documents and the testimony of witnesses identified by it. By making its proffer, Arctic Glacier almost certainly gave the government at least a partial roadmap for its prosecution. The government may use this roadmap, should the company abandon further plea negotiations and threaten to take this case to trial.

The Antitrust Division Grand Jury Practice Manual recognizes the likelihood that, should this Plea Agreement be rejected, there will be another. It states:

> Rejected "C" agreements. Obviously, if the Court rejects a "C" agreement and refuses to impose the agreed-upon sentence, the entire agreement is void. In most cases, the defendant, nevertheless, will want to dispose of ... its criminal liability despite the court's refusal to accept the "C" agreement. Likewise, the [Antitrust] Division will want to dispose of the case against the defendant and obtain his cooperation in continuing the investigation.

Manual at IX-30. The Manual suggests several ways to achieve this goal, the first being to renegotiate the agreement. *Id.*

In short, the overwhelming likelihood is that there is too much water over the dam, and the government has too much evidence against Arctic Glacier for it to go to trial. Rejection of this Plea Agreement will almost surely result in its renegotiation and the entry of another.

II. THE VICTIMS HERE QUALIFY AS "CRIME VICTIMS" UNDER THE CVRA.

The Victims' standing as "crime victims" under the CVRA has been thoroughly briefed in prior papers. *E.g.,* 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, at 7-9; letter to U.S. Probation Officer Laura Jensen (attached as Exhibit A), at 2-5. Our argument there is incorporated by reference.

III. THE PLEA AGREEMENT SHOULD BE REJECTED.

Section 6B1.2(a), p.s. of the Sentencing Guidelines deals with plea agreements that include agreements not to pursue potential charges. It provides that such an agreement should not be accepted unless it "adequately reflects the seriousness of the actual offense behavior and ... accepting the agreement will not undermine the statutory purposes of sentencing." DOJ policy provides that plea-bargaining should "result in convictions that are consistent with the goals of the Guidelines – i.e., that are uniform for defendants guilty of similar crimes and that reflect the seriousness of the crime(s) committed." Manual at IX-9. It also mandates that "[i]n order to guard against inappropriate restrictions of the court's sentencing options, the plea agreement should

provide adequate scope for sentencing under all the circumstances of the case." Manual at IX-18.

We respectfully urge that to accept the Plea Agreement in this case would violate all of these admonitions.

a. <u>The Plea Agreement minimizes the offense by ignoring relevant conduct.</u>

Limiting Arctic Glacier's confession to the customer allocation conspiracy in southeastern Michigan and the Detroit, Michigan metropolitan area conflicts with considerable evidence that suggests the conspiracy extended beyond that region. Some of that evidence is described below, but it seems obvious that there is much more that is known only to the government and the company.

Such information constitutes relevant conduct and need not be provable beyond a reasonable doubt to be counted at sentencing. Therefore, we respectfully urge the Court to question the government directly about the nature and extent of its evidence of offense conduct outside southeastern Michigan.[7]

i. The Plea Agreement itself shows the conspiracy was significantly broader than recognized therein.

The Plea Agreement requires the company to "cooperate fully and truthfully with the United States in ... the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the sale of packaged ice in the United States, [and] any other federal investigation resulting therefrom." Plea Agreement ¶ 14. Additionally, it contains a Sentencing Guidelines § 1B1.8 provision, limiting the use of self-incriminatory information provided by the company. Plea Agreement ¶ 7.

[7] The Victims would not object to this occurring *in camera*, to the extent necessary to preserve the secrecy of ongoing investigations.

Implicitly, the company will provide information beyond that which is already in the Plea Agreement. The government rarely enters cooperation agreements unless it already knows the defendant can provide significant information. Manual at IX-13-14. Thus, it stands to reason that there is substantial additional information that only the defendant and government are in a position to provide.

It also stands to reason that some or all of that information was self-incriminatory, or there would have been no reason for a § 1B1.8 provision. Even information provided pursuant to § 1B1.8 must be disclosed to the Court. U.S.S.G. § 1B1.8, Application Note 1 ("[t]his provision does not authorize the government to withhold information from the court").

Additionally, the Plea Agreement provides for the government to recommend the agreed sentence only if the company has provided full and complete cooperation. Thus, the government's recommendation that the case proceed according to the terms of the Plea Agreement implicitly acknowledges that the company has disclosed information about other antitrust violations. The government's motion for a downward departure, filed February 1, 2010, confirms that the company has disclosed additional offenses.[8] The company must have been involved in those violations or its employees would not know about them.

Finally, the non-prosecution provision of the Plea Agreement reflects the true scope of the conspiracy. It provides that the government "will not bring further criminal charges against Arctic Glacier for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an attempted or completed antitrust

[8] Obviously, the Victims are not privy to the contents of the motion; our inference is based on the nature of a § 5K1.1 motion.

conspiracy involving the sale of packaged ice in the United States." Plea Agreement ¶ 16. In other words, it provides nationwide transactional immunity. DOJ policy dictates that "[t]he geographic scope of the non-prosecution agreement should be limited to where the defendant does business." Manual at IX-41. This policy is routinely followed. *See* November 10, 2009 Tr. at 105-07. Arctic Glacier does business only in the midwest, northeast and California. There would be no reason for immunity beyond those areas except for Arctic Glacier's agreement not to compete in other regions, as well.

ii. Other direct and circumstantial evidence also shows that the conspiracy extended beyond southeastern Michigan.

A. The McNulty Complaint

The scope of the conspiracy is discussed in an amended complaint filed on behalf of Martin McNulty (the "McNulty Complaint"),[9] a former employee of Arctic Glacier and a whistleblower. The McNulty Complaint provides a number of details of a nationwide customer and territory allocation conspiracy among Arctic Glacier, Reddy Ice and Home City. It describes McNulty being told by Keith Corbin (then Arctic Glacier's Vice President of Sales), "Arctic Glacier had agreed with both Home City and Reddy Ice to geographically divide the market for the sale and delivery of packaged ice.... Mr. Corbin also explained that Arctic Glacier's conspiracy with Reddy Ice extended throughout the United States." McNulty Complaint ¶¶ 35-36.

There is good reason to credit McNulty's claims. On information and belief, McNulty was a government informant who assisted in the investigation of this case. *See* McNulty Complaint ¶ 46, which describes McNulty "wearing a recording device

[9] *Martin G. McNulty v. Reddy Ice Holdings, Inc., et al.*, Case No. 2:08-cv-13178 (E.D. MI) (copy attached as Exhibit B).

provided to him by the FBI" at a meeting on January 27, 2006. Additionally, on or about March 4, 2008, the government executed a search warrant on Reddy Ice's headquarters in Dallas Texas. The warrant affidavit remains sealed, so it is impossible for us to say with certainty, but under the circumstances, it seems likely that McNulty provided at least part of the probable cause for the warrant.[10]

B. The Chamberlain Complaint

The complaint in a separate securities class action also illustrates the true scope of the conspiracy. The complaint in *John Chamberlain v. Reddy Ice Holdings*, Case No. 08-13451 (E.D. Mich.) (the "Chamberlain Complaint") alleges that "Reddy Ice agreed not to compete with Arctic Glacier in the State of California," and that "in an illegal *quid-pro-quo* arrangement, Arctic Glacier secretly agreed not to compete with Reddy Ice in the State of Arizona." Chamberlain Complaint at ¶ 15.[11] It cites evidence from four "confidential witness[es]" all former Reddy Ice employees who were well positioned to observe the conspiracy. *See* Chamberlain Complaint ¶¶ 46, 47, 54 and 57. Those confidential witnesses recount numerous internal conversations at Reddy Ice concerning details of the conspiracy. Chamberlain Complaint ¶¶ 46-60. The complaint summarizes the scope of the conspiracy:

> Pursuant to unlawful agreements with Arctic Glacier and Home City, Reddy Ice dominated packaged ice sales in the Sun Belt region, ranging from Arizona to Florida, as well as certain states in the mid-Atlantic region. Similarly, pursuant to unlawful agreements with Reddy Ice and Home City, Arctic Glacier dominated packaged ice sales in Canada, certain Northeastern states and in the Central U.S. region and

[10] Obviously, should the government seek to impugn McNulty's credibility in opposing these objections, it should be able to tell the Court whether this inference is correct.

[11] Copies of the pages of the Chamberlain complaint referred to here are attached as Exhibit C. The full complaint will be made available at sentencing, or in advance, as the Court directs.

> California, while Home City was unlawfully allocated exclusivity in territories consisting primarily of Illinois, Indiana and Ohio.

Chamberlain Complaint at ¶ 43.

C. Circumstantial Evidence

In addition, circumstantial evidence suggests a conspiracy that extended well beyond southeastern Michigan. Obviously, we do not have firsthand knowledge of many of the facts stated below, but allege them on information and belief, and expect that they are known to the government and can easily be provided to the Court.

The conspirators' conduct in northern Tennessee is enlightening. Home City has established the infrastructure necessary to sell ice in northern Tennessee, yet limits its Tennessee sales to Kroger in Nashville. Our understanding is that Home City is in Tennessee at all only because Kroger will not purchase from Reddy Ice, which was otherwise allocated the state of Tennessee.

Additionally, although ice sales are linked to climate (*i.e.*, ice sales should be higher in warm weather states), the companies do not compete even in states like Florida, Arizona and California. McNulty specifically alleges that Arctic Glacier "backed away" from buying an ice company in Nevada to avoid competing with Reddy Ice. McNulty Complaint ¶ 36. Further, Reddy Ice withdrew from California, which accounted for approximately ten percent of its sales, and Arctic Glacier agreed not to sell in Arizona to eliminate competition in those states. Class Action Complaint ¶¶ 46-47.[12] In 2002, Arctic Glacier stopped competing in Oklahoma and New Mexico, both warm weather

[12] *In re Packaged Ice Antitrust Litig.*, MDL No. 1952, Indirect Purchasers' Amended Class Action Complaint.

states, "even though it retained production and distribution facilities in the bordering states of Kansas and Texas." *Id.* at ¶ 49.

Finally, this case itself suggests that the conspiracy was not confined to southeastern Michigan. The Plea Agreement admits that one or more affirmative acts occurred in the Southern District of Ohio. Plea Agreement ¶ 4(d). The government has been unwilling to apprise the Victims of the nature and number of those acts, or whether customers were allocated in this district. We respectfully urge the Court to inquire before deciding whether to accept the Plea Agreement. The answer to this question alone may result in its rejection.

iii. Self-incriminatory information about a broader conspiracy should be considered by the Court in imposing sentence.

Any additional self-incriminatory information provided by the company is relevant to its sentence, both under the Sentencing Guidelines and under 18 U.S.C. § 3553. As noted above, commentary to Guidelines § 1B1.8(b) explains that it does not authorize the government to withhold information, however acquired. Such information is also supposed to be available for the Court's consideration in ordering restitution. *See, e.g., United States v. Peyton*, 186 Fed. Appx. 81, 83, 2006 WL 1788445 at *2 (2d Cir. June 19, 20).

iv. Conspiratorial acts beyond southeastern Michigan are relevant conduct in this case.

Conduct is "relevant" if it is either part of a "common scheme or plan" or the "same course of conduct." U.S.S.G. § 1B1.3. As the Sixth Circuit explained in *United States v. Four Pillars Enterprise Co., Ltd.*, "For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least

one common factor, such as common victims, common accomplices, common purpose or similar *modus operandi*." 253 Fed. Appx. 502, 510 (2007).

Here, the customer allocation scheme is undoubtedly connected to conspiratorial acts elsewhere by a common purpose and similar *modus operandi*. Additionally, the court in *Four Pillars* stated that "[o]ffenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a[n] ... ongoing series of offenses." The cooperation provision in the Plea Agreement clearly implies an ongoing series of offenses, since it expressly requires cooperation in the government's continuing investigation of antitrust violations in the packaged ice industry. Plea Agreement ¶ 14.

In short, the company's conspiratorial acts involving sales of packaged ice would be relevant conduct even if part or a separate conspiracy and not mentioned in the Information or Plea Agreement. *See United States v. Velez*, 1 F.3d 386, 387 (6th Cir. 1993) (relevant conduct included conspiratorial acts in eight states even though defendant charged with conduct in only one state); *United States v. Seiler*, 348 F.3d 265, 269 (D.C. Cir. 2003) (relevant conduct for sentencing and restitution included parallel bid-rigging scheme involving different bids and a different co-conspirator). Thus, they are relevant conduct and should be part of the sentencing calculus.

b. <u>If accepted, the Plea Agreement would help the company avoid paying restitution.</u>

The Plea Agreement provides that the government will refrain from asking for restitution here because of the availability of a civil remedy. Plea Agreement ¶ 13. That

links this case to the Class Action for purposes of restitution. Ergo, the Plea Agreement's effect on the Class Action should be considered in deciding whether to accept it.

By relegating restitution to the Class Action, the Plea Agreement would help Arctic Glacier avoid having to pay restitution. It has already moved to dismiss class claims relating to criminal activity outside of southeastern Michigan. Its primary argument, founded on *Bell Atlantic Corp. v Twombley*, 550 U.S. 544 (2007), is that those claims are not stated in enough detail.[13] The company also leverages the criminal case, arguing for dismissal because "[t]he DOJ, after an extensive investigation, obviously concluded that there was no national conspiracy and limited its charges against Home City and Arctic to Michigan." *Brief in Support of the Motion of Home City and Arctic Glacier to Dismiss the Indirect Purchasers' Amended Class Action Complaint*, at 4. Should it be successful, the company will have its cake and eat it, too, *i.e.,* it will have sharply reduced its exposure in both cases to the detriment of all of its victims.

We urge the Court not to condone relegating restitution to a civil action that company seeks to dismiss. It should at least have to admit the full range of its conduct in this case, so that appropriate restitution may be made in one case or the other. *See* Manual at IX-17 (essential for the public record to demonstrate the full extent of the defendant's offense). For this additional reason, the Plea Agreement should be rejected.

[13] While the motion remains pending, it is clear that defendants have met the notice requirements imposed by *Twombley*.

[15] Available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.htm.

c. **The Plea Agreement provides for a fine that may interfere with the company's ability to make restitution.**

i. **The company already suffers from a mountain of debt.**

The Plea Agreement requires Arctic Glacier to pay a $9 million fine. However, Arctic Glacier's public filings reflect such a precarious financial condition that imposition of this fine may jeopardize its ability to make restitution.

Under U.S.S.G. § 8C3.3(a), "[t]he court shall reduce the fine below that otherwise would be required ... to the extent that imposition of such fine would impair [the defendant's] ability to make restitution." *Accord United States v. Four Pillars Enterprise Co., Ltd., supra*, at 514. Further, 18 U.S.C. § 3572(b) specifically provides that no fine may interfere with a defendant's ability to pay restitution. Finally, the Antitrust Division's policy seems consistent in rejecting a fine under these circumstances. *See Model Annotated Corporate Plea Agreement* ¶ 9.[15]

Arctic Glacier's Third Quarter Report to Unitholders for 2009, at p. 10, reports $167.6 million in long-term debt. $60 million is in secured notes that came due on January 4, 2010. The company also reports debt of $100.1 million under a revolving term credit facility, which matures on May 31, 2011. *Q3, Third Quarter Report to Unitholders* at 10.

This mountain of debt jeopardizes the company's ability to pay restitution. A $9 million fine would make the situation worse. The law is clear that restitution takes precedence over fines for the government. Thus, the requirement of a $9 million fine is an independent reason for rejecting the Plea Agreement.

ii. The Court should create a restitution fund.

Furthermore, rejecting the Plea Agreement would allow the Court to avail itself of procedural devices to ease the burden of managing restitution in this case. For instance, it may order that restitution be paid to the government as trustee for the victims, to be disbursed during the period of probation. In fact, claims for restitution may be entertained for as many as twenty (20) years after sentencing by having the government file a lien on behalf of the victims. *See id.* at 611.[16]

Here, the Court could create a restitution fund for the benefit of victims in the civil cases. *See United States v. Bernardini,* 112 F.3d 606, 611 (2d Cir. 1997) (affirming order creating a restitution fund for victims that had not yet been identified). That would be appropriate, since the Plea Agreement explicitly relegates restitution to those proceedings. Plea Agreement ¶ 13. Creation of a restitution fund in lieu of a fine is particularly important, since Arctic Glacier is unlikely to be able to pay both. Other sentencing courts have approved devoting a defendant's limited resources to compensating victims in civil cases. *See, e.g., United States v. Purdue Frederick Co,* 495 F. Supp.2d 569. 575 (W.D. Va. 2007) (upholding plea agreement because, *inter alia,* defendant agreed to pay at least $130 million to settle private claims); *In re Exxon Valdez,* 296 F. Supp.2d 1071, 1107 n. 111 (D. Ark. 2004) (noting that in the criminal case, Exxon was ordered to pay $100 million but fined only $25 million to preserve resources for restitution).

[16] 18 U.S.C. § 3663(h)(1) provides that an order of restitution may be enforced by the government "in the manner provided for the collection and payment of fines in [18 U.S.C. §§ 3611-15]." Section 3613, in turn, establishes a fine as "a lien in favor of the United States, which continues until the liability is 'satisfied, remitted, or set aside'" (§ 3613(a)) or becomes unenforceable by the passage of 20 years from the date of the judgment or by the death of the defendant (§ 3613(b)).

d. The Plea Agreement ignores evidence of attempted obstruction, other than to immunize it.

The Sentencing Guidelines provide for a three-point increase in a company's culpability score for obstruction. U.S.S.G. § 8C2.5(e). Nevertheless, the Plea Agreement makes no mention of evidence of obstruction by Arctic Glacier, other than to **immunize** it. The Plea Agreement immunizes directors, officers and employees for offenses involving the sale of packaged ice "or undertaken in connection with any investigation of such a conspiracy." *See* Plea Agreement ¶ 17(a).

McNulty – the government's former informant – provides a detailed description of the company's efforts to bribe and intimidate him into ceasing his cooperation with federal law enforcement authorities. He describes being told "that Arctic Glacier was withholding Mr. McNulty's two-year earn out (to which he was entitled) because Mr. McNulty was cooperating with government authorities," and that "Arctic Glacier would pay Mr. McNulty his earn out plus a large salary if Mr. McNulty would return to work at Arctic Glacier and cease cooperating with federal authorities." McNulty Complaint ¶ 49. Having left his employment with Arctic Glacier, McNulty reports being threatened "that no ice company would hire [him] until he stopped providing information to law enforcement officers." *Id.*[17]

The conspicuous absence of reference to McNulty's claims in the Plea Agreement suggests that this information was not provided to the Probation Office, either. It should be counted in the Sentencing Guidelines calculation; its omission should cause the Court to reject the Plea Agreement.

[17] The United States District Court for the Eastern District of Michigan has held that Mr. McNulty's claims state a claim for a RICO violation. *McNulty v. Reddy Ice Holdings, Inc.*, No. 08-CV-13178, 2009 WL 2168231 at *5 (E.D. Mich. July 17, 2009).

c. The Plea Agreement wrongly treats Arctic Glacier as if it has accepted responsibility.

U.S.S.G. § 8C2.5(g) provides for consideration of acceptance of responsibility in calculating the culpability score. It provides for a reduction of 5, 2 or 1 points, depending on the level of cooperation and timeliness of disclosure. Application note 12 further explains that to qualify for the 5 or 2-point reductions under § 8C2.5(g)(1) or (g)(2), respectively, cooperation must be both timely and thorough. To be thorough, cooperation should include "disclosure of all pertinent information known by the organization."

In this case, that would require disclosure of the full scope of the conspiracy, and all that the company knows about the attempted suppression of McNulty's testimony. If it made such disclosures, that information should be provided for the Court's consideration at sentencing. If the company has not made such disclosures, it should receive no credit for acceptance

Furthermore, the company's motion to dismiss the Class Action further reflects its desire to evade responsibility. Sentencing courts have rejected plea agreements in comparable circumstances. For instance, in *United States v. Conahan,* No. 3:09-CR-28, Slip Op. at 4 (M.D. Penn. July 31, 2009), the court rejected a plea agreement because the defendant made public statements that "contradict[ed] some of the offense conduct."

If the case proceeds to sentencing under the terms of the Plea Agreement, the company will unjustly receive the kind of sentence that should be reserved for truly repentant defendants. The company's lack of acceptance is yet another reason to reject the Plea Agreement.

f. The Plea Agreement must give the court flexibility to craft an appropriate sentence.

Finally, the Plea Agreement should give the Court the flexibility to craft a sentence commensurate with the magnitude of the offense. *See* Manual at IX-18 ("plea agreement should provide adequate scope for sentencing under all the circumstances of the case"). In view of the circumstances described above, we ask the Court to consider the following:

- The establishment of a restitution fund;
- As a condition of probation, cooperation in the determination of the losses suffered by the victims from the totality of the company's conduct. Such a condition is routinely imposed in criminal tax cases, where defendants are ordered to cooperate in the assessment and collection of the tax deficiency. This condition is especially important because of the company's motion to dismiss the Class Action; and
- A requirement that the company publicly acknowledge the entirely of its offenses.

IV. CONCLUSION

The company has engineered the legal equivalent of a "Catch 22" for the victims, whereby it may prevent them from learning much from the criminal case, while seeking to dismiss the Class Action for their alleged failure to plead in sufficient detail. That would not be just under any circumstances, but the injustice is magnified by the Plea Agreement's relegating restitution to very civil case that the company seeks to dismiss.

Under ordinary circumstances, we would simply urge the Court to impose a sentence that differs from the government's recommendations in the Plea Agreement.

But here, the Plea Agreement is a take-it-or-leave-it proposition. Therefore, we respectfully urge the Court to "leave it" by rejecting the Plea Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Victims' Objections to Plea Agreement and Request That It Be Rejected has been served by regular U.S. Mail, this 1st day of February, 2010, on:

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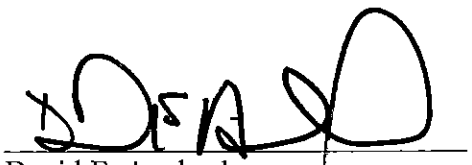

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