No. _____

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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**In re: Martin McNulty,**

***Petitioner***

**-against-**

**United States District Court**
**for the Southern District of Ohio,**

***Respondent.***

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# PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIM'S 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 Martin McNulty, a former employee of Arctic Glacier International, Inc. 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-0149. Arctic Glacier International, Inc. is an interested party to this petition. It is a domestic subsidiary of Arctic Glacier, Inc. and Arctic Glacier Income Fund. A related criminal case in the same district is *United States v. Home City Ice*, No. 1:07-CR-0140, making Home City Ice (and any other co-conspirator of Arctic Glacier International, Inc., allegedly including Reddy Ice Corporation) a potentially interested party. Both of these cases have been handled by District Judge Herman J. Weber.

Numerous customers of Arctic Glacier International, Inc. and Home City Ice were injured by the customer allocation conspiracy to which Arctic Glacier

International, Inc. and Home City Ice have pleaded guilty. These customers may have an interest in the disposition of this petition. Several purchasers of packaged ice asserted their rights as victims, namely Lawrence J. Acker, Brian Buttars, Linda Desmond, James Feeney, Ainello Mancusi, Ron Miastkowski, Perry Peka, Patrick Simaski, Wayne Stanford, and The Baron Group, Inc. b/b/a Baron's Ice House. *See In re Acker*, No. 10-3159 (6th Cir.).

Gary Mowery, former owner of Rapids Ice, also asserted his victim status in the lower court, and may have an interest in this petition.

## NOTICE OF RELATED PROCEEDING

*In re Acker et al.*, No. 10-3159 (6th Cir.) was a mandamus petition filed on behalf of purchasers of packaged ice who also allege that they are victims of Arctic Glacier International Inc. and were allegedly denied rights under the Crime Victims Rights Act. The petitioners in *Acker* simultaneously filed a direct appeal, *United States v. Arctic Glacier International, Inc.*, No. 10-3160 (6th Cir.). The petition was denied and the appeal was dismissed.

## STATEMENT OF THE RELIEF SOUGHT

Petitioner Martin McNulty respectfully petitions this Court, pursuant to the Crime Victim's 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 Mr. McNulty as a "crime victim" under the CVRA of the crime charged in *United States v. Arctic Glacier International, Inc.*, Case No. 1:09-CR-0149; and

2. To afford him all of the rights that crime victims are provided under the CVRA, including the right to "full and timely restitution." 18 U.S.C. § 3771(a).

## ISSUES PRESENTED

1. Defendant Arctic Glacier International Inc. ("Arctic Glacier") has pleaded guilty to engaging in a customer allocation conspiracy in violation of 15 U.S.C. § 1. Petitioner Martin McNulty was fired and blackballed to prevent him from disrupting the conspiracy where he refused to participate in the conspiracy and cooperated with the government in the criminal investigation. As a result, Mr. McNulty suffered from lost wages and continues to suffer from reduced future earnings. Where the Crime Victim's Rights Act defines a "victim" as a person "directly and proximately harmed as the result of the commission of a Federal offense," 18 U.S.C. § 3771(e), is Mr. McNulty a "victim" where Defendant

Arctic Glacier fired and blackballed him in furtherance of the conspiracy to which it pleaded guilty?

2. Where U.S. Sentencing Guidelines §§ 5E1.1 and 8B1.1 provide that restitution shall be imposed as a mandatory condition of probation, and 18 U.S.C. § 3563 authorizes restitution as a term of probation "not subject to the limitation of section 3663(a) or 3663A (c)(1)(A)," did the District Court err in finding that Mr. McNulty was not entitled to restitution because the offense of conviction was not an offense listed under 18 U.S.C. § 3663(a)?

## STATEMENT OF FACTS

Arctic Glacier International Inc. ("Arctic Glacier") produces packaged ice and engages in the sale of packaged ice in Canada and certain regions of the United States. Arctic Glacier has admitted to a felony offense of participating in a conspiracy to allocate customers of packaged ice sold in Southeastern Michigan and the Detroit, Michigan area beginning January 1, 2001 and continuing until at least July 17, 2007. (Record Entry No. 11, plea agreement at 5 (pleading guilty to violating 15 U.S.C. § 1)). Arctic Glacier stated that it engaged in discussions and meetings with representatives of other packaged ice producers, and reached agreements to allocate customers in Southeastern Michigan and the Detroit, Michigan metropolitan area.

(*Id.*) According to the plea agreement, sales of packaged ice affected by the conspiracy totaled $50.7 million. (*Id.* at 4).

Mr. McNulty lives in the Detroit, Michigan metropolitan area and was a successful packaged ice salesperson and executive who was consistently promoted during his fourteen-year career in the industry. In January 2005, Mr. McNulty was instructed by an Arctic Glacier executive to participate in the conspiracy, and was told that he would be blackballed if he did not cooperate. (McNulty Decl. ¶ 13, attached hereto as Ex. 1; Record Entry No. 46, sentencing hr'g tr. 30:14-20). Mr. McNulty refused, expressed his opposition to the conspiracy, and decided to inform government authorities about Arctic Glacier's criminal activities. (Record Entry No. 46, hr'g tr. 30:21-24, 32:2-4). The success of Arctic Glacier's customer allocation conspiracy would have been endangered if Mr. McNulty had continued working for Arctic Glacier– or another packaged ice company – without participating in the conspiracy, as he would have made sales in violation of the terms of the allocation agreement. In furtherance of the conspiracy, therefore, Arctic Glacier fired Mr. McNulty in late January 2005. (McNulty Decl. ¶ 15, Ex. 1).

Shortly after he was fired by Arctic Glacier, Mr. McNulty contacted law enforcement authorities and told them about the existence of the conspiracy among Arctic Glacier, Home City, and other packaged ice companies. (*Id.* ¶ 16). The DOJ

and FBI started its investigation based on the information provided by Mr. McNulty, and Mr. McNulty assisted in the investigation by tape-recording telephone calls and an in-person meeting. (*Id.* ¶ 18). As a result of the federal investigation, Arctic Glacier pleaded guilty to participating in the unlawful conspiracy.

In an effort to stop Mr. McNulty from cooperating with the government investigation and to prevent him from disrupting the conspiracy, Arctic Glacier blackballed Mr. McNulty from employment in the packaged ice industry, informing him – through intermediaries – that he would not be hired by a packaged ice company unless he stopped cooperating with the government. (*Id.* ¶¶ 17, 20, 21; Record Entry No. 46, hr'g tr. 32:9-21). As a result, Mr. McNulty's earnings have been substantially reduced (McNulty Decl. ¶ 22, Ex. 1), he has lost his house to foreclosure, his credit scores have fallen dramatically, he has endured extended periods of unemployment, and he is currently searching for a job in a very difficult job market in Detroit, Michigan.

## PROCEEDINGS BELOW

On September 10, 2009, the United States filed a sealed Information charging Defendant Arctic Glacier with a conspiracy "to allocate packaged-ice customers in southeastern Michigan and the Detroit, Michigan metropolitan area." (Record Entry No. 1, information). On October 13, 2009, the United States filed a Plea Agreement

pursuant to Fed. R. Crim. P. 11(c)(1)(C) in which Defendant Arctic Glacier agreed to plead guilty to participating in a conspiracy to allocate customers of packaged ice sold in southeastern Michigan and the Detroit, Michigan metropolitan area, the parties agreed to recommend a fine of $9 million, and the United States "agree[d] that it will not seek a restitution order." (Record Entry No. 1, plea agreement ¶ 13).

Counsel for Petitioner was informed by the United States that restitution could be requested through the probation officer, Laura Jensen. Counsel contacted Ms. Jensen, who instructed Petitioner to submit any request for restitution in the form of a letter to Ms. Jensen. Petitioner sent a letter and accompanying declaration (Ex. 1) to Ms. Jensen on January 20, 2010, and those documents were provided to the Court.

A sentencing hearing was held on February 11, 2010, before Judge Weber in the Southern District of Ohio. During the hearing, Petitioner McNulty moved for restitution pursuant to the Crime Victims Rights Act, and stated the basis for his claims. (Record Entry No. 46, hr'g tr. 29:7-34:13, 52:6-57:25). The factual basis for Petitioner's claims was not disputed by the parties or by the Court, with the exception of one factual clarification offered by the government.[1] Judge Weber nonetheless ruled that Mr. McNulty was not a "victim" eligible for restitution for two reasons:

[1] Petitioner misspoke regarding the date of Mr. McNulty's termination. (Record Entry No. 46, hr'g tr. 31:7). The government pointed out the error (*id.* 31:10-18), which Petitioner corrected (*id.* 31:20-22).

first, only customers who purchased packaged ice could be considered victims; and second, because the crime of conviction, 15 U.S.C. § 1, was not an offense specifically enumerated in 18 U.S.C. § 3663(a)(1)(A) as an offense for which restitution is authorized:

> The Court determines the victims of the offense in this case were the customers . . . . Mr. McNulty was an employee of defendant, not a customer. There is no evidence he was directly or proximately harmed by the conspiracy. The cou[n]t of conviction is a violation of . . . 15 United States Code, Section 1, which is not a listed offense under 18 United States Code, Section 3663(a)(1)(A). He is not a victim of the offense charged in this case.

(*Id.* 117:2-3, 17-23).

Judge Weber imposed a $9 million fine and a five-year term of probation. (*Id.* 134:18-19, 136:24-25).

Several purchasers of packaged ice filed a mandamus petition and appeal on February 19, 2010. *See In re Acker*, No. 10-3159 (6th Cir.); *United States v. Arctic Glacier Int'l, Inc.*, No. 10-3160 (6th Cir.). The *Acker* petition was denied and the appeal was dismissed. In its Order, this Court stated: "Whether these petitioners as indirect purchasers were "directly and proximately harmed" by the actions of Arctic Glacier is an issue that is largely beside the point, because we conclude that the district court afforded them the status of crime victims." Order (Feb. 22, 2010). This

Court found that, with respect to customers of packaged ice, the district court "reasonably concluded that the difficulty of determining losses claimed would so prolong and complicate the proceedings that any need for restitution would be outweighed by the burden on the sentencing process." *Id.*

Mr. McNulty timely brought this petition for review, as specifically authorized by the CVRA. *See* 18 U.S.C. § 3771(d)(3).[2] The CVRA directs that the Court shall decide such application within 72 hours. 18 U.S.C. § 3771(d)(3).

## STANDARD OF REVIEW

Martin McNulty comes before this 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).[3] Four circuits have held that a mandamus petition under the CVRA is subject to ordinary appellate review, and Petitioner believes these circuits have applied the

[2] Mr. McNulty is also seeking to claim his CVRA rights as a "victim" in the related case of *United States v. Home City Ice Company, Inc.*, No. 07-CR-0140 (S.D. Ohio). Sentencing in that case is scheduled for March 2, 2010.

[3] As the plain language of this provision 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).

correct standard. *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005); *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006); *In re Walsh*, 229 Fed. Appx. 58, 60-61 (3d Cir. 2007); *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008).

Petitioner acknowledges, however, that this Court recently found that the normal standards for mandamus review apply to mandamus petitions filed under the CVRA. Order, *In re Acker*, No. 10-3159 (6th Cir. Feb. 22, 2010). "[M]andamus is a discretionary remedy," 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, 323 (6th Cir. 2009). A writ of mandamus is justified by a "clear abuse of discretion." *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 380 (2004).[4]

Unlike a normal mandamus petition, however, a CVRA mandamus petition must be "take[n] up and decide[d]" by the appellate court, and if the appellate court denies CVRA rights, "the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3).

[4] The legal question underlying this petition – whether Petitioner is a "victim" – is a legal issue that is ordinarily reviewed *de novo*. *See, e.g.*, *United States v. Andrews*, 88 Fed. Appx. 903, 907 (6th Cir. 2004) ("The propriety of ordering restitution is reviewed *de novo*."); *United States v. Hoglund*, 178 F.3d 410, 413 (6th Cir. 1999) ("We review *de novo* whether restitution is permitted under the law . . . .").

## STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

This case presents the issue of whether an individual who has been directly harmed by acts in furtherance of a conspiracy, but was not the intended victim of the conspiracy, is able to claim the protections of the Crime Victim's Rights Act. The CVRA guarantees rights to all "victims" of federal crimes. The CVRA broadly defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e).

The district court's decision that only customers are "victims" of the market allocation conspiracy between Arctic Glacier and other packaged ice companies is clearly in error and should be reversed. The district court did not dispute the facts that Mr. McNulty submitted to the court in his January 20, 2010 written request to be recognized as a victim, or in the oral statement of facts presented during the February 11, 2010 sentencing hearing. In particular, the district court did not contest that, to prevent Mr. McNulty from disrupting Arctic Glacier's customer allocation conspiracy, Mr. McNulty was terminated and blackballed by Arctic Glacier for refusing to cooperate in the conspiracy and for cooperating with the government's criminal investigation, and that Mr. McNulty's earnings have been reduced as a result. Neither the district court nor the parties challenged Mr. McNulty's factual allegations.

As numerous circuit court opinions hold, a crime can harm many different people in many different ways, yet they are all entitled to their rights as "victims" if the harm was directly and proximately caused by the crime. *See, e.g.*, *United States v. Birdsong*, 330 Fed. Appx. 573, 587 (6th Cir. 2009); *United States v. Hunt*, 521 F.3d 636, 648 (6th Cir. 2008); *United States v. Sosebee*, 419 F.3d 451, 459 (6th Cir. 2005); *United States v. Garcia-Castillo*, 127 Fed. Appx. 385 (10th Cir. 2005) (federal agents were "victims" of a conspiracy to rob a train where they were physically injured while attempting to apprehend one of the defendant's co-conspirators).

Under the facts here, Mr. McNulty was directly and proximately harmed as a result of Arctic Glacier's crime, which is all that he is required to prove to secure rights under the Crime Victim's Rights Act. 18 U.S.C. § 3771(e). The district court's order that only customers could be victims is clearly erroneous, and should therefore be reversed.

## I. THE CRIME VICTIM'S RIGHTS ACT BROADLY DEFINES THE "CRIME VICTIMS" WHO ARE ENTITLED TO CLAIM ITS PROTECTIONS.

### A. The CVRA is Remedial Legislation That Gives Crime Victims Generous Rights to Participate in the Federal Criminal Justice Process.

In October 2004, Congress passed and the President signed into law the Crime Victim's Rights Act, Pub. L. No. 108-405, 118 Stat. 2251 (codified at 18 U.S.C. §

3771).[5] Congress intended to enact a "broad and encompassing" law "which provides enforce[able] rights for victims." 150 CONG. REC. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). Congress was concerned that crime victims in the federal system were "treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough . . . and by a court system that simply did not have a place for them." *Id.* To reform the system, Congress gave victims "the simple right to know what is going on, to participate in the process where the information that victims and their families can provide may be material and relevant . . . ." *Id.*

The CVRA gives victims of federal crimes a series of rights, including the right of notice of court proceedings, to be "heard" at plea and sentencing hearings, to reasonably "confer with the attorney for the Government in the case," and to "full and timely restitution as provided in law." 18 U.S.C. § 3771(a). These are rights that are "independent of the Government or the defendant that allow[] the victim to . . . independently address the court . . . ." 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Kyl). The CVRA further assures victims broadly that they will "be

[5] *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 850-52; John Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005).

treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). The government is required to use its "best efforts" to ensure that crime victims are accorded their rights under the CVRA. 18 U.S.C. § 3771(c)(1).

All these rights must be enforced by the federal courts. The CVRA directs 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). The CVRA also affords crime victims the right to "assert the rights described in [the CVRA]." 18 U.S.C. § 3771(d)(1).

Congress intended the CVRA to dramatically rework the federal criminal justice system. In the course of construing the CVRA generously, the Ninth Circuit observed: "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The Crime Victim's Rights Act sought to change this by making victims independent participants in the criminal justice process." *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). Remedial legislation "should be construed broadly to extend coverage" to effectuate its purposes. *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009). Indeed, in other areas, courts have stated that "remedial legislation . . . should be liberally construed so as to include the largest number of [individuals] within its entitlement provisions." *Adams v. Director, OWCP*, 886 F.2d

818, 825 (6th Cir. 1989).

### B. Legislative History Provides That the CVRA's Definition of "Crime Victim" Should Be Given a Generous Construction.

This Court should give liberal construction not only to the CVRA as a whole, but to its definition of "crime victim" in particular. After reciting the definition-of-"victim" language at issue here, the Act's co-sponsors explained that Section 3771(e) employs "an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." 150 Cong. Rec. S4270 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); *id.* (statement of Sen. Feinstein) (agreeing with same).[6] The provision at issue here should be construed broadly in favor of victims.

## II. MR. MCNULTY IS A "VICTIM" OF ARCTIC GLACIER'S CONSPIRACY BECAUSE HE HAS BEEN DIRECTLY AND PROXIMATELY HARMED AS A RESULT OF THE CRIME.

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). Under the CVRA, Mr. McNulty is a "crime victim" of defendant Arctic Glacier's

[6] The description of the victim definition as "intentionally broad" was in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. *See Kenna*, 435 F.3d at 1015-16 (discussing significance of CVRA sponsors' floor statements).

customer allocation conspiracy, as he was a person "directly and proximately harmed as result of the commission of a Federal offense." 18 U.S.C. § 3771(e); *accord In re Sewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) ("If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA").

Mr. McNulty meets the definition of crime victim under the CVRA because he was: (A) "directly" harmed and (B) "proximately" harmed (C) as "a result of" a federal offense. *Id.*[7]

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[7] There are two significant differences between the definition of "victim" in the CVRA compared to the VWPA and MVRA. First, the CVRA does not include the qualifier phrase "for which restitution may be ordered," as the CVRA applies to all criminal prosecutions, regardless of whether restitution is appropriate. Second, while the CVRA, VWPA, and MVRA all define a victim as a person directly and proximately harmed as a result of the commission of a relevant offense, the CVRA omits a phrase from the VWPA and MVRA explicitly "including, in the case of an offense that involves as involves as an element a scheme, conspiracy, or pattern of criminal activity, *any person directly harmed by the defendant's criminal conduct in the course of the* scheme, *conspiracy*, or pattern." *Compare* 18 U.S.C. § 3771(e), *with* 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2) (emphasis added).

There is no legislative history explaining the omission, but at least one federal court has interpreted the CVRA definition "to include that expansive clause because of the Congressional and case law history of that clause." *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 462 (D.N.J. 2009) (discussing the history of the VWPA, MVRA, and CVRA). This interpretation is "consistent with the stated purpose of the CVRA to strengthen rather than weaken victims' rights in federal criminal prosecutions." *Id.* Moreover, the CVRA grants victims "the right to full and timely restitution *as provided by law*," 18 U.S.C. § 3771(a)(6), suggesting that it was intended to incorporate the definition of the VWPA and MVRA.

### A. Mr. McNulty Was "Directly" Harmed By Arctic Glacier's Market Allocation Conspiracy.

#### 1. As a Direct Result of Arctic Glacier's Crime, Mr. McNulty was Terminated and Boycotted.

Mr. McNulty was directly harmed in two ways by Arctic Glacier's criminal conspiracy. First, Mr. McNulty was terminated by Arctic Glacier because he would not participate in the conspiracy (and therefore was likely to disrupt the conspiratorial agreement by making competitive sales in violation of the agreement). Second, Arctic Glacier and its co-conspirators boycotted Mr. McNulty from employment in the packaged ice industry in an effort to cover up the conspiracy by discouraging him (and, by example, discouraging other potential whistleblowers) from cooperating with federal authorities. Mr. McNulty was told that he would not be hired by a packaged ice company unless he agreed not to cooperate with the government, and that Arctic Glacier told other packaged ice companies not to hire him. These actions by Arctic Glacier (and its co-conspirators[8]) directly affected Mr. McNulty in the form of lost past and future earnings.

[8] *See also United States v. Thorpe*, 166 F.3d 1216, 1998 WL 738624, at *8 (6th Cir. 1998) (table) ("It is well settled that an individual is liable for all acts of his coconspirators[.]").

### 2. Because Mr. McNulty Would Not Have Suffered Financial Losses "But For" Arctic Glacier's Crime, He Was *Directly* Harmed By the Crime Under the CVRA.

Because Mr. McNulty would not have been harmed "but for" Arctic Glacier's crime and because the loss was not too attenuated, he suffered "direct" harm from his crime within the meaning of that word in the CRVA. This Sixth Circuit has broadly interpreted the phrase "directly and proximately" harmed as meaning "but for" harm. *United States v. Hunt*, 521 F.3d 636, 648 (6th Cir. 2008). In *Hunt*, this Court stated: "[b]ecause [the victims] would not have paid for [certain costs] *but for* the [defendant's fraudulent conduct], [defendant] was the direct and proximate cause of the harm suffered by those [victims]." 521 F.3d at 648 (emphasis added); *accord United States v. Sosebee*, 419 F.3d 451, 459 (6th Cir. 2005) ("*But for* her continuing concealment of the losses being incurred by [the victim], those losses might have been avoided altogether . . . . We have no hesitation in concluding that [defendant]'s misprision of felony involved in this case was a direct and proximate cause of some or all of the victim's losses, even if it was not the sole cause.").[9]

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[9] Similar statements can be found in *United States v. Vaknin*, 112 F.3d 579, 589 (1st Cir. 1997) (interpreting MVRA victim provision to require "but for causation" and a "causal nexus between the conduct and the loss [that] is not too attenuated"); *United States v. Checora*, 175 F.3d 782, 795 (10th Cir. 1992) (interpreting MVRA victim provision to find that sons of murder victim were "victims"; "[t]hey have been directly and proximately harmed as a result of their father's death because they have lost, among other things, a source of financial support").

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. For example, in *United States v. Birdsong*, 330 Fed. Appx. 573, 587 (6th Cir. 2009), the defendant was convicted of possession of a firearm by a convicted felon, but was required by the trial court to pay restitution to an individual whose firearm he had stolen. *Id.* The Sixth Circuit rejected defendant's argument that there was no "official victim" of the crime of possession of a firearm, and affirmed the restitution award, relying on and citing with approval *United States v. Donaby*, 349 F.3d 1046 (7th Cir. 2003). *Id.*

In *Donaby*, the defendant robbed a bank, then fled. The police engaged in a high-speed pursuit in which a police vehicle was damaged before defendant was captured. The district court awarded restitution to the police department for the damage to the car, and the Seventh Circuit affirmed.[10] Interpreting the "direct and

[10] A similar situation arose in *United States v. Washington*, 434 F.3d 1265 (11th Cir. 2006), where the defendant committed an armed bank robbery. During the escape from that robbery, defendant damaged a police car and property of a condominium association. In affirming a restitution award to the police department and the association, the court explained that "[a]lthough flight is not an element of bank robbery, its harm may directly and proximately result from the robbery." *Id.* at 1268. Because the bank robber's "flight was causally related to the bank robbery," restitution was proper. *Id.* at 1269. The court went on to explain that the MVRA contains a "broad definition of 'victim'" because it allows restitution to those "directly and proximately harmed *as a result* of the commission of" a federal offense. *Id.* (emphasis in original). The CVRA contains the same

proximate cause" language at issue here, the Seventh Circuit explained that "[b]ut for the robbery, it is certain that this particular chase would not have occurred." *Id.* at 1053. Moreover, the court explained that direct-and-proximate harm is *not* limited "to the elements of the offense. . . . Thus, while fleeing the bank is not an element of bank robbery, the damage to [the police department] was a direct and proximate consequence of the specific conduct involved in robbing the bank." *Id.* at 1054. Because the chase was a "direct and foreseeable consequence of robbery," *id.* at 1055, the police department was a victim of the crime entitled to restitution.

Similarly, in *United States v. Garcia-Castillo*, 127 Fed. Appx. 385 (10th Cir. 2005), under facts analogous to those here, the Tenth Circuit held that individuals who were harmed in attempting to stop the underlying crime are considered "victims" of each co-conspirator, even though they were not the intended victims of the crime of conviction. In *Garcia-Castillo*, defendant Garcia-Castillo and his co-conspirators attempted to rob a train near the Mexican border. *Id.* at 387. One of Garcia-Castillo's co-conspirators, Eduardo Calderon, fled to the border, where Calderon was pulled through a hole in the border fence by five or six men on the Mexican side. *Id.* The men also pulled two law enforcement agents through the fence and beat them with

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broad language as the MVRA. *See* 18 U.S.C. § 3771(e) (defining victim as "a person directly and proximately harmed *as a result* of the commission of a Federal offense") (emphasis added).

their fists, rocks, and bricks. *Id.* Defendant Garcia-Castillo argued that he could not be held liable for restitution to the agents who were injured in Calderon's escape attempt, as he was not involved in the assault and such injuries were not foreseeable. *Id.* at 388. The court rejected this argument, finding that the agents were victims of Garcia-Castillo because "[t]he conspiracy was the direct cause of the agents' injuries," the injuries "flowed from the conspiracy," and it was "foreseeable that during a criminal act such as [a conspiracy to steal merchandise from a train], law enforcement agents could confront and seek to apprehend the thieves, and that bodily harm could result from the encounter." *Id.* at 389.

Further, *United States v. Hackett*, 311 F.3d 989 (9th Cir. 2002), involved the girlfriend of a methamphetamine dealer placing a jar of his chemicals on a hotplate, triggering an explosion that produced a fire that burned down a house. *Hackett* held that the insurance company that insured the house was a "victim" of his narcotics trafficking offense. *Hackett* reasoned that:

> [T]he conduct underlying the offense of conviction must have caused a loss for which a court may order restitution. . . . Any subsequent action that contributes to the loss, such as an intervening cause must be directly related to the defendant's conduct.

*Id.* at 992-93. Applying this standard, *Hackett* found that the insurance company was entitled to restitution because the loss from the storing and subsequent explosion of the dangerous chemicals was directly related to the defendant's drug trafficking crime.

*Id.* at 993.

Here, the connection between Mr. McNulty's losses and the crime is closer than in *Donaby*, *Garcia-Castillo*, and *Hackett*. In each of those cases, unlike here, the victims were unknown to the defendant, and the defendant did not intend to cause harm to the victims. As in *Garcia-Castillo*, "[t]he conspiracy was the direct cause of" Mr. McNulty's injuries," his injuries "flowed from the conspiracy," and it was "foreseeable" that someone could seek to stop the conspiracy and inform authorities, and that financial harm to that individual could result. 127 Fed. Appx. at 389.

### 3. The District Court's Conclusion that Only Customers Could Be Crime Victims is Plainly Incorrect.

Without addressing or distinguishing the foregoing authorities, several of which were cited by Mr. McNulty during the hearing, the district court determined that only customers were victims because the crime of conviction was a customer allocation conspiracy. (Record Entry No. 46, hr'g tr. 117:2-4, 8-9, 17 ("The Court determines the victims of the offense in this case were the customers of the conspirators located in the southern . . . Michigan and Detroit, Michigan area. . . . The offense of conviction charges a conspiracy to allocate packaged ice customers . . . . Mr. McNulty was an employee of defendant, not a customer.")).

But courts have held that victim status is not limited to those whose identity

constitutes an element of the offense or those who are intended targets of the crime:

> The CVRA . . . does not limit the class of victim 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 [he] may not have been the target of the crime, as long as [he] suffers harm as a result of the crime's commission.

*In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008); *see also United States v. Battista*, 575 F.3d 226, 231-32 (2d Cir. 2009) ("Although [defendant] did not defraud the NBA directly, we conclude that the district court properly characterized the NBA as a 'victim'" where the defendant used "nonpublic information solely belonging to the NBA (conveyed to him by the co-conspirators) to place illegal wagers on [NBA] games."); *United States v. Blair-Torbett*, 230 Fed. Appx. 483, 490 (6th Cir. 2007) (rejecting defendant's argument that restitution was only appropriate as to victims named in the indictment).

Similarly, courts "have approved 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) (citing *United States v. Rice*, 38 F.3d 1536, 1542 (9th Cir. 1994); *United States v. Koenig*, 952 F.2d 267, 275-75 (9th Cir. 1991)).

Because the district court failed to consider the CVRA's broad definition of "victim," it clearly erred and the case should at least be remanded for further proceedings to have the court make the proper evaluation of the Mr. McNulty's claims under the CVRA's controlling legal standard. *Cf.* 18 U.S.C. § 3771(b)(1) ("The reasons for any decision denying relief under this chapter shall be clearly stated on the record.").

But no remand is necessary to resolve this case, as Mr. McNulty's status as a "victim" is obvious. The district court apparently failed to recognize that a single crime can result in more than one category of "victims" under the CVRA. In concluding that only customers were the victim of the conspiracy, the district court deviated from cases such as *Birdsong*, *Donaby*, *Garcia-Castillo*, and *Hackett* that properly hold that a crime can harm multiple victims in various ways – including victims that are nowhere mentioned in the charging instrument. *See Birdsong*, 330 Fed. Appx. at 587 (holding that theft victim was a victim of crime of possession of firearm by a felon); *Donaby*, 349 F.3d at 1053-55 (holding that police department that suffered damage to police vehicle was a victim of bank robbery); *Garcia-Castillo*, 127 Fed. Appx. at 389 (holding that agents who were physically beaten in Mexico were victims of a train robbery in the United States); *Hackett*, 311 F.3d at 992-93 (holding that insurance company that insured damaged house was victim of crime of aiding and

abetting the illegal manufacture of methamphetamine).

All of these cases (and many others like them) stand for the general principle that courts must look at the full effects of a charged crime in determining whether someone is a victim. Because the clear and undisputed facts demonstrate that "but for" Arctic Glacier's conspiracy, Mr. McNulty would not have suffered financial losses, this Court should find that Mr. McNulty was directly harmed as a result of Arctic Glacier's crime.

### B. Mr. McNulty Was "Proximately" Harmed By Arctic Glacier's Conspiracy to Allocate Customers.

The CVRA's definition of "victim" also requires Mr. McNulty to show that he was "proximately" harmed as a result of Arctic Glacier's crime. 18 U.S.C. § 3771(e). The term "proximate" harm in the CVRA "encompasses the traditional . . . proximate cause analys[i]s," *In re Rendon Galvis*, 564 F.3d 170, 175 (2d Cir. 2009), and relates to "traditional [tort] standards," *In re Antrobus*, 519 F.3d 1123, 1126 (10th Cir. 2008) (Tymkovich, J., concurring) (citing *Restatement (Second) of Torts* in construing the CVRA). A harm is "proximately" caused by an action "'which, in natural and continuous sequence, unbroken by any efficient intervening cause, produce[s] injury, and without which the result would not have happened.'" *United States v. Hunter*, No. 2:07CR307, 2008 WL 53125, at *2 (D. Utah 2008) (quoting *Black's Law*

*Dictionary* definition of "proximate cause" as a basis for construing the CVRA's "victim" provision).

In construing the "directly and proximately harmed" language of the MVRA, the Tenth Circuit recently held that "an individual will be 'proximately harmed as a result of' the defendant's crime if either there are no intervening causes, or, if there are any such causes, if those causes are directly related to the defendant's offense." *United States v. Speakman*, __ F.3d __, 2010 WL 348033, at *6 (10th Cir. Feb. 2, 2010).

Here, there was no intervening cause of Mr. McNulty's financial losses. Arctic Glacier directly terminated and blackballed Mr. McNulty in furtherance of the conspiracy in an attempt to prevent him from disrupting the conspiracy. Mr. McNulty's lost earnings were directly related to the Arctic Glacier's conduct, and Arctic Glacier's conduct (acceded to by Arctic Glacier's co-conspirators) was the sole cause of his losses.

The conduct at issue occurred in the middle of the conspiracy to which Arctic Glacier pleaded guilty, both in terms of geography and time span – occurring in the Detroit, Michigan area beginning in 2005. *See* Record Entry No. 11, plea agreement (admitting to a conspiracy in the Detroit, Michigan area from 2001 to 2007). Nor can Arctic Glacier reasonably dispute that it could foresee that Mr. McNulty would suffer

lost earnings from Arctic Glacier's actions. In view of these facts, Mr. McNulty was "proximately harmed" by Arctic Glacier's crime.

### C. Mr. McNulty's Harms Were "As a Result Of" Arctic Glacier's Conspiracy.

The CVRA finally requires Mr. McNulty to show that his harms were "as a result of" Arctic Glacier's crime. 18 U.S.C. § 3771(e). As with the other elements of the "victim" definition, this fact is readily shown. Mr. McNulty's lost income resulted directly from Arctic Glacier's customer allocation conspiracy, and actions taken in furtherance of the conspiracy by Arctic Glacier and its co-conspirators. The chain of causation was immediate, direct, and indisputable.

Indeed, the connection between Arctic Glacier's offense and Mr. McNulty's losses is far tighter than, for instance, the connection in *Garcia-Castillo*. In *Garcia-Castillo*, law enforcement agents were injured when they attempted to stop conspirators from robbing a train. 127 Fed. Appx. at 387. The agents were not injured by Garcia-Castillo himself, or in attempting to apprehend Garcia-Castillo. *Id.* Rather, the agents were attempting to apprehend a co-conspirator, Calderon, and were attacked by a group of men on the Mexican side of the border who may or may not have been part of the conspiracy. *Id.* at 389 ("[W]e don't even know if the people who ended up injuring these agents were part of the conspiracy or just other people in

the area[.]"). Here, Mr. McNulty attempted to impede the conspiracy, and was directly harmed by Arctic Glacier in the course of Arctic Glacier's attempts to further the conspiracy and to avoid detection – not by third parties who were attempting to assist a co-conspirator, as in *Garcia-Castillo*. *Id.*

### D. The District Court Should Be Directed to Give Mr. McNulty an Opportunity to Exercise His Rights As a Victim Under the CVRA.

For all these reasons, the district court's conclusion that Mr. McNulty was not a "victim" of Arctic Glacier's crime was erroneous. The district court's resulting order that the CVRA does not protect Mr. McNulty should therefore be vacated and the writ should issue directing the district court to recognize Mr. McNulty as a "crime victim" with all accompanying rights under the CVRA, including restitution. *See Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) (finding a violation of the CVRA and remanding to the district court to give the victims an opportunity to exercise their rights).[11]

In addition to rights that Mr. McNulty will be entitled to exercise on his own behalf, the CVRA provides that "the Department of Justice . . . shall make [its] best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." 18 U.S.C. § 3771(c)(1). The Department of Justice did not make best

[11] If for any reason, however, this Court were to find some sort of factual dispute precludes granting immediate relief to McNulty, then at a minimum this Court

efforts to see that Mr. McNulty was accorded his rights below, including his right to full and timely restitution. *See, e.g.*, Record Entry No. 11, plea agreement at 11 ("[T]he United States agrees that it will not seek a restitution order[.]").

While this Court held that the petitioners in *In re Acker* had been afforded all their rights under the CVRA by the district court, including restitution (Order, *In re Acker*, No. 10-3159), the district court's ruling on restitution with respect to the *Acker* petitioners did not apply to Mr. McNulty. The district court determined that calculating the amount of restitution owed to *customers* such as the *Acker* petitioners would unduly complicate sentencing, and that it would therefore deny restitution to customers on that basis. (Record Entry No. 46, hr'g tr. 118:13-18). Specifically, the district court stated: "Allocation of customers, rather than price fixing, make quantifying damages difficult, if not impossible to determine." (*Id.* 118:16-18). By contrast, the difficulty of determining Mr. McNulty's lost wages was not addressed by the trial court. His lost wages would not be difficult to determine and would not delay sentencing. *Cf.* 18 U.S.C. § 3664(d)(5) (providing that a final determination of a victim's losses may be made up to 90 days after sentencing).

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should direct the district court to make further factual findings.

## III. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. MCNULTY WAS INELIGIBLE FOR RESTITUTION BECAUSE THE CRIME OF CONVICTION IS NOT LISTED IN 18 U.S.C. § 3663

As a victim under the CVRA, Mr. McNulty has the right to "full and timely restitution" as provided by law. In denying restitution to Mr. McNulty, the District Court cited the fact that Arctic Glacier's crime of conviction, a violation of 15 U.S.C. § 1, is not among the crimes enumerated under the VWPA, 18 U.S.C. § 3663, erroneously suggesting that there was no statutory basis for awarding restitution to Mr. McNulty. (Record Entry No. 46, hr'g tr. 117:19-23 (denying restitution to Mr. McNulty because "[t]he cou[n]t of conviction is a violation of . . . 15 United States Code, Section 1, which is not a listed offense under 18 United States Code Section 3663 (a)(1)(A).")).

But 18 U.S.C. § 3563(b)(3) provides that a court may order restitution as a term of probation, and that such a restitution award is "not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)," which limit restitution to certain enumerated crimes:

> The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant . . . (2) make restitution to a victim of the offense under section

> 3556 (*but not subject to the limitation of section 3663 (a) or 3663A(c)(1)(A)*).

18 U.S.C. § 3563(b)(2) (emphasis added).

Pursuant to the authorization provided by 18 U.S.C. § 3563(b)(2), the U.S. Sentencing Guidelines provide that restitution *shall* be imposed as a mandatory term of probation:

> (a) In the case of an identifiable victim, the court *shall* --
>
> . . . .
>
> (2) impose a term of probation or supervised release with a condition *requiring restitution* for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

U.S.S.G. §§ 5E1.1, 8B1.1 (emphasis added).

Because Mr. McNulty is an identifiable victim, and the Court sentenced Arctic Glacier to probation, the Sentencing Guidelines mandated that the probation include "a condition requiring restitution for the full amount of the victim's loss." *Id.*

As the Sixth Circuit has held, "where restitution is imposed as a condition of probation, the provisions of § 3563(b)(3), the Probation Statute, override the limitations of § 3663." *United States v. Lexington Wholesale Co.*, 71 Fed. Appx. 507, 508 (6th Cir. 2007) (citing *Gall v. United States*, 21 F.3d 107 (6th Cir. 1994));

*accord* U.S.S.G. §§ 5E1.1, 8B1.1, Background Comment ("For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.").

The U.S. Sentencing Guidelines give priority to restitution over fines, stating that "[i]f a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution." U.S.S.G. §§ 5E.1.1(c); 8B1.1(c); *see also* U.S.S.G. § 8C3.3 ("The court shall reduce the fine . . . to the extent that imposition of such fine would impair [defendant's] ability to make restitution to victims."); § 8D1.4(b)(4) ("The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.").

In addition, 18 U.S.C. § 3553(a)(7) provides that the court, "in determining the particular sentence to be imposed, shall consider . . . the need to provide restitution to any victims of the offense."

Thus, the District Court erred in assuming that there was no statutory basis to award restitution to Mr. McNulty, and in imposing a fine but not restitution. The District Court should be ordered to reconsider the denial of restitution to Mr. McNulty.

## CONCLUSION

Mr. McNulty was directly and proximately harmed as a result of defendant Arctic Glacier's crime of conspiracy to unreasonably restrain trade. The writ should therefore issue to direct the district court to recognize Mr. McNulty as a "crime victim" with rights under the CVRA, and to reconsider whether restitution should be awarded.

Dated: February 23, 2010

Respectfully submitted,

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Counsel for Martin McNulty

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)**

The undersigned certifies that this Petition complies with the limitations contained in FRAP 21 and FRAP 32(a)(7)(B) because it contains 8,855 words, fewer than the 14,000-word limit for a 30-page document, according to the Microsoft Word software that counsel employs.

Daniel L. Low

## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2010, the foregoing Petition for a Writ of Mandamus Pursuant to the Crime Victim's Rights Act, 18 U.S.C. § 3771(d)(3) was served upon the following:

*Via E-mail and U.S. Mail:*

Kevin C. Culum, Esq.
Trial Attorney
United States Department of Justice – Antitrust Division
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*Via Federal Express:*

Honorable Herman J. Weber
United States District Judge
801 Potter Stewart Federal Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

Daniel L. Low

# Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| UNITED STATES,<br><br>Plaintiff,<br><br>v.<br><br>ARCTIC GLACIER INTERNATIONAL, INC.,<br><br>Defendant. | Crim. No. 1:09-cr-00149-HJW |
| UNITED STATES,<br><br>Plaintiff,<br><br>v.<br><br>KEITH CORBIN,<br><br>Defendant. | Crim. No. 1:09-cr-00146-HJW |

**DECLARATION OF MARTIN McNULTY IN SUPPORT OF REQUEST FOR RESTITUTION**

Pursuant to 28 U.S.C. § 1746, I, Martin G. McNulty, hereby declare as follows:

1. I am an individual seeking restitution in the above-captioned cases as a victim of a conspiracy involving Defendant Arctic Glacier International Inc. ("Arctic Glacier"), Defendant Keith Corbin, Home City Ice Company, Inc. ("Home City"), and others.

2. I was employed in the packaged ice industry from approximately 1991 to 2005.

3. I started as a sales representative at Great Lakes Ice. I was promoted in less than one year to sales manager. In 1994, I was promoted to Vice President of Sales. I expanded sales to Sam's Club and other significant corporate accounts.

4. In 1994, Great Lakes Ice was acquired by Party Time Ice ("Party Time").

5. I increased Party Time's sales significantly, including with CVS stores. In 1996, I was promoted from Sales Manager to Vice President of Sales. In 1997, I was offered an equity stake in the company. In or around 2002, I received an award from Wal-Mart for my sales efforts.

6. In 2004, Party Time's President, Charles Knowlton, told me that, "Everyone knows that you are the best corporate salesman in the ice industry."

7. In October 2004, Arctic Glacier, Inc. ("Arctic Glacier") announced that it would acquire Party Time. Arctic Glacier offered me a five-year contract to stay on at Arctic Glacier. Arctic Glacier executive Keith Corbin called me numerous times to encourage me to accept the offer.

8. Mr. Corbin told me that there was a strong possibility that I would be named Vice President of Sales at Arctic Glacier after his retirement. My understanding is that Mr. Corbin was approximately 70 years old, and retired from that position sometime in or around 2006.

9. At various times beginning in or around 1997, Party Time Ice distributors Dave Taylor, Geoff Lewandowski, Morgan McConnell, Sue Knowlton, and Bruce Brown informed me that they were aware of meetings between Party Time Ice executives Chuck Knowlton and/or Steve Knowlton, and Home City Ice executives Tom Sedler and/or Lou McGuire involving customer allocation and bid-rigging.

10. While I was at Party Time, I had several conversations with Charles Knowlton regarding the conspiracy in which I told him that I would not participate. In 2004 or 2005, he told me that if I did not participate in the conspiracy, I would not be able to get a job at other packaged ice companies.

11. In November 2004, I presented my salary expectations to Keith Corbin at Arctic Glacier. He informed me that my expectations were high, and that I did not have the option of going to work for Home City because of their relationship with Arctic Glacier. He later told me that Reddy Ice also would not hire me because of their relationship with Arctic Glacier. Mr. Corbin explained that most of Michigan was allocated to Arctic Glacier.

12. In or around November 2004, Party Time employee Steve Knowlton told me that his father, Charles Knowlton, wanted me to save an account that had contacted Home City about switching suppliers. Home City had called Party Time about the account to encourage them to make efforts to keep it. I told him that the collusion was inappropriate and that I would not participate.

13. In late 2004 or January 2005, Keith Corbin told me that Arctic Glacier was colluding with competitors, and that the collusion extended to most of the United States and all of Canada. For example, Mr. Corbin stated that Arctic Glacier had "backed away" from purchasing an ice company in Nevada so that Arctic Glacier and Reddy Ice would not be in direct competition. Mr. Corbin also stated that he had recently met with Tom Sedler and Lou McGuire from Home City to discuss details of the market allocation conspiracy, including who would control certain stores. Mr. Corbin indicated that if I refused to cooperate in the conspiracy, he would ensure that Home City would not hire me.

14. From my conversations with industry insiders, including conversations with Charles Knowlton and various distributors at Party Time Ice, I understand that packaged ice companies are typically acquired at a multiple of between 2 and 2.5 times annual sales.

15. On or around January 27, 2005, shortly after I told Mr. Corbin that I would not participate in the unlawful conspiracy, Arctic Glacier fired me.

16. In March 2005, I contacted governmental authorities regarding the conspiracy.

17. I told Geoff Lewandowski about my plans to contact the government, and shortly thereafter, on or around March 28, 2005, I received a call from Fiaz Simon, who I had previously worked with at Great Lakes Ice. Mr. Simon said that he was calling on behalf of Charles Knowlton of Arctic Glacier, which wanted to rehire me at a higher salary – potentially up to $200,000 a year. I declined to meet with him without my lawyer present. Mr. Simon told me that they would not be interested in a meeting that included my lawyer.

18. During 2005 and 2006, I met with the Department of Justice and Federal Bureau of Investigation numerous times. I provided information about the conspiracy, tape-recorded telephone calls, and wore a recording device to an in-person meeting.

19. In 2005, I applied to several packaged ice companies, including Home City. Despite my extensive experience and my prior success as a packaged ice sales executive, none of the packaged ice companies would hire me.

20. In 2005 or 2006, I spoke with Geoff Lewandowski. On behalf of Arctic Glacier, Mr. Lewandowski asked me if I would consider returning to Arctic Glacier at a higher salary – plus an earn out – in return for ceasing communications with federal authorities.

21. In early 2006, I met with Joseph Riley, President of Tropic Ice, about potential employment. Mr. Riley stated that he had spoken with Jim Forsberg of Arctic Glacier, and they

had agreed not to compete with each other on price. Mr. Riley also stated that I was being blackballed from the industry by Chuck Knowlton, a senior manager at Arctic Glacier. Mr. Riley did not offer me a job.

22. Since being fired from Arctic Glacier, I have been unemployed for a number of months and have been unable to find a job in the packaged ice industry. On average, my earnings have been approximately $42,000 per year during that time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of January, 2010.

Martin McNulty
Victim