UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE PACKAGED ICE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTIONS	Case Number: 08-MD-01952 Honorable Paul D. Borman

DIRECT PURCHASER PLAINTIFFS' MOTION TO COMPEL THE U.S. DEPARTMENT OF JUSTICE TO PRODUCE CERTAIN TAPE RECORDINGS AND VERBATIM TRANSCRIPTS THEREOF

Direct Purchaser Plaintiffs ("plaintiffs"), through their counsel, move this Court to overrule objections to a subpoena served upon the U.S. Department of Justice, Antitrust Division ("D.O.J."). Once the criminal investigation of the packaged ice industry concluded, plaintiffs served a subpoena upon the D.O.J. to produce certain consensual tape recordings involving defendants in this lawsuit which the D.O.J. has in its possession. The D.O.J. did not dispute that its criminal investigation and proceedings have concluded, but nevertheless objected to the subpoena *in toto* on the grounds of what it terms the "investigatory files and law enforcement privilege." Plaintiffs' subpoena and the D.O.J. objections are attached hereto verbatim as Exs. B and C respectively.

Pursuant to Local Rule 7.1, plaintiffs determined that the D.O.J. would not consent to this motion. Plaintiffs' counsel have conferred with the D.O.J. and explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought.

In support of this motion, plaintiffs rely upon the accompanying memorandum of law, and attachments thereto, which are incorporated by reference as though fully set forth herein.

DATED: March 9, 2011

Respectfully submitted,

/s/ *Joseph C. Kohn*

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STATEMENT OF ISSUES PRESENTED

1. Whether the D.O.J.'s objections to the direct purchaser plaintiffs' subpoena should be overruled, and the tape recordings and verbatim transcripts should be Ordered to be produced for use in this civil litigation, where the controlling decision, *United States v. Leggett & Platt, Inc.,* 542 F.2d 655, 658 n.4 (6th Cir. 1976), *cert. den.*, 430 U.S. 945 (1977), holds that these kinds of "factual materials" are not privileged at all, and assuming *arguendo* they are, that any such qualified privilege should yield to plaintiffs' need for the materials since the criminal prosecution has ended.

CONTROLLING AND MOST APPROPRIATE AUTHORITIES

United States v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976), *cert. den.*, 430 U.S. 945 (1977)

In re Bankers Trust Co., 61 F.3d 465 (6th Cir. 1995)

In re High Fructose Corn Syrup Antitrust Litigation, 216 F.3d 621, 624 (7th Cir. 2000).

INTRODUCTION

The U.S. D.O.J., Antitrust Division, conducted a criminal investigation into antitrust violations in the packaged ice industry. The investigation focused upon the three largest companies that manufacture and sell packaged ice in the United States, namely Home City, Arctic Glacier, and Reddy Ice. The D.O.J. obtained guilty pleas from Home City and Arctic Glacier (and/or their former officers).[1] Those persons were criminally sentenced in 2010. On October 29, 2010, Reddy Ice published a news release that the D.O.J. had decided not to take any action against it. (Ex. A hereto). Hence, the criminal investigation concluded in late October, 2010. The D.O.J. does not dispute this proposition.

On January 24, 2011, direct purchaser plaintiffs ("plaintiffs") served a subpoena pursuant to F.R.Civ.P. 45 upon the D.O.J. for production of certain tape recordings in its possession (and verbatim transcripts of those recordings if they exist). The subpoena is Ex. B hereto. The subpoena was tailored to specific conversations involving Home City, Arctic Glacier, or Reddy Ice that are directly relevant to this litigation. Plaintiffs know of these tape recordings from statements that were made on the public record at the criminal sentencing of Arctic Glacier, and through plaintiffs' settlement agreement with Home City, which contains a cooperation provision. However, neither Home City, nor anyone else except the D.O.J., possesses the tape recordings themselves, or verbatim transcripts. Hence a subpoena upon the D.O.J. was required to obtain them. On February 4, 2011, the D.O.J. objected, stating that it

[1] *See*: *U.S. v. The Home City Ice Company,* 1:07-cr-140 (S.D.Ohio); *U.S. v. Keith Corbin,* 1:09-cr-146 (S.D.Ohio); *U.S. v. Frank G. Larson,* 1:09-cr-147 (S.D.Ohio); *U.S. v. Gary D. Cooley,* 1:09-cr-148 (S.D. Ohio); *U.S. v. Arctic Glacier International Inc.,* 1:09-cr-149 (S.D.Ohio)

would refuse to produce any materials in response to the subpoena, largely on the basis of what it termed the "investigatory files or law enforcement privilege." A copy of the objection is Ex. C.

Plaintiffs now move this Court to overrule those objections and direct that the materials sought by the subpoena be produced. The controlling decision, *United States v. Leggett & Platt, Inc.,* 542 F.2d 655, 658-59 and n.4 (6th Cir. 1976), *cert. den.*, 430 U.S. 945 (1977), holds that the investigatory files/law enforcement privilege does not apply at all to the "factual materials" sought by plaintiffs' subpoena, which are sought solely for their intrinsic evidentiary value (and not for any use the D.O.J. made of them). Rather, "the privilege protects only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data, and surveys in government files." *Id.* at n. 4. Alternatively, assuming *arguendo* the privilege somehow applied, *Leggett* holds that the privilege is qualified, and must yield to plaintiffs' need in the circumstances presented here.[2]

[2] As a threshold procedural matter, the subpoena was issued from this Court, is returnable in Detroit, and seeks tape recordings that are physically located in the D.O.J. Antitrust Division office in Cleveland, Ohio. The subpoena was properly issued, because F.R.Civ.P. 45 permits a subpoena to be served "outside [the] district but within 100 miles of the place specified for the…production or inspection." Fed.R.Civ.P. 45(b)(2). The straight line distance from Cleveland to Detroit is approximately 90 miles. *See http://www.timeanddate.com/worldclock/distances.html?n=77*. Courts use this straight line method for purposes of Fed.R.Civ.P. 45's "100 mile" subpoena range. *See* 9A Wright & Miller, *Fed. Prac. & Proc. Civ. § 2461 (3d ed.)*("Subpoena for Hearing or Trial"), cases at note 5. The Sixth Circuit recently cited this line of cases with approval in *Senzarin v. Abbott Severance Pay Plan for Employees of KOS,* 361 Fed.Appx. 636 n. 3 (6th Cir. Jan. 11, 2010), stating that: "Straight line earth-arc distance provides a reasoned method for calculating the miles between Plaintiff's workload center and her principal residence." The D.O.J. did not object to the subpoena on this basis. Exhibit C.

I. FACTUAL BACKGROUND

A. Allegations in This Lawsuit

This lawsuit alleges that Home City, Arctic Glacier and Reddy Ice colluded to fix prices and divide and allocate customers and territories in selling packaged ice to the class of direct purchasers in the United States. *See* the operative amended complaint, docket no. 198.

Arctic Glacier and Reddy Ice filed motions to dismiss the complaint. By Opinion and Order entered July 1, 2010, this Court denied those motions. Docket no. 260. In doing so, this Court rejected defendants' arguments that no viable conspiracy had been pled (as Reddy Ice contended) or that any conspiracy should be limited just to the Detroit/eastern Michigan region (as Arctic Glacier argued). This Court noted that the complaint contained allegations of antitrust violations throughout the U.S.:

> An example of the agreement to geographically divide customers and markets was the arrangement under which Reddy Ice, which formerly had a significant presence in the state of California, with five facilities generating 10% of its revenue, curtailed selling its Packaged Ice in California, thereby allowing Arctic Glacier to sell in the California market free of competition from Reddy Ice. As part of this agreement, Arctic Glacier agreed not to compete in Arizona. (CAC ¶¶ 28-29.) Similarly, as part of the agreement between Arctic Glacier and Reddy Ice, Arctic Glacier withdrew from competing in Oklahoma and New Mexico, while maintaining production and distribution facilities in the neighboring states of Kansas and Texas, allowing Reddy Ice to establish a presence in Oklahoma and New Mexico, free of competition from Arctic Glacier. (CAC ¶ 30.)

(Docket No. 260, p. 5). This Court also noted that Reddy Ice had suspended Ben Key after an internal investigation. "[O]n September 15, 2008, Reddy Ice announced that it had suspended Ben D. Key, the company's Executive Vice President of Sales and Marketing finding that Mr. Key had 'likely violated Company policies and is associated with matters under investigation.' (CAC ¶¶ 33-35.)". *Id.* p. 6.

Discovery in the present case has now begun. On November 16, 2010, plaintiffs participated in the deposition of Keith Corbin, Arctic Glacier's former officer, in Nashville, TN. (This deposition was ordered, upon defendants' motion, because of Mr. Corbin's ill health). That is the only deposition that has occurred to date. Defendants produced documents related to that deposition. The parties are now engaged in more general discovery of interrogatories and document requests, to be followed by depositions.

B. Description of the Tape Recordings

Plaintiffs' subpoena sought tape recordings in the D.O.J.'s possession that can be divided into three categories.

(1) Tape Recordings Made by Home City

Plaintiffs' settlement agreement with Home City contains a "cooperation" clause. (Docket no. 206-3, subpart H). Pursuant to those obligations, plaintiffs learned of the existence and general description of the following taped telephone conversations which Home City consented to having the F.B.I. record. Neither Home City nor its counsel had or have either the tape recordings themselves, or any verbatim transcripts of them. Rather, the D.O.J. took and has custody of the recordings. Hence, the only source from which they can be obtained is the D.O.J. Plaintiffs subpoenaed the following eleven (11) tape recorded conversations, and any verbatim transcripts of them that exist (See Ex. B hereto, description attached to subpoena):

(a) A recording of 9/25/07 between Keith Corbin of Arctic Glacier and Ted Sedler of Home City in which, inter alia, they discussed settling issues with Ben Key of Reddy Ice and discussed dividing territories with Reddy Ice in Texas, Kansas or Oklahoma.

(b) A recording of 8/17/07 in which Greg Cooley of Arctic Glacier said that Arctic Glacier and Reddy Ice have worked together and co-existed in Texas.

(c) A recording of 11/17/07 in which Greg Snyder of Arctic Glacier explained that he and Ben Key had traded customers in Kansas and that Arctic Glacier and Reddy had allocated territories after acquisition of Shepards.

(d) A recording of 11/5/07 between Greg Geiser of Home City and Ray Torteriesse in which they confirmed prior meetings with Lou McGuire; indicated that Bob Nagy of Arctic Glacier had pricing conversations with Kerry Chamberlin of Happy Ice; stated that Happy Ice had been causing problems; and that Arctic worked with Holiday Ice to broker peace.

(e) A recording of 11/5/07 between Ben Key of Reddy Ice and Ted Sedler of Home City regarding Roanoke, VA.

(f) A recording of 12/11/07 between Ted Sedler of Home City and Greg Cooley of Arctic Glacier regarding Lubbock, TX, Carlisle, PA, and Phoenix.

(g) Three recordings, of 2/20/08, 2/22/08 and 2/26/08 respectively, between Ted Sedler of Home City and Ben Key of Reddy Ice regarding Tennessee and Kentucky.

(h) A recording of 8/24/07 in which Greg Cooley of Arctic Glacier confirmed past practices with Home City's Lou McGuire.

(i) A recording of 8/24/07 in which Frank Larson confirms that Arctic Glacier wants to continue working with Home City.

(2) Tape Recordings Made by Mr. Mowrey

At the criminal sentencing of Arctic Glacier on February 11, 2010, Mr. Mowrey stated on the public record that he met with the FBI in September, 2005, and agreed to make tape recorded conversations. "I made phone calls, like I say, in a number of states. I talked to 20 different ice companies, and there's probably tape recordings on maybe ten different ice companies." (Ex. D hereto, tr. pp. 38-40). "I contacted at this point Chuck Knowlton, who was an Arctic Glacier employee, and I tape-recorded his conversation for the Justice Department." (*Id.,* p. 39). Mr. Knowlton's subsequent written statement "contradicted what he said on the tapes." (*Id.,* p. 44).

Plaintiffs have limited their subpoena to those tape recordings made by Mr. Mowrey which mention or relate to present or former employees of Reddy Ice, Arctic Glacier, or Home City. Exhibit B, attachment to subpoena.

(3) Tape Recordings Made by Mr. McNulty

In the same criminal sentencing transcript, the attorney for Mr. McNulty represented that "Mr. McNulty, in fact, refused to go along with the conspiracy and he was fired by Arctic Glacier. He went to the Department of Justice and he cooperated with the Department in investigating the criminal conspiracy. He made tape recordings and assisted them." (Ex. D, tr. p. 30). Plaintiffs have limited their subpoena to those tape recordings made by Mr. McNulty which mention or relate to present or former employees of Reddy Ice, Arctic Glacier, or Home City. Exhibit B, attachment to subpoena.

II. ARGUMENT

A. The Tape Recordings and Transcriptions Are Highly Relevant

It cannot be seriously contended that the tape recordings described above are not highly relevant to the present action (or in the more precise language of Fed.R.Civ.P. 26(b)(1), that the tape recordings are not "calculated to lead to the discovery of admissible evidence.") The D.O.J.'s objections do not so contend. (Ex. C).

Under the antitrust laws, each co-conspirator is jointly and severally liable for any combination or conspiracy in which it participated. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). Any evidence of understandings and agreements between and among Home City, Arctic Glacier, and Reddy Ice are probative to this lawsuit.

The tape recordings and verbatim transcripts are not only "calculated to lead to the discovery of admissible evidence." Rather, these tape recordings will likely themselves

constitute among the most probative evidence, both at depositions and at trial. To play for the jury actual telephone calls that were made by, or which mention, officers or employees of these three companies is among the best, most probative, and most persuasive, form of evidence. Many of these tape recordings appear to contain admissions under Fed.R.Evid. 801.

They are also important to impeach witnesses, and to refresh recollections, in the forthcoming deposition program. To illustrate, the first recording above is described as follows:

> A recording of 9/25/07 between Keith Corbin of Arctic Glacier and Ted Sedler of Home City in which, inter alia, they discussed settling issues with Ben Key of Reddy Ice and discussed dividing territories with Reddy Ice in Texas, Kansas or Oklahoma.

At his deposition in the present case, Mr. Corbin (the only witness deposed to date) was asked by plaintiffs' counsel if he had had any telephone conversations with Mr. Sedler. Mr. Corbin testified that he had only two conversations, both of which were limited to the following subject matter: "He [Mr. Sedler] wanted some help on getting a new replacement for, let's see, a new sales manager…He wanted to see if I had some recommendations or could help him find somebody." (Ex. E., pp. 118-119). Mr. Corbin had no memory of any discussion with Mr. Sedler of any conversation that mentioned Ben Key of Reddy Ice:

> Q. Do you remember telling Mr. Sedler during a call that Reddy Ice and Arctic Glacier had divided territories in Texas, Kansas and Oklahoma?
>
> [3 objections by defense counsel]
>
> A. No.

(Ex. E., p. 121). Clearly, the actual recorded telephone conversation itself, and a verbatim transcript of it, could have been used to refresh Mr. Corbin's memory. It can still be used to establish admissions under F.R.Evid. 801, and can be used at trial to impeach Mr. Corbin's testimony.

B. Any "Governmental Privilege" Is Inapplicable Or Ended With the Conclusion of the Criminal Investigation

The major objection that the D.O.J. has launched to plaintiffs' subpoena is what it terms the "investigatory files or law enforcement privilege." (Ex. C, p. 2). It should be noted that plaintiffs seek only the actual evidence itself , the tape recordings of conversations and any verbatim transcripts in existence. Plaintiffs do not seek any internal D.O.J. memoranda or work product analyzing these tape recordings, or analyzing how the D.O.J. believed the statements on the tape recordings related to other evidence which the D.O.J. amassed.

(1) The Cases On the Qualified "Law Enforcement" Privilege Support Disclosure

At the threshold, the "law enforcement and investigative files privilege" upon which the D.O.J. relies is, like any privilege, in derogation of the search for truth and "everyman's evidence," and must therefore be narrowly construed. As the Supreme Court has made clear:

> [The public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege. [citations omitted].
>
> …Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.
>
> … 'Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'

United States v. Nixon, 418 U.S. 683, 710 and n. 18 (1974) (emphasis supplied).

The "privilege" at issue here was part of a proposed Federal Rule of Evidence 509(a)(2)(B), the "investigative files" privilege, that was not enacted. "No such privilege was known to common law and some states still do not recognize it." Wright & Graham, *Federal Practice & Procedure, Federal Rules of Evidence,* §5681 ("Rejected Rule 509 – Governmental

Privileges, Official Information, Investigative Files Privilege") (West Online). Indeed, Wright & Graham state that "the Supreme Court seems to have rejected the privilege by implication" in *Roviaro v. U.S.*, 353 U.S. 53 (1957). *Id.*, text at n. 7.

However, federal courts have the power under F.R.Evid. 501 to develop and articulate new privileges. Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to continue the evolutionary development of testimonial privileges." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996); *United States v. Weber Aircraft Corp*., 465 U.S. 792, 804, n. 25 (1984) ("Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them").

To the knowledge of the undersigned, the only Sixth Circuit decision that has considered the privilege at issue is *United States v. Leggett & Platt, Inc., supra,* 542 F.2d 655 at 658-59 and n. 4. In that case, the D.O.J., Antitrust Division, brought a civil antitrust action against Leggett & Platt, to require divestiture of assets in two box springs companies. Leggett sought production from the D.O.J. of all investigations it had ever made of any acquisitions in the box spring industry. The district court ordered production, over the D.O.J. assertion of privilege. When the D.O.J. refused to comply, its complaint was dismissed without prejudice, and it appealed.

The Sixth Circuit held that Leggett's need for these documents was irrelevant to show selective enforcement, because that was no defense. *Id.* at 658. However, the files might still be relevant because the files could contain "factual materials, such as surveys and economic analyses of the industry, and the government analysis." *Id.* at 658.

Turning to what it termed the "qualified governmental official information privilege," the Sixth Circuit held that that this privilege does **not** protect **factual materials** contained in D.O.J. files**:**

> Given that the privilege is designed to encourage candid suggestions, advice, recommendations, and opinions, **the privilege protects only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data, and surveys in government files.** [citations omitted]. The government's appellate brief implicitly acknowledges the inapplicability of governmental privilege to 'purely factual materials.' Government brief 13.

542 F.2d at 658, n. 4 (emphasis supplied). Here, plaintiffs are not seeking any D.O.J. "suggestions, advice, recommendations or opinions", and instead are seeking only **"**factual materials" which are contained in the D.O.J. files. Hence, under *Leggett,* there is no governmental privilege as to these tape recordings and transcripts at all.

Assuming *arguendo* these materials were nevertheless deemed "privileged," *Leggett* instructed district courts to use a balancing test as to the qualified privilege. *Id.*:

> To override the government interest in secrecy the court must find that LP's objective, rather than its subjective need for the documents overrides the governmental interest in secrecy. [citations omitted]. …
>
> In assessing LP's need, the district court should consider, *inter alia,* the importance of the documents to LP's defense [citations omitted] and the availability elsewhere of the information contained in the documents [citations omitted].
>
> In assessing the governmental interest in secrecy, the district court should remember that the requested files are of completed investigations. Often courts have recognized that there is less government interest in secrecy in completed, than in ongoing, investigations. [citation omitted].

Id. at 658-659.

This *Leggett* balancing test clearly favors enforcing the subpoena in the present case. Plaintiffs' "objective" need for the tape recordings is high, for reasons set forth above. They are important as admissions under Rule 801 to proving plaintiffs' allegations, and for purposes of refreshing witnesses' recollections and for impeachment of witnesses. And the tape recordings and verbatim transcriptions are not available from any other source. Conversely, the D.O.J.'s interest is continued secrecy under *Leggett* is quite low because its criminal investigation has concluded. And to the extent the Government has an interest in protecting the identity of "informants" (a factor not mentioned in *Leggett,* but treated in cases from other Circuits, discussed *infra*), there is no such "interest" in the case at bar. There are no "confidential informants," because plaintiffs have already learned, through proper channels, the identity of the "informants" who made the tape recordings. Those are the Home City officers and employees (*e.g.* Messrs. Sedler and Geiser) and Messrs. Mowrey and McNulty, the latter of whom voluntarily disclosed their identity of public record at criminal sentencing proceedings.

Disclosure is also warranted here based upon *In re High Fructose Corn Syrup Antitrust Litigation*, MDL 1087, Master File No. 95-1477 (C.D. Ill.). That case involved criminal violations of the antitrust law in the manufacture and distribution of high fructose corn syrup, and a companion civil action by private plaintiffs. In that case, an informant, Mark Whitacre, recorded conversations relating to price fixing at Archer Daniels Midland Company ("ADM") concerning lysine, citric acid and high fructose corn syrup ("HFCS"). Those tape recordings were used in the criminal prosecution of ADM. On October 28, 1996, the private civil plaintiffs subpoenaed the government's tapes and transcripts. On February 26, 1997, on plaintiffs' motion to compel production, the district court ordered the Department to produce certain tape recordings.

At the time this occurred, the criminal investigation was still on-going. The D.O.J. sought and received appellate review under the collateral order doctrine, on the grounds that production while the criminal proceeding was ongoing would violate the governmental "investigatory privilege." Judge Posner, writing for the Seventh Circuit, agreed with the D.O.J. and reversed the district court's ruling, holding that under the "investigatory privilege" there should not be production to the civil plaintiffs while the criminal proceeding was still in progress. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997).

Subsequently, the criminal investigation concluded. As a result, on November 24, 1998, Plaintiffs served a new subpoena on the D.O.J. On January 22, 1999, the D.O.J. agreed to produce all of the tape recordings. Approximately 200 tapes were produced. This time, ADM (civil defendant) and one of its former employees, intervenor James Randall, attempted to halt plaintiffs' access to the tape recordings (Randall on the basis that the tapes contained embarrassing and irrelevant materials). Judge Posner forcefully rejected these efforts, and held that private antitrust plaintiffs were now entitled to all relevant portions of all tape recordings, for use in discovery and trial, because the "investigatory privilege" ended with the conclusion of the criminal proceedings:

> [W]e think the plaintiffs are entitled to all the recordings, to use as they see fit except insofar as the district judge may exercise his power under the Federal Rules of Civil Procedure to limit, by protective order or otherwise, such disclosure of the contents of the recordings as may infringe the privacy of parties to the recorded conversations beyond what the plaintiffs require to prosecute their antitrust case effectively.

In re High Fructose Corn Syrup Antitrust Litigation, 216 F.3d 621, 624 (7th Cir. 2000).

The D.O.J. objections rely upon two decisions from the District of Columbia Circuit, *Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336 (D.C. Cir. 1984) and *Black v. Sheraton Corp. of America,* 564 F.2d 531 (D.C. Cir. 1977). (Ex. C, p. 2). This reliance is off-

point. *Friedman* held that the government agency had **not** established with any precision the application of the privilege. *Black* did not involve any recorded conversations.

In *Friedman,* the Commodity Futures Trading Commission (CFTC), was conducting an on-going investigation into the silver market. It had deposed 40 people, had 6,000 pages of transcribed testimony, 60,000 pages of documents, and 1,000 pages of indices. *Id.* at 1341. Civil plaintiff subpoenaed the CFTC for all of these records to use in his private civil action. The district court denied the subpoena. The D.C. Circuit reversed and remanded, holding the CFTC had not met its burden to show why these materials should not be produced. *Id.* at 1342. Instead, the CFTC had merely "made a generalized claim that the requested documents are protected by a common-law law-enforcement investigatory files privilege." *Id.* Here, too, the assertion of privilege appears conclusory. (Ex. C). The Court also confined the privilege to a narrow scope, only that needed to protect "strategy, procedures and direction of the investigation, forewarn suspects, deter witnesses from providing candid testimony…" *Id.* *Friedman* did not bar production even where, as there, the governmental investigation was ongoing. Rather, it commended a 10 factor test. *Id. at* 1342-43. Those factors favor disclosure here. [3]

[3] Those factors are: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. 738 F.2d at 1342-43.

In *Black,* the civil plaintiff had been the subject of a "concededly illegal eavesdropping operation" by the FBI, and sued for money damages. 564 F.2d at 535. In civil discovery, he sought the entire FBI file. The FBI voluntarily turned over large portions of its files, including the recorded eavesdropping, together with all surveillance logs from the eavesdropping, all summary "airtels" based on those logs (an "airtel" is an FBI field office response to a request from another FBI office relating to a "lead", *id.* at 535); two memoranda from the director of the FBI advising the Attorney General of the information obtained from the surveillance; and those portions of two FBI reports to the Criminal Division which contained information directly obtained from the surveillance. *Id.* at 535. The dispute centered on materials that involved "intra-agency recommendations" or "disclose[d] the investigative techniques of the FBI and unfairly harm[ed] third parties." *Id.* at 537. The Court remanded for an *in camera* hearing as to whether plaintiff's need for these materials required production. *Id.* at 547. Plaintiffs here are not seeking the entire Antitrust Division files concerning its investigation of the packaged ice industry, including its interview notes, confidential sources, memoranda concerning such interviews, or anything else. *Black,* like *Friedman,* confined the scope of the privilege narrowly, namely to "minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources." *Id.* at 545-46 (emphasis supplied). Plaintiffs here seek neither confidential investigative techniques nor confidential sources, for reasons set forth above (the sources are already known, having voluntarily disclosed themselves to plaintiffs).

Thus, neither *Friedman* nor *Black* support the D.O.J.'s objections in the case at bar. And other District of Columbia Circuit cases (not cited in the D.O.J.'s objections) further support disclosure here. In *Tuite v. Henry,* 98 F.3d 1411 (D.C. Cir. 1996), the Court reversed and remanded the failure to provide to civil litigants what appears to be the complete D.O.J.

investigatory file concerning allegedly illegal tape recordings, for use in a civil lawsuit. *Id.* at 1415 n. 1. In applying the 10 factor test, the Court held "need in the context of the law enforcement investigatory privilege is meant to be an elastic concept that does not turn only on the availability of the information from an alternative source." *Id.* at 1415. In *In re Sealed Case,* 856 F.2d 268 (D.C. Cir. 1988), the Court reversed and remanded the denial of a request for documents and testimony from the SEC, even though the SEC investigation was still ongoing. *Id.* at 272. A District Court in this Circuit relied upon those cases in ordering the FBI to produce boxes of documents it seized in Tennessee, for use in a private civil case in California, even though there were on-going investigations by the grand jury, the FBI, the U.S. Attorney, and the SEC. *Tri-Star Airlines, Inc. v. Willis Careen Corp. et al,* 75 F.Supp.2d 835, 837-838 (W.D. Tenn. 1999).

(2) D.O.J. Internal Guidelines Support Disclosure

The D.O.J. has also objected based upon its own regulations, 28 C.F.R. §§16.21-29. (Ex. C hereto, second paragraph). This is misplaced. These are what are known as government "Housekeeping Regulations," which, as explained below, create no privileges in derogation of the Federal Rules of Civil Procedure discovery provisions, as the Sixth Circuit has explicitly held in *In re Bankers Trust Co.,* 61 F.3d 465 (6th Cir. 1995). *See generally* Wright & Graham, *Federal Practice & Procedure, Federal Rules of Evidence,* §5682 "Official Information---the Housekeeping Act") (West online).

As a matter of threshold logic, the D.O.J.'s own regulations cannot create new "privileges" that are binding on federal courts. This would run afoul of F.R.Evid. 501, which provides:

> **Rule 501. General Rule**
>
> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision therefore shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience….

An agency---whether it be the D.O.J. or any other governmental agency---cannot make up its own rules of privilege and then use them to shield information in a federal lawsuit.

The regulations upon which the D.O.J. relies are termed "housekeeping rules" because they are adopted pursuant to 5 U.S.C. §301 ("Departmental Regulations"). Congress amended this statute in 1958 to make explicit that it cannot be used to shield information from the public, by adding the following final sentence:

> **§301. Departmental regulations**
>
> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. **This section does not authorize withhold information from the public or limiting the availability of records to the public.** (emphasis supplied).

Wright & Graham conclude that the so-called "housekeeping privilege" (*i.e.,* privileges supposedly created by agency regulations adopted pursuant to 5 U.S.C. §301) is "defunct." Wright & Graham, *supra,* text at ns. 145, 146.

Wright & Graham cite for this proposition (among many other cases) the Sixth Circuit's decision in *In re Bankers Trust, supra.* In that case, defendant Bankers Trust sought to shield documents from discovery based upon Federal Reserve regulations, 12 C.F.R. §261 *et seq.,* which are the counterpart of the D.O.J. regulations cited here, *i.e.* they are both promulgated

pursuant to 5 U.S.C. §301. The Sixth Circuit categorically rejected the argument that this statute could create privileges through agency regulation:

> Section 301 [of 5 U.S.C.], however, is nothing more than a general housekeeping statute and does not provide "substantive" rules regulating disclosure of government information….Congress amended the statute, adding the following sentence: 'This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. §301. Thus, the court [in *Exxon Shipping Co. v. U.S. Dept. of Interior,* 34 F.3d 774 (9th Cir. 1994] concluded that nothing in the text of the statute empowers a federal agency to withhold documents or testimony from federal courts.
>
> …**To allow a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure and, in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority as found here.**

61 F.3d at 470 (emphasis supplied).

In *Kwan Fai Mak v. F.B.I.*, 252 F.3d 1089, 1092 (9th Cir. 2001), the Ninth Circuit reached the same conclusion concerning the D.O.J. regulations at issue in the case at bar. Indeed, the Government so acknowledged in that case:

> As the government acknowledged at oral argument, the regulations [28 C.F.R. §§16.21-16.29] do not "create an independent privilege" authorizing the Department of Justice to withhold information. *Exxon Shipping Co. v. United States Dep't of Interior,* 34 F.3d 774, 780 (9th Cir.1994). Nor could they, because the statutory authority for them, 5 U.S.C. § 301, makes clear that it "does not authorize withholding information from the public or limiting the availability of records to the public." *Id.* Rather, the regulations simply set forth administrative procedures to be followed when demands for information are received.

Id.

In any event, even if the regulations were applicable, they do not support withholding the subpoenaed materials from plaintiffs. Disclosure of these tape recordings violates no statute or regulation. 28 C.F.R. § 16.26(b)(1, 2). There is no "classified information" on these tapes. 28

C.F.R. § 16.26(b)(3). Disclosure will not reveal a confidential source or informant, 28 C.F.R. §16.26(b)(4), because, as is clear from the subpoena and factual section of this brief, above, plaintiffs are already aware of the sources. There will be no interference with enforcement proceedings, 28 C.F.R. §16.26(b)(5), as the DOJ criminal investigation in the packaged ice industry is completed. Nor will production of the tapes "disclose investigative techniques and procedures" as to "impair[]" the "effectiveness" of the techniques and procedures by which the tapes were made. 28 C.F.R. § 16.26(b)(5). Finally, disclosure of the tapes will not reveal trade secrets. 28 C.F.R. § 16.26(b)(6).

Even if there were any concerns (and there is not) under 28 C.F.R. 16.26(b)(1-6), those concerns would be outweighed here by the factors identified in 28 C.F.R. § 16.26(c). The violations are serious, 28 C.F.R. § 16.26(c)(1), namely felonies which carry a maximum penalty of 10 years imprisonment. *See* 15 U.S.C. § 1. Arctic Glacier and Home City both admitted to criminal violations of the antitrust laws for an extensive past period of time. 28 C.F.R. §16.26(c)(2). The relief sought and the issues presented in the present civil case are important. 28 C.F.R. § 16.26(c)(3, 4). *In re Packaged Ice Antitrust* is a private civil action that is brought under section 4 of the Clayton Act, 15 U.S.C. § 15, which authorizes those injured by antitrust violations to seek redress from antitrust violators since 1914. Courts have often recognized the importance of these private actions to enforcing United States antitrust laws. *See*, *e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (the "purpose of giving private parties treble-damages and injunctive remedies was not merely to provide private relief, but to serve as well the high purpose of enforcing the antitrust laws").

The catchall factor (28 C.F.R. § 16.26(c)(5)) also favors disclosure here. The requesting parties who seek production of these recordings are the victims of the defendants'

anticompetitive and unlawful conduct, and their interest requires vindication in the present lawsuit.

C. The Remaining Objections Are Off-Point

In addition to the "investigatory files/law enforcement privilege," the D.O.J. objects on two other grounds. First, it claims, in one conclusory sentence with no support, that the tape recordings are "work product." (Ex. C, p. 2, final paragraph). This is far-fetched. Plaintiffs are not seeking anything that would remotely qualify as D.O.J. attorney work product.

Finally, the D.O.J. objection claims that plaintiffs do not need the tape recordings because "you can prove your case without obtaining the tapes and transcripts…Home City Ice has been cooperating with you…Martin McNulty and Gary Mowrey cooperated in the government's investigation and could testify about the conversations at issue. I have no reason to believe these witnesses would not provide you with all the evidence you require." (Ex. C, p. 2, final paragraph).

With all due respect, it is difficult to believe that Ms. Varney, the author of these words, would subscribe to this proposition if the shoe were on the other foot – *i.e.* if the D.O.J. sought verbatim tape recordings to prove its case, and was told that the D.O.J. did not need them because it could "prove its case" with descriptions of the conversations by one of the participants. This argument is improper in light of the "best evidence" rule, as explained by the Supreme Court:

> The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction.

Gordon v. U.S., 344 U.S. 414, 421 (1953). Here, similarly, the recorded conversations themselves are the "best evidence," and are clearly better evidence than any recollections of

those conversations many years later by Mr. Sedler, Mr. Geiser, Mr. Mowrey or Mr. McNulty. Tape recorded conversations are considered the "best evidence" under *Gordon*. *See U.S. v. Morales-Madera* 352 F.3d 1, 9 (1st Cir. 2003) ("The best evidence rule requires that the tape recordings themselves must be furnished.")

For the foregoing reasons, the D.O.J.'s objections should be overruled, and the materials sought by plaintiff's subpoena should be ordered produced.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served through the Court's ECF system upon all counsel registered to receive ECF in this case on March 9, 2011. In addition, copies were served by Federal Express, overnight delivery, and by email on March 9, 2011 upon the following:

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