



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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February 4, 2011

Robert J. LaRocca, Esq.
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One South Broad Street
Suite 2100
Philadelphia, PA 19107-3304

Re: *In re Packaged Ice Antitrust Litigation*, 08-MD-1952 (E.D. Mich. Borman, J.)

Dear Mr. LaRocca:

This letter is in response to your subpoena dated January 24, 2011 and served on the Department of Justice ("Department") on January 25, 2011. The subpoena directs the Department to produce various recordings of conversations and any transcripts of those conversations. Specifically, you demand production of eleven taped conversations (and their transcripts) recorded on dates listed in the subpoena that involve discussions "in which a present or former officer, director, or employee of Home City Ice was one of the participants." Subpoena, p. 3. In addition you seek production of the following recordings and transcripts:

B. Any recording of conversation to which Mr. Martin G. McNulty was one of the parties, and which: (a) the other party to the conversation was at the time, had been, or subsequently became, affiliated with Home City Ice, Arctic Glacier, or Reddy Ice; or (b) the conversation mentioned a person who was at the time, had been, or subsequently became, affiliated with Home City Ice, Arctic Glacier, or Reddy Ice.

C. Any recording of conversation to which Mr. Gary Mowery was a party, and which: (a) the other party to the conversation was at the time, had been, or subsequently became, affiliated with Home City Ice, Arctic Glacier, or Reddy Ice; or (b) the conversation mentioned a person who was at the time, had been, or subsequently became, affiliated with Home City Ice, Arctic Glacier, or Reddy Ice.

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According to your January 24, 2011 letter addressed to John J. Powers, III, you seek the documents in question in connection with the above-captioned case that is currently pending in the Eastern District of Michigan. You state that you have been appointed lead counsel for the direct-purchaser plaintiffs in that case and assert five reasons why the subpoenaed recordings and transcripts are relevant to your case: (1) they “are relevant to prove anti-competitive conduct”; (2) they “will assist in proving the geographical scope of the” alleged conspiracy; (3) they are relevant to depositions you intend to take in the future in which you might use the “recordings to refresh recollections and as substantive evidence”; (4) they could be used to impeach; and (5) they “are relevant evidence under F.R.Evid. 404(b).” Letter from Robert J. LaRocca addressed to John J. Powers, III (Jan. 24, 2011).

I have carefully considered your request in light of the applicable Department regulations governing the disclosure of information by Department employees. 28 C.F.R. §§ 16.21-.29 (2010). Among other things, the regulations require me to consider “[w]hether disclosure is appropriate under the relevant substantive law concerning privilege.” 28 C.F.R. § 16.26(a)(2). The regulations further explain that “[a]mong the demands in response to which disclosure will not be made by any Department official are those demands with respect to which . . . (1) Disclosure would violate a statute . . . , [or] (2) Disclosure would violate a specific regulation [or] Disclosure would reveal a confidential source or informant . . . , [or] (5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired” 28 C.F.R. § 16.26(b). Applying these factors and based on the information you have submitted and the representations you have made, I have concluded that I cannot authorize the requested production. There are several reasons for this conclusion.

All of the tapes and transcripts you seek were made during the course of a criminal investigation. Investigatory files compiled for law enforcement purposes are privileged under what is commonly referred to as the investigatory files or law enforcement privilege. See *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *Black v. Sheraton Corp. Of Am.*, 564 F.2d 531 (D.C. Cir. 1977). The privilege protects criminal law enforcement investigatory files from civil discovery. I am particularly reluctant to authorize disclosure of the tapes at issue here because those tapes have never been played in public and contain information about persons who were under investigation and details about our investigation that have not been made public. In addition, both the tapes and the transcripts that the Division made of the tape recorded conversations are protected from disclosure by the work product privilege. Finally, you can prove your case without obtaining the tapes and transcripts. Specifically, I have been informed that Home City Ice has been cooperating with you and providing evidence relevant to your case. Moreover, several people involved in these recordings, including Martin McNulty and Gary Mowery, cooperated in the government’s investigation and could testify about the conversations at issue. I have no reason to believe that these witnesses would not provide you with all the evidence you require.

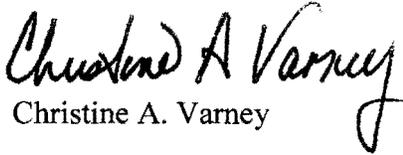
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For all of the above reasons, I cannot authorize the requested production of documents pursuant to the Department's regulations governing the disclosure or production of any material in Department files in cases in which the United States is not a party. 28 C.F.R §§ 16.22-.29 (2010). Moreover, the foregoing objections are not exclusive, and the Department reserves the right to assert further objections in response to the subpoena as appropriate.

Please feel free to contact the Assistant Chief of the Antitrust Division's Appellate Section, John J. Powers, III, to discuss this matter, including the timing and narrowing of issues in any litigation that may arise with respect to your request for the production of the recordings and transcripts you seek.

Sincerely,


Christine A. Varney