

4. I have personally been involved in multiple investigations involving consensual monitoring as defined by 18 U.S.C. § 2511(2)(c) and 18 U.S.C. § 2511(2)(d). In those investigations, the FBI routinely consulted with the antitrust attorneys when determining investigative strategy, including whether to, how to, and when to, use consensual monitoring.
5. During my tenure, I was the lead attorney on the packaged ice, criminal antitrust investigation. The packaged ice investigation began at least as early as June 2005 and focused primarily on allegations of customer allocation among packaged ice manufacturers. The grand jury investigation ultimately resulted in charges being filed against two corporations, Arctic Glacier International, Inc. (AGI) and Home City Ice Company (Home City), and three individuals, Frank Larson, Gary Cooley, and Keith Corbin. In essence each charge focused on a conspiracy to suppress and eliminate competition by allocating packaged ice customers in southeastern Michigan and the Detroit, Michigan metropolitan area, in violation of 15 U.S.C. § 1. There was never a trial of the matter.
6. I am aware that the plaintiffs in this case seek production from the Antitrust Division of three sets of recorded conversations. The first set lists 11 specific conversations in which a Home City employee recorded an employee of another packaged ice manufacturer (Home City recordings). The second set requests “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” (McNulty recordings). The third requests “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” (the Mowery recordings).

7. Because of my role in the packaged ice investigation, I am familiar with the recordings in the possession of the Antitrust Division that would be responsive to the plaintiffs’ request.
8. These recordings were made from at least as early as October 2005 through March 2008 in the course of a grand jury investigation by FBI and the Antitrust Division concerning possible violations of the antitrust laws. The recordings and transcripts are maintained within the Division’s criminal case system of records, ATR-006, and retrieved by a number of personal identifiers, including, for example, the name of subjects and targets of the investigation and assigned case numbers.
9. In an antitrust investigation, the FBI, in consultation with the Antitrust Division, determines what investigative techniques to use in any particular

investigation, including whether to request someone to cooperate and agree to have their conversations consensually monitored, and agree to testify at trial. Individuals who agree to do so are generally referred to as a cooperating witness or as a confidential human source (cooperating witness). These cooperating witnesses are given confidential treatment, as described in paragraph 14 below. Consensual monitored recordings can be used as an investigative technique to acquire purely historical or factual information or to record conduct as it is occurring, or a combination of the two. These decisions are made on a case by case basis and are highly fact determinative.

10. In those antitrust investigations in which the FBI, in consultation with the Antitrust Division, determines that consensual monitoring is appropriate, the FBI and the Antitrust Division continuously review the recordings to determine future investigative steps. The FBI then provides continual and ongoing direction to the cooperating witness(es).

11. In the packaged ice grand jury investigation, the FBI and the Antitrust Division developed specific goals and needs for the investigation, which continually were modified over time. After determining those goals and needs, the FBI and the Antitrust Division designed and implemented an investigative strategy to meet those goals and needs, including the use of consensual monitoring.

12. Consistent with our investigative strategy, particular recordings sought to acquire purely historical or factual information, other recordings sought to

record possible criminal conduct as it occurred, while others either by design, or by result, combined both types of consensual monitoring goals. Public disclosure of the recordings or transcripts will necessarily reveal in part the decisions of the Antitrust Division and the FBI in the investigation including whether to record, who to record, and what to record. For this reason, the public disclosure of the recordings or transcripts will necessarily reveal the nature, scope and direction of the grand jury investigation.

13. During the course of the grand jury investigation, I directed people working on the investigation, including Deborah A. Farren, to transcribe certain recordings. Whether the Antitrust Division has transcribed any particular recording reflects judgments of the FBI and the Antitrust Division concerning the perceived significance or usefulness of the recording. For this additional reason, the public disclosure of the transcripts will necessarily reveal the nature, scope and direction of this investigation.

14. It is the policy of the Department of Justice not to publicly disclose information provided by cooperating witnesses unless absolutely essential for the success of our investigations. In my experience as a Trial Attorney, cooperating witnesses are especially concerned that their cooperation remains confidential because they are secretly recording fellow employees, professional colleagues and friends. Our ability to maintain the confidentiality of cooperating witnesses except for the disclosure of information in rare instances is absolutely essential to retaining and

obtaining the cooperation of cooperating witnesses as well as the success of our investigations. Without such protection many individuals would simply not be willing to cooperate and record conversations with their friends and colleagues. The knowledge or perception that consensual recordings of their telephone conversations would likely be disclosed if the Antitrust Division received a subpoena would chill the willingness of cooperating witnesses to consent to record their conversations. That would have a ruinous effect on our ability to conduct investigations and prosecute cases.

15. During the course of the packaged ice investigation, the Antitrust Division did not disclose publicly any person who chose to cooperate in the investigation. Nor has it done so since it closed its grand jury investigation.
16. During the course of the packaged ice grand jury investigation, the Antitrust Division maintained the confidentiality of conversations recorded in cooperation with our investigation. No recording was played publicly. To do so would reveal several things, including the following: (1) the identity of individuals and corporations who may have been subjects of the criminal investigation but were not charged (see e.g., Plaintiff subpoena request III A. 3); (2) the names of individuals and companies who were not even subjects of the investigation; and (3) various unsubstantiated speculation of criminal conduct by other individuals or corporations not previously disclosed to the public.

17. To further its criminal investigation, the Antitrust Division played a limited number of recordings to counsel for subjects of the grand jury investigation. The Antitrust Division did so to allow counsel for those subjects to assess the strength or weakness of the recorded evidence.
18. Prior to playing any recording, the Antitrust Division secured from counsel for that subject a confidentiality agreement, which provided, in part, that the substance of the recordings would not be revealed to counsel for any other subject and that the information obtained could be used solely in the criminal investigation.
19. When playing this limited number of recordings, the Antitrust Division did not allow any counsel the opportunity to review the universe of recordings, nor has the universe, in aggregate, been reviewed by the various counsels. Rather, the Antitrust Division has permitted counsel the opportunity to review only recordings in which that counsel's client participated, and not necessarily all of those recordings.
20. When listening to the recordings, the subjects were not provided transcripts for a variety of strategic and legal reasons, including that the transcripts represented work product. See Declaration of Deborah A. Farren ¶¶ 7-9. Further, the transcripts, like the recordings themselves, reflect efforts of the Antitrust Division and the FBI at investigating and charging individuals and companies in the packaged ice industry, including the pattern of the

investigation, the assembling of information, the determination of the relevant facts, and the planning of strategy.

21. The plaintiffs' request for Mowery recordings and McNulty recordings lacks the specificity of its request for the 11 Home City recordings. To assess whether any particular recording is called for by the subpoena will be a difficult matter of judgment. The quality of the recordings varies; not all recordings have been transcribed and therefore a review of transcripts is not available; and some references to persons or events on recordings may be inferential, anecdotal or merely tangential.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 28, 2011, at Cleveland, Ohio.



Kevin C. Culum
[3460-MT]
Trial Attorney
U.S. Department of Justice
Antitrust Division
Carl B. Stokes United States Court House
801 West Superior Avenue, 14th Floor
Cleveland, Ohio 44113-1857
Tel: 216-687-8400
Fax: 216-687-8423
E-mail: kevin.culum@usdoj.gov