IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-3159.

In re LAWRENCE J. ACKER, et al.,

Petitioners.

ANSWER OF THE UNITED STATES OF AMERICA
TO PETITION FOR WRIT OF MANDAMUS

ISSUE PRESENTED

Whether petitioners' express admission to the district court that "we have received all of the rights to which we are entitled under the Crime Victims' Rights Act [18 U.S.C. § 3771(a)], and more" precludes them from obtaining a writ of mandamus under Section (d)(3) of that act.

STATEMENT

This case concerns an Information filed by the Antitrust Division of the United States Department of Justice against Arctic Glacier International, Inc. ("AGI"), a producer of packaged-ice, and the proposed plea agreement to settle the case. For several years the Division has been investigating the packaged-ice industry for violations of the Sherman Antitrust Act, 15 U.S.C. § 1. Dec. ¶¶ 2-3.[1] Packaged-ice is marketed for human consumption and is produced in blocks and bags of various sizes. Tr. 7;[2] Dec. ¶ 2. The Division's investigation has been public since at least March 2008, Dec. ¶ 3, and the first prosecution to result from the investigation was *United States v. Home City Ice Co.*, (S.D. Ohio 1:7cr14). The Information and plea agreement in that case became public on June 17, 2008. Dec. ¶ 6.

Fifteen months later the Division filed the Information in the instant case under seal.[3] The Information charged AGI with conspiring to eliminate competition by allocating packaged-ice customers in Southeastern Michigan and the Detroit area. The Information was unsealed and the plea agreement filed on

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[1] "Dec." refers to the Declaration of Kevin Culum attached hereto.

[2] "Tr." refers to the transcript of the hearing held February 11, 2010.

[3] Petitioners' claim that the government misled the court into sealing the Information, Pet. 25-26, is wrong. There is a world of difference between announcing an intention to cooperate with a government investigation and actually admitting culpability and promising to cooperate against your partners in crime.

October 13, 2009. Arraignment was set for October 27, 2009.

After the government's investigation became public, several civil class-action lawsuits alleging a nationwide antitrust conspiracy were filed against packaged-ice manufacturers, including AGI, by both the defendants' direct customers, typically wholesalers and retailers, and indirect customers, typically the ultimate consumers. Petition ("Pet.") 2; Tr. 96; Dec. ¶¶ 2, 4. These cases were consolidated into a multi-district litigation ("MDL"), *In re Packaged Ice Antitrust Litig.*, MDL No. 1952, pending in the United States District Court for the Eastern District of Michigan. Petitioners' counsel here also represents the indirect purchaser class action plaintiffs in the MDL. Pet. 23. Petitioners themselves, apparently MDL plaintiffs, are nine consumers, only three of whom claim to have purchased ice in Southern Michigan, and a corporate direct purchaser that is located in Texas but has not purchased any ice in southeastern Michigan. Pet. 4 & n.2, 23.

After the AGI Information was made public, petitioners filed a motion asserting their rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771. Doc. 13.[4] Subsequently, they have repeatedly asserted that the Information and plea agreement "artificially truncate[d]" AGI's conduct (*id.* at 6) because "the plea agreement did not reflect the full, nationwide scope of Arctic Glacier's crimes."

[4]"Doc." refers to the document number in the district court's docket sheet.

Pet. 8; *accord* Doc. 37 at 1 & n.1, Tr. 66. In their motion, petitioners asked that arraignment and acceptance of the plea agreement be postponed. In response, the court continued the arraignment to November 10, 2009, to allow petitioners to confer with government counsel. Doc. 18. That conference took place on November 4, 2009. Dec. ¶ 13. On November 10, 2009, the court conditionally accepted the guilty plea and, to allow for a presentence report ("PSR") and input from all those concerned including "representatives of the alleged victims," set a hearing for February 11, 2010, for deciding whether to accept the plea agreement. Doc. 25.

Petitioners submitted comments on the plea agreement to the probation office in mid-December. Dec. ¶ 14. They also filed a motion to unseal the PSR. Doc. 27. The court held hearings on that motion on January 21, 25 and 28, 2010, and ultimately decided to deny it. On February 1, 2010, petitioners filed their objections to the plea agreement and asked the court to reject it. Doc. 37. Among other things, although the volume of commerce for the charged conspiracy amounted to $50.7 million, Tr. 16, and only 3 petitioners ever bought ice in Southeastern Michigan, petitioners asked the court to "create a restitution fund for the benefit of the victims in the civil [class-action] cases," Doc. 37 at 15, and to fund it with a minimum of $9 million. Tr. 83-84.

On February 11, 2010, the court held an extensive hearing on whether to

accept the plea agreement. Notably, although they had been given notice of the hearing, none of AGI's direct purchasers in Southeastern Michigan attended. Tr. 95-96, 105. Petitioners did participate. They acknowledged that under the CVRA they had been given notice of all proceedings, attended all such proceedings, spoke at those proceedings, and that the court had listened. Tr. 89-90. They also acknowledged that they have "had the reasonable opportunity or right to confer with the government" and to proceed without unreasonable delay. *Id.* at 90. In fact, they told the court "[w]e believe that we have received all of the rights to which we are entitled under the Crime Victims' Rights Act, and more." *Id.*

Petitioners then explained that their "primary concern" was the right to timely and full restitution. *Id.*, *accord* 110. They contended that restitution in their nationwide class action MDL would be jeopardized by imposition of the proposed $9 million fine, which is to be paid over a five-year period. Tr. 75, 135. The government responded, however, that if any civil plaintiffs were successful and payment of restitution was impaired by any remaining fine due, the government would waive collection of the remaining fine. *Id.* at 99. Petitioners also expressed concern that restitution in the MDL was being jeopardized because if the allegations in those complaints "aren't specific enough" it was "at least in part, because the evidence here [of a broader conspiracy] has not been disclosed"

by the government.[5] *Id.* at 111.

The government, for its part, explained that the charged conspiracy "is the most serious readily provable offense . . . developed," Tr. 20-21, and that despite the length of the investigation, it has been unable to discover evidence of a nationwide conspiracy. *Id.* at 100. Among other things, AGI noted that in the area charged in the Information its customers "[m]ay well exceed a thousand." *Id.* at 98.

After hearing from all present, the court accepted the plea agreement and imposed the proposed sentence.[6] With respect to restitution, the court explained that any restitution must be tied directly to the crime of conviction, to which petitioners agreed. Tr. 109. The court found that because quantifying damages is "difficult, if not impossible to determine" with a customer allocation scheme, trying to determine the victims' losses here "would complicate or prolong the sentencing process" to such an unreasonable degree that "no restitution order can be made." *Id.* at 118; *see* U.S.S.G. § 8B.1.1(b)(2). Apparently given petitioners' acknowledgment that they had been afforded all their rights under the CVRA, the

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[5] As this Court explained in *In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009), the CVRA rights "'are limited to the criminal justice process; the Act . . . is silent and unconcerned with victims' rights to file civil claims against their assailants'" (quoting *United States v. Moussaoui*, 483 F.3d 220, 234-35 (4th Cir. 2007)).

[6] The agreement was pursuant to Fed. R. Crim. P. 11(c)(1)(C).

court concluded that it did not need to decide whether petitioners were in fact victims under the Act and, instead, could leave it "an open question." *Id.* at 140-41.

REASONS FOR DENYING THE WRIT

I. Petitioners Have Acknowledged That They Were Afforded All Their Rights Under The CVRA

Prior to the February 11, 2010, hearing, petitioners had asserted that the plea agreement should be rejected because the government failed to consult with them before the agreement was reached. *E.g.*, Doc. 37 at 2 n.3. As noted above, however, during the hearing, the court went through every right listed in 18 U.S.C. § 3771(a) that could pertain to petitioners, and they admitted that they were afforded every one. Tr. 89-90. It is impossible to reconcile their assertions that the court failed to "ensure that victims were treated fairly, were given notice of their rights, and afforded their right to confer with the Government," Pet. 26, with their express acknowledgment that they had "received notice" of all proceedings, had participated in each, that the court had "been more than reasonable," and that they had "received the reasonable opportunity or right to confer with the government attorney." Tr. 90. In fact, petitioners admitted they "have received all of the rights to which we are entitled under the Crime Victims' Rights Act, and

more."[7] *Id.* Given petitioners' abandonment of their claim to a right to confer pre-charge, and because none of the petitioners' CVRA rights have been violated, there is nothing for this Court to mandamus the district court to do.[8]

To the extent petitioners challenge the court's acceptance of the plea agreement as an abuse of discretion, or the sentence imposed as unreasonable, that challenge is beyond the scope of the mandamus relief prescribed by the CVRA. Section 3771(d)(3) makes clear that a petition for mandamus is limited to protecting victims' ability to assert the eight rights enumerated in Section 3771(a). It does not authorize plenary review of the district court's decisions to accept a guilty plea pursuant to a plea agreement or to impose a particular sentence, however much the victim believes these decisions affect them, so long as their rights under the CVRA were not violated. *See* 18 U.S.C. 3771(d)(3); 150 Cong. Rec. S4262 (April 22, 2004 (Sen. Feinstein)) (mandamus provision allows crime victim to have court of appeals review "a denial of his rights by a trial court.").[9]

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[7] This acknowledgment cannot be reconciled with petitioners' request that "this Court should remand to the district court with instructions to consider the violations of the victims' rights as part of its decision." Pet. 27.

[8] As noted above, apparently because petitioners admitted that they were not denied any CVRA right, the court concluded that it could leave "open" the fact-based question whether petitioners are victims under the CVRA. Tr. 140-41. Because the district court is better placed to decide that issue in the first instance, this Court should reject petitioners' invitation to do so.

[9] For these reasons, the United States intends to oppose as inappropriate petitioners' motion to consolidate this mandamus proceeding with their direct

II. Failure to Confer Before Filing Charges Does Not Violate the CVRA

Petitioners principally contend that the government violated Section 3771(a)(5) of the CVRA by failing to confer with them before reaching a plea agreement with AGI and filing the information.[10] That section provides victims with "[t]he reasonable right to confer with the attorney for the Government *in the case*." 18 U.S.C. § 3771(a)(5) (emphasis added). There is, however, no "case" until charges are filed, and thus no right to confer before then.

The word "case" is a term of art that has long been understood to mean "a suit instituted according to the regular course of judicial procedure." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (Article III "case" or controversy); *see also* Black's Law Dictionary (6th ed.) 215 ("case" is a "general term for an action, cause, suit or controversy at law or in equity"). This general understanding

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appeal in case No. 10-3160.

[10] Petitioners also contend in a footnote that this Court should direct the district court to reconsider its ruling denying them access to the PSR. Pet. 28 n. 14. "An argument contained only in a footnote does not preserve an issue for [this Court's] review." *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 856 (6th Cir. 2005). In any event, "[t]he CVRA does not provide an independent right to obtain PSRs and, therefore, did not require the disclosure of PSRs in this case." *In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009); *accord In re Kenna*, 453 F.3d 1136 (9th Cir. 2006); *In re Brock*, No. 08-1086, 2008 WL 268923 (4th Cir. Jan. 31, 2008). Nor does the "the common law right to access to court records . . . cover the defendants' PSRs" because "PSRs are not treated as public records within the judicial system, but are handled and marked as 'confidential reports.'" *In re Siler*, 571 F.3d at 610.

applies to criminal proceedings. *See Chavez v. Martinez*, 538 U.S. 760, 766 (2005) (holding that a criminal "case" – as distinct from an investigation – "at the very least requires the initiation of legal proceedings"). Moreover, the statute's use of the definite article "the" in reference to the word "case" shows that "the case" implies a specific adversary proceeding rather than an indefinite investigation. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (use of definite article "the person" in 28 U.S.C. § 2242's provision regarding a habeas custodian signifies that there is usually only one proper custodian, and not several different ones). By contrast, petitioners apparent reading of Section 3771(a)(5) wrongly makes its use of "in the case" superfluous. *See*, *e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (court's duty is to "give effect, if possible, to every clause and word of a statute," and to avoid rendering terms superfluous).

Our interpretation, however, gives "in the case" effect and comports with the legislative history. *See* 150 Cong. Rec. S10910, S10911 (Oct. 9, 2004) (statement of Sen. Kyl) ("This right to confer does not give the crime victim any right to direct the prosecution. . . . Under this provision, victims are able to confer with the government's attorney about proceedings *after charging*.") (emphasis added). It also accords with other provisions of the CVRA. The victims' right to confer with the prosecutor presupposes that the victims have already received notice. Yet the CVRA's right to "notice" is tied to the pendency of "proceedings."

18 U.S.C. § 3771(a)(2). Likewise, the CVRA's best efforts provision shows that Congress is perfectly capable of distinguishing between an "investigation," on the one hand, and a "prosecution" or "case" on the other. *See* 18 U.S.C. § 3771(c)(1) (referring to both "investigation[s]" and "prosecution[s]"). If Congress intended for the right to confer to apply to "investigations," and not just "cases," it would have said so explicitly. Yet by not doing so, and indeed, by using the word "case" instead, Congress plainly meant something other than an investigation.[11]

We recognize that in *In re Dean*, 527 F.3d 391 (5th Cir. 2008) (per curiam), the court stated that in the CVRA Congress made a "policy decision – which [courts] are bound to enforce – that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached" even where no charges have been filed.[12] *Id.* at 395. *Dean*, however, is

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[11] In addition, a universal rule of pre-charging conferral may adversely affect investigations and may well interfere with the exercise of prosecutorial discretion. *Cf.* 18 U.S.C. 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."). While the government can and frequently does confer with crime victims during the investigation and before charges are filed, requiring it to do so in every case could adversely affect whether and how the investigation is conducted and whether and what charges should be brought.

[12] That there may be "rights under the CVRA that apply before any prosecution is underway," 527 F.3d at 394, is irrelevant to whether the reasonable right to confer with the attorney for the Government in the case exists before there is a case. While some rights may apply where "no prosecution is underway," 18 U.S.C. § 3771(d)(3), for example, the "right to be treated with fairness and with respect for the victim's dignity and privacy," 18 U.S.C. § 3771(a)(8), not every

not well reasoned and should not be followed in this Circuit. The opinion does not address the meaning or import of Section 3771(a)'s phrase "in the case." In fact, it omits it when quoting the statute. This is not surprising because the temporal scope and meaning of the right to confer was not a focal point of the *Dean* mandamus litigation – the parties assumed that the right to confer applies before charges are filed, and so the court of appeals reached out and addressed that issue without the benefit of briefing.

Moreover, *Dean* limits its ruling to the particular circumstances of that case: the refinery explosion had "fewer than two hundred victims, all of whom could be easily reached." *Id.* at 395. *Dean* does "not speculate on the applicability to other situations." *Id.* at 394. The situation here is much different. If petitioners' contentions are correct, all direct and indirect purchasers of ice in the country – probably tens of millions of people – could be recorded as victims. Lastly, because the *Dean* court concluded, "for prudential reasons, a writ of mandamus is not 'appropriate under the circumstances,'" it had no need to decide whether the petitioner demonstrated a right to the issuance of the writ. 527 F.3d at 394.

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right enumerated right necessarily applies before a prosecution begins. *See, e.g.*, 18 U.S.C. § 3771(a)(4)-(5).

III. Standard For Issuance of Writ of Mandamus

Since the petitioners told the district court that they had received every right to which the CVRA entitles them, they cannot prevail under any standard. We do, however, wish to address briefly their mistaken claim (Pet. 11-14) that Congress in giving CVRA victims the right to seek review of district court denials of relief through a petition for a writ of mandamus did not mean mandamus in its long-established meaning as an extraordinary remedy, but rather meant it to be the equivalent of a routine appeal under 28 U.S.C. § 1291 or 1292(b).

While this Court has noted the circuit split on what standard to apply, it has not yet ruled on the issue. *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (citing *In re Dean*, 527 F.3d 391, 394 (5th Cir.2008) (applying traditional mandamus standard); *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir.2008) (same); *In re W.R. Huff Asset Management. Co.*, 409 F.3d 555, 562-63 (2d Cir.2005) (applying lesser standard); *In re Walsh*, 229 Fed.Appx. 58 (3d Cir.2007) (unpublished) (same); *Kenna v. United States Dist. Ct. for the Central Dist. of Cal.*, 435 F.3d 1011, 1017 (9th Cir.2006) (same)).

In adopting the CVRA's judicial-review provisions, "Congress could have drafted the CVRA to provide for 'immediate appellate review' or 'interlocutory appellate review,' something it has done many times." *Antrobus*, 519 F.3d at

1124.[13] But "[i]nstead, it authorized and made use of the term 'mandamus'" – a specific form of judicial review that is distinct from ordinary appellate review. *Id.*; *Cf. Will v. United States*, 369 U.S. 90, 97 (1967) ("Mandamus * * * may never be employed as a substitute for appeal.").

Because Section 3771(d)(3) triggers mandamus review, it follows that traditional mandamus standards of review apply. When a statute, like the CVRA, uses a term of art that has an established meaning, like "mandamus," the judiciary generally presumes, in the absence of evidence to the contrary, that Congress intended to "adopt[] the cluster of ideas that were attached to [it] in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952). The CVRA's text does not speak to the applicable standard of review, and thus does not displace these principles or compel a different result. Thus, under "the plain language of the statute . . . review of this CVRA matter [is] under traditional mandamus standards." *Antrobus*, 519 F.3d at 1125; *accord*

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[13] In fact, Congress did authorize ordinary appellate review allowing the government, "[i]n any appeal in a criminal case," to assert as error the denial of a victim's rights. 18 U.S.C. § 3771(d)(4). The juxtaposition of "mandamus" and "appeal" indicates that Congress made a deliberate choice to authorize victims to seek mandamus review. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Dean, 527 F.3d at 394.

There is nothing inconsistent with the CVRA's purpose to empower victims and Congress' decision to give the victims themselves more limited appellate review of their own claims than the government would receive were it to appeal those claims on the victims' behalf. Congress may have wanted limited expedited mandamus review both to avoid delay and because it knew that if relief was denied, the government could subsequently appeal the issue on the victims' behalf.

Petitioners wrongly argue that the statute's direction that "the court of appeals shall take up and decide such applications forthwith," 18 USC § 3771(d)(3), "overrules conventional mandamus standards," Pet. 11. Rather, this command and the highly compressed 72-hour window within which Congress required the courts of appeals to decide mandamus petitions reinforces the conclusion that traditional mandamus standards apply. It is reasonable for Congress to demand that appellate courts promptly decide whether a district judge has committed a glaring legal error, but it is far less reasonable to believe that Congress intended for appellate courts to conduct full-blown appellate review under such a restrictive time frame.

The Second and Ninth Circuits' contrary opinions are not persuasive: their interpretation is inconsistent with the text and at odds with first principles of interpretation. While the CVRA does create a "unique regime that . . .

contemplate[s] routine interlocutory review" of CVRA decisions, *Kenna*, 435 F.3d at 1017, it does not follow – much less follow "clear[ly]," *Huff*, 409 F.3d at 562 (2d Cir. 2005) – that such review is to be conducted as if this was an ordinary appeal, rather than an mandamus action. At bottom, the Second and Ninth Circuits' view is that Congress, despite its deliberate use of the word "mandamus," really intended to create a novel and unprecedented creature that is part mandamus and part appeal. But the text does not support that conclusion, let alone compel it.[14] *Cf. In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (declining to decide whether the Second and Ninth Circuits' interpretation of the CVRA was correct because the result would be the same under any standard); *In re Brock*, 2008 WL 268923, at *2 (4th Cir. Jan. 31, 2008) (unpub.) (same).

[14] Petitioners reliance (Pet. 13) on Third and Eleventh Circuit decisions is also unavailing. *In re Walsh*, 229 Fed.Appx. 58 (3d Cir. 2007), is an unpublished, non-precedential opinion devoid of any reasoning why a lesser standard of review applies. And the Eleventh Circuit in *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) does not identify what standard it is applying, let alone provide any reason why the traditional mandamus standard should not apply to a mandamus petition under the CVRA. As result, neither decision has any persuasive force.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

Philip J. Weiser
Acting Assistant Attorney General

Scott D. Hammond
Deputy Assistant Attorney General

/s/ John P. Fonte
Robert B. Nicholson
John P. Fonte
James J. Fredricks
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Room 3224
(202) 514-2435 (telephone)
(202) 514-0536 (facsimile)
John.Fonte@usdoj

Kevin Culum
Donald M Lyon
Attorneys
U.S. Department of Justice
Antitrust Division
801 W. Superior Ave., 14th Floor
Cleveland, Ohio 44113-1857

February 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2010, I served a true copy of the foregoing response on the following counsel by Federal Express and email and to Judge Herman J. Weber by Federal Express:

David Freeman Axelrod
250 Civic Center Drive
Suite 500
Columbus, OH 43215
Counsel for Petitioners

John M. Majoras
Jones Day
901 Lakeside Avenue
North Point
Cleveland, OH 44114
Counsel for Respondent Arctic Glacier International, Inc.

Judge Herman J. Weber
Potter Stewart U.S. Courthouse, Room 801
100 East Fifth Street
Cincinnati, OH 45202
Respondent

/s/ John P. Fonte
John P. Fonte

No. 10-3159

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Lawrence J. Acker, *et. al.*

Petitioners.

DECLARATION OF KEVIN C. CULUM

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1. My name is Kevin C. Culum, and I am a Trial Attorney for the U.S. Department of Justice, Antitrust Division in the Cleveland Field Office. I have been employed with the Department of Justice since October 1990. I make this declaration in response to the petition for a writ of mandamus.

2. I am the lead attorney in what is referred to as the packaged-ice investigation and participated as lead counsel for the government in the sentencing of Arctic Glacier International, Inc., the subject of the mandamus petition. Packaged ice is marketed for human consumption and is sold in blocks and various bag sizes, primarily to retail establishments like grocery stores, convenience stores and gas stations.

3. The investigation became public in March 2008, when representatives of two public companies announced that the Department of Justice had sought information from them.

4. Soon after these public announcements, several lawsuits were filed both by direct purchasers of packaged-ice, i.e., those who purchase packaged-ice directly from the manufacturers, and by indirect purchasers of packaged ice, i.e., those who purchase packaged-ice from direct purchasers or other indirect purchasers.

5. Ultimately, these various lawsuits were consolidated into a multi-district litigation (MDL), overseen by Judge Borman, including causes of actions for direct purchasers and causes of action for indirect purchasers. See, *Packaged Ice Antitrust Litigation*, 2:08-MD-01952 (E.D. Michigan)..

6. On or about June 17, 2008, we unsealed a plea agreement and Information in United States v. Home City Ice Company, (S.D. Ohio 1:07 00140). The Information charged Home City Ice with participating in a conspiracy to suppress and eliminate competition by agreeing with other packaged ice manufacturers to allocate customers and territories in southeastern Michigan and the Detroit, Michigan metropolitan area, beginning at least as early as January 1, 2001 until July 17, 2007.

7. On or about June 20, 2008, counsel for the indirect purchasers in the MDL contacted me and requested copies of the plea agreement and the Information, which I forwarded to him.

8. On or about July 17, 2009, I attended a status conference before Judge Borman concerning discovery in the MDL. Prior to the conference, MDL counsel for the indirect purchasers introduced themselves to me, as well as MDL counsel for the direct purchasers. Mr. Axelrod was not present. The primary issue they both wanted to discuss with me related to a discovery schedule in the MDL. Neither group asked to confer with the United States about any potential plea agreements in the criminal investigation.

9. On or about September 10, 2009, we filed under seal the Information in the instant case. We unsealed the Information

and filed the plea agreement on or about October 13, 2009.

10. On October 27, 2009, we had an extensive discussion with the Court in chambers, discussing whether to proceed with the arraignment. Judge Weber decided to recess the arraignment until November 10, 2009 to allow the petitioners to confer with the Department of Justice.

11. On or about October 28, 2009, Scott Watson, the chief of the Cleveland Field Office, contacted Mr. Axelrod and scheduled a meeting with the petitioners for November 4, 2009.

12. On or about November 3, 2009, the petitioners provided us with a fourteen page document containing their views of the plea agreement and charge.

13. On or about November 4, 2009, we met with the petitioners and discussed at considerable length their concerns, including the concern that AGI might deplete its assets. Petitioners provided us information they believed was consistent with a nationwide conspiracy. We took their information into consideration.

14. On or about December 15, 2009, counsel for the indirect purchasers forwarded their concerns to the probation officer in this case.

15. In their submissions to the Court and to the probation office, the petitioners did not quantify or specify an actual amount of damages that they incurred as a result of the conspiracy charged.

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

2/19/2010
Date

KEVIN C. CULUM