

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	Criminal No.: 1:09cr149
Plaintiff)	
)	
v.)	HON. HERMAN J. WEBER
)	
ARCTIC GLACIER,)	
INTERNATIONAL INC.,)	
)	
Defendant.)	

**RESPONSE TO PETITIONERS' MOTION FOR DISCLOSURE
OF PRESENTENCE INVESTIGATION REPORT**

On December 30, 2009, the Baron Group Inc. d/b/a Baron's Ice House, Lawrence J. Acker, Brian W. Buttars, Linda Desmond, James Feeney, Ainello Mancusi, Ron Miastkowski, Perry Peka, Patrick Simasko and Wayne Stanford ("the petitioners") filed a motion asking the Court to order the disclosure to of the Presentence Investigation Report (PSR) in the above captioned matter.¹ Because they have shown no compelling need to have access to the PSR the Court should deny the petitioners' motion.

I. PRESENTENCE REPORTS ARE CONFIDENTIAL MATERIALS AND SHOULD NOT BE DISCLOSED ABSENT A *COMPELLING* NEED.

PSRs are confidential. *United States Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988). As confidential materials, courts rarely grant third parties access to a PSR. Such a disclosure would have a chilling effect on the willingness of a defendant to contribute meaningful

¹ From the motion and accompanying papers, it is unclear to the United States which petitioners are indirect purchasers and which are direct purchasers. Likewise, it is unclear which petitioners are located in southeastern Michigan.

information to the report. *Id.* See also, *In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009); *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995) (explaining the need for the defendant to provide meaningful information to the sentencing court and the court's commitment to maintain the report's confidentiality absent a "compelling need"); *United States v. Hirsh*, 2007 WL 1810703 (E.D. Pa, 2007) (distinguishing sentencing memorandum from PSRs and requiring third party to demonstrate a compelling or a particularized need to obtain disclosure). To ensure that a defendant provide meaningful information to a sentencing court, courts vigilantly protect the information contained in the report from disclosure. See *Huckaby*, 43 F.3d at 138 (citing *United States v. Corbitt*, 879 F.2d 224, 239 (7th Cir. 1989)). See also, *In re Siler*, 571 F.3d at 610-11. Consequently district courts have the discretion to turn over PSRs only "where a compelling, particularized need for disclosure is shown." *United States v. Happ*, 2008 WL 5101214 (S.D. Ohio 2008) (quoting *United States v. Corbitt*, 879 F.2d 224, 239 (7th Cir. 1989)).² Even then, disclosure should be limited to those portions which are directly relevant to that need. *Corbitt*, 879 F.2d at 239.

Here, the petitioners have not, and cannot, show a compelling need. First, the petitioners do not cite any legal authority in their motion or brief in support which would demonstrate why the information which they demand could or would satisfy the compelling need standard. Second, the petitioners have not shown, and cannot show, what is extraordinary about their circumstances. Rather, the petitioners circumstances are ordinary. Ordinary circumstances do

² In the petitioners' motion, petitioners place great weight on the statement of Mr. Culum at the hearing in which, he stated that to the extent the PSR were disclosed, it should be in redacted form. In essence, the petitioners suggest that Mr. Culum has (or had) the right to disclose the PSR. He does not. The authority to disclose the PSR rests exclusively with this Court and any suggestion to the contrary is wrong.

not satisfy the compelling need standard.

The petitioners' laundry list of demands begins with whether the PSR contains all of the defendant's relevant conduct. The United States has fulfilled its obligation to inform the Court of all the defendant's relevant conduct. The petitioners have presented to the Court and the probation office their position on the issue of relevant conduct. Having been given the opportunity to air their position fully the petitioners are not disadvantaged if they do not know what the probation office conveys to the Court in its confidential report. Therefore the Court can be assured that it has all the information necessary to impose a "sentence sufficient, but not greater than necessary" (18 U.S.C. § 3553(a)(1)) on Arctic Glacier, and that this demand does not satisfy the compelling need standard.

The petitioners also demand to review the PSR to determine in various ways whether in the petitioners' opinion the sentencing guidelines calculations, the fine and the structure of paying it and the culpability score are correct. First, the plea agreement sets the affected volume of commerce (\$50.3 million), the number of employees and all relevant facts from which one can determine the sentencing guidelines. Second, the plea agreement establishes an agreed upon fine of \$9 million and structure to the payment of that fine. The petitioners are free to offer an alternative calculation and argue against the agreed upon fine. To demand the PSR to determine, in essence, whether the probation officer correctly calculated the guidelines range is unnecessary. This demand does not reflect any compelling need on the part of the petitioners.

Finally, the petitioner demands the PSR to determine whether "it fully portrays the company's poor financial condition." The petitioners have already argued that the defendant is in dire financial condition. Further, this demand is exactly the rationale the United States Supreme

Court addressed when discussing why PSRs should not be disclosed. *United States Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988). *See also, In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009); *United States v. Huckaby*, 43 F.3d 135 (5th Cir. 1995). Whatever is the financial condition of a defendant, that information is private, confidential and should not be disclosed. To permit the petitioners to have access to such information would have a chilling effect on any defendant, particularly a corporate defendant, to provide frank and full disclosure of the defendant's financial condition.

In summary, the petitioners fail to show a compelling need for any of their demands and therefore their motion should be denied.

II. THE CRIME VICTIMS RIGHTS ACT (CVRA) DOES NOT AUTHORIZE THE DISCLOSURE OF THE PRESENTENCE REPORT.

Because the petitioners cannot establish a compelling need, the petitioners argue that without access to the PSR they will be denied meaningful exercise of their right to be heard in connection with the sentencing of Arctic Glacier. That is not the standard. It is also dubious. The petitioners demand the PSR as part of the rights granted to victims under the Crime Victims Rights Act (CVRA), 18 U.S.C. § 3771.³ If the petitioners were victims under the CVRA, the CVRA would not provide them the relief sought. Nowhere in the CVRA or Rule 32 of the Federal Rules of Criminal Procedure are victims given the right to review the PSR. Rather, like all third parties, a victim must demonstrate a compelling need. Courts addressing the issue have expressly denied the position taken by the petitioners here, i.e., that the CVRA confers a right to victims to gain access to PSRs. *In re Siler*, 571 F.3d 604, 609 (6th Cir. 2009); *In re Kenna*, 453

³ The United States has argued and continues to argue that the petitioners making this motion are not victims of the charged crime within the meaning of the CVRA.

F.3d 1136 (9th Cir. 2006). In *In re Siler*, the Sixth Circuit Court of Appeals expressly held that “the CVRA does not provide an independent right to obtain PSRs.” 571 F.3d at 609. The *Siler* court went on to state that the CVRA “‘is . . . silent and unconcerned with victims’ rights to file civil claims against their assailants.’” *Id.* at 610 (quoting *United States v. Moussaoui*, 483 F.3d 220, 234-35 (4th Cir. 2007)).

The CVRA allows the petitioners to receive reasonable notice of public hearings, the opportunity to be heard at public hearings and the opportunity to confer with the government. The petitioners have taken every opportunity to assert their rights. In their letter of October 15, 2009, their filing of October 27, 2009, and orally during the October 27, 2009, hearing and during the November 10, 2009, arraignment, they raised their concerns to the Court. During a November 11, 2009, meeting and in the course of numerous telephone conversations they conferred with the government regarding their position on the Arctic Glacier sentencing. In a December 17, 2009, letter they detailed their position to Laura Jensen the probation officer assigned to the Arctic Glacier sentencing. The Court has given them the opportunity to file another paper outlining their concerns due January 22, 2010, and they will be afforded the opportunity to address the Court at sentencing.

In this case, regardless of what is contained in the PSR, the petitioners can continue to advance their various claims and demands at the sentencing. First, they can continue to claim that they are victims. Second, they can continue to claim they are entitled to restitution. Third, they can continue to claim that a \$9 million dollar fine is too high or too low; or how Arctic Glacier should pay its fine. Finally, they can continue to forward the argument that a nationwide criminal conspiracy exists. While the petitioners may want to know whether the probation

officer agrees with their claims and demands, these claims and demands do not, and cannot, satisfy the compelling need standard required to allow for the disclosure of the PSR.

Consequently the petitioners' motion should be denied.⁴

Dated: January 7, 2010

/s/ Kevin C. Culum

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⁴ If the Court were, in its sole discretion, to order disclosure of the PSR to the petitioners, the disclosure should be extremely limited, presumably only to the portion of the PSR which speaks directly to the impact on victims.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2010, the foregoing *Response to Petitioners Motion for Disclosure of Presentence Investigation Report* was filed electronically and to the best of my knowledge, information and belief, counsel for the victims and defendant Arctic Glacier International Inc., will be notified through the Electronic Case Filing System and have been served by overnight mail.

/s/ Kevin C. Culum
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