IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-3201

In re: MARTIN MCNULTY,

Petitioner.

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

ISSUE PRESENTED

Whether petitioner's pending civil action in federal district court, in which his claims for relief are based on the same allegations he advanced below, forecloses the remedy of mandamus here.

STATEMENT

1. Petitioner Martin McNulty is a former employee of Arctic Glacier International, Inc. ("AGI"), a producer of packaged ice. In December 2004 he was

employed by Party Time Ice, which AGI purchased that month. Tr. 29.[1] AGI thereafter terminated McNulty near "the end of January," and he "signed a severance agreement . . . in March of '05." *Id.* at 31.

On July 23, 2008, McNulty filed a civil complaint in the United States District Court for the Eastern District of Michigan against three producers of packaged ice, including AGI, and several of their executives. *McNulty v. Reddy Ice Holdings, Inc., et al.* (E.D. Mich. No. 08-cv-13178). The defendants moved to dismiss and the court partially granted and partially denied those motions. The court explained that although McNulty pleaded causes of action under RICO, federal and state antitrust laws, and tortious interference, his "various causes of action can be boiled down to two overarching claims: (1) Plaintiff was terminated for refusing to participate in the alleged unlawful collusion and (2) Defendants conspired against Plaintiff and effectively blackballed him from the packaged ice industry." E.D. Mich. No. 08-cv-13178: Document No. 84 at 10. AGI filed an Answer asserting that the "'decision [to terminate McNulty] was made as a result of the restructuring of the Corporate Marketing department,'" and denying that its decision resulted from any "market allocation scheme." *Id.*: Document No. 97 at 17 (quoting January 27, 2005 termination confirmation letter to McNulty).

[1] "Tr." refers to the transcript of the February 11, 2010, hearing, and is document number 46 in the district court's docket sheet (S.D. Ohio No. 1:09-cr-149).

2. This case arose from an Information filed by the Antitrust Division of the United States Department of Justice against AGI and a proposed plea agreement. *United States v. Arctic Glacier Int'l, Inc*., No. 09-cr-149 (S.D. Ohio). In September 2009, the Division filed the Information charging AGI with conspiring to eliminate competition by allocating packaged ice customers in southeastern Michigan. After the AGI Information was made public several purchasers of packaged ice filed a motion asserting rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA").[2] Doc. 13.[3] On November 10, 2009, the court conditionally accepted the guilty plea and, to allow time for a presentence report and input from all those concerned including "representatives of the alleged victims," set the sentencing hearing for February 11, 2010. Doc. 25.

On January 20, 2010, McNulty sent a letter to the probation officer claiming (Letter at 1), as he had in his civil action, that because of his refusal to participate in AGI's customer allocation conspiracy he "was fired and blackballed from the industry."[4] He sought $6.3 million in restitution. *Id.* at 1-7.

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[2] This Court recently denied those purchasers' petition for a writ of mandamus in *In re Acker*, __ F.3d __, No. 10-1359, 2010 WL 624128 (6th Cir. Feb. 22, 2010).

[3] "Doc." refers to the document number in the district court's docket sheet in *Arctic Glacier*.

[4] Although in his petition (at 7) McNulty states that he "sent a letter and accompanying declaration (Ex. 1) to Ms. Jensen [the probation officer] on January

On February 11, 2010, the court held an extensive hearing on whether to accept the plea agreement. Mr. McNulty, through counsel, appeared at the hearing and, pursuant to the CVRA, asserted a right to restitution. Tr. 52. As he had in his letter to the probation officer, McNulty failed to mention his pending civil action against AGI.[5] At the end of his presentation, however, the court asked the following:

> THE COURT: Were there any civil actions filed by Mr. McNulty resulting from his experience?
>
> [McNulty's Counsel]: Yes, Your Honor. There is currently a civil action pending.
>
> THE COURT: So there is a civil action available to him?
>
> [McNulty's Counsel]: Yes, Your Honor.

Tr. 55.

After hearing from all present the court, among other things, denied McNulty's request for restitution. It concluded that "McNulty was an employee of defendent, not a customer," that there was "no evidence he was directly or proximately harmed by the conspiracy," and that he "is not a victim of the offense charged." Tr. 117. The court also concluded that even with respect to AGI's

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20, 2010," he attached as Exhibit 1 only the declaration that accompanied the letter, but not the letter, to his petition.

[5] McNulty similarly fails to mention his civil action in his petition for mandamus, not even including it in his "Notice of Related Proceeding." Pet. 2.

direct-customer victims, "determining complex issues of fact related to the cause or amount of the victim's losses" would so complicate and prolong "the sentencing process . . . . [that] no restitution order can be made." *Id*. at 118.

STANDARD FOR ISSUING A WRIT OF MANDAMUS

As this Court recently held, "the plain language of the statute compels application of the normal mandamus standards" to petitions, like this one, for a writ of mandamus under the CVRA. *In re Acker*, slip op. at 2. A writ of mandamus "is an extraordinary remedy that [the Court] will not issue absent a compelling justification," and "[t]hus, only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." *Id.* (internal quotation marks and citations omitted). The petitioner must establish that he has "no other adequate means to attain the [desired] relief" and that his "right to issuance of the writ is clear and indisputable." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403 (1976) (internal quotation marks and citations omitted). Moreover, "because mandamus is a discretionary remedy, [the] Court may decline to issue the writ if it finds that it would not be 'appropriate under the circumstances' even if the petitioner has shown he is 'clear[ly] and indisputabl[y]' entitled to it." *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 437 (6th Cir. 2009) (quoting *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 381 (2004)).

REASONS FOR DENYING THE WRIT

1. Petitioner's Civil Suit Is The Better Forum To Redress Any Harm He May Have Suffered.

To prevail in his civil case, McNulty must prove his disputed allegations that he was terminated and blackballed from the industry as a result of AGI's market allocation conspiracy. In this case, however, he contends that his mere assertions of wrongful termination and blackballing at the February 11, 2010, sentencing, which he states "the district court did not contest" (Pet. 11), entitle him to $6.3 million in restitution. The court, however, expressly asked him whether he had filed any civil actions "resulting from his experience" with AGI, and when told yes, it specifically remarked: "So there is a civil action *available to him*?" Tr. 55 (emphasis added). Thus the court was fully aware that McNulty had brought a suit "resulting from his experience" in which his allegations about AGI had been raised.

Moreover, McNulty's counsel also represents another alleged victim who similarly sued AGI but settled, and in the present case sought restitution to supplement an allegedly inadequate settlement. Tr. at 55-57. After learning that that case took 2½ years to settle, the district court "want[ed] the record to understand that it took two-and-a-half years for one alleged victim to determine a loss, which was settled. And then [he entered this case with an] additional claim

for restitution." *Ibid*.

Thus, even if McNulty is a victim and also a victim of the crime of conviction,[6] it is clear that the court fully understood that deciding his restitution claim was pregnant with "determining complex issues of fact related to the cause [and] amount of [McNulty's] losses [that] would [overly] complicate or prolong the sentencing process." *Id*. at 118. Because causation and loss must be proved, the court was fully justified in leaving resolution of those complex issues to McNulty's civil action. Indeed, because McNulty has his civil action "to attain the [desired] relief," *Kerr,* 426 U.S. at 403, as the court expressly noted (Tr. 55), mandamus is unjustified and would not be "'appropriate under the circumstances.'" *In re Professionals Direct Ins.,* 578 F.3d at 437.

II. The District Court Correctly Understood That It had Discretion To Award Restitution As A Condition of Probation.

Petitioner wrongly contends that the "district court erred in concluding that [he] was ineligible for restitution because the crime of conviction is not listed in 18 U.S.C. § 3663." Pet. 30. Rather, the court correctly observed that 18 U.S.C. §

[6] Significantly, the nature of the offenses and the resulting harms in the cases cited on pages 19-22 of the petition—flight from bank and train robberies, stolen firearms and meth lab explosions—are radically different than the conspiracy to allocate customers charged here and the damage McNulty alleged, unemployment. Moreover, the existence of *some* connection between those crimes and the harms was not being hotly contested in separate civil actions brought by the alleged victims, as it is here.

3663(a)(1) does not include the Sherman Act, 15 U.S.C. § 1, among the listed offenses for which it authorizes, but does not mandate, restitution.[7] Tr. 117.

Nor did the court wrongly conclude that, with Section 3663 inapplicable, there was no way to impose restitution. Reading the plea agreement at the hearing, the court acknowledged that normally it "may order [AGI] to pay restitution to the victims of the offense" pursuant to U.S.S.G. §8B1.1 and 18 U.S.C. § 3563(b)(2), both of which provide for restitution as a condition of probation.[8] Tr. 9. The court expressed concern that it could not impose probation here, however, because the Rule 11(c)(1)(C) plea agreement contained no probation recommendation. Tr. 19-20. AGI alleviated that concern with a board resolution, obtained during a recess, that consented to probation in conjunction with the plea agreement, and the corporate Secretary's acknowledgment that the court "can use [its] own discretion in what [it] impose[s] after appropriate procedure as far as the Chapter 8 conditions [of probation] are concerned." Tr. 49-50.

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[7] Sherman Act offenses are also not among the offenses for which 18 U.S.C. § 3663A generally makes a restitution order mandatory. 18 U.S.C. § 3663A(c)(1)(A).

[8] *See* 18 U.S.C. § 3563(b)(2) ("The court may provide, as [a] further condition[] of a sentence of probation, . . . that the defendant . . . make restitution to a victim of the offense.").

As a result, the district court fully understood it could sentence AGI to probation and impose conditions, including restitution, to that probation. Nevertheless, it ultimately declined to order restitution to AGI's customers, not for lack of authority, but because it found that "determining complex issues of fact related of the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." Tr. 118 (citing U.S.S.G. §8B1.1(b)(2)).

Petitioner also wrongly contends that the court was *required* to impose restitution as a condition of probation. Pet. 30-31. Petitioner argues that the Sentencing Guidelines transform the obviously discretionary restitution regime of Section 3563(b)(2) into a mandatory one. Pet. 31 (citing U.S.S.G. §§5E1.1, 8B1.1). While the cited guidelines sections do say that "the court shall . . . impose a term of probation . . . with a condition requiring restitution for the full amount of the victim's loss," U.S.S.G. §§5E1.1(a), 8B1.1(a),[9] the sentencing guidelines are now advisory only and do not bind the district court's discretion. *United States v.*

[9] Significantly, these sections also provide that the directive to impose restitution does not apply if "(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." U.S.S.G. §§5E1.1(b)(2), 8B1.1(b)(2).

Booker, 543 U.S. 220, 246 (2005). Thus, the guidelines may advise, but cannot require, the court to impose restitution as a condition of probation. Lastly, to the extent petitioner argues that the CVRA itself makes restitution mandatory, he also is wrong. The right to full and timely restitution provided by the CVRA is subject to the "important modifier" that such restitution must be "'as provided in law.'" *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 563 (2d Cir. 2005) (quoting 18 U.S.C. § 3771(a)(6)). Nothing, however, provided in law makes a $6.3 million restitution to McNulty mandatory in this case.[10]

[10] Nor should this Court be detained by McNulty's concern that the $9 million fine imposed by the court will impede his ability to collect restitution. Pet. 32. That fine is back-end loaded and payable over 5 years. Tr. 75, 134-35. At the hearing the government expressly agreed that it would waive collection of the remaining fine if any civil plaintiff obtained a judgement but could not collect it because of the fine. *Id*. at 99.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2010, I served a true copy of the foregoing Answer on the following by Federal Express:

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