

# **Exhibit B**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

-----X	:	
	:	
IN RE:PACKAGED ICE ANTITRUST	:	Case Number 08-MD-01952
LITIGATION:	:	Honorable Paul D. Borman
	:	
-----X	:	
	:	
THIS DOCUMENT RELATES TO DIRECT	:	
PURCHASER ACTIONS	:	
	:	
-----X	:	

**DECLARATION OF GREGORY K. ARENSON**

I, Gregory K. Arenson, declare:

1. I am a partner in the firm of Kaplan Fox & Kilsheimer LLP, which was one of the three co-lead counsel for class plaintiffs in the case entitled *In re: High Fructose Corn Syrup Antitrust Litigation*, MDL No. 1087 and Master File No. 95-1477, in the United States District Court for the Central District of Illinois, Peoria Division (“*HFCS*”). We represented a class of direct purchasers who were suing defenants for a civil violation of the antitrust laws, the same type of proceeding as *Packaged Ice Antitrust Litigation*.

2. I submit this declaration in connection with purchaser plaintiffs’ motion to compel the United States Department of Justice (“DOJ”) to produce certain tape recordings and verbatim transcripts, and more specifically to rebut the declaration of Christine A. Varney that tape recordings cannot be disclosed because “[t]he requested recordings 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” (Varney Dec., ¶ 10), and the declaration of Kevin Culum to the same effect (Culum Dec., ¶¶ 12-20).

3. I have personal knowledge of the facts stated in this declaration, since I was actively involved in the *HFCS* case from beginning to end. To prepare this declaration, I have reviewed extensive information in my firm's files to verify what is set forth below. So as not to burden this Court unnecessarily, I have not attached all that supporting material to this declaration, but it is available should the Court request to review it.

4. On October 28, 1996, class plaintiffs in *HFCS* subpoenaed the custodian of documents for the DOJ in Peoria, Illinois seeking production, among other things, of all recordings made by or with the consent of Mark E. Whitacre. Over the period from November 1992 through July 1995, Mr. Whitacre had recorded or consented to the recording of approximately 150 hours of his conversations with personnel of Archer Daniels Midland Company ("ADM") and third parties on 239 audio and video tapes.

5. The DOJ asserted the law enforcement investigatory privilege, and plaintiffs moved to compel compliance. The district court ruled that those tapes pertaining to lysine only and certain tapes the DOJ had selected and played for attorneys who were counsel to a special committee of ADM's Board of Directors should be produced, while reserving decision on the remainder. The lysine-only tapes were then produced by the DOJ, subject to a stringent protective order restricting access to a limited number of designated counsel of record for each party. *See* First Addendum to the Protective Order of May 2, 1996, filed April 10, 1997 (Exhibit 2).

6. On October 30, 1997, on an appeal under 28 U.S.C. §1292(b), the Seventh Circuit upheld the DOJ's assertion of the law enforcement investigatory privilege and quashed plaintiffs' subpoena, on the grounds that the criminal investigation was still in progress. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997).

7. A criminal trial against Michael D. Andreas, Terrance S. Wilson and Whitacre in the United States District Court for the Northern District of Illinois for violating the antitrust laws in the lysine market culminated in a conviction on all counts on September 17, 1998. During the trial, certain tapes were played for the jury and made publicly available. A number of tapes (approximately 200 of the 239) were not used in the criminal trial and were not made public.

8. On November 24, 1998, class plaintiffs in *HFCS* served a subpoena on the custodian of documents for the DOJ in Peoria, Illinois seeking production, among other things, of all recordings made by or with the consent of Whitacre.

9. On January 22, 1999, the DOJ, no longer asserting the law enforcement investigatory privilege, agreed to produce almost 200 “remaining tapes from DOJ’s antitrust investigation . . . that were not admitted at trial in the criminal matter” and other information. *See* letter from Terry M. Henry to me, dated January 22, 1999 (Exhibit 1). As this letter shows, these nearly 200 tapes had never been made public. The DOJ by that time had already provided to us those tapes that had been used and made public in the criminal trial.

10. ADM objected and moved to quash the subpoena. In addition, ADM’s former President and then current consultant James Randall moved to intervene and quash the subpoena.

11. On March 22, 1999, the district court heard argument, and subsequently entered an amended order that reads in pertinent part:

On November 24, 1998, Plaintiffs served a subpoena *duces tecum* on the Department of Justice seeking, *inter alia*, all recordings made by or with the consent of Whitacre during the FBI’s investigation. On January 22, 1999, the DOJ agreed to produce the approximately 200 tapes that remain from the DOJ’s criminal antitrust investigation. Those tapes introduced in the criminal trial of *United States v. Andreas*, 96 CR 762 (N.D. Ill.), which are not included in the 200 figure, are already part of a public record and have been delivered to Plaintiffs and Defendants.

*In re: High Fructose Corn Syrup Antitrust Litig.*, 46 F. Supp. 2d 819, 821 (C.D. Ill. 1999). The district court granted in part the motions to quash and restricted our access for discovery to less than the approximately 200 tapes the DOJ was willing to provide.

12. The district court certified this order for interlocutory appeal under 28 U.S.C. § 1292(b), and the Seventh Circuit again accepted the appeal.

13. I argued the appeal before the Seventh Circuit. On the appeal, the Seventh Circuit modified the district court's order and directed that plaintiffs were entitled to all the recordings. *See In re High Fructose Corn Syrup Antitrust Litig.*, 216 F.3d 621, 626 (7th Cir. 2000).

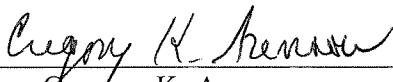
14. On remand, the district court conducted a telephone conference on July 28, 2000, to make arrangements for the copying and production of the remaining tapes by the DOJ. At that time, the protective order for the tapes was modified to permit them to be used in the case as other highly confidential material. *See* Second Addendum to the Protective Order of May 2, 1996, filed on August 21, 2000 (Exhibit 3). This permitted us to use the tape recordings in the *HFCS* civil litigation, which we did.

15. In addition, class plaintiffs sought and obtained an order from the United States District Court for the United States District Court for the Northern District of Illinois in *United States v. Andreas*, 96 CR 762 (N.D. Ill.), to permit class plaintiffs to access the tapes despite the protective order that had been entered in the criminal proceeding. The Order sought by class plaintiffs was entered on August 25, 2000. It read, in part:

The Department of Justice is authorized to produce to *High Fructose Corn Syrup Antitrust Litigation* Class Plaintiffs all transcripts of tapes sought under Class Plaintiffs' November 23, 1998 subpoena in *High Fructose Corn Syrup Antitrust Litigation*, regardless of whether the transcripts were introduced into evidence in *United States v. Andreas*.

I declare under penalty of perjury that the foregoing is true and correct.

Executed March 31, 2011.

  
\_\_\_\_\_  
Gregory K. Arenson

# **Exhibit 1 to Exhibit B**



U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
P.O. Box 883  
Washington, D.C. 20044

Terry M. Henry  
Trial Attorney

Tel: (202) 514-4107  
Fax: (202) 616-8202

RECEIVED  
Kaplan, Kilsheimer & Fox LLP

January 22, 1999

1 25 99

BY FAX & FIRST-CLASS MAIL

Gregory K. Arenson, Esq.  
Kaplan, Kilsheimer & Fox, LLP  
685 Third Ave.  
New York, NY 10017  
Fax No. (212) 687-7714

Re: In Re High Fructose Corn Syrup Antitrust Litigation  
MDL No. 1087 and Master File No. 95-1477 (C.D. Ill.)

Dear Greg:

As a follow-up to our telephone conversation, I am writing to describe for you materials the Department of Justice ("DOJ") is willing to produce in response to the subpoena in this matter received at the United States Attorney's Office in Peoria, Illinois, on November 23, 1998.

**Tapes.** DOJ is willing to produce, with certain exceptions noted below, the remaining tapes from DOJ's antitrust investigation related to the subject matter of this case that were not admitted at trial in the criminal matter, United States v. Andreas, No. 96 CR 762 (N.D. Ill.) (Manning, J.).<sup>1</sup> Any such disclosure would be made under the terms of the First Addendum to the Protective Order of May 2, 1996, which has governed tapes previously produced by DOJ in this case. There are just under 200 tapes that may be turned over.

Approximately four other tapes, two of which are duplicates of another, are under seal and may not be disclosed, however. These tapes reflect situations where conversations continued to be recorded, for example, when Mark Whitacre left the room where the recording device was located. Thus, the tapes may not be lawfully disclosed.

You should also know that approximately five of the tapes that can be copied and turned over are defective. These tapes, therefore, may be of little value.

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<sup>1</sup> Tapes designated by Judge Mihm as "lysine-only" were previously produced pursuant to protective order in this case.



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In addition, approximately four tapes exist that fall within the technical scope of your subpoena, but do not record arguable conspiratorial conduct concerning price-fixing. One of these tapes was supplied by Mr. Whitacre in 1997 in connection with a non-antitrust matter and should be obtained from him, if you wish to pursue it. The other tapes were supplied by non-DOJ sources during 1996-1997 in connection with non-antitrust cases or investigations related to Mr. Whitacre and others. The circumstances of DOJ's receipt of these other tapes constrain disclosure of the tapes or further discussion of their contents, except to say that they do not record arguable conspiratorial conduct concerning price-fixing.

**Duplication of Tapes.** DOJ can have the tapes it is willing to produce duplicated at approximately \$2.00 per tape, an expense I assume plaintiffs would be willing to bear. We estimate that it will take approximately 30 days to assemble and duplicate the tapes, once any legal issues related to the production are resolved. I refer specifically to defendant ADM's intended motion to quash or modify the subpoena. See December 28, 1998 Letter to H. Laddie Montague and Terry M. Henry from Steven R. Kuney.

**Transcripts.** Transcripts exist for the tape segments used at trial in United States v. Andreas, and draft transcripts exist for certain tapes or tape segments that were not used at the trial. As noted in my December 7, 1998 letter to Mr. Montague concerning the subpoena, Judge Manning entered an order in United States v. Andreas that precludes DOJ from releasing transcripts that are not themselves admitted as evidence in the case. An unsigned copy of that order, entered on July 16, 1998, and a ruling on a motion to reconsider are attached for your information. Please be aware that, in connection with the sentencing in United States v. Andreas, DOJ will ask Judge Manning to include in any record for appeal certain transcripts pertaining to tapes admitted at trial. Judge Manning's action on DOJ's request may result in some transcripts being put into the public record in United States v. Andreas.

Furthermore, assuming issues related to Judge Manning's July 16, 1998 order are resolved in a fashion that would permit DOJ to disclose transcripts, we suggest that, in order to minimize the burden on DOJ and avoid unnecessary wrangling over issues discussed in Judge Mihm's September 15, 1997 order concerning transcript production, you review the tapes that will be produced and identify specific ones for which you need transcripts. We can then discuss whether a draft or other transcript exists and whether DOJ is willing to produce it.

**Documents That Accompanied Tapes.** Request No. 5 of plaintiffs' subpoena seeks documents that accompanied DOJ's receipt of tapes, which I understand to mean business cards, meeting notes, etc. that Mr. Whitacre may have provided DOJ along with tapes. DOJ does not maintain such documents in a fashion where they are easily tied to specific recordings or are segregable from non-tape related internal agency documents. Accordingly, we suggest that, in order to minimize the burden on DOJ, you review the tapes that will be produced and identify documents you desire. We can then discuss DOJ's attempting to locate specific documents.

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**Custody Materials.** With respect to Requests No. 7 & 8 of plaintiffs' subpoena, DOJ is willing to produce the Forms FD-504 pertaining to the tapes to be produced. These reflect the chain of custody for a tape and, in some cases, supply other information concerning the tape. You received 504's for the lysine-only tapes previously produced by DOJ in this case. There are other documents, including FBI 302's, that may arguably "relate" to tape receipt or custody, but identifying and reviewing such documents in order to locate custody-related information and separate any privileged information would be unduly burdensome. Again, we suggest that, in order to minimize the burden on DOJ, you review the tapes that will be produced and identify specific tapes for which you need information that the 504's do not provide. We can then discuss any further production by DOJ.

**Indices.** DOJ will provide an index of the tapes produced that is similar to the index provided by DOJ with the lysine-only tapes. Numerous other indices of the tapes exist in DOJ files for various purposes. Production of these other indices would be burdensome; furthermore, these indices contain attorney work product or otherwise reflect analyses of information by the Department in anticipation of litigation.

Please contact me with any questions.

Sincerely yours,



Terry M. Henry

# **Exhibit 2 to Exhibit B**

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APR - 8 1997  
U.S. CLERK'S OFFICE  
PEORIA, ILLINOIS

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

APR 10 1997

JOHN M. WATERS, Clerk  
U.S. DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

IN RE:	HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION	)	MDL No. 1087 and
		)	
	THIS DOCUMENT RELATES TO ALL ACTIONS	)	Master File No. 95-1477
		)	
		)	
		)	

FIRST ADDENDUM TO THE PROTECTIVE ORDER OF MAY 2, 1996

1. Pursuant to this Court's minute entry of February 27, 1997, order of March 20, 1997 and minute entry of March 27, 1997, the United States Department of Justice shall produce certain tape recordings subject to the following limitations, which shall apply temporarily until such time as a more detailed addendum to the Protective Order of May 2, 1996 is ordered by this Court.

2. The tape recordings shall be made available to the following attorneys for plaintiffs and defendants in the above-captioned litigation through the procedures outlined in paragraph 4 below:

For Plaintiffs:

Michael J. Freed  
Barat S. McClain  
MUCH SHELIST FREED DENENBERG  
AMENT BELL & RUBENSTEIN, P.C.

Robert N. Kaplan  
Gregory K. Arenson  
KAPLAN, KILSHEIMER & FOX LLP

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H. Laddie Montague, Jr.  
Charles P. Goodwin  
BERGER & MONTAGUE, P.C.

Ann C. Yahner  
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.

Richard B. Drubel  
SUSMAN GODFREY, L.L.P.

For Defendant Archer Daniels Midland Company:

Aubrey M. Daniel, III  
Steven R. Kuney  
John E. Schmidlein  
WILLIAMS & CONNOLLY

For Defendant Cargill, Incorporated:

Robert E. Bloch  
Mark C. Ryan  
Michael Lackey  
MAYER, BROWN & PLATT

For Defendant A.E. Staley Manufacturing Co.:

Terry M. Grimm  
Joseph A. Spiegler  
WINSTON & STRAWN

For Defendant American Maize-Products Company  
(now known as Cerestar USA, Inc.):

Donald R. Harris  
Edward F. Malone  
Charles Leuin  
JENNER & BLOCK

3. Each of the above-named persons is not permitted access to any of the tape recordings until that person has signed a certificate in the form of attached Exhibit B and sent the certificate to Terry M. Henry, Esq., United States Department of

Justice, Civil Division, 901 E Street, N.W., Room 942,  
Washington, D.C. 20004.

4. There shall be a single copy of the tape recordings provided for the plaintiffs, to be maintained at the law firm of Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C., and a single copy of the tape recordings provided for the defendants, to be maintained at the law firm of Williams & Connolly. These law firms shall be responsible for maintaining these tapes in a secure place, limiting access to only those individuals identified in paragraph 2 of this Addendum as entitled to have access to this material, and maintaining a record of those who have had such access. There shall be no other copies of these tape recordings made absent further order of this Court.

5. Pending further order of this Court, no person not identified in paragraph 2 shall receive or review the produced tape recordings. The contents of these tape recordings are not to be disclosed to any person not identified in paragraph 2; except to members of the staffs of the attorneys listed in paragraph 2, who have been instructed concerning, and agree to comply with, the Protective Order of May 2, 1996 and this

Addendum, to the extent necessary to perform clerical or administrative duties.

Dated: April 10, 1997

SO ORDERED:

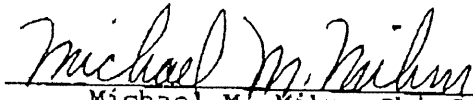
  
Michael M. Mihm, Chief Judge  
United States District Court

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION	) ) ) ) ) ) )	MDL No. 1087 and  Master File No. 95-1477
THIS DOCUMENT RELATES TO ALL ACTIONS	) ) ) ) ) ) )	

CERTIFICATE

1. My name is \_\_\_\_\_ . I am with the  
firm of \_\_\_\_\_ . We are attorneys  
for \_\_\_\_\_ in this action.

2. I have read the Protective Order dated May 2, 1996  
and the First Addendum to the Protective Order of May 2, 1996,  
and I agree to abide by the terms of those documents.

3. I declare under penalty of perjury under the laws  
of the United States of America that the foregoing is true and  
correct.

Executed this \_\_\_\_\_ of \_\_\_\_\_, 1997.

\_\_\_\_\_



# **Exhibit 3 to Exhibit B**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

**FILED**  
AUG 21 2000

JOHN M. WATERS, Clerk  
U.S. DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

MDL No. 1087 and

Master File No. 95-1477

IN RE: HIGH FRUCTOSE CORN SYRUP  
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

SECOND ADDENDUM TO THE PROTECTIVE ORDER OF MAY 2, 1996

The following is the Second Addendum to the Protective Order of May 2, 1996 ("Protective Order"):

1. Pursuant to the orders of this Court entered March 25, 1999 and April 27, 1999, as modified by the Judgment of the United States Court of Appeals for the Seventh Circuit dated June 19, 2000, the United States Department of Justice ("DOJ") is authorized to produce certain tape recordings, transcripts and custody materials related to those recordings, as well as other documents responsive to subpoenas dated November 19, 1998, and January 29, 1999, served by plaintiffs and limited by agreement between plaintiffs and DOJ, subject to the following limitations, which shall apply temporarily until such time as a more detailed addendum to the Protective Order is ordered by this Court. This production is without prejudice to any claim of privilege by DOJ or any party over any portion of the materials as appropriate.

2. All custody materials related to the recordings and other documents responsive to the subpoena shall be treated as documents CONFIDENTIAL AND

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LAWYERS ONLY PURSUANT TO COURT ORDER under the terms of the Protective Order.

3. The tape recordings and transcripts shall be made available to the following attorneys for plaintiffs and defendants in the above-captioned litigation through the procedures outlined in paragraph 4 below:

**For Class Plaintiffs:**

Michael J. Freed  
Barat S. McClain  
**Much Shelist Freed Denenberg  
Ament & Rubenstein, P.C.**

Edith F. Canter  
**Law Offices of Edith F. Canter**

Robert N. Kaplan  
Gregory K. Arenson  
**Kaplan, Kilsheimer & Fox, LLP**

H. Laddie Montague, Jr.  
Charles P. Goodwin  
**Berger & Montague, P.C.**

Ann C. Yahner  
**Cohen, Milstein, Hausfeld & Toll, P.L.L.C.**

Richard B. Drubel  
Stephen R. Neuwirth  
**Boies, Schiller & Flexner, LLP**

**For Plaintiff Gray & Co.:**

Brian J. Posewitz  
**Tonkon Torp LLP**

**For Defendant Archer Daniels Midland Company:**

Aubrey M. Daniel, III  
Steven R. Kuney  
John E. Schmidlein  
Laurie S. Fulton  
**Williams & Connolly**

**For Defendant Cargill, Incorporated:**

Mark W. Ryan  
Michael E. Lackey, Jr.  
Gary A. Winters  
**Mayer, Brown & Platt**

**For Defendant A.E. Staley Manufacturing Co.:**

Terry M. Grimm  
Joseph A. Spiegler  
**Winston & Strawn**

**For Defendant American Maize-Products Company  
(now known as CereStar USA, Inc.):**

Donald R. Harris  
Edward F. Malone  
Margaret Simpson  
**Jenner & Block**

**For Defendants The Hubinger Company and Roquette America, Inc.**

John R. Horan  
**Fox Horan & Camerini LLP**

4. Each of the above-named persons is not permitted access to any of the tape recordings and transcripts until that person has signed a certificate in the form of attached Exhibit C and sent the certificate by overnight courier to Terry M. Henry, United States Department of Justice, Civil Division, 901 E Street, N.W., Room 942, Washington, D.C.

20004, or by mail to Terry M. Henry, United States Department of Justice, Civil Division, Federal Programs Branch, P.O. Box 883, Washington, D.C. 20044.

5. There shall be two copies of the tape recordings provided for the plaintiffs and two copies of the tape recordings provided for the defendants. One copy of the tape recordings provided for the plaintiffs shall be maintained at the law firm of Much Shelist Freed Denenberg Ament & Rubenstein, P.C. One copy of the tape recordings provided for the defendants shall be maintained at the law firm of Williams & Connolly. The second copies of the tape recordings provided for the plaintiffs and for the defendants shall be maintained at the offices of the above-named counsel. These law firms shall be responsible for maintaining these tapes in a secure place, limiting access to only those individuals identified in paragraph 3 of this Addendum as entitled to have access to these tapes, and maintaining a record of those who have had such access. There shall be no other copies of these tape recordings made absent further order of this Court.

6. Pending further order of this Court, no person not identified in paragraph 3 shall receive or review the produced tape recordings or transcripts. The contents of these tape recordings and transcripts shall be disclosed only to those persons identified in paragraph 3 and to members of the staffs of the attorneys listed in paragraph 3, who have been instructed concerning, and agree to comply with, the Protective Order and this Second Addendum, to the extent necessary to perform clerical or administrative duties. Final

disposition of the tapes and transcripts shall be governed by paragraph 10 of the Protective Order.

Dated: August 21, 2008

**SO ORDERED:**

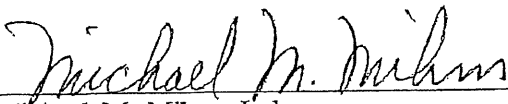
  
\_\_\_\_\_  
Michael M. Mihm, Judge  
United States District Court

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION	)	MDL No. 1087 and
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	Master File No. 95-1477

CERTIFICATE

1. My name is \_\_\_\_\_ I am with the  
firm of \_\_\_\_\_. We are attorneys for  
\_\_\_\_\_ in this action.

2. I have read the Protective Order dated May 2, 1996 and the Second  
Addendum to the Protective Order of May 2, 1996, and I agree to abide by the terms of  
those documents.

3. I declare under penalty of perjury under the laws of the United States of  
America that the foregoing is true and correct.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

\_\_\_\_\_