State of Ohio
Office of the Inspector General

THOMAS P. CHARLES, Inspector General

REPORT OF INVESTIGATION

FILE ID NUMBER:	2009032
AGENCY:	Ohio Department of Transportation
BASIS FOR INVESTIGATION:	Inspector General Initiative
ALLEGATIONS:	Failure to follow state policy for "Buy Ohio" preference; Market allocation by salt vendors; Unlawful product substitution by vendors; Payment of gratuities by a vendor to state and local government officials
INITIATED:	February 4, 2009
DATE OF REPORT:	January 6, 2011

EXECUTIVE SUMMARY

File ID No. 2009032

In the winter of 2008-09, the Ohio Department of Transportation ("ODOT") endured the road salt market's equivalent of a perfect storm. A salt shortage and ODOT's habitual practice of issuing its Invitation to Bid late in the bidding season caused the price of salt to soar up to 236% higher than ODOT paid during the previous season.

Alarmed by the increases, Governor Ted Strickland asked ODOT to analyze and report on the reasons for the price spikes. The resulting report from ODOT's Bid Analysis and Review Team ("BART") raised troubling questions about the conduct of ODOT's two primary salt vendors, Cargill Deicing Technology ("Cargill") and Morton Salt Company ("Morton"), while also apportioning blame to "uncontrollable market forces." The report additionally included intimations, not fully explored by BART, that decisions made by ODOT officials may have contributed to the state's predicament. Acting on our own initiative, the Office of the Inspector General ("OIG") opened an investigation on February 4, 2009.

Our investigation – which spanned nearly two years and involved the review of hundreds of thousands of pages of road salt bidding, pricing, mine sourcing, stockpiling and transportation data – found evidence that Cargill and Morton have engaged in anti-competitive market allocation practices that have cost the state tens of millions of dollars. Although we failed to find evidence that the two companies communicated on salt bids, we did find evidence that Cargill's and Morton's practices have created a duopoly in Ohio's salt market. Historical bid results reveal that the companies have carved up the market into what Cargill documents reveal are "primary" clients that Cargill bids to win and "secondary" clients that the company bids high and would be "surprised" to win. Comparing ODOT bid results for 2010-11, we found that Morton won the vast majority of Cargill's secondary clients. Similarly, Morton executives conceded that they bid their incumbent county clients "more aggressively" than they bid Cargill's incumbents and that they predetermine the share of the market that they want Morton to win.

Despite ODOT officials' claims that ODOT is a victim, the Cargill/Morton duopoly has been aided by ODOT's misinterpretation of the state's "Buy Ohio" statute, a commendable and effective law that gives a financial preference to companies that do business in Ohio and creates jobs for Ohioans. ODOT interprets Buy Ohio to mean that if two companies bid Ohio-mined salt, all other bids are excluded, no matter how much lower they are. This is contrary to the interpretation of the Department of Administrative Services ("DAS"), which Ohio law identifies as the statutory authority for Buy Ohio, and conflicts with the practices of the Ohio Turnpike Commission. ODOT's interpretation is referred to as "lockout bidding."

ODOT's lockout application has been a financial windfall for Cargill and Morton and a financial debacle for Ohio. We reached this conclusion after interviewing witnesses, reviewing documentary evidence and consulting at length with Dr. James T. McClave, the founder of Info Tech Inc., one of the nation's premier bid-analysis consulting firms. Data analysis performed by BART, McClave and Info Tech yields preliminary estimates, based on currently available information, that ODOT may have overpaid Cargill and Morton between $47 million and $59 million over the last decade as a result of their market allocation practices.

We analyzed the bid practices of Cargill and Morton, and found evidence supporting the following five indicators of market allocation: 1) stable market shares; 2) high incumbency (*i.e.* repeatedly winning the same customer); 3) suspicious bidding patterns; 4) sham or complementary bids; 5) and significantly higher profit margins on ODOT contracts when compared with similarly situated departments of transportation in surrounding states.

Evidence of all of these indicators were primarily identified in the 54-county northern region of the state, where lockout prevails and Cargill and Morton have segmented the market into counties that both companies consistently win, year after year. Lockout bidding has so discouraged out-of-state vendors that they are reluctant to submit bids, assuming that Cargill and Morton will lock them out of the market by both bidding in as many counties as possible. Even in the salt bid for 2008-09, when Cargill and Morton uncharacteristically did not bid head-to-head in any of Ohio's 88 counties, not a single outside vendor tendered a salt bid to ODOT.

Evidence that Cargill and Morton engaged in sham bidding is revealed in consistent bidding patterns in which the same company has continued to win its incumbent-client counties year after year despite significant increases in prices over time. In those cases, the losing bidder has frequently raised its prices to an even greater extent, thus helping to preserve the winning company's incumbency via lockout. It is extremely unlikely that these bidding patterns would be present in a truly competitive market.

We also compared the ODOT profit margins of Cargill – the dominant road salt vendor in Ohio – to Cargill's profit margins on its contracts with transportation departments in seven nearby states. In response to our subpoenas, Cargill provided profit-margin data spanning the winters of 2004-05 through 2007-08. The data showed that, with few exceptions, Cargill's profit margins in Ohio were significantly higher than its margins in the other seven states. At its extreme, in the winter of 2007-08, Cargill's ODOT profit margin was a staggering 4,000% higher than its profit margin on its contract with a transportation agency in a neighboring state.

We particularly focused on the state of New York due to the fact that Cargill has salt mines in both Ohio and New York and has nearby competitors in both states. In addition, the tonnages of salt that the company sells to Ohio and New York each year are comparable. In this comparison, we found that Cargill's profit margins on its ODOT contracts were consistently higher in all four winter seasons, and more than 150% higher in three of the four winters. These profit margins further evidence that ODOT was not receiving competitive prices from Cargill during those years.

Our investigation also found evidence that Cargill and Morton violated their Buy Ohio contractual commitments to supply Ohio-mined salt by substituting salt mined outside of the state. We identified 115 instances in which Cargill certified that it was delivering Ohio-mined salt when a portion of the salt came from out of state. We also identified seven instances in which Morton substituted Louisiana salt for Ohio-mined salt, and another 10 instances in which the Morton salt came from Canada, Chile or the Bahamas.

One of the justifications invoked by Cargill for this product substitution was an urgent concern for the safety of the motoring public. Considering that some of the out-of-state salt was delivered in April, when the temperature was in the high-60s, we find these claims to be specious.

During this investigation, we learned that Cargill Strategic Account Manager Tony DiPietro, formerly an Assistant Deputy Director in ODOT District 12 in Garfield Heights, and other Cargill employees provided approximately $4,700 in gratuities to an ODOT official and other public employees in northeast Ohio. The public employees receiving these gratuities had significant influence on the purchasing of Cargill's road salt and other Cargill deicing products. The gratuities ranged from Cleveland Browns tickets to golf outings and meals. Recipients included Diana Clonch, Assistant Administrator of ODOT's Office of Maintenance Administration, and service directors in the cities of Akron, Twinsburg and Bedford Heights.

We also corroborated information provided by Cargill that Frank Bianchi, the Vice President of one of Cargill's salt haulers, Granger Trucking, spent thousands of dollars to entertain public officials throughout northeast Ohio "in the name of Cargill." Regarding Bianchi's expenditures, Cargill officials did provide us with contemporaneous correspondence indicating that they informed Bianchi that he was not authorized to entertain public officials on Cargill's behalf.

Based on the findings of this investigation, we are making six recommendations and asking ODOT and DAS to respond to this office within the next 60 days with a plan explaining how these recommendations will be implemented. We also are referring copies of this report to the Ohio Attorney General's Office, Cuyahoga County Prosecutor's Office, Ohio Ethics Commission, State Auditor's Office and the U.S. Department of Justice.

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I. BASIS FOR INVESTIGATION

In the fall of 2008, Governor Ted Strickland asked the Ohio Department of Transportation ("ODOT") to analyze and explain the large spike in prices that ODOT received that year on bids from vendors for road deicing salt. The price spikes ranged from 19% to 236% higher than the previous year. In the most egregious case – in Ross County – the price of salt soared from $44.66 per ton to $150.11 per ton. In response to Governor Strickland's request, ODOT's Bid Analysis and Review Team ("BART") prepared a report that was submitted to the Governor on December 15, 2008. Information in the report raised questions about the conduct of ODOT's two primary salt vendors, Cargill Deicing Technology ("Cargill") and Morton Salt Company ("Morton"), as well as about decisions made by ODOT officials that may have contributed to the state's predicament. Acting on our own initiative, the Office of the Inspector General ("OIG") opened an investigation on February 4, 2009.

II. ACTION TAKEN IN FURTHERANCE OF INVESTIGATION

During this investigation, the OIG issued 14 subpoenas to Cargill and Morton to obtain road salt bidding, pricing, mine sourcing, stockpiling and transportation data. We reviewed nearly 190,000 pages of documents that were produced by Cargill in response to our subpoenas and other less-formal requests for records. Additionally, we reviewed more than 91,000 pages of documents that were produced by Morton. We also analyzed hundreds of ODOT, Ohio Turnpike Commission ("Turnpike Commission"), other states' and local Ohio governmental road salt bidding, pricing and delivery records.

We conducted interviews with 27 people. They included supply chain managers; bidding and sales managers for both Cargill and Morton; ODOT, Turnpike Commission and local governmental road salt purchasing consortium personnel; several municipal service directors; and employees at some of Cargill's and Morton's competitors.

We also consulted extensively with Dr. James T. McClave,[1] founder and president of Info Tech Inc. of Gainesville, Florida, on issues related to alleged market allocation. Info Tech provides statistical and economic consulting services. The company also developed statistical software for detecting collusive behavior in sealed-bid markets. We additionally consulted on these issues with ODOT BART team economists.

III. DISCUSSION

Salt from the earth

1. Highway Rock Salt in the United States

Since the 1940s, rock salt has been used world-wide in snowbelt regions to maintain traffic safety on snowy and icy roadways.[2] A study done by Marquette University determined that the prompt application of salt reduces traffic crashes by 85% and reduces crashes involving injuries by 88%.[3]

Road salt works by lowering the freeze-point of water after the salt has dissolved into brine. According to the Salt Institute, the salt industry's trade association, 66% of salt sales by volume in the United States were used on highways in 2009. This amounted to approximately 22 million tons of rock salt that was sold for use on U.S. highways, at a cost of more than $700 million.

The majority of rock salt used on U.S. roadways comes from underground mines. Salt occurs naturally in underground deposits formed as horizontal salt beds from ancient oceans or as the

[1] McClave graduated with a Ph.D. in Statistics from the University of Florida in 1971. He then served on the faculty of the Department of Statistics at the University of Florida for 20 years. He has written six textbooks in the field of statistics. In 1977, he founded Info Tech Inc. Since then, he has worked with the offices of numerous state attorneys general, helping them to recover millions of taxpayer dollars lost due to bid-rigging schemes. McClave and Info Tech developed the Bid Analysis and Monitoring System/Decision Support System software program, a tool that identifies suspicious bidding patterns.
[2] American Salt Institute website at http://www.saltinstitute.org/
[3] http://www.saltinstitute.org/News-events-media/Salt-Sensibility/Highway/Safe-winter-roads-worth-fighting-for

result of tectonic forces. Salt is mined using the "room and pillar" method, whereby salt is excavated by blasting out rectangular cuts. This process leaves between 35% and 50% of the salt behind in the form of rectangular pillars, which support the mine roof.

There are ten major salt basins in the western hemisphere. The top rock salt producing states nationally are Louisiana, Texas, New York, Ohio and Kansas.[4] In the Great Lakes region, there are two salt mines in Ohio, two in New York, one in Michigan and two in Ontario, Canada.

2. Highway Rock Salt in Ohio

In 2009, rock salt shipments from Ohio's two underground mines totaled 5.1 million tons (Exhibit 1). Both of Ohio's mines are located under Lake Erie – one in Cleveland and the other in Fairport, Ohio. The property from which the salt is extracted in Ohio is owned by the State of Ohio.

Since the late 1950s, Ohio has leased the mine sites to private companies, which pay annual fees and royalties to the state in exchange for the mineral rights to the salt. Currently, two companies mine salt under Lake Erie (Exhibit 2) under 100-year lease agreements with the state: Cargill and Morton. Cargill extracts more than 3 million tons of salt a year from its Cleveland mine. Morton excavates more than 1 million tons of salt a year from its Fairport mine in Lake County.[5]

Cargill is headquartered in the Cleveland suburb of North Olmsted. The company is a division of the industrial segment of Cargill Inc., which is based in Minneapolis. Cargill Inc. is a privately-held international producer and marketer of food, agricultural, financial and industrial products and services. It had annual sales of $116.6 billion in fiscal year 2009.

Morton is headquartered in Chicago. In April 2009, Morton was acquired by the German Company K+S for $1.7 billion. Morton had annual sales of more than $1 billion in fiscal year 2008.

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[4] U.S. Geological Survey.
[5] Date based on information reported annually to ODNR.

Other companies, including the North American Salt Company ("NAMSCO") and American Rock Salt, participate minimally in the Ohio rock salt market. NAMSCO is a subsidiary of Compass Minerals, the largest salt producer in North America and the United Kingdom.

Rock salt used on Ohio roads is stockpiled at three categories of locations – Lake Erie ports, along the Ohio River and at inland locations. Salt stockpiled at Lake Erie ports is often shipped by boat from Great Lakes mines, while salt stockpiled on the Ohio River is often barged from Louisiana or supplied via rail from Cleveland. Salt stored at inland stockpiles typically is transported by rail from the Great Lakes or New York, or trucked from Great Lakes locations.

By far, the largest consumer of highway rock salt in Ohio is ODOT. Also notable is the fact that ODOT historically has been the largest single U.S. road salt customer of both Cargill and Morton. In 2010, ODOT and local governmental entities participating in ODOT's cooperative purchasing program[6] awarded contracts totaling more than 1.4 million tons of salt (Exhibit 3), spending more than $77 million. Other large consumers include the Turnpike Commission and local governmental cooperative purchasing organizations such as the Southwest Ohio Purchasers for Government ("SWOP4G") cooperative.

Both ODOT and local governmental purchases made through ODOT's cooperative purchasing program are bid on a county-by-county basis. This is ODOT's practice, in part, because transportation costs from salt stockpiles to individual counties vary according to distance. As would be expected, counties that use the largest amount of salt are those located in northern Ohio's snowbelt.

The BART report

Commissioned at the request of Governor Strickland, the BART report (Exhibit 4) accurately zeroed in on the most notable aspect of the salt bids that ODOT received in the winter of 2008-

[6] ODOT's cooperative purchasing program allows local government agencies the opportunity to contract with salt vendors using the terms of ODOT's contract and at the awarded ODOT price.

09. Not only were Cargill's and Morton's bids significantly higher than in the previous year, they revealed a pattern in which the two companies did not bid against one another in any of Ohio's 88 counties. "Instead," the BART analysis said, "the two firms essentially created county-by-county monopolies."[7]

The BART report noted that, by virtue of its higher production volume, Cargill is the dominant firm in Ohio, with Morton serving as a fringe competitor. Under such conditions, the report said, Cargill, as the setter of the market equilibrium price,[8] would be expected to try to maximize its profits by first bidding aggressively to win Cuyahoga County (the location of its Ohio salt mine) and then bidding "on successively more distant counties until Cargill has exhausted its salt supplies, at which point the company no longer bids."[9]

Instead, the report noted, Cargill bid Cuyahoga County at $41 a ton and Fayette County – 140 miles away – at $58 a ton, bypassing potentially lucrative salt contracts in Lake and Geauga counties – which border Cuyahoga County – by not bidding in those counties.[10] As a result, Lake, Geauga and other counties in northeast Ohio received no bids from Cargill and were forced to buy Morton salt at between $64 and $69 a ton – up to 68% more than Cuyahoga County was paying for Cargill salt.[11] "This outcome experienced by ODOT is very different from what is considered typical within a competitive market," the BART report concluded. "Morton's bids were not constrained by Cargill's strong market position, and Cargill did not bid in a way that would be expected to maximize profits. Cargill did not increase its bid prices to maximize profits, and Morton did not lower its bid prices for concern of losing business to Cargill."[12]

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[7] BART report, p. 7.
[8] The market equilibrium price, also known as the market-clearing price, is the price that is set when the quantity of a product that is demanded and the quantity that is supplied are equal.
[9] BART report, p. 6.
[10] BART report, p. 8.
[11] BART report, p. 8.
[12] BART report, p. 8.

In brief, the BART report also addressed what it referred to as "uncontrollable market forces"[13] – increases in fuel prices, the harsh 2007-08 winter and competition from other states for Ohio salt. The report further analyzed the implications of so-called "min-max contracts,"[14] which can create supply problems for salt companies because they potentially require suppliers to maintain additional reserves above what a purchaser has agreed to buy, in the event that the purchaser requires more salt.

While ample evidence exists to support all of BART's findings, the findings thematically characterized ODOT as a victim of the vagaries of salt economics and the predatory practices of Cargill and Morton. Absent was an analysis of ODOT's contributory conduct – a shortcoming due not to the BART economists who wrote the report, but to ODOT administrations spanning more than a decade.

On pages 5 and 6 of the BART report is a brief discussion of what BART referred to as a "statutory requirement that ODOT purchase salt from Ohio producers when two or more in-state suppliers exists." The report goes on to add: "This result occurs regardless of submitted bid prices from other vendors, even if those outside vendors offer cheaper prices."[15]

Contrary to the BART report's claim that the Buy Ohio statute[16] undermines competition and drives up prices, it is ODOT's *interpretation* of Buy Ohio – not the statute itself – that has created opportunity for market allocation, resulting in pricing practices that have cost Ohio tens of millions of dollars in added fees for salt. The implications of ODOT's misinterpretation of

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[13] BART report, p. 9.

[14] Min-max contracts obligate ODOT to buy a minimum amount of salt and require the salt companies to set aside a maximum amount for potential purchase. So, for instance, in a 50/150 min-max contract, ODOT would be obligated to buy one-half of the specified tonnage and hold in reserve 1½ times the contract tonnage. To cover their risk of only selling half of the guaranteed tonnage, salt companies may charge a higher price per ton than if the quantities were specified.

[15] BART report, p. 6.

[16] While not defined as such, the Ohio bid preference is referred to as "Buy Ohio" in various sections in the Ohio Administrative Code and DAS policy PUR-003. See, for example, OAC 123:5-1-06(E) and PUR-003(V)(3), p. 4.

Buy Ohio and Cargill's and Morton's alleged market allocation practices are the foundation of this report.[17]

Background to Allegation 1 – ODOT's Misinterpretation of the 'Buy Ohio' Statute

1. The law

In 1983, Ohio law was amended to establish preferences in bidding for products manufactured or mined in Ohio, commonly referred to as "Buy Ohio." State law also authorizes the Department of Administrative Services ("DAS") to establish rules for all state agencies to use when applying Buy Ohio preferences in the awarding of contracts.[18] A key concept in the Buy Ohio program is that two Ohio bids constitute sufficient competition to ensure that the state does not pay an excessive price or acquires an inferior product.[19]

2. The rules

Under Buy Ohio, a bid is considered to be an "Ohio bid" if it is received from a vendor offering Ohio products or from a vendor that demonstrates a "significant Ohio economic presence."[20] In order to be considered to have a significant Ohio economic presence, a bidder must pay Ohio state taxes; be licensed and registered to do business in Ohio; and have 10 or more employees, or 75% of the company's employees, based in Ohio. Mined products, however, are treated differently than manufactured products in that "significant Ohio economic presence" does not qualify a mined product as an Ohio bid. For mined products, the sole determining criterion is whether the product was mined or excavated in Ohio.[21]

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[17] In response to the BART report, ODOT did make some efforts to modify its salt-purchasing procedures, including issuing its Invitation to Bid earlier in the year.
[18] ORC Section 125.09 (C).
[19] ORC Section 125.09(C)(6).
[20] OAC 123:5-1-01(N) and PUR-003(IV).
[21] PUR-003(IV) and Ohio Attorney General opinion No. 87-045 (syllabus 3).

DAS Directive No. 09-21 establishes state policy for procurement procedures. Regarding in-state and domestic preferences, including Buy Ohio, it instructs state agencies to apply preferences in accordance with DAS Office of Procurement Services Policy PUR-003, as found in the State of Ohio Procurement Handbook for Supplies and Services. The "Scope" section of the policy states: "A state agency must adopt this Policy and Procedure for use in applying the domestic and in-state preferences to their direct and/or delegated procurements." DAS also reiterates that mined products must be mined or excavated in Ohio to be considered Ohio products.

What is deemed to be an "excessive price" for purposes of establishing "sufficient competition"[22] is further refined in the Ohio Administrative Code ("OAC"),[23] which defines excessive price as a price "that exceeds by more than five percent the lowest price submitted on a non-Ohio bid." Like the OAC, DAS similarly defines excessive price as follows: "For purposes of Buy Ohio, a price is deemed to be excessive when the lowest 'Ohio' bid exceeds the lowest non-Ohio bid [by] more than 5%."[24]

In outlining step-by-step procedures for evaluating and awarding bids, DAS policy establishes that two bid responses constitute sufficient competition to continue evaluating bids. It also states that preferences are to be applied to give Ohio products a 5% preference over non-Ohio products, as well as to give qualifying border states the same preference over non-qualifying border states.

A border state is defined as a state contiguous to Ohio that does not impose restrictions on Ohio products greater than Ohio imposes on products from that state.[25] The significance of a border state in the Buy Ohio program is that a qualifying border state is given preference over a non-border state. In certain cases, border-state bids may even be considered on equal terms with Ohio bids.

Implementation of the Buy Ohio bid preference is outlined in the OAC. After stating that it is Ohio's policy to give preference to Ohio bidders, the section outlines the procedures to be used

[22] ORC Section 125.11(B).
[23] OAC Section 123:5-1-06(C)(3).
[24] PUR-003V(3).
[25] OAC Sections 123:5-1-01(E) and 123:5-1-06(C)(2).

by state agencies to accomplish this policy preference. The ORC states that bidders seeking the preference for either United States or Ohio products "shall designate in their bids" whether the product is an Ohio product or whether the bidder has a significant Ohio economic presence. Bolstering this statutory requirement, the OAC delineates specific information that is to be submitted by bidders, including whether the prices being submitted are for Ohio products.[26] DAS policy and ODOT's Invitation to Bid go even further, requiring bidders to complete a certificate attesting that they are claiming a preference based on offering an Ohio product.

The OAC states that "information furnished by the bidder . . . shall be relied upon in making the determination."[27] If the apparent low bid is an Ohio bid or a qualifying border-state bid, state agencies are instructed to make the award to the apparent low bidder.

For cases in which the apparent low bid is from a non-Ohio or non-qualifying border-state bidder, state agencies are instructed to determine whether the lowest Ohio bid is at a price that exceeds by more than 5% the lowest non-Ohio or non-qualifying border state bid. In other words, if the lowest non-Ohio or non-qualifying border-state bid is $1, any Ohio bid exceeding $1.05 would be deemed an excessive price, and the award would be made to the apparent low bidder.

3. Attorney General opinions

In 1996, ODOT sought advice from the Attorney General for clarification of the Buy Ohio domestic bid preference for salt purchases. The ODOT request asked: "Must ODOT's Office of Purchasing continue to provide a five percent (5%) preference to Ohio producers of salt versus bids received from other states?" (Exhibit 5). In response, The Attorney General's Office opined: "ODOT must still allow an Ohio bidder the ability to offer a price up to 5% above the lowest non-Ohio bidder before considering the difference in price to be 'excessive.' " (Exhibit 5).

[26] OAC Section 123:5-1-06(E).
[27] OAC Section 123:5-01-06(C)(1).

ODOT previously sought guidance on Buy Ohio in 1987. That request was addressed in Attorney General Opinion No. 87-045, which concluded: 1) ODOT must comply with Buy Ohio statutes when purchasing goods; 2) Buy Ohio statutes require that bids be evaluated in accordance with administrative rules promulgated by DAS; 3) "a product is 'mined in Ohio' if it is actually extracted from the earth in this state"; and 4) products not mined in Ohio are not entitled to bid preferences, regardless of whether the vendor has a significant Ohio economic presence.

Allegation 1: For more than a decade, ODOT officials have failed to apply Buy Ohio according to law resulting in reduced competition in the road salt market, costing Ohio taxpayers millions of dollars.

ODOT's lockout interpretation

Under ORC 5513.01, ODOT has its own purchasing authority. However, this does not include the purchasing of salt, for which ODOT must receive a Release and Permit from DAS. OAC and DAS Release and Permit both require ODOT to follow DAS purchasing guidelines, including the application of Buy Ohio preferences. Nevertheless, ODOT has continued to independently interpret and implement the Buy Ohio statute.

ODOT and DAS similarly interpret matters as nuanced as whether New York is a border state (by virtue of the fact that both Ohio and New York share the "border" of Lake Erie), and both generally provide Ohio bidders with a 5% preference over non-Ohio bidders. However, ODOT has failed to follow DAS policies on one major issue – the interpretation of "sufficient competition."

As mentioned previously, DAS considers the submission of two Ohio bids the starting point for determining if there is sufficient competition, but continues evaluating other bids; ODOT, however, interprets the statute to mean that if two unrelated companies bid Ohio-mined salt, the company submitting the lower of the two bids will be awarded the contract. For ODOT this is true even if a third company submitted a bid for non-Ohio-mined salt that is more than 5% lower.

This interpretation – which also conflicts with the policy of the Turnpike Commission, which has adopted the DAS model – is referred to as "lockout bidding."

ODOT's application of the lockout interpretation illustrates another example of ODOT's failure to follow DAS policies – excessive price. In cases involving two Ohio bids, DAS instructs state agencies to consider whether awarding to an Ohio bidder will cause the state to pay an excessive price – *i.e.*, a price that is 5% higher than the price for the non-Ohio product.[28] In contrast, ODOT only applies the excessive-price analysis to situations in which only one Ohio bid is received (Exhibit 6).

In short, DAS policies, by preventing state agencies from paying excessive prices in order to purchase Ohio products, work to the benefit of state agencies, especially in austere times. By locking out non-Ohio bidders when two Ohio bids are received, regardless of price differences, ODOT tends to benefit the only two vendors – Cargill and Morton – that are able to offer Ohio-mined salt. Although ODOT officials displayed an awareness of this fact as early as August 2001, they nevertheless continued to apply lockout to salt bid evaluations (Exhibit 7).

Bidding patterns for Turnpike Commission salt contracts illustrate this point. The Turnpike Commission operates a 241-mile toll road stretching across northern Ohio. Although the Turnpike Commission does not purchase road salt in near the same quantities as ODOT, it is still a significant purchaser[29] when compared with other governmental purchasers.

The Turnpike Commission awards salt contracts based on lowest bid by location for 15 storage sites along the toll-way. The Turnpike Commission voluntarily adopted DAS model-purchasing guidelines, including Buy Ohio, in June 2008. Further, in April 2010, the Turnpike Commission awarded the contract for one of its locations to Kansas-based NAMSCO based on a legal analysis that concluded that NAMSCO demonstrated a significant Ohio economic presence by maintaining three stockpile locations in Ohio and utilizing Ohio trucking companies to deliver its product. In contrast, NAMSCO, due to the Cargill/Morton duopoly created in northern Ohio by

[28] PUR-003V(3).
[29] For the winter of 2009-10, the Turnpike Commission bought 61,500 tons of salt; ODOT purchased 450,000 tons.

ODOT's lockout interpretation, has not won a single ODOT contract in the northern region of the state for at least 15 years.

Cargill and Morton have dominated the ODOT salt market in Ohio for well over a decade, with only a brief interruption. In 1996, Cargill purchased Akzo Nobel, which leased the mining rights to the Whiskey Island salt mine in Cleveland. In 1997, Cargill entered into an antitrust settlement with American Rock Salt under which Cargill was required to make 200,000 tons of rock salt from its Cleveland mine available for purchase by American Rock Salt for four years.[30] Although American Rock Salt is based in New York, it was able to offer Ohio-mined salt under this arrangement and, thus, qualify for the Buy Ohio preference for the duration of the settlement.

Having American Rock Salt as a third bidder able to qualify for the Buy Ohio preference temporarily muted the impact of ODOT's lockout interpretation. In turn, the financial benefits of this added competition was reflected in the lower prices that some counties paid during those years when compared with the price increases that the same counties saw when the settlement ended and American Rock Salt again was locked out of the Ohio market.[31]

Around the time that the Cargill/American Rock Salt settlement was in effect, there was a brief interruption in ODOT's lockout interpretation. In 1997, then-ODOT Director Jerry Wray[32] authorized an interim salt-contract policy that was consistent with DAS policy, specifying that ODOT should apply the "excessive price" provisions of Buy Ohio for cases in which the lowest Ohio bid exceeded the lowest non-Ohio bid by more than 5% – *i.e.*, no lockout (Exhibit 9). However, despite Wray's interim policy, ODOT continued to practice lockout in the following years. Its effect, however, was blunted by the settlement that permitted the competing third vendor – American Rock Salt – to also qualify for the Buy Ohio discount.

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[30] Federal Register, Vol. 62, No. 93, May 14, 1997.

[31] Morton strategy documents show that American Rock Salt's entry into the Ohio market during this period was of particular concern to Morton executives. In a February 2000 document headlined "Key Strategic Issues," Morton noted that "Increased supply → declining prices. ARS [American Rock Salt] – [redacted] MM tons in C'2002." (Exhibit 8)

[32] Wray served as ODOT director from 1991 to 1999. On Nov. 30, 2010, Governor-elect John Kasich appointed Wray to serve a second term as ODOT director.

ODOT records show that in 2002, ODOT reversed course and chose not to follow DAS policy (Exhibit 10). These records contain information that reflect that ODOT contracts would not be awarded in accordance with DAS regulations but would be awarded to the lower of the two Ohio bids – *i.e.*, a return to lockout. None of the ODOT records that we reviewed or people that we interviewed shed light on this policy reversal. However, heavy lobbying by Cargill and Morton – as we discuss below – appears to have contributed to the reversal.

Lobbying to preserve the status quo

The state's Buy Ohio procurement preferences for Ohio bidders and Ohio products were enacted by the General Assembly in 1983. The legislation allowed these preferences to be amended in one of two ways: via statutory modification or via modification of the administrative rules that govern Buy Ohio. Both Cargill and Morton have long employed lobbyists for legislative matters, which include the Buy Ohio program, and on executive agency decisions, such as the interpretation and application of Buy Ohio's administrative rules.

Subpoenaed records from Cargill and Morton are replete with correspondence, notes and strategy documents pertaining to governmental relations and lobbying, often noting that because Buy Ohio favors Cargill and Morton over their outside competitors, the salt companies' lobbyists need to ensure that the program remains intact. On occasion, the companies have even coordinated lobbying activities in an attempt to preserve the exclusion of competitors.

Notes from a May 1999 meeting (Exhibit 11) between Cargill and Morton lobbyists document their discussions about an attempt by International Mining Company, a Kansas company purchased by Compass Minerals in 2001, to amend Buy Ohio. The notes indicate that the two companies' shared lobbying strategy included a coordinated campaign to identify the "key committee members in Columbus that have the power to propose or not propose changes in this legislation."

Morton executives were concerned about the impact of allowing New York to qualify as a border state due to the fact that American Rock Salt had opened a New York mine and was likely to

tender bids for ODOT contracts based on New York salt. Their concern was warranted, as can be seen from an August 17, 2001, ODOT memo (Exhibit 7) that indicates that Mark Kelsey, then ODOT's Contracts Administrator, intended to adopt the DAS policy interpretation, which alarmed Morton's sales team.

Already derisively referring to DAS' decision to use Lake Erie to declare the two states contiguous as "infamous" (Exhibit 12), Thomas Butler, Morton's Director of Ice Control Sales and Marketing, wrote colleague Carol Panozzo in an email: "We must remind ourselves too that Mr. Kelsey was and is behind the attempts to dilute or eliminate the Ohio Producers preference. Not our friend." (Exhibit 13). When ODOT subsequently reversed course and resumed applying the lockout interpretation, Butler explained in another email to Panozzo and other Morton executives that ODOT purchasing "prevailed over DAS." (Exhibit 14).

ODOT failed to follow DAS' border-state policy, and allowed border states to qualify for the 5% Buy Ohio preference only in situations in which either one or no Ohio bid was received. Cargill in 2006 lost Belmont, Clinton and Greene counties, and Morton lost Montgomery County, based on the 5% preference that American Rock Salt received for New York-mined salt. As a Cargill executive noted in an email to her colleagues in 2006, Cargill and Morton both failed to qualify for the Buy Ohio preference and lost the four bids to American Rock Salt because Cargill's and Morton's salt was coming from mines in Louisiana (Exhibit 15). Cargill bid Belmont and Greene counties the following year with Ohio-mined salt, thus neutralizing the border state advantage American Rock Salt benefited from in 2006. As will be detailed later in this report, it is notable that during the 2007-08 salt season, Cargill substituted Louisiana salt for Ohio salt in deliveries to Greene County.

That same year, Morton filed a lawsuit, seeking to nullify the border-state recognition for American Rock Salt as a result of ODOT's award of the contract to American Rock Salt in Montgomery County. The suit was later dismissed due to lack of timely filing (Exhibit 16).

In March 2007, Cargill executives again considered the ramifications of Buy Ohio while they were deliberating the benefits of making a salt trade with a competitor, NAMSCO (Exhibit 17).

Cargill National Supply Chain Manager Ken Ellen reminded colleagues that if Cargill were to trade salt from its Cleveland mine, NAMSCO would be able to qualify for the Buy Ohio preference if it chose to bid that salt in Ohio.[33] The following year, in July 2008, Ellen again emphasized the importance of preserving ODOT's Buy Ohio lockout, telling his colleagues that they "should be mindful of what increased no-bids with ODOT in [northwest] Ohio could mean for the future of 'Buy Ohio.' " (Exhibit 18).

In the winter of 2008-09, a salt shortage and ODOT's practice of issuing its Invitation to Bid for salt late in the bidding season led to price spikes ranging from 19% to 236% higher[34] than the prices ODOT paid during the previous season. Cargill and Morton exacerbated the effect of the shortage by bidding in a manner in which the two companies did not bid against one another in any of Ohio's 88 counties (Exhibit 19). Due in part to the chilling effect of ODOT's long-established lockout interpretation, no outside companies bid either.[35] Even after ODOT rebid the contract due to a technical problem involving Morton's bid, Cargill and Morton again did not bid against one another in any county, and only one county, Adams, received bids from more than one vendor on the same bid offering.[36] (Exhibit 20).

Instead of determining at this point that they needed to abandon the lockout interpretation and adopt DAS' rules for Buy Ohio,[37] ODOT officials responded to this emergency by seeking statutory changes in the Transportation Budget bill[38] that would exempt salt from Buy Ohio requirements. Morton executives began compiling data to persuade Ohio legislators that Buy Ohio benefitted Ohio as is (Exhibit 21), while Cargill officials expressed concern that salt bids "will be under a microscope in Ohio." (Exhibit 22). In a letter to State Representative Vernon Sykes, Chairman of the House Finance Committee, Morton's Fairport mine Facility Manager, Mark Mitchell, invoked the politically charged debate over outsourcing. "At a time like this,"

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[33] This trade ultimately did not occur, but we did not find evidence that it was called off due to Cargill's concern that NAMSCO would use the Cleveland-mined salt to bid on ODOT contracts based on the Buy Ohio discount.
[34] BART analysis of 2007-08 and 2008-09 salt bids.
[35] McClain transcript, p. 2.
[36] International Salt Company bid $146.20 per ton vs. Morton's bid of $103.50 per ton.
[37] As reflected in the BART report, ODOT officials insist that ODOT's interpretation of the Buy Ohio lockout is correct. See BART report, p. 12.
[38] House Bill 2.

Mitchell wrote, "does Ohio really intend to 'out-source' its salt procurement at the expense of hard-working Ohioans who are paying taxes and raising their families here?" (Exhibit 23).

In a March 2009 email to colleagues at Cargill, Cargill National Supply Chain Manager Ken Ellen said he hoped that Buy Ohio "doesn't become a spotlighted item around salt that [Governor] Strickland and other pols will demagog (sic) around." (Exhibit 22). Ellen and other Cargill officials subsequently were pleased when they received word from the Ohio Chamber of Commerce that the Ohio Senate had stripped language exempting salt from Buy Ohio out of the bill, thus preserving the *status quo* (Exhibit 24).

Although representatives of Cargill and Morton downplayed the significance of Buy Ohio in their comments to us, their responses to the proposed changes betray their true views. Lobbying efforts were ramped up, data was assembled to defend Buy Ohio for salt purchases and the two companies enlisted the assistance of the Ohio Chamber of Commerce to monitor legislative actions at the Statehouse.

It is additionally disingenuous for Cargill and Morton to downplay the significance of Buy Ohio given the prominence it plays in both companies' business strategies (Exhibits 25 and 26). Buy Ohio is consistently identified by the firms as "strengths" and "conditions that favor us." Meanwhile, repeal of Buy Ohio is identified as a "threat" to Cargill and Morton, as well as an "opportunity" for non-Ohio bidders.

In interviews with our office, Cargill and Morton executives alternately expressed indifference to Buy Ohio and alarm that ODOT might reinterpret the program. These contradictions are illustrated by several exchanges our investigators had with Ken Howe, Cargill's National Sales Manager – the executive responsible for Cargill's pricing decisions. Asked about his colleague Ellen's observation that Cargill "should be mindful of what increased no-bids with ODOT in [northwest] Ohio could mean for the future of 'Buy Ohio,' " (Exhibit 18) Howe responded: "What it says to me is we are afraid to no-bid because if an Ohio person doesn't bid on it, then

Ohio [ODOT] starts to question whether or not they need Buy Ohio."[39] Later in the interview, Howe denied that Cargill's marketing strategy included bidding on ODOT contracts – even if the bids were high and certain to lose to Morton – in order to take advantage of ODOT's lockout interpretation. "I don't remember ever using the Buy Ohio clause to price a number or put a price down," he said. "You know what I mean? I just don't think we thought about it that much."[40]

ODOT's late awakening

In an interview in February 2009, ODOT Assistant Director Keith Swearingen expressed concern that ODOT had experienced diminished competition for road salt contracts despite regularly reexamining contract specifications to try to make them more attractive to new bidders. Ultimately, ODOT concluded that the biggest impediment to competition was Buy Ohio – *i.e.*, lockout - failing to recognize that they were out of step with DAS policy.

The most confounding aspect of ODOT's late recognition that Buy Ohio was restricting competition is that ODOT officials sought a change in the law instead of simply revisiting their own interpretation and application of Buy Ohio. As far back as 2001, ODOT officials recognized that their interpretation of Buy Ohio differed from DAS' interpretation, even acknowledging that the DAS interpretation likely would benefit ODOT by fostering competition (Exhibit 7). In 2008, the Turnpike Commission adopted the DAS model for applying Buy Ohio (Exhibit 27), and today the Turnpike Commission has a more competitive bid process than ODOT. As we confirmed in interviews with DAS officials and DAS legal counsel, ODOT stands alone in enforcing a lockout interpretation. When asked about holding ODOT accountable for its departure from DAS rules for Buy Ohio, the same DAS officials answered that DAS lacks enforcement authority.

It also bears reiteration that ODOT was instructed as far back as 1987, in Attorney General Opinion No. 87-045, to evaluate bids and award contracts under the rules established by DAS. Instead, the department has chosen to employ its own interpretation to its own detriment and

[39] Howe transcript, p. 59.
[40] Howe transcript, p. 64.

great expense to Ohio taxpayers. By applying the lockout interpretation when awarding salt contracts instead of the excessive-price interpretation, ODOT has been an enabler in its own victimization.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

Background to Allegation 2 – Market Allocation

1. The Ohio salt market

Ohio generally breaks down into two distinct salt markets, relatively along a north versus south division (Exhibit 28). These markets are referred to as the Lake [Erie] market and the [Ohio] River market. In most instances, Cargill and Morton tender bids for Ohio-mined salt in the Lake market, and bids based on salt mined in Louisiana in the River market. In the Lake market – Cargill and Morton offer Ohio-mined salt, where the preponderance of lockout bidding occurs. Here, Cargill and Morton have been able to maintain consistent market shares and high rates of incumbency, winning the same ODOT counties year after year without threat of outside competition (Exhibit 29).

Cargill and Morton also regularly reap higher profit margins for salt in the Lake market – where Cargill and Morton lock out the competition by both submitting bids using their Ohio-mined salt – than in the River market. This is a logical outgrowth of a duopoly under which the two companies control the price of salt because they have little outside competition (Exhibit 30).

2. Indicators of market allocation

According to BART and McClave, there is evidence supporting the following five indicators of market allocation in Ohio: 1) stable market shares; 2) high incumbency; 3) suspicious bidding patterns; 4) sham or complementary bids; 5) and significantly higher profit margins on ODOT contracts when compared with similarly situated departments of transportation in surrounding

states. The opinions of McClave and BART are primarily based on their analyses of road salt bid tabulations and specification data, including more than a decade of bids submitted to ODOT, the Turnpike Commission and the Community University Education and SWOP4G purchasing cooperatives, as well as records subpoenaed from both Morton and Cargill.

Allegation 2: Since 2003, Cargill Deicing Technology and Morton Salt Company have engaged in anti-competitive market allocation in the sale of highway rock salt.

Stable market shares

According to McClave, in a truly competitive environment, there should be significant fluctuation in market shares from year to year, *i.e.* Morton and Cargill should win varying numbers of counties year to year. All things being equal, vendors submit blind bids with ODOT awarding contracts to the lowest bidder by county; however, with ODOT's lockout interpretation as a back-drop, Cargill and Morton are able to stifle competition by simply both tendering bids for Ohio-mined salt, regardless of offered price.

The market share analysis for rock salt sales in Ohio is a study in regional contrasts. Since 1999, the market shares (number of counties won) of Cargill and Morton have remained relatively stable in the northern 54 counties of the state ("northern region"), where both companies have almost always tendered bids[41] (Exhibit 31), triggering ODOT's lockout application for contract awards. As explained by McClave, a competitive market should experience greater fluctuation in market share than what has occurred in the northern region.

In Ohio's southern 34 counties ("southern region"), where Cargill and Morton rarely bid Ohio-mined salt in the same county – thus not triggering ODOT's lockout interpretation of the Buy Ohio statute – market-share fluctuations have been significant.[42] (Exhibit 32). This wider spread

[41] Between 2000 and 2010, Morton's salt market share in Ohio's northern 54 counties fluctuated from a high of 31% to a low of 18%. During the same period, Cargill's market share also fluctuated slightly, varying from a high of 82% to a low of 68% in the northern region.

[42] From 2000 to 2010, Cargill's market share in the southern region of Ohio varied from a high of 98% to a low of 33%. Morton's market share for the same time period fluctuated from a high of 46% to a low of 2%. The Buy Ohio lockout interpretation is rarely triggered in the southern region because Cargill and Morton don't tender bids offering Ohio salt but, rather Louisiana salt, which is shipped by barge on the Mississippi River.

between high and low market shares and the greater fluctuation in market shares from year to year is more consistent with a competitive market, according to McClave.

High incumbency

Complete incumbency occurs when the same bidder wins the same contract year after year – i.e., one company wins the same county 100% of the time. Since 2000, the percentage of Ohio counties with incumbent winning vendors has been as high as 98% (2009) and has never dropped below 68% (2008) (Exhibit 33).

Again, Ohio's northern and southern regions are a study in contrast. In the southern 34 counties, the percentage of counties with incumbent winning bidders is significantly lower than the incumbency rates in the northern region, indicating that the salt market in the southern region is more competitive than in the northern region, according to McClave.[43] (Exhibit 34).

McClave also identified two sub-groups in the 54-county northern region as being examples of unusually high rates of incumbency. First, between 2000 and 2010 in the nine counties comprising northeastern Ohio[44] (one subset of the northern market), eight of the thirteen times ODOT awarded salt contracts showed that Cargill and Morton won the same counties every year (Exhibit 35). Similarly, in the 10 counties comprising north central Ohio,[45] the incumbent vendor won the salt bid in all 10 counties in all but one bidding cycle between 2000 and 2010 (Exhibit 36).

According to McClave, the extremely high incumbency reflects a lack of competition in the northern region of Ohio and is indicative of market allocation. This purchasing pattern is rooted in ODOT's application of the Buy Ohio lockout. The northern market – where high levels of incumbency exist – is the area in which both Cargill and Morton consistently bid Ohio-mined salt in every county, locking out their competitors. In the southern region, Cargill and Morton rarely both bid Ohio-mined salt in the same counties.

[43] The fluctuations range from a high of 95% to a low of 20%.
[44] Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, Summit, and Trumbull.
[45] Ashland, Crawford, Erie, Huron, Ottawa, Richland, Sandusky, Seneca, Wayne and Wyandot.

Suspicious bidding patterns

Bidding patterns over the last decade in Cuyahoga County provide a prime example of suspicious outcomes (Exhibit 37). In 1999, Cargill won Cuyahoga County's contract for 54,200 tons of road salt from Morton by lowering its price by 39% from the previous year. Cargill also won Cuyahoga County's salt contract in 2000 by a 20% difference in price. The following year, in 2001, Cargill raised its price per ton by 25% and still won Cuyahoga County. Cargill then comfortably prevailed in the bidding of road salt in Cuyahoga County for the next six years in a row, due to the fact that Morton either continued to raise its bids or failed to lower them by an amount significant enough to make the bids competitive. Cargill's ability to raise its price by 25% and still win the Cuyahoga County ODOT bid is an indication that Cargill did not fear being undercut by Morton's pricing.

Other examples are provided by Cargill's and Morton's repeated decisions to bypass – i.e., bid high on – contracts with nearby counties (entailing lower transportation costs) in favor of incumbent county clients that are geographically farther from the vendors' nearest salt stockpiles. Some examples:

- In 2004, 2005, and 2006 in Hardin County, Cargill bid a lower price for a smaller quantity of road salt to maintain its incumbent county than it bid in losing to Morton's incumbent in Hancock County. This pattern is made more suspicious by the fact that Hardin County is a greater distance than Hancock County from Cargill's nearest salt stockpile in Toledo, resulting in higher shipping costs for Cargill. Thus, Cargill chose to bypass a lower-cost county contract in favor of retaining a more distant incumbent client.
- In 2004, 2005, 2006 and 2007, Cargill bid a lower price for a smaller quantity of salt in Paulding County, one of its incumbent counties, than its losing bid for a higher quantity in Putnam County, despite the fact that Putnam County is a similar distance from Cargill's Toledo stockpile.
- In 2003, 2004, 2005, 2006 and 2007, Morton bid a lower price in its incumbent Tuscarawas County than its losing bid in Stark County, despite the fact that Tuscarawas County is farther from Morton's stockpile in Fairport. Morton also supplied a

significantly smaller quantity of salt to Tuscarawas County than it would have supplied to Stark County in each of those years.

Put in its simplest terms, profit margins for salt vendors are comprised of bid price, minus the mining cost of the salt, minus distribution cost, which is primarily transportation. Because distribution costs increase with distance, a Cargill or Morton contract with a county that is farther from its mine or stockpile typically yields lower profits than a contract with a county that is closer to its salt source. Thus, one would expect Cargill and Morton to bid higher prices to counties geographically farther from their mines, particularly for smaller quantities of salt. Yet if it is an incumbent county, Cargill and Morton consistently both bid prices that yield lower profit margins, even when that same bid to a closer non-incumbent county would have won the bid and yielded higher margins for greater quantities of salt. The failure of Morton and Cargill to seek business that would be expected to generate greater profit margins is indicative of a lack of competition.

Cargill and Morton officials could not identify a persuasive business reason that justified bidding higher prices for greater quantities of a fungible commodity such as road salt to be shipped a shorter distance. Claims by the salt company executives that this behavior can be explained by historical practices, customer loyalty and "serviceability"[46] are not convincing. Asked to explain these bidding practices, Cargill officials Howe and Jeanne Schulz, a Regional Sales Manager, went to great lengths to describe the unique business "relationships" they had developed with their incumbent county customers in contrast with what Howe called "jerks"[47] that were supplied by Morton. Butler, the Director of the Highway Ice Control Sales and Marketing for Morton Salt, responded similarly, describing in vague terms the "flexibility"[48] of Morton's county clients as opposed to Cargill's less-flexible county customers. These explanations are contrary to basic market theory and are evidence of suspicious bidding behavior and indicative of market allocation.

[46] Howe transcript, p. 30.
[47] Howe transcript, p. 85.
[48] Butler transcript, p. 42.

We also note that, once again, ODOT's interpretation of Buy Ohio contributed to these suspicious bidding patterns by incentivizing Cargill and Morton to bid in every county in the northern region – even if the companies had no serious intention of winning – in order to lock out competitors.

Sham or complementary bids

BART and McClave analyzed ODOT bid data spanning more than a decade. The data showed that, in 2005, Morton raised its prices for road salt by a moderate 7% to 17% in 12 counties that it had won the previous year. It lost none of these incumbent counties. The same year, Morton significantly raised its prices in Cargill's 43 incumbent counties by 21% to 34%. Not surprisingly, Morton lost all 43 bids.[49]

This pattern of bidding, in which Cargill and Morton sought to maintain their incumbent counties, came into stark relief in 2008. Prices were extremely high in 2008, in part due to a shortage of road salt and ODOT's practice of issuing its Invitation to Bid late in the salt bidding season. That year, ODOT received only one bid in each of the 54 counties that comprise the northern region – the region of Ohio that Cargill and Morton historically controlled due to ODOT's lockout interpretation.

In a complete departure from past practices, Cargill and Morton did not bid head-to-head in a single county in the northern region. The pattern that their bids revealed is enlightening: Morton was the sole bidder, and therefore automatic winner, in all 14 of the counties that it won the previous year. Similarly, Cargill was the sole bidder in all 39 of its incumbent counties.[50] Butler, Morton's Director of Ice Control Sales and Marketing, confirmed that the counties that Morton bid and won that year constituted the pre-determined market share that Morton wanted to win.[51]

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[49] For example, in Lucas County in 2005, Morton raised its bid for 5,200 tons of rock salt by 26% over its 2004 bid. Specifically, in 2004, Morton bid $43.14 per ton, losing Lucas County to Cargill's bid of $38.14 per ton. Nevertheless, in 2005, Morton raised its bid in Lucas County by 25%, to $53.82 per ton, while Cargill stood virtually pat at $38.41.

[50] The single exception to this pattern in the northern 54 counties that year occurred in Wood County, an incumbent Cargill county that initially received no bid. A second round of bidding saw Morton submit the only, and thus winning, bid in Wood County.

[51] Butler transcript, p. 81.

Internal Cargill bid strategy documents for 2008 make it clear that Cargill intentionally ceded some contracts for local governmental purchasing cooperatives to Morton that year. "This Co-ops is not critical for CDT [Cargill Deicing Technology], bid it high, let Morton to [sic] have it…" a Cargill official wrote in a July 2008 bid strategy report (Exhibit 38). Referring to the Tuscarawas County co-op, the same report states: "This bid is not as critical for CDT. Bid it high so Morton can get what they did last year and maybe some more." (Exhibit 39).

Other Cargill strategy documents for 2009 and 2010 show that Cargill executives also were closely monitoring Morton's bidding practices along the Ohio Turnpike. They note that Morton cut its prices on Turnpike contracts that it historically won and raised its prices on contracts that it historically lost to Cargill (Exhibit 40). The documents also show that Cargill engaged in similar bid practices in 2009 by raising its prices by 20% on all of the Cleveland-area Turnpike contracts that Morton won the previous year (Exhibit 41).

In a healthy competitive bidding environment, such practices should not exist, according to McClave. And once again, with regard to the ODOT contracts, it is ODOT's interpretation of Buy Ohio that has contributed to this result by discouraging outside bidders, who have grown used to seeing Cargill and Morton lock them out of the northern region year after year. As Jamie McClain, Bidding Manager for New York-based American Rock Salt, told us: "[I]t doesn't make any sense for me to put a price in and then not be awarded anyway. So it's kind of a waste of our time. . . . I can say that most of the time Cargill gets the exact same counties and Morton gets the exact same counties every year."[52]

In response to our subpoenas, Cargill provided bid strategies for the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 road salt contracts for the central region of the United States, which includes Ohio (Exhibit 42). Those documents revealed evidence of a bidding strategy in which Cargill categorizes clients as "primary" and "secondary" customers. In its 2010-2011 bid

[52] McClain transcript, p. 2.

strategy, Cargill listed each ODOT county as being either primary or secondary.[53] The bid strategies also break down Cargill's salt bids based on stockpile locations.

The 2010-2011 bid strategy sheds light on Cargill's definition of primary and secondary customers. In reference to Cargill's central region bids for the state of Indiana, the 2010-2011 bid strategy states: "In areas that are secondary, we can put a high price on those districts, which would give us an option to drop pricing later if we appear to do poorly in the initial pricing round." (Exhibit 43).

In the 2010-2011 bid strategy, Cargill lists its primary ODOT county customers to be served from its Toledo stockpile as Allen, Hancock, Hardin, Lucas, Ottawa, Paulding, Putnam, Van Wert, and Wood counties (Exhibit 44). These are all ODOT counties that Cargill typically wins year after year. In this same bid strategy, Cargill lists the following ODOT counties as secondary: Fulton, Henry, Defiance and Williams. With the exception of two minor deliveries totaling 1,000 tons of salt, ODOT records show that all of these counties have been served by Morton since 2001.

We examined all of the ODOT and Turnpike Commission primary and secondary county customer categorizations provided by Cargill on a statewide basis for the 2010-2011 salt season, comprising 123 total bids. Cargill was the successful bidder 86.9% of the time for the ODOT counties categorized as primary (60 out of 69 bids). In contrast, Cargill was the winning bidder only 7.4% of the time in counties it categorized as secondary (4 out of 54 bids). Tellingly, Morton was the winning bidder on 79.6% (43 out of 54 bids) of the contracts that Cargill deemed as secondary customers (Exhibit 45).

We asked Howe, Cargill's National Sales Manager, to explain the difference between primary and secondary ODOT county customers. He responded that "one's a primary, which means we want it. We want it more than another county."[54] He added: "One is primary, one is a secondary.

[53] In the other bid strategies provided by Cargill, the ODOT bids were not broken down by county.
[54] Howe transcript, p. 46.

I wouldn't say we don't price it to win it [secondary]. One has a better price than the other."[55] When asked why Cargill classified Lake County, a potentially lucrative client that purchased 54,725 tons of salt in 2010-2011, as a secondary customer, Howe described Cargill's strategy thusly: "Hey, Lake County, we really don't value your business because we don't know who you are and we don't want to fire Cuyahoga or Lorain or Medina."[56]

Howe's subordinate, Schulz, confirmed that Cargill's goal is to keep its primary customers and passively pursue secondary customers. She also characterized a situation in which Cargill won a secondary ODOT county bid as "accidental."[57] Schulz summed up Cargill's bidding strategy as follows: "Maintain familiar tons."[58] Cargill executives' use of the terms "primary" and "secondary" and their ability to regularly predict the winner in advance of what is supposed to be a competitive bidding process is further evidence that Cargill allocated a share of the ODOT salt market to its competitor, Morton.

Although Morton does not designate its customers as primary and secondary, it does take the same approach as Cargill when bidding on ODOT salt contracts. Butler, Morton's Director of Ice Control Sales and Marketing, said in his interview that Morton chooses the counties it wants to win by bidding them year after year "more aggressively"[59] than the counties it loses. When asked about the nearly 250,000 tons of salt that Cuyahoga County buys from Cargill every year – even though Cuyahoga County is close to Morton's Fairport mine – Butler said he would be "surprised" to win the Cuyahoga County contract and would "not expect to get it." Morton's high-priced bids submitted for the Cuyahoga County contract ensure that his expectations are likely to be met.

[55] Howe transcript, p. 45.
[56] Howe transcript, p. 84.
[57] Schulz transcript, p. 16.
[58] Schulz transcript, p. 63.
[59] Butler transcript, p. 54.

Pricing and profits in comparison with other states

In response to our subpoenas requesting data from 1999 through 2009, Cargill provided profit-margin data for the winter seasons of 2004-05 through 2007-08. Due to the fact that these data are proprietary business information, we are constrained from releasing or reporting specific profit margins. However, the data conclusively shows that Cargill's ODOT profit margins during those four years were higher – and most of the time much higher – than Cargill's profit margins on its contracts with transportation departments in seven nearby states.[60] At its extreme, in the winter of 2007-08, Cargill's ODOT profit margin was a mind-boggling 4,000% higher than its profit margin on a contract with a state transportation agency in another mid-western state.

Of particular interest are the comparisons of Cargill's ODOT salt contract profit margins with Cargill's profit margins in New York. According to McClave, Cargill would be expected to have similar profit margins in its contracts with ODOT and the New York State Department of Transportation since Cargill has a salt mine and a nearby competitor in both states and the contract tonnages are comparable each year. However, New York does not have an in-state preference policy for road salt. Cargill's margins on the ODOT contracts were notably higher during all four winters and more than 150% higher in three of the four winters.

These profit-margin comparisons are further evidence that ODOT was not receiving competitive prices from Cargill during this period. Again, Cargill was able to extract much higher profits from ODOT due to a lack of competition from other bidders who were excluded due to ODOT's Buy Ohio lockout.

We also examined Cargill's and Morton's bidding practices in contiguous counties along the Ohio/Pennsylvania border (Exhibit 46). Although we do not have comparative profit-margin data, the bids clearly demonstrate the impact of the Buy Ohio lockout on Cargill's bid strategy – to the detriment of Ohio taxpayers.

[60] The states are Illinois, Indiana, Kentucky, Michigan, New York, Pennsylvania and West Virginia.

In the winter of 2009-2010, Cargill submitted a bid to ODOT for Columbiana County for 16,644 tons of salt at $86.74 per ton. Morton bid $60.49 per ton that year in Columbiana County and easily won the contract for the eighth straight year.

On the other side of the border lies Beaver County, Pennsylvania. Although both counties were to be supplied with salt from Cargill's Cleveland stockpile – which is closer to Columbiana County than it is to Beaver County – Cargill bid just $58.92 per ton for 37,240 tons of salt in Beaver County, 32% less than its ODOT bid. Cargill won the Beaver County contract with a bid that was almost $10 a ton lower than Morton's bid.

This pattern was repeated in Ohio's Mahoning County and neighboring Lawrence County, Pennsylvania. For the last decade, Morton has consistently been the low bidder in Mahoning County.[61] In 2009-2010, Cargill bid $85.08 per ton in Mahoning County and lost to the incumbent vendor, Morton, which bid $58.02 per ton, 32% less than Cargill. Across the border, in Lawrence County, Cargill bid just $54.78 per ton, winning the contract with a bid that was more than $11 a ton lower than Morton's bid.[62]

Cargill's bids in eastern Ohio and western Pennsylvania in 2009-10 also show that, whereas Cargill bid high and lost several of its "secondary" ODOT customers – including Lake, Geauga, Ashtabula and Trumbull counties – Cargill declined to bid at all in Erie, Crawford and Venango counties in western Pennsylvania, which were won by Morton.[63] It is notable in this comparison that Pennsylvania does not apply domestic or American preferences and thus has a far more competitive salt market.

When asked to explain the disparities in prices offered to contiguous counties in Ohio and Pennsylvania, Howe, Cargill's National Sales Manager, said he could not.[64] Schulz, a Region

[61] Cargill did underbid Morton for the most recent Mahoning County ODOT salt contract.
[62] Curiously, Cargill chose to supply Lawrence County from its Cleveland stockpile instead of its Neville Island (Pittsburgh) stockpile, which is closer. Cargill's Mahoning County bid indicated that the salt would be coming from Neville Island, even though Cargill's Cleveland stockpile is closer.
[63] The Ohio and Pennsylvania counties are similar in that they are all rural, use comparable tonnages of salt and are all served by Cargill's Cleveland stockpile.
[64] Howe transcript, p. 74-75.

Sales Manager, speculated that Cargill's Ohio motor carriers might not be licensed in Pennsylvania or that supply limitations might be the culprit,[65] an assertion contradicted by Howe.[66] Neither of these explanations comes close to explaining why Cargill cedes Ohio business to its competitor, Morton, and offers substantially better pricing to the Pennsylvania Department of Transportation than it does to ODOT.

Estimated losses due to alleged market allocation

Two recognized methods of estimating losses due to market allocation were utilized by BART and McClave. Both of the preliminary estimates that follow are based on currently available information. One method is to compare profit margins in the 54 counties in Ohio's northern region to the margins in the southern 34 counties. This method first calculates the difference per ton in the average profit margins by subtracting the average profit margin in the competitive southern region from the average profit margin in the non-competitive northern region. The second step is to multiply the per-ton difference in profit margins by the total tonnage ordered by ODOT in the northern region, which provides the total estimated overcharge for each year.[67]

Based on the first method of calculation, Cargill's estimated overcharges between 2003 and 2008 are slightly over $30 million. Morton's estimated overcharges for the same period are approximately $17 million. Thus, the total estimated losses suffered by ODOT during this period total $47 million based on this regional comparison.

The second method focuses solely on the northern region. It compares the profit margin in each year during which evidence indicates market allocation occurred (a market allocation year) to the profit margin in a relatively competitive year (the base year). Under this formula, the difference in profit margins between a market allocation year and the base year are multiplied by the total tons to calculate the total overcharge, which also is adjusted for inflation. This inflation

[65] Schulz transcript, p. 57.
[66] Howe transcript, p. 76.
[67] McClave's first formula is expressed mathematically as follows: O = (N-S) x Q. In this formula, O equals Overcharge, N equals Northern Region Weighted Average Unit Profit, S equals Southern Region Weighted Average Unit Profit and Q equals Quantity Northern Region.

adjustment makes an "apples to apples" comparison of the market allocation year and base year profit margins.[68]

Applying this formula, from the base year 2000 to 2008, Cargill's estimated annual overcharges in the northern region range from $0 in 2000 to more than $14 million in 2008. During the same period, Morton's estimated annual overcharges range from $0 in 2000 to more than $7 million in 2008.

When this same formula is applied in the southern region, the estimate is near zero, confirming that the methodology yields little or no overcharge when applied to a fairly competitive market. The total estimated overcharges in the northern market using this methodology are slightly over $42 million attributable to Cargill's bidding practices and $17 million attributable to Morton's bidding practices. Thus, the total estimated losses to ODOT using this methodology are $59 million.

Based on currently available evidence, both estimations by BART and McClave indicate that ODOT's losses attributable to Cargill's and Morton's bidding practices in the northern region are between $47 million and $59 million.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

[68] McClave's second formula is expressed mathematically as follows: $O_N = P_N - (P_B \times D)$. In this formula, O_N equals overcharge in a given year, P_N equals unit profit in a given year, P_B equals unit profit in the base year and D equals deflator. The deflator in the formula adjusts for inflation from the base year to year N, for which the overcharge is being calculated.

Background to Allegation 3 – Product Substitution

1. Salt is salt – Authenticating Ohio-mined salt

Although the origin of the salt sitting in an ODOT salt barn may not be apparent, the Buy Ohio statute requires that Ohio salt be distinguished from non-Ohio salt in order to qualify for the 5% Buy Ohio preference. As we have discussed, only Cargill and Morton produce road salt that is mined in Ohio. Therefore, according to ODOT's interpretation of Buy Ohio, if both companies bid Ohio-mined salt in a given Ohio county, all other bidders are locked out, no matter how low they bid.

Even if lockout is not triggered, salt mined in non-border states, such as Louisiana, is subjected to a 5% bid penalty, and salt mined outside of the United States is subjected to a 6% penalty.[69] (Exhibit 6). This means that companies that bid salt mined in other states are the successful bidders only when there is no lockout *and* when their bid is at least 5% lower than bids submitted by any company offering Ohio-mined salt.

When submitting an ODOT salt bid that seeks to take advantage of the Buy Ohio preference, a vendor must provide a county-by-county breakdown of its bids, identifying the mine location from which the salt will be provided. The vendor also must complete a Buy Ohio statement and an authorized representative of the company must sign the bid, attesting to its accuracy. In addition, upon delivery to ODOT's storage site, the vendor or its shipping agent must provide a bill of lading that identifies the stockpile from which the salt was supplied in order to authenticate the salt as having been mined in Ohio.

[69] OAC Section 123:5-1-06 and DAS Policy PUR-003V(3).

2. Cargill's stockpile locations and source mines

Since 1998, Cargill has used 13 stockpile locations to store salt for shipping in Ohio (Exhibit 47). Ten of these locations are located in Ohio, two are located in the Pittsburgh area and one is in West Virginia.

According to Ken Ellen, who oversees transportation and storage for Cargill, salt stored at Cargill's Cincinnati, North Bend, Ironton/Hanging Rock and Bellaire[70] stockpiles on the Ohio River came exclusively from Cargill's salt mine in Avery Island, Louisiana.[71] This is corroborated by Cargill documents we received via subpoena. The salt stored at Cargill's West Elizabeth[72] and Neville Island stockpiles near Pittsburgh, as well as the salt stored at Cargill's West Virginia stockpile in Belmont, also came primarily from the Avery Island mine. The other six Cargill stockpiles in Ohio are predominantly sourced by Cargill's Cleveland mine.[73] Asked whether Cargill ever blends its Ohio salt with its Louisiana salt, Ellen replied that salt is "a fungible commodity," adding that "from a customer's standpoint, it's highway spec salt, regardless of where it comes from, so there's no . . . need to segregate sourcing."[74]

3. Morton's stockpile locations and mine sources

Since 1998, Morton has used 15 salt stockpile locations from which Ohio customers were supplied (Exhibit 48). Stockpiles that have primarily served southern Ohio are located in Cincinnati, Portsmouth and Marietta.[75] These stockpiles, which are all located along the Ohio River, are supplied primarily by barge from Morton mines in Weeks Island, Louisiana, and from

[70] The Bellaire stockpile contained exclusively Louisiana salt until 2007, when it went out of service. Reopened in 2009, the Bellaire stockpile now is sourced with Cleveland salt.
[71] Ellen transcript, p. 8-9.
[72] While most of the salt stored at the West Elizabeth stockpile comes from Avery Island, some Ohio-mined salt is stored there, too (Ellen transcript, p. 15).
[73] These six other stockpiles are Ashtabula, Camden, Cleveland, Columbus, Dayton and Toledo. The Belmont, Dayton and Ashtabula stockpiles are no longer in use and the new Bellaire and Camden stockpiles have only been in service since 2009.
[74] Ellen transcript, p. 14.
[75] At different times, Cincinnati and Portsmouth have had more than one stockpile site. The Marietta site is now closed.

Morton's solar salt operation in Inaugua, the Bahamas. The river stockpiles also are periodically supplied with salt purchased from South America. For example, according to documents provided by Morton, five salt shipments to its Portsmouth stockpile in 2008 came from Chile.

Linda Hetz, Morton's North American Supply Chain Manager, said several steps are taken to ensure that foreign salt is segregated from American salt at Morton's Ohio River stockpiles. First, she said, Morton salt mined at Weeks Island is treated with a coloring agent to give it a light blue tinge; salt from South America and the Bahamas is not treated with this agent and remains white. Second, salt that is destined for customers such as ODOT that have "Buy America" requirements in their contracts is kept in separate piles. Third, tarps covering the piles are marked to indicate their place of origin.

Hetz said Morton relies on its locally contracted stockpile managers to deliver salt from the stockpiles to customers, such as ODOT, whose contracts are predicated on mine source. She said local contractors are given instructions either by phone or by email as to how to segregate road salt by mine source and customer. Although we asked Morton officials to provide all documents that detailed these salt-segregation instructions, they provided no documentation pertaining to instructions for segregating domestic-mined salt from foreign-mined salt.

Hetz conceded that Morton does not audit its local stockpile manager contractors to ensure compliance with its segregation instructions.[76] She also admitted that blue-tinted Weeks Island-mined salt is sometimes mixed with foreign-mined salt, but insisted that this never happened with deliveries to ODOT.

Morton supplies salt to customers primarily located in northern Ohio from stockpile locations in Conneaut, Ashtabula, Fairport, Cleveland, Sandusky and Toledo. These stockpiles are supplied by salt from Morton's mines in Fairport, Ohio and Ojibway, Ontario, Canada. Deliveries to these stockpiles – all of which are located on the shore of Lake Erie – are made almost exclusively by boat.

[76] Hetz transcript, p. 39.

In contrast to the system of controls described by Hetz at Morton's Ohio River stockpiles, the segregation of the foreign and U.S. salt stored at Morton's Ohio stockpiles on the shore of Lake Erie is less rigorous. Salt mined in Ojibway has the same blue tint as salt mined in Fairport. Hetz said Morton erected signs that inform its truckers which piles of salt are destined for Ohio customers and which piles are being delivered to customers in Pennsylvania, which does not have a Buy American preference.

Hetz said the only record of Morton importing salt from Ojibway to Ohio stockpiles occurred in the 2005-06 winter season.[77] A spreadsheet she prepared indicates that, in 2005-06, 20,000 tons of salt mined in Ojibway were shipped to Morton's Ashtabula stockpile and an additional 11,000 tons were shipped from Ojibway to Morton's Cleveland stockpile (Exhibit 49).

United States Customs data contradict her claim (Exhibit 50). The Customs data shows that Morton shipped substantially more Canadian salt to its Ashtabula and Cleveland stockpiles – 28,968 tons in 2005 and another 44,596 tons in 2006. The data further shows that Morton shipped approximately another 280,000 tons of Ojibway salt to the two Ohio stockpiles on several other occasions between 2000 and 2006.

Allegation 3: Cargill Deicing Technology and Morton Salt Company violated Buy Ohio contractual commitments to supply Ohio-mined salt by substituting salt mined outside of Ohio.

Cargill's product substitution

In the fiscal years spanning 1998 to 2008, Cargill was the successful bidder on 632 ODOT county salt contracts. Based on analysis of ODOT bid and delivery records and Cargill documents, our office identified 115 instances in which Cargill certified in its bid to ODOT that it was providing Ohio-mined salt when the company actually delivered salt mined outside of Ohio (Exhibit 51).

[77] Hetz transcript, p. 58, 67 and 131.

In 31 of the 115 instances of product substitution, Cargill was the winning bidder by virtue of having submitted its bids as Ohio-mined salt (Exhibit 52). As a result of these substitutions, Cargill was awarded approximately $3.7 million in sales it would have lost had its bid been based on salt mined in Louisiana. In turn, the companies that should have been the successful bidders lost sales to Cargill. We calculated that American Rock Salt lost $1,570,470 in business, North American Salt Company lost $1,058,755 in business, Morton lost $896,032 in business and Central Salt LLC lost $183,690 in business.

These losses, of course, do not take into account the business lost by these companies – and the attendant higher prices paid by ODOT – as a result of the chilling effect of ODOT's application of its lockout interpretation. According to representatives of the three companies, they all but ceased bidding in northern Ohio because it was a foregone conclusion that if both Cargill and Morton offered bids in any given county, all other companies would be locked out.
In addition, due to the fact that the true low bidder was not awarded the ODOT contract, ODOT paid a higher price for salt than it should have. ODOT's resulting losses totaled $30,145.[78]

Representative example of Cargill's product substitution

In the winter of 2005-06, ODOT contracted with Cargill to supply 4,500 tons of road salt to Clark County. At a cost of $40.82 per ton, the contract represented $183,690 in revenue for Cargill.

Cargill's bid documents indicate that the salt being delivered to Clark County would originate from Cargill's Cleveland mine (Exhibit 53). Cargill Customer Solutions Specialist Jeanne Donnelly signed Cargill's bid on August 12, 2005, attesting that Clark County would receive salt that had been mined in Cleveland (Exhibit 54).

In the 2005-2006 ODOT salt contract in Clark County, Illinois-based Central Salt LLC bid $39.41 per ton for salt mined in Louisiana, $1.41 per ton less than Cargill. Thus, but for the 5%

[78] This damages figure was calculated by determining the difference between what ODOT paid Cargill and the price ODOT would have paid had the contract been awarded to the low bidder.

preference given to Cargill based on its pledge to supply Ohio-mined salt, Central Salt would have won the Clark County contract. This means that ODOT would have paid $6,345 less for salt in Clark County that year had Cargill represented the source of the salt as Louisiana.

Cargill records show that some of the salt supplied to Clark County that year came from its Avery Island mine in Louisiana. This is established by two sets of documents. First, Cargill's inventory records indicate that the salt delivered to Clark County was shipped from Cargill's North Bend stockpile in Cincinnati (Exhibit 55). Ellen said the North Bend stockpile was supplied by Cargill's Avery Island mine.

Records reveal that more than 40% of the salt that was received by Clark County under the contract came from Louisiana.[79] In addition, bills of lading from Cargill's trucking agent, Riverbend Trucking, (Exhibit 56) show that Cargill delivered salt, under the 2005-06 ODOT/Clark County contract, from its Cincinnati stockpile, which is sourced by salt from Avery Island.

Ken Ellen, Cargill's National Supply Chain Manager, was unable to explain Cargill's multiple instances of product substitution, and Cargill declined to produce someone who could. Instead, Cargill sent a letter that attempted to reframe the discussion by analyzing a narrower segment of time, thus omitting other instances of product substitution. The Cargill response also only looked at awards that Cargill won *due* to the Buy Ohio preference – even though Cargill won other bids without being given the 5% preference in which Cargill attested in its bid documents that it would deliver Ohio-mined salt.

Cargill also attempted to minimize the incidents of product substitution by referring to them as "mis-shipped tons." This claim is disputed by the company's own documents, which appear to reveal intent. For instance, a typewritten August 2002 ODOT bid document clearly shows that the salt for 12 of Ohio's 88 counties would be supplied from Louisiana (Exhibit 57). However, the column in the document showing that the salt was coming from Louisiana has hand-written

[79] Tons delivered can vary from tons contracted based on minimum/maximum provisions included in the contract.

overwrites indicating that the salt being delivered to the 12 counties would be Ohio-mined salt. Other Cargill documents definitively show that the salt supplied to all 12 counties did indeed come from Louisiana. These documents demonstrate an awareness of the necessity of supplying Ohio-mined salt. However, due either to neglect or design, Louisiana salt was supplied instead.

Ellen and Lisa Montonaro, Cargill's Central Region Distribution Manager, also attempted to justify Cargill's substitution of non-Ohio salt by invoking public safety concerns. "In our judgment, from a public safety and a customer relationship standpoint, if the choice is not delivering any salt at all or shipping temporarily some salt out of position, we will do the latter to protect the customer," Ellen said.[80]

This claim is misleading. In the 2005-06 Clark County salt substitution, as well as in many other cases in which Cargill engaged in product substitution, the delivery of non-Ohio salt occurred at times when there were no inclement-weather conditions. For example, Cargill made seven deliveries of Louisiana-mined salt to Clark County – totaling 181.06 tons – on April 27, 2006. Weather records for the April 17, 2006, order date for that salt indicate that the temperature was 66 degrees Fahrenheit. On April 27, the delivery date, the temperature was 68 degrees.[81]

Finally, Montonaro admitted that Cargill did not seek any type of waiver or approval from ODOT to substitute Louisiana-mined salt for salt that it represented would be mined in Ohio.

Morton's product substitution

Between fiscal years 1999 and 2008, Morton was the successful bidder on 173 ODOT county salt contracts. Of that number, our office identified 17 instances in which Morton certified in its bid to ODOT that it was providing Ohio-mined salt when the company actually delivered salt mined outside of Ohio (Exhibit 58). In nine of those 17 instances, Morton was the winning bidder due to the fact that it represented its bid as Ohio-mined salt (Exhibit 59).

[80] Ellen transcript, p. 25.
[81] www.wunderground.com

Among the 17 instances identified above, 10 of them involved sales in which Morton certified that it was providing American-mined salt when the company actually delivered salt mined outside of the United States (Exhibit 60). In three of those 10 instances, Morton was the winning bidder due to the fact that it qualified for the Buy American preference by representing the salt as having been mined in America (Exhibit 59).

Morton's substitution of salt mined outside of Ohio for Ohio salt and its substitution of foreign-mined salt for U.S. salt resulted in Morton being awarded approximately $1.2 million in sales to which it would not have otherwise been awarded. As a result, Morton's competitors lost sales to Morton. We calculated that Cargill lost $486,405 in business, American Rock Salt lost $278,881 in business and North American Salt Company lost $450,495 in business.

ODOT paid a higher price for salt since the true low bidder was not awarded the contract in these cases. Consequently, ODOT suffered losses totaling $35,676.[82] As in the Cargill examples cited earlier, these losses do not take into account the business lost by these companies, and the higher prices paid by ODOT, as a result of the chilling effect of ODOT's application of its lockout interpretation.

Representative examples of Morton's product substitution

In the winter of 2000-01, ODOT contracted with Morton to supply 4,700 tons of road salt to Harrison County. At a cost of $33.50 per ton, the contract represented $157,450 in business for Morton.

Morton's bid documents indicated that the salt to be delivered to Harrison County would come from its Fairport mine and be delivered from its Fairport stockpile. Instead, Morton's records

[82] This damages figure was calculated by determining the difference between what ODOT paid Morton and the price ODOT would have paid had the contract been awarded to the low bidder.

show that 2,301 tons of the total (32%) came from Morton's salt mine in Weeks Island, Louisiana.[83] (Exhibit 61).

That same winter, the Village of Kirtland and the City of Painesville, contracting with Morton under ODOT's cooperative-purchasing agreement, entered into contracts with Morton to supply 600 tons and 3,500 tons of salt, respectively. At a cost of $29.15 per ton for each contract, the two contracts represented a combined $119,515 in business for Morton.

Morton's bid documents indicated that the salt to be delivered to Kirtland and Painesville would come from its Fairport mine and be delivered from its Fairport stockpile. Instead, Morton's records show that 50 tons of the salt supplied Kirtland (6%) and 282 tons of the salt supplied to Painesville (8%) came from Morton's Ashtabula stockpile, which was supplied with Canadian salt mined in Ojibway, Ontario (Exhibit 61).

In each of these three cases, the losing bidder, Cargill, should have been awarded the contract due to the fact that Cargill bid Ohio-mined salt, triggering the 5% Buy Ohio preference.[84] As a result of these substitutions, Cargill lost $276,965 in sales to Morton.

During our interview with Hetz, Morton's North American Supply Chain Manager, we asked about Morton's substitution of out-of-state salt, noting the discrepancies between the spreadsheet she provided and other Morton documents. We followed up by requesting additional information from Morton that documented all instances in which salt stockpiles were supplied from a mine other than the "standard source," – *i.e.*, instances in which Morton deviated from its usual stockpile-supply procedures. We also requested all records documenting intercompany shipments of salt from Morton's Ojibway mine to any stockpile serving Ohio customers. Finally, we provided Morton with data from U.S. Customs showing seven shipments of Canadian salt, as opposed to the two shipments from the 2005-06 season on the spreadsheet Hetz had provided to us.

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[83] Harrison County actually exceeded the contract, purchasing 7,131 tons of salt. As explained earlier, purchasers are permitted to exceed the contracted amount under the "min-max" terms of their contracts.

[84] In the Harrison County contract, Cargill bid $34.25 per ton vs. Morton's "winning" bid of $33.50 per ton. In the Kirtland and Painesville contracts, Cargill bid $30.78 per ton vs. Morton's "winning" bid of $29.15 per ton.

Morton ultimately conceded that Hetz was incorrect when she claimed that Morton only imported salt from Ojibway to its Ohio stockpiles in the winter of 2005-06 (Exhibit 61). They then claimed that the substitutions of Canadian salt to Kirtland and Painesville – as well as the substitution of Louisiana salt to Harrison County – were permitted under the "min-max" terms of Morton's contracts because Morton had already exceeded the contracts' 120% maximums. The latter claim is incorrect, too. In each case, the contract maximum was 140%, not 120% (Exhibit 62), and Morton had not reached the 140% maximum on any of the contracts.[85]

Morton further asserted that it is company policy to call their county clients and inform them "as a matter of courtesy" when non-Ohio salt is being substituted. However, Hetz said in her interview that she could not recall a single instance in which she or one of her subordinates sought approval from ODOT to substitute out-of-state salt.[86] Further, Morton's response did not contain any documentation that Morton provided this courtesy notification to ODOT.

Finally, Morton's response also acknowledged the accuracy of the Customs data we provided, conceding that Hetz had erred when she claimed that the Ojibway shipments to Morton stockpiles serving Ohio customers occurred only during the 2005-06 season and totaled 31,000 tons (Exhibit 61). They acknowledged that, between the 2003-04 and 2005-06 seasons alone, Morton actually shipped more than 122,000 tons of salt from its Ojibway mine to stockpiles that served its Ohio customers.[87] Also, despite their previous assertions that no other Morton records concerning stockpile mine sources existed, and after being confronted with the Customs data, their response also included intercompany freight and salt-transfer records documenting the shipments.

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[85] Min-max contract terms are based on a statewide, running total. Morton's lawyers conceded that Morton sold 125,808 tons of Ohio-mined salt to ODOT and its cooperatives during the 2000-01 season, representing 127.3% of the total award for Ohio-mined salt.
[86] Hetz transcript, p. 99.
[87] Data provided to us by Morton's attorneys show that, between the 1999-00 and 2005-06 seasons, Morton shipped more than 364,000 tons of salt from its Ojibway mine to stockpiles that served Ohio customers.

In summary, neither Cargill nor Morton asked their ODOT customers whether substituting salt mined outside of Ohio was acceptable. Furthermore, Cargill's attempt to justify its product substitution by claiming that it was acting in the interest of public safety is contradicted by the fact that some of its deliveries of non-Ohio salt were made in 60 degree-plus weather.

The actions of Cargill and Morton officials also are unfair to their competitors. It is one thing to give these companies an advantage for products that are mined in Ohio and create Ohio jobs. It is quite another to require Ohioans to pay 5% or more for salt that was not mined in Ohio, did not involve Ohio mining labor and, at the same time, unfairly cut companies that mine salt in New York or Michigan out of the market.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

Background to Allegation 4 – Gratuities to Public Employees

1. Cargill's 'enhanced deicing' products

Cargill manufactures a variety of "enhanced deicing" products, including ClearLane and the AccuBrine automated brine maker. The company's sales testimonials claim that these products are all state-of-the-art and that, despite generally being more expensive than other deicing products on the market, ultimately save users time and money.

ClearLane is a product that contains 95.9% rock salt, a pre-wetting agent, a corrosion inhibitor and a coloring agent. Cargill touts it as a product that adheres to the road surface more effectively than regular rock salt and therefore minimizes the loss of deicer due to wind and traffic scatter. Cargill also claims that ClearLane reduces the amount of product used by 20% to 40% when compared with rock salt.

ClearLane also is more expensive than rock salt. Between January 2009 and June 2010, ODOT paid between $75.12 a ton and $80.38 a ton for ClearLane. In contrast, during the winter of

2009-10, ODOT paid between $43.53 and $68.50 a ton for rock salt from Cargill. Cargill sold more than $2.7 million worth of ClearLane to ODOT and local governmental entities in Ohio in 2009 and 2010. Most of the purchases were made through Cargill's Regional Sales Manager, Tony DiPietro.

AccuBrine is a computerized device that measures salt and water mixtures and is touted by Cargill as a state-of-the-art automated brine-making system. Cargill literature says the device allows users to maintain optimal percentages of salinity in liquid brine for spreading on icy roads. The AccuBrine system is considerably more expensive than other available brine-making equipment offered by competing vendors. For example, the current base price for a competitor's brine maker is $30,400, whereas the base price for the Cargill AccuBrine system is $47,621.[88]

Allegation 4: Officials at Cargill Deicing Technology provided gratuities to ODOT and other public employees who were responsible for making and recommending purchases of the company's deicing products.

Between 2006 and 2009, Cargill, primarily through DiPietro, provided more than $4,700 in gratuities (Exhibit 63) to public employees responsible for making or recommending the purchase of Cargill's road salt, ClearLane and the AccuBrine brine mixer. These gratuities, which included Cleveland Browns tickets, golf outings and expensive meals, often were timed to coincide with major purchases. Gratuities were provided to employees of 32 local governments, most of them in northeast Ohio.

ODOT

Between April 2006 and December 2008, Diana Clonch, Assistant Administrator of ODOT's Office of Maintenance Administration and the agency's point person on the setting of specifications for purchases of road salt and treated salt, accepted meals from DiPietro and other Cargill employees totaling $404 (Exhibit 64). They included a $189 meal for DiPietro, Clonch

[88] ODOT contract No. 013-11.

and one other person at Martini Italian Bistro in Columbus on December 4, 2008.[89] Notations that DiPietro made on his expense reports during this period reference salt product discussions that he had with Clonch (Exhibit 65). Clonch also admitted to receiving these gratuities in her interview with the OIG.

An email sent by DiPietro to Clonch show that DiPietro forwarded a list of municipal customers who might be interested in purchasing ClearLane through ODOT's Cooperative Purchasing Program[90] (Exhibit 66). In an email he sent to Clonch on June 9, 2008, DiPietro wrote: "I do think there is a real interest statewide to try treated salts and a statewide pricing would benefit all."

One of the municipalities DiPietro identified was the City of Twinsburg, which was interested in buying 1,000 tons of ClearLane for the upcoming winter, DiPietro informed Clonch (Exhibit 66). In turn, Clonch promoted the use of ClearLane to a counterpart at the New York Department of Transportation, noting in a June 16, 2008, email (Exhibit 67) that ODOT was "working on specs for a treated salt product (ClearLane or equivalent) . . ." On September 9, 2008, Clonch also sent an email about treated salt to ODOT district service engineers, writing: "This product goes by brand names such as ClearLane (produced by Cargill). There are a couple of reasons for letting this contract. First, there have been a number of local governments who want to try or use this product and want to be able to purchase it off of the State bid – in addition to the locals some of the ODOT Counties want to try it also." (Exhibit 68).

On September 18, 2008, ODOT employee Sam Grier, who reports to Clonch, emailed Clonch to inform her that he had canvassed municipalities that were interested in buying ClearLane through ODOT's Cooperative Purchasing Program (Exhibit 69). Based on DiPietro's

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[89] The values of these gratuities were calculated based on expense reports and receipts provided by Cargill. If the expense report indicated that a meal was purchased for a total of $100 for four individuals, a $25 gratuity was attributed to each individual in attendance.

[90] Under ORC Section 5513.01(B), the Director of Transportation may permit any political subdivision to participate in contracts into which the Director has entered for the purchase of machinery, materials (such as salt), supplies or other articles.

information, Clonch instructed Grier to verify the quantities of ClearLane that communities such as Bedford Heights wanted to buy.

On June 30, 2009, DiPietro again identified several potential municipal customers for ODOT, emailing Clonch a list of interested municipalities. Grier then developed a contact list to canvass those municipalities, almost exactly matching those listed in DiPietro's email (Exhibit 70).

It appears that competing salt vendors did not have the same access to ODOT officials as Cargill. At least one of Cargill's competitors complained that Clonch was not keeping vendors informed about ODOT's progress in buying treated salt products. On April 20, 2009, an official at Innovative Municipal Products (U.S.) Inc. wrote to Clonch: "I have seen the salt institute touting your upcoming salt bid? I thought you were going to keep us vendors informed on this, and the specification involved?" (Exhibit 71).

Ultimately, the specifications that ODOT developed for treated salt proved to be an identical match for ClearLane (Exhibit 72). The specs even stipulated that the coloring of the salt be either green or blue. ClearLane is green. Since the development of these specifications, no bid has been close to those submitted by Cargill.[91]

We also discovered that the process Clonch used to manage the local government cooperative purchasing of treated salt significantly deviated from the procedures established for ODOT's Cooperative Purchasing Program in several ways. First, Clonch approached local governments. Normally, interactions with local governments on cooperative purchasing are managed by ODOT's Office of Contract Administration. In addition, it is highly unusual for ODOT to canvass local governments in the cooperative purchasing of a particular product. Typically, local jurisdictions decide what products they want to buy from the list of ODOT's co-op offerings – which are available on ODOT's web site – without prompting from ODOT.

[91] In 2009, Klink Trucking of Indiana submitted a bid at more than double the price of that submitted by Cargill. No other bids were tendered.

Clonch also engaged in improper conduct by verifying interest from local governments at the request of the ODOT vendor who was marketing its product. Lastly, ODOT deviated from normal purchasing procedures by allowing local governments to purchase ClearLane under ODOT's Cooperative Purchasing Program without passing an ordinance or resolution required by ORC 5513.01(B).

Community University Education Purchasing Association and the City of Akron

The Community University Education Purchasing Association ("CUE") bills itself as a "professional, non-profit association that makes it possible for public, non-profit entities to save substantial sums of money through collective volume purchasing."[92] The CUE is administered by the University of Akron's Purchasing Department. Its only paid employees are University of Akron Contract Administrator Andy Roth and his assistant, Denise Cool.[93] According to Cool, CUE exists primarily to make salt purchases for its 81 members, although it also purchases custodial products, gasoline, diesel fuel and other products.

Membership in CUE is open to governmental entities in Summit, Portage, Medina and Stark counties. Members are required to purchase a minimum of $10,000 worth of goods annually. Dues are $200 a year and each member is given an equal vote in contract decision making. However, the most influential members of CUE are the University of Akron, the City of Akron and Summit County.

The Chairman of the CUE Board is Paul Barnett, who is listed on CUE's website as its "Steering Committee Representative." Barnett is a professional engineer and has served as the Public Works Manager for the City of Akron for the last 14 years. Sixteen percent of Akron's highway maintenance budget is funded by ODOT through reimbursement for the maintenance of state highways within its city limits.[94] This includes funds for the purchase of road salt and treated salt through CUE.

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[92] http://www3.uakron.edu/purchasing/cue/
[93] The CUE pays Roth $8,000 a year; Cool is paid $4,000 annually. Barnett transcript p. 14.
[94] Barnett transcript, p. 26.

Since 2001, Cargill has been the sole supplier of road salt to CUE (Exhibit 73). In 2008 and 2009, Cargill was the sole bidder. During the winter of 2009-10, Akron spent nearly $2 million on road salt and treated salt products (Exhibit 74). Akron also has steadily increased the volume of its purchases of ClearLane during the last five years.[95]

On December 10, 2008, Akron also purchased an AccuBrine brine maker from Cargill. The AccuBrine unit, which was customized for Akron's brine storage and spreading equipment, cost the city $86,532. In an interview with our office, Barnett admitted that DiPietro assisted in developing the City of Akron's specifications for this purchase.[96] Barnett also admitted that he did not seek input on the product specifications from any other company and said no other company bid on this contract.[97]

The following month, DiPietro used Akron's AccuBrine machine as part of a sales demonstration for potential customers for the cities of South Euclid and Lyndhurst. According to DiPietro's expense accounts, immediately after the demonstration, DiPietro treated Barnett and the officials to whom he pitched the AccuBrine device to lunch at the House of Hunan restaurant in Akron, which DiPietro expensed at $79 (Exhibit 63).

Of greater concern is the fact that, on September 30, 2007, while DiPietro was negotiating with Barnett on the specifications of the AccuBrine unit, he treated Barnett and his son to a Cleveland Browns football game, spending $134 on tickets[98] for the Barnetts and another $50.50 on food, snacks and drinks (Exhibit 75). DiPietro's Cargill expense report included the following explanation: "The City of Akron is a current customer and is in the process of purchasing an AccuBrine mixing station from us." (Exhibit 75). In an interview with our office, Barnett also admitted that DiPietro paid for two golf outings for him while Akron was increasing its purchases from Cargill.[99]

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[95] In 2005-2006 and 2006-2007, Akron bought no ClearLane. In 2007-2008, it purchased 3,527 tons. In 2008-2009, it bought 4,374 tons. In 2009-2010, Barnett bought 4,720 tons of ClearLane from Cargill (Barnett transcript, p. 6).
[96] Barnett transcript, p. 22-23.
[97] Barnett transcript, p. 24.
[98] The tickets cost $67 apiece.
[99] Barnett transcript, p. 28, 31.

City of Bedford Heights

On October 3, 2008, City of Bedford Heights Service Director Nick Baucco ordered 194 tons of ClearLane from Cargill through ODOT's Cooperative Purchasing Program at a price of $54.04 per ton. Bedford Heights paid $10,484.84 for this order and later purchased an additional 442 tons of ClearLane at a cost of $25,028.06.

According to DiPietro's expense account records, he "entertained the service director Nick Baucco and assistant director Frank Paparone for the City of Bedford Heights at the Cleveland Browns football game" on October 13, 2008 (Exhibit 76) – 10 days after Baucco authorized Bedford Heights' initial purchase of ClearLane from DiPietro. DiPietro's expense account indicates that he paid "$225 ($75 x 3) in cash for three tickets in advance." DiPietro further stated in his expense report: "The City of Bedford Heights is a current customer and has used and is in the process of purchasing ClearLane from us."

In an interview with our office, Baucco admitted that he attended the game and acknowledged that he did not reimburse DiPietro for the tickets. Baucco also claimed that the tickets were not a *quid pro quo* for Bedford Heights' business.

Cargill records indicate that DiPietro's use of his expense account to entertain public officials with whom he was doing business was condoned by senior company officials. In his November 3, 2008, expense report in which he sought reimbursement for Baucco's and Paparone's Browns tickets, DiPietro stated: "In the past when I have entertained customers at events like this I discussed the situation with the Business Unit Controller, Stewart Petrick, and he had advised me to put this in writing and include this information with the expense report I submit." (Exhibit 76). DiPietro reiterated this point in an interview with our office, saying Petrick and his supervisors were aware that he was entertaining public officials and never objected until Cargill officials put a halt to all gratuities for public officials after our office began this investigation.

DiPietro's expense reports further show that he provided Baucco with meals and drinks valued at an additional $245.25 between May 2006 and May 2009. DiPietro provided Paparone with gratuities valued at $169.65 during the same period (Exhibits 77 and 78).

City of Twinsburg

On June 13, 2006, the City of Twinsburg, at the recommendation of Dennis Koballa, General Superintendent of Roads, purchased an AccuBrine brine maker from Cargill for $47,105. Twinsburg's brine maker, like the City of Akron's, has been used by DiPietro in sales demonstrations.

Between June 2006 and August 2008, Koballa accepted gratuities from Cargill totaling $407.28 (Exhibit 79). They included a $125 golfing fundraiser on June 6, 2006, to support the re-election campaign of Independence Mayor Fred Ramos (Exhibit 80), and one ticket to a Cleveland Browns game[100] (Exhibit 81).

In his expense report for Koballa's Browns tickets, DiPietro wrote: "I took our AccuBrine customer Dennis Koballa to the Cleveland Browns football game on October 29, 2006." (Exhibit 81). DiPietro also entertained Koballa at a Cleveland Indians game on June 7, 2007 (Exhibit 79).

Between 2007 and 2009, Twinsburg purchased 2,154 tons of ClearLane from Cargill through DiPietro at a cost of $117,223.94. Koballa denied to us that the gratuities provided by DiPietro influenced his recommendation to buy Cargill products.

Gratuities provided by Granger Trucking

Records we received from Cargill via subpoena also indicate that Frank Bianchi, Vice President of one of Cargill's salt haulers, Granger Trucking, provided gratuities to public officials in northeast Ohio. These gratuities are referenced in a summary of a phone conversation (Exhibit 82) that Lisa Montonaro, Cargill's Central Region Distribution Manager, had with Bianchi in April 2009, and in Bianchi's response to a subpoena from our office.

Montonaro documented a phone conversation she had with Bianchi after Bianchi demanded a 2.5% to 3% rate increase. "He was very upset that I even asked him about his increase,"

[100]The ticket had a face value of $67.

Montonaro wrote. "He began complaining about his costs and how he isn't making any money hauling salt. He then started to tell me how much money he spends on entertainment in the name of Cargill. He said on Monday he was taking several key officials from the City of Cleveland out on a fishing excursion. He was renting a fishing yacht and having them out for the day while in Florida. He went on to tell me that he entertains charity events, dinners, and overall general entertainment all in the name of Cargill to total over $20k."

Montonaro's summary indicates that she asked Bianchi whether "anyone at Cargill has asked him to spend money on entertaining public officials in the name of Cargill." After initially ducking the question, Montonaro wrote, Bianchi responded: "Well how do you think things run so smoothly Lisa [sic]. He said well if Cargill cant [sic] give me my 3% increase then they should pay the entertainment bill."

Attorney Robert Bianchi, Frank Bianchi's brother, initially responded to our subpoena by claiming that neither Granger Trucking, nor anyone acting on behalf of Granger, had provided anything of value to any ODOT employee or any other public employee in Ohio. Attorney Bianchi subsequently provided us with a list of expenditures by Frank Bianchi that included thousands of dollars for meals, drinks, charity golf outings and other events (Exhibit 83). Recipients of these gratuities include Cuyahoga County Commissioner Jimmy Dimora, who faces a federal indictment in Cleveland that accuses him of bribery, fraud and conspiracy; Cleveland City Council President Martin Sweeney; Cleveland Street Commissioner Randell Scott; and Julius Ciaccia, Director of the Northeast Ohio Regional Sewer District.

In an interview with our office, Montonaro said she believed it was a violation of Cargill policy to entertain government officials on behalf of the company.[101] Cargill also provided a draft and a finished copy of a letter that Ken Ellen, Cargill's National Supply Chain Manager, wrote to Frank Bianchi on April 27, 2009 – following Montonaro's phone conversation with Bianchi. In the April 24, 2009, draft version not sent to Bianchi, Ellen characterized it as "troubling" to learn that Bianchi was entertaining public employees "in the name of Cargill." Ellen wrote: "What

[101] Montonaro transcript, p. 19.

Granger deems appropriate for business entertaining of customers is Granger's decision to make. Cargill does not want or need to be pulled in to (sic) this decision. I just want to be clear on that point." (Exhibit 84). In the final version sent to Bianchi, Ellen's objection to Bianchi's entertainment practices was comparatively understated (Exhibit 85).

Although we did not find evidence that Cargill officials authorized their vendor, Frank Bianchi of Granger Trucking, to provide gratuities to public officials, it is clear that their employee, DiPietro, did so with the full knowledge and acquiescence of his superiors. Ellen, when discussing Cargill's relationships with another of its salt haulers, referred to the trucking company as "the face of Cargill to a lot of our customers in that area."[102] In addition, DiPietro explanations for the gratuities were contained in his expense reports, and he was reimbursed for them. He also stopped providing gratuities to ODOT and other public officials only after we initiated this investigation and Cargill executives told him to stop.

We additionally note that Ellen identified Petrick – Cargill's Business Unit Controller and the official who approved DiPietro's reimbursements – as the company official who is responsible for providing Cargill employees with training on the company's "guiding principles."[103] Those principles include the entertainment of public officials.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in these instances.

IV. CONCLUSION

ODOT, like all state agencies, is obligated to follow DAS guidelines for implementing Buy Ohio. For well over a decade, ODOT officials, spanning four administrations, have failed to follow DAS Buy Ohio rules in purchasing road salt and have misinterpreted the Buy Ohio statute in a manner that has benefitted Cargill and Morton and harmed Ohio taxpayers. This

[102] Ellen transcript, p. 12.
[103] Ellen transcript, p. 44.

misinterpretation of Buy Ohio stands in stark contrast to the way both DAS (the primary purchaser of goods for state government) and the Ohio Turnpike Commission have interpreted the very same provisions.

Under ODOT's misguided interpretation of Buy Ohio, if Morton offers Ohio-mined salt at $100 per ton and Cargill offers Ohio salt at $90 per ton, even if a third company offers Kansas-mined salt at $10 per ton, Cargill still wins the bid at $90 per ton! Under both the DAS and Ohio Turnpike Commission interpretation of Buy Ohio, the $10 per ton bid would prevail. DAS and the Turnpike Commission do honor the laudable policy espoused by the Buy Ohio law by giving Ohio products a 5% preference, as required by the Ohio Administrative Code. This is both the correct and practical way to advance the policy of Buy Ohio while protecting taxpayer dollars. ODOT's misinterpretation of Buy Ohio set the table for the abuses catalogued in this report.

Evidence uncovered in this investigation indicates that the two salt companies have exploited ODOT's incorrect interpretation of Buy Ohio by engaging in anti-competitive bidding practices and product-substitution. Particularly in difficult economic times, when the public is demanding that state government be both lean and efficient, this is intolerable.

Cargill and Morton have substantial financial investments in the Lake Erie salt mines that they lease from the state, and they deserve to earn a reasonable profit for mining and delivering the vast quantities of salt on which Ohioans rely to keep the state's roads clear and safe during Ohio's harsh winters. However, the companies do not have a right to extract profits from ODOT that significantly exceed the profits they reap in their contracts with transportation departments in neighboring states.

Cargill and Morton have further exploited their duopoly in Ohio's salt market by pledging to deliver salt mined in Ohio by Ohio workers and then substituting salt mined in Louisiana, Canada, Chile and elsewhere. At best, this constitutes a careless insensitivity to the substantial benefit both companies enjoy under ODOT's overly generous interpretation of Buy Ohio. At worst, it is a callous attempt to manipulate the state of origin of products sold to ODOT, all at the expense of the taxpayer. Executives for Cargill attempted to minimize this conduct by falsely

claiming that these shipments occurred in instances in which public safety was at stake. In fact, as previously mentioned, some of the non-Ohio salt was delivered on days when the temperature was approaching 70 degrees.

Cargill also quarreled with our findings by attempting to truncate the time frame of our analysis. In so doing, Cargill claimed that the company only won two contracts in which it supplied ODOT with non-Ohio salt after winning the contracts as a result of the 5% Buy Ohio preference. This claim ignores the other 113 instances of product substitution that were identified in records Cargill supplied to this office.[104]

Finally, Cargill's payment of gratuities – such as golf outings, sporting event tickets, and multiple meals – to public officials who were able to influence the purchase of its products casts a further shadow on its dealings with ODOT. It is even more troubling that there was a pattern and practice of this behavior over a period of almost three years, and these gratuities were paid through a corporate expense account system managed by Cargill's controller and apparently condoned by him.

V. RECOMMENDATIONS

Based on the results of our investigation, we are making the following recommendations and are asking ODOT and DAS to respond to this office within the next 60 days with a plan explaining how these recommendations will be implemented:

1. ODOT should adhere to DAS purchasing guidelines when evaluating bids and applying preferences in the awarding of all contracts.

[104] Cargill offered guidance for identifying sensitive commercial information in the documents it provided during the course of this investigation. Specifically, it expressed concerns about two categories of data that it considered sensitive—profit margin information and mine-production capacity. We exercised an abundance of caution in protecting these data. In the case of Morton, our task was made somewhat more onerous because it designated nearly every document that it provided as "confidential." See, for example, Exhibit 23, a public letter written to a state legislator for lobbying purposes that Morton stamped "confidential".

2. ODOT should ensure consistent application of bidding policies and procedures, including cooperative-purchasing procedures, for all road-deicing product contracts.
3. ODOT should require salt vendors to provide documentation verifying their mine sources on deliveries of road salt.
4. ODOT should routinely audit contract compliance by salt vendors, including, but not limited to, compliance with Buy Ohio and Buy American statutes.
5. DAS, in consultation with ODOT, should evaluate factors – including "significant Ohio economic presence" – that would enhance competition for mined products such as rock salt.
6. ODOT should review the conduct of any employees involved in wrongdoing in this case and take appropriate administrative action as warranted.

VI. REFERRALS

Copies of this report are being referred to the Ohio Attorney General's Office, Cuyahoga County Prosecutor's Office, Ohio Ethics Commission, State Auditor's Office and the U.S. Department of Justice.