IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. FRANK PEAKE, Defendant	Criminal No.:11-512 (DRD)

AMENDED OPINION AND ORDER

On January 14, 2013, Peake moved for a mistrial on the basis of the United States' opening statement (Docket No. 153). Therein, Peake notes that the United States articulated during its opening that "Shipping is very important to Puerto Rico." and that "This case is about Puerto Rico." Peake also avers that the United States argued that school lunches in Puerto Rico cost more because of the conspiracy. Peake advances that the United States' discussion of the effects of the conspiracy on Puerto Rico are irrelevant to whether Peake was apart of the conspiracy.

On January 18, 2013, the United States opposed Peake's motion (Docket No. 161) arguing that the United States' opening remarks did not lead the jurors to believe that they were direct victims of the alleged price-fixing conspiracy. Instead, the United States asserts that their opening merely laid out what the evidence will demonstrate at the conclusion of the United States' case.

In relevant parts, the United States stated during its opening:

> Most consumer goods travel to Puerto Rico from the

> shipping lane of Jacksonville, Florida, Elizabeth, New Jersey and Houston, Texas. Food for Pueblo supermarket, medicine at Walgreens, most things at Walmart. Most things made in Puerto Rico for sale in the States travel through those same shipping lanes, things like pharmaceuticals, electronics and rum . . . .
>
> [The conspiracy] was so significant [in] that it affected billions of dollars of freight to and from Puerto Rico. Billions of dollars. This case is about Puerto Rico because the conspiracy affected so much of what is sold here and what is exported here . . . .
>
> [The Sherman Act] is important because it is pretty much impossible to live without spending money. We all have to buy things, whether it is a cup of coffee at work, a sandwich at lunch, another cup of coffee in the afternoon, maybe some groceries for dinner because people have to spend money . . . .
>
> Businesses like Burger King, Office Max and Walgreens, businesses that have stores all over Puerto Rico, they were all paying more than they should have to ship freight to Puerto Rico because Sea Star and Horizon were conspiring, not competing . . . .
>
> [T]here will be evidence that the government used the shipping companies to ship food for the school lunch program. The federal program gives free and reduced price lunches to families who can't afford to pay for their lunches. You will hear from the Department of Agriculture, USDA which will tell you that paying more for shipping meant that the government had less money the school luncheon program to buy food for school children.

"A mistrial is viewed as a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair." United States v. Dunbar, 553 F.3d 48, 58 (1st Cir. 2009) (internal brackets and quotation marks omitted). To warrant a mistrial, Peake must demonstrate that the United States engaged in misconduct and that there was a resulting prejudice. *See* United States v. Giorgi, 840 F.2d 1022, 1037 (1st Cir. 1988) ("Even were we to find the prosecutor's methods improper, that alone would not

suffice to reverse the conviction. . . . [A] party must show both misconduct and resulting prejudice." (citing Berger v. United States, 295 U.S. 78, 89 (1935)). "The test is whether the prosecutor's misconduct so poisoned the well that the trial's outcome was likely affected, thus warranting a new trial . . . . In such cases, this court has applied a three part test: (1) whether the prosecutor's conduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; (3) whether it is likely that any prejudice surviving the instruction could have affected the outcome of the case." United States v. Azubike, 504 F.3d 30, 39 (1st Cir. 2007).

The Court disagrees with Peake's characterization of the United States' opening. First, upon reviewing the opening as whole, beyond the excerpted portion above, the United States' opening generally lays out the evidence they anticipated to be presented including the purported harm done to the direct victims of the conspiracy, those entities that contracted with Sea Star. Second, considering the allegedly offending portions, the Court finds that the United States did not unduly stress or emphasize that all residents of Puerto Rico who have purchased goods from the continental United States are victims. Admittedly, a reasonable juror could have made the inference from the United States' opening that because companies doing business in Puerto Rico had higher shipping costs, they passed these higher costs onto their customers, the residents of Puerto Rico, who then indirectly paid higher prices for goods originating from the continental United States. However, there is nothing impermissible

about jurors being indirectly or secondarily affected by the charged crimes.[1] We find that the United States did not inflame the hearts of the jurors or otherwise arouse such pride for Puerto Rico as to ineradicably taint the jury and thereby impede Peake's constitutional right to a fair trial by an unbiased jury. Simply, the Court finds no prosecutorial misconduct as to the United States' opening statement.

Yet even assuming misconduct, Peake cannot satisfy the tripartite test for resulting prejudice enumerated in Azubike. The United States' opening remarks were largely isolated and were not repeated throughout the trial. As to the second prong, the Court gave a curative instruction on third full day of trial.[2] The Court instructed the jury as follows:

> Before we receive the remaining evidence I think it is critical that the Court provide you with an instruction. The fact that Puerto Rico may have potentially been affected or consumers and/or prices and/or business is not to be considered by [you] in your judgment as to the [guilt or not] guilt of the defendant. The effect on prices or consumers in Puerto Rico is not *per se* an element of the offense. You are not to decide this case based on pity and sympathy to Puerto Rican businesses, to Puerto Rico, or to Puerto Rican consumers. The effect on Puerto Rico only is material as to potentially establishing an effect on interstate commerce. This case is about a potential conspiracy in violation of the

[1] As the United States illuminates in its brief, cases of antitrust violations, environmental harms and political corruption cases all have a general, negative effect on the community at large. These secondary and diffused effects upon the populace of the region effected does not invalidate a juror who hails from that same region's service or otherwise call into question their impartiality.

For instance, the Environmental Protection Agency could bring a criminal enforcement action against a San Juan factory owner for an alleged violation of the Clean Air Act. While, if proven, all the residents of the San Juan metropolitan area's health and properly values may have been compromised, the residents are but secondary victims of the owner's crime. As such, these residents may properly serve on the jury and be able to impartially satisfy their oath despite having suffered from the diffuse effects of the alleged crime.

[2] Peake filed a motion for a mistrial on January 14, 2013 at 8:32 PM. Prior to the filing of the United States' opposition, the Court gave a curative instruction on January 16, 2013.

> antitrust law, and whether or not, the defendant, Mr. Frank Peake, joined the conspiracy. Sympathy to Puerto Rico is, therefore, to play absolutely no role in your consideration of this case. Any statement that may have implied or that you have understood that this is a case relating to the effect on Puerto Rico is an erroneous interpretation. And I don't want you to have that interpretation. So, therefore, any effect on Puerto Rico is not to be considered at all.

Trial Transcript (Jan. 16, 2013) at 101-02. The Court deems its instruction to have satisfactorily assuaged any concerns of improper prejudice. *See* United States v. Sepulveda, 15 F.3d 1161, 1185 (1st Cir. 1993) ("Swiftness in judicial response is an important element in alleviating prejudice once the jury has been exposed to improper testimony," and "appellate courts inquiring into the effectiveness of a trial judge's curative instructions should start with a presumption that jurors will follow a direct instruction to disregard matters improvidently brought before them."). Additionally, the Court will also give a second, similar cautionary instruction to the jury prior to their deliberation. The Court remains confidant that the not one, but two, jury instructions will adequately provide the necessary panacea to remedy any purported prejudice.[3]

In regard to the third factor of the Azubike test, the Court concludes that any surviving prejudice would not likely affect the outcome of the proceedings as the statements in question do not directly bear weight on any of the elements of the charged offense.

For the reasons stated herein, the Court ascertains that the

[3] In addition to the curative instruction, the Court also engaged in an extensive voir dire process, which included employing jury questionnaires. The potential jurors answered numerous questions designed to eliminate direct victims of the conspiracy from serving on the jury.

prosecutor for the United States did not engage in any misconduct; and that the United States' opening statement did not expose the jury to any cognizable prejudice which could not be eradicated by a curative jury instruction. Hence, the Court finds that there is no need to utilize the "last resort" option of a mistrial. Peake's motion for a mistrial (Docket No. 153) is hereby **DENIED.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 25th day of January, 2013.

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge