UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CASE NO. 11-CR-512 (DRD)

UNITED STATES OF AMERICA,

vs.

FRANK PEAKE,

Defendant.
_____/

FRANK PEAKE'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Frank Peake, through counsel, files his Objections to the Presentence Investigation Report (PSR), pursuant to Local Rule 132(b). In addition to these objections, we also will be filing a sentencing memorandum explaining why a non-incarcerative sentence is appropriate in this case.

INTRODUCTION

The probation office, relying on the prosecution, has recommended a guideline range that, if followed by this Court, would result in a sentence *almost two times higher than any sentence in the history of United States antitrust cases*. The piling-on of guideline points for Mr. Peake is not legally or factually justified. The primary objections in this memo relate to the:

- 12 level enhancement for volume. The government has not proven (nor will it be able to at sentencing) that any commerce was affected at all, let alone by Frank Peake. In fact, at trial, the government repeated again and again that it need not prove any affected commerce, and this Court agreed in its instructions to the jury that it need not do so. Now, without explaining its methodology for determining affected commerce, the government – through the probation officer – simplistically asks for

all commerce to count regardless of whether a particular deal was even part of the supposed conspiracy or whether its ultimate price was affected by the conspiracy. Without sufficient and reliable evidence that a particular contract was part of the conspiracy, that its price was affected by the conspiracy, and that Frank Peake participated in that particular deal, the volume of commerce should be zero. In the alternative, the numbers provided by the government are unreliable for a number of reasons explained below and the commerce affected is much less than the government submits.

- 4 level enhancement for role in the offense. Frank Peake's alleged role in this case was minor, and he deserves a role reduction, not an enhancement. Peake was not responsible for entering Sea Star into the conspiracy agreement, nor did he shape it, determine its scope, draw others in, or participate in its day-to-day implementation. Importantly, the jury foreman described Serra, Baci, and Glova as having "bigger role[s]" than Peake and believed that Peake's participation was minor: "Mr. Peake's involvement in the scheme was that of an occasional problem solver and not one of the main participants." *See* Exhibit 1.

OBJECTIONS

I. The "Facts" In The PSR Are Not Based On The Full Trial Testimony Or Exhibits And Are Therefore Unreliable.

The PSR adopts a selective portion of the trial testimony which fails to accurately summarize the evidence. Accordingly, we object to the "factual" portion of the PSR and ask the Court to rely upon the trial evidence that it observed first hand.

II. The PSR Incorrectly Calculates The Volume Of Commerce Affected.

We object to the application of a 12 level enhancement for volume of commerce pursuant to § 2R1.1(b)(2)(F), *see* PSR at ¶ 68, and to the underlying factual paragraphs used in support of this enhancement. No volume of commerce numbers were proven to the jury (or to the Court) during the trial of this matter. Accordingly, should the government wish to enhance Mr. Peake's guideline range, it should be required to produce reliable and competent evidence as to the volume of commerce affected by Mr. Peake. *See, e.g.,* U.S.S.G. § 6A1.3(a).

In antitrust cases, the calculation of the applicable guideline range turns largely on the volume of commerce affected by the price-fixing conspiracy. In determining the range, U.S.S.G. § 2R1.1(b) instructs the Court to add levels based on "the volume of commerce *attributable to the defendant*." (emphasis added). This term is defined by the solitary statement that it is "the volume of commerce done by him or his principal in goods or services that were affected by the violation." *Id.* No further advice or direction is provided. Like the term "volume of commerce," the term "affected by the violation" is "not defined in the Guidelines, is not used elsewhere in the Guidelines, is *sui generis* to the Guidelines in the antitrust context, and is not a term of art." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999).

Appellate courts have recognized that the "plain language of the section makes clear that the volume of commerce includes only those sales 'affected by the violation,' rather than *all sales*." *United States v. Andreas*, 216 F.3d 645, 676 (7th Cir. 2000) (emphasis in original). Thus, courts consistently refuse to adopt the government's assertion that all sales made by a defendant are necessarily "affected." *See, e.g., SKW Metals & Alloys, Inc.*, 195 F.3d at 91.

The volume of commerce numbers in the PSR are seriously flawed, as they include bids that were not part of the conspiracy and bids/contracts in which Peake (or Baci) was not a participant.

Accordingly, the Court should put the government to its burden at sentencing to prove which bids were both affected by the conspiracy and attributable to Frank Peake.

It always has been the law in the First Circuit that the burden rests with the government to prove enhancements and specific offense characteristics, like loss or tax figures, by a preponderance of the evidence. *See, e.g., United States v. Mitrano*, 658 F.3d 117 (1st Cir. 2011). The government should bear this burden in antitrust cases under Section 2R1.1 as well to prove what, if any, volume of commerce Mr. Peake is responsible for by a preponderance of the evidence. No First Circuit case has held otherwise.

We recognize that some courts (not the First Circuit) – in a break from the general requirement that the government bear the burden of proof – presume that all sales made above market price during the period of a conspiracy were affected by the antitrust activity. *See United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001); *Andreas*, 216 F.3d at 677-78. But this approach has been criticized and has not been adopted by the First Circuit, and therefore we object to it and ask that this Court follow First Circuit precedent directing that the burden rests with the government to prove sentencing enhancements and specific offense characteristics that increase a defendant's sentence. *See* Julia Schiller, Ian Simmons, Angela Thaler Wilks, *Towards Convergence: The Volume of "Affected" Commerce Under the U.S. Sentencing Guidelines and "Impact" Analysis Under the Clayton Act*, 18 Geo. Mason L. Rev. 987 (2011) ("It may strike some as a paradox that, despite the fact that criminal antitrust cases are subject to a higher burden of proof than their civil counter-parts, when it comes to the question of showing impact from an alleged violation the level of rigor evinced in the civil setting far exceeds that in the criminal setting.").[1] In fact, the civil cases

[1] In civil cases, where a person's liberty is not at stake, the burden to prove commerce attributable to a defendant is very high. As the Schiller article states:

before this Court required a higher standard of proof than the government is urging here.

Even in those courts which recognize a presumption for sales above market price, the defense can rebut this presumption by offering evidence that particular sales were not affected. *Andreas*, 216 F.3d at 677-78. Those sales are then subtracted from the total sales, and act to decrease the guideline levels imposed. This methodology is entirely consistent with the purpose of the § 2R1.1 increase which is to address the harm caused by the illegal activity. *Id.* at 678.

"[S]ales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense." *Id.* For example, there are instances where a "'seller quotes or agrees to a price without any reference to the fixed price,' even during a period when a price-fixing conspiracy is otherwise effective." *Giordano*, 261 F.3d at 1147, fn. 16 (quoting *SKW Metals & Alloys, Inc.*, 195 F.3d at 93 (Newman, J., concurring)). Such sales should not be included within the volume of commerce. Similarly, "[r]ecognizing that many companies have multiple product lines that compete in separate markets,

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> Typically in the civil setting, parties develop evidence and economic models through expert testimony purporting to show what the marketplace conditions would have been "but-for" the antitrust violation. This inquiry often involves sophisticated econometric modeling with regression techniques to compare periods of economic activity when the alleged violation was not in effect to periods when it was in effect (the latter is often termed the "conduct" or "conspiracy" period). The goal of these econometric analyses is to model the market, incorporating all factors that could influence prices, including costs, consumer demand, and demand and supply shocks. A model that incorporates all factors that could affect prices can be used to estimate the effect, if any, of the alleged conspiracy. This inquiry also can rely on documentary evidence that illustrates the economic conditions during the conduct period, including whether price competition was intense, whether there was oversupply, whether customers had bargaining power, and whether conspirators cheated. The extent to which price competition and volatile market shares in the periods "before or after" the conduct period extend to the conspiracy period often is a point of contention.
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> *Id.* at 987-88.

[§ 2R1.1] may simply instruct the court to count only the commerce in the product line that was the subject of the illegal agreement." *Andreas*, 216 F.3d at 677. Accordingly, "services affected" often refers only to a subset of the services a company offers. *Id.* (finding that the defendants' company was a global business which was involved in nearly every farm commodity, and only sales of lysine were within the scope of the antitrust agreement). Services and customers not included within the conspiracy should not be counted for sentencing purposes.

In addition, because the volume of commerce "attributable to the defendant" includes only that commerce "done by him or his principal," § 2R1.1(b), the volume of commerce calculation should include revenues only from the period in which Mr. Peake was supposedly involved in the conspiracy.

To sum up, Frank Peake objects to the volume of commerce numbers and asks this Court to require the government to prove with reliable and accurate evidence:

1) the particular deals involved in the indicted conspiracy;

2) whether, and by how much, the ultimate price was affected by the conspiracy; and

3) which deals were done by Frank Peake.

Generally in civil cases this is done with an expert witness subject to the constraints of *Daubert* and Rule 702 to ensure that the numbers are accurate and reliable. Because the government is asking this Court to sentence Mr. Peake to the longest sentence in antitrust history by almost double, the government should be required to prove up its numbers with reliable and accurate evidence.[2]

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[2]Any expert would have to concede that some of the containers that Sea Star shipped could not have had artificial prices because the commerce was based upon other factors, such as customer loyalty, package deals, Sea Star's use of 53 foot containers (which Horizon lacked), or the absence of any interest by Horizon. None of this was addressed at the trial because the government argued successfully that it was irrelevant. But it can't have it both ways. If it wants

In any event, even under the controversial approach taken by some of the other courts, none of the rates charged were above market price, and therefore no sales should be included in determining the volume of commerce affected. Even assuming that the rates were above-market, the PSR erroneously includes sales that pre-dated Peake's alleged involvement in the indicted conspiracy totaling approximately $450 million, all of which should have been excluded. It further improperly includes freight excluded from the agreement (worth approximately $32,521,850), revenue from freight shipped pursuant to contracts that pre-dated Peake's alleged participation in the conspiracy (exact figure unknown, but greater than $4.3 million), revenue from customers who were not part of the alleged agreement (worth approximately $39 million), and bunker fuel surcharges. As a result, at a minimum, a total of $525.8 million should be excluded from the loss figures, reducing the total calculated volume of commerce to at most approximately $386.2 million and resulting in a 2 level reduction in Mr. Peake's guideline range.

A. Because The Rates For Customers Were Not Above Market Price, No Sales Should Be Included In Determining The Volume Of Commerce Affected.

In establishing the volume of commerce affected by Mr. Peake, the government first must prove that sales of services made by Sea Star were above the market price. *Andreas*, 216 F.3d at 677.

Market price is dependent upon the fundamental components of supply and demand. Prior to 2003, in the Puerto Rico trade, five shipping companies competed for cargo traveling to and from San Juan, Puerto Rico. These five carriers had far more ships in the water than was necessary to carry all the cargo traveling to San Juan. Thus, at that time, supply (i.e. capacity) was tremendously greater than demand. There was a huge imbalance. With so much availability of space, customers

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to increase Mr. Peake's sentence, then it must use reliable evidence subject to cross-examination.

dictated the trade and could demand reduced rates. Shipping companies reacted by charging rates for their services that were well below costs. As a result, the shippers lost millions of dollars; eventually, one called Navieras de Puerto Rico (NPR) went out of business. As Serra testified:

Q. Sometimes they (Navieras) were charging less than their costs just to generate some money, correct?

A. At that time all carriers were charging below costs.

Q. And when all the carriers [were] charging below costs, everybody was losing a lot of money, right?

A. The press reports were that in 2001 the industry lost $100 million.

Q. And the market, I mean, it was just a mess, wasn't it?

A. It was difficult.

Q. And then Navieras goes out of business, correct?

A. Yes.

Q. And that helps to sort of normalize the market, does it not?

A. **It eliminated some capacity and it also showed that some of those prices were unsustainable**. In our discussions with our customers we can certainly point to their failure as proof that the prices was [un]sustainable and not remunerative.

Q. **And one of the reasons the market turned around is because Navieras goes out of business and you are able to tell customers, it is not going to happen like that anymore, am I correct?**

A. **In a way, yes.**

Q. And the customers understood that, right?

A. To some extent, yes.

. . .

Q. Supply is going down, right?

A. At that point, yes.

Q. **And when supply goes down prices can go up, right?**

A. **Yes.**

See Tr. Jan. 23, 2013 at 33-34 (emphasis added) . Baci, additionally, testified before the Grand Jury:

> A. Going back before 2002 there were five ocean carriers in the trade. One of those carriers went bankrupt. Before the conspiracy started the carriers in the trade were collectively losing a great deal of money. There was no profit in the trade. One carrier went out of business. **It opened the opportunity for us to be able to increase prices and, therefore, drive some profitability back into the operation of the companies.**

See G.J. Jan. 19, 2011 at 13-14 (emphasis added). According to all the testimony and evidence, the bankruptcy of NPR coincided directly with the time the Sea Star/Horizon conspiracy agreement began. Following these two events, rates offered by the shippers increased. Regardless of the conspiracy, though, rates went up because there was a shift in the key components of the market. Supply was drastically reduced and demand went up. After the death of NPR, there were 5 fewer ships in the water – significantly less capacity than the preceding 4 years. As Baci attested, this departure of NPR "opened the opportunity for us to be able to increase prices." *Id.* Thus, the natural market rate was higher than previously, and it is not accurate to utilize the previous market price to evaluate whether the post-conspiracy price was above market.

Indeed, even with the existence of the conspiracy, rates were not greater than the market would bear nor were they unreasonable. In fact, Gabriel Serra testified, both at trial and before the FBI, that rates charged to customers were fair. Baci agreed. This is highly significant, as the reason for having the antitrust law is "to protect consumers." *See Antitrust -- What's the Big Deal*, http://ethics.csc.ncsu.edu/commerce/anticompetitive/dominance/microsoft/study.php (quoting Senator John Sherman).

During Serra's first interview with the FBI in 2008, Serra told the FBI that the conspiracy

agreements with Sea Star "have not been to the detriment of customers they serve. . . . People in Puerto Rico are not paying too much for shipping; before the market allocation agreements between the shippers, they were paying too little." *See* FBI 302, 4/17/2008, signed by SA Edwin Lopez. During his cross-examination, Serra made the following additional statements confirming this fact:

> Q. And one of the things you told [the FBI] and you told them many times, the conspiracy in this case did not hurt consumers and customers, correct?
>
> . . .
>
> A. **I said we never got to where we were charging onerous prices. We were trying to cover the increases in costs. That is correct. That is how I said it.**
>
> Q. In fact, you said that before 2002 customers and [consumers] were paying too little, correct?
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> . . .
>
> A. I wouldn't talk about customers and consumers. I would talk about customers of the shipping companies.
>
> Q. **And you were talking about those customers paying too little before 2002, right?**
>
> A. **And below costs.**

See Tr. Jan. 23, 2013 at 53-54 (emphasis added). The government has never presented anything to the contrary. In fact, the Court instructed the jury, and the government argued in closing, that even if the prices were reasonable (as they were in this case), Peake could still be found guilty of the conspiracy. Because Sea Star continued to sell their services at a reasonable rate that was not above the market price, even during the time of the antitrust agreement, consumers were not harmed. Accordingly, the volume of commerce was not affected and there should be no increase to Peake's sentencing guidelines. *Andreas*, 216 F.3d at 677-78.

B. The PSR Fails To Fully Exclude Revenues From The Period Before The Indictment.

In paragraph 44, the PSR is incorrect in claiming that Peake joined the conspiracy in 2003.

Equally, paragraph 44 wrongly states that "Mr. Peake was charged with participating in the conspiracy from June 7, 2005 until April, 2008." Rather, the Indictment charged that Peake participated in the conspiracy "[f]rom at least as early as late 2005, and continuing until at least April 2008." The government at trial asserted only that Peake participated in the conspiracy at Sea Star since late 2005. The Court, moreover, instructed the jury during trial as follows:

> I want you to keep clear that even though it is alleged that the conspiracy began in 2002, Mr. Peake, there is no evidence that he joined this conspiracy. The Court cannot allow evidence before 2005 because it is charged as to him as early as 2005.
>
> So he is only responsible, subject to your credibility and your weight, and keeping in mind that he is presumed innocent and that it is up to the United States to prove beyond a reasonable doubt his participation between 2005 and 2008.

See Tr. Jan. 22, 2013 at p. 16. After giving this direction to the jury, when the government continued to question Serra regarding earlier time periods, the Court demanded counsel "Move to 2005. Enough background evidence. Move to 2005." *Id*. at 80. Accordingly, the affected commerce "done by him or his principal" should not include any Sea Star revenue before November 2005. *See* § 2R1.1(b). As a result, even assuming that Sea Star sold at an above-market rate, nearly $450 million should be excluded from the $912 million commerce volume claimed by the government.[3] This leaves approximately $462 million.

C. The PSR Fails To Exclude Commerce That Was Not Affected By The Conspiracy.

From this $462 million, several other "sales that were entirely unaffected . . . should not be counted for sentencing because they [do] not reflect the scale or scope of the offense." *Andreas*, 216 F.3d at 678.

The PSR improperly includes in its volume of commerce calculation certain categories of Sea

[3] Sea Star Puerto Rico trade revenues for 2003, 2004, and 2005 total $454.6 million.

Star revenue that were not "attributable to the conspiracy." This revenue derived from freight types excluded from the conspiracy, freight shipped pursuant to contracts that pre-dated Peake's alleged participation in the conspiracy, and revenue from customers who were not part of the agreement.

1. The Revenue From Freight That Was Never Part Of The Conspiracy Agreement Cannot Be Included In The Volume Of Commerce Affected.

The PSR incorrectly included commerce attributable to freight that was not included within the conspiracy. *Id.* at 677 (2R1.1 "may simply instruct the court to count only the commerce in the product line that was the subject of the illegal agreement."). Revenue from non-container freight cannot be included for sentencing purposes, as it was not part of the antitrust agreement. As part of its ocean transportation service, Sea Star utilized ships (RoCons) that were capable of carrying cargo in containers, liquid cargo in huge tanks, freight on flat beds and flat racks, special equipment, and cargo that could be rolled on and off the ship. Horizon only used lift on/lift off ships, meaning they could only accommodate cargo in containers. Since Horizon could not manage the other types of freight (*e.g.,* liquid cargo, cars, livestock, construction equipment, and other out-of-container cargo), the companies did not compete for these loads. By definition, the companies could not have colluded for these customers. This freight was not part of the conspiracy and was expressly excluded from the supposed Florida 50/50 rule.

At trial, Baci testified on direct examination that non-container cargo was not a part of the conspiracy:

> Q. Was there any other type of cargo that was excluded from the 50/50 rule at the beginning in 2002?
>
> A. At the beginning the cargo -- we carried automobiles and bulk fructose and not in container cargo like our cows didn't count toward the 50/50 rule because Horizon Line couldn't carry them.
>
> . . .
>
> Q. Was [brick bulk cargo that will not fit inside a container] excluded from the

50/50 rule in 2002?

A. Yes, sir.

See Tr. Jan. 17, 2013 at 106-07. Because the non-container cargo sales were not part of the alleged conspiracy, they are not "services that were affected by the violation" and they must be excluded from the volume of commerce calculation. U.S.S.G. § 2R1.1(b). This revenue includes:

Type of Freight	Approx. Revenue Amount
Bulk/Fructose	$10,880,970
Automobiles	$6,668,970
NIC	$11,755,800
Special Equipment	$3,196,110
Total	**$32,521,850**

This further reduces the $462 million volume of commerce to approximately $429.5 million.

2. Revenue from Contracts Prior To Late 2005 Cannot Be Included In The Volume Of Commerce Affected.

Revenue earned pursuant to contracts that pre-date Frank Peake's alleged participation in the conspiracy, i.e. late 2005, also must be excluded from the calculation of the volume of commerce affected. Contracts that were bargained for and signed prior to late 2005 and remained valid through a period of time after November 2005 were not affected commerce "done by [Frank Peake] or his principal." *See* U.S.S.G. § 2R1.1(b). They thus were not "services that were affected by the violation" and must be excluded from the calculation. *Id.* For example, Sea Star's contract with the U.S. Postal Service was negotiated and signed in early 2002 and did not expire until June 30, 2007. Thus, the approximately $4.3 million in revenue gained from this contact, even during the late 2005 to 2008 time period, must be excluded as it was not affected by any collusion between the competing shipping companies, and certainly was not commerce affected by the actions of Peake.

Equally, as most Sea Star contracts were negotiated every year or every other year, countless other contracts fall within this exception and account for an even greater amount of revenue volume which must be deducted from the number in the PSR. The government has the burden to show which contracts count here. At a minimum, however, the $429.5 million must be reduced to $425.2 million.

3. The Revenue From Customers Who Were Never Discussed As Part Of The Conspiracy Cannot Be Included In The Volume Of Commerce Affected.

There were 2,634 customers that were never discussed as part of the antitrust conspiracy. These were customers and contracts with regard to whom there was no price-fixing or bid-rigging. They were never raised between the companies (or Baci, Gill, Glova, Serra, or Peake) and were simply not factors in the conspiracy. As such, the shipment of these customers' products were not the subject of the alleged agreement in this case. *Andreas*, 216 F.3d at 677. These customers account for approximately 80% of the total customers of Sea Star. The revenue earned from the transportation of their freight for late 2005 until April 2008 (approximately $39 million) cannot be included in the volume of commerce affected.

This further reduces the $425.2 million volume of commerce to approximately $386.2 million.

4. Bunker Fuel Surcharge Should Be Excluded From The Volume Of Commerce Affected

Any Sea Star revenue which included bunker fuel surcharges must also be excluded from the calculation of volume of commerce affected. As each of the government cooperating witnesses explained, the bunker fuel surcharge was "designed to recover the changes of cost on the fuel." *See, e.g.,* Tr. Jan. 22, 2013 at 145 (Serra testimony). One of the most expensive components of shipping is the cost of fuel. When the cost of fuel went up, Sea Star passed the rise in cost (not the entire cost)

on to its customer – it became "part of the total that the customer pays the shipping company." *Id.* at 146. Sea Star, however, did not benefit from a fuel price increase. Therefore, even though the customer may have been paying a higher price for its total shipping service because of the rising cost of fuel, the surcharge did not result in any profit to the company. Consequently, the surcharge must be excluded from the volume of commerce amounts – which is likely to equal millions of dollars, further reducing the $386.2 million.

D. The Court Should Not Adopt The Volume of Commerce Figure That Was Forced Upon Judge Corrigan In Sentencing The Co-Conspirators.

This Court should not adopt the sentencing guidelines calculations and volume of commerce utilized in the sentencings of the four other co-conspirators. This is because co-conspirators Baci, Gill, Glova, and Serra entered Rule 11(c)(1)(C) plea agreements which forced Judge Corrigan to accept the guidelines as they were calculated by the government, which included adding points for the volume of commerce affected.

In entering these plea agreements, the co-conspirators did not have the ability to challenge the numbers set forth by the government. This is the typical policy for the Department of Justice Antitrust Division. If defendants want to dispute the volume of commerce affected, the Division simply refuses to plea bargain. Deputy Assistant Attorney General Scott Hammond has stated flatly that "[t]he Division will not engage in plea negotiations with a company that desires to litigate gain or loss." Scott D. Hammond, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants, Speech Before the ABA Section of Antitrust Law Spring Meeting 10 (Mar. 30, 2005), available at http://www.justice.gov/atr/public/speeches/208354.htm.

Judge Corrigan very reluctantly accepted the plea agreements with these loss figures, despite

his misgivings, after he was "urged" to do so by the government and defendants. *United States v. Baci*, D.E. 33, 3:08-cr-00350-TJC-TEM (M.D. Fl. 2008). The judge, in fact, repeatedly commented during the hearings that he was not comfortable with aspects of the agreements, but "by accepting the plea agreements I've agreed to play along. And so that's what we'll have to do." *Baci*, 3:08-cr-00350-TJC-TEM (M.D. Fl. Jan. 30, 2009). Having his hands tied, the only issue he could address at sentencing was the credit these defendants should receive for assistance. Apologetically, Judge Corrigan addressed the defendants and their family members and stated:

> And what I want to say to you-all is that – and I'm not necessarily expecting family members to understand this, but it – it is the way it is.
>
> Typically in a sentencing, the court can consider such things as the history and characteristics of the person, so that these types of [character] letters and other information about the person are important.
>
> The court can consider things like whether – whether the person is likely to repeat the crime or not. The court can consider things like the need for deterrence of the person, as opposed to general deterrence.
>
> But I won't be considering any of that today. . . . And the reason I'll be doing only that and not doing what I would normally do is because that's the agreement that the government and each of these defendants entered into.

See Baci, 3:08-cr-00350-TJC-TEM (M.D. Fl. May 12, 2009). The volume of commerce was not discussed at the sentencing hearings, except for a brief statement by Baci's attorney declaring that the government would not let them negotiate or present any evidence regarding the amount of affected commerce. In fact, Baci's lawyer had informed the government that its volume of commerce numbers were inaccurate but he was told that he was not permitted to contest it under the terms of the agreement.

Accordingly, this Court should evaluate the appropriate volume of commerce without reliance on the figures utilized in the other sentencings.

III. Frank Peake Should Receive A Role Reduction For His Minimal Participation In The Conspiracy, And Certainly Should Not Receive An Aggravating Role Enhancement.

The probation officer incorrectly increased Mr. Peake's guidelines by four points for playing an aggravating role in the offense pursuant to § 3B1.1(a). PSR at ¶ 69. To the contrary, he should be given a reduction for minimal role pursuant to § 3B1.2. The juror foreman in this case reached out to this Court and he explained that Frank Peake's role was minor: "Mr. Peake's involvement in the scheme was that of an occasional problem solver and not one of the main participants." *See* Exhibit 1 (also stating that the other defendants had a "bigger role" than Peake). This was not just one juror's beliefs, but the thought process of the whole jury: "There was a concern among the jury about the defendant receiving an equal or even more severe punishment than those who decided not to go through the trial process but seemed to have a bigger role on the conspiracy as per the reviewed evidence." The Court should defer to the jury on this issue.

In order to impose a four-level enhancement, a district court must find that the defendant: 1) acted as an organizer or leader of the criminal activity, and 2) the criminal activity involved 5 or more participants. *United States v. Arbour*, 559 F.3d 50, 53 (1st Cir. 2009). The PSR errs on both accounts.

Factors that determine a conspirator's role include: "(1) the exercise of decision-making authority; (2) the nature of the participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning or organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others." *See* U.S.S.G. § 3B1.1 cmt. n. 4*; United States v. Appolon*, 695 F.3d 44, 70 (1st Cir. 2012); *United States v. Aguasvivas–Castillo*, 668 F.3d 7, 15 (1st Cir. 2012).

Although Frank Peake was the President of Sea Star Line, it is clear that he was not a leader or organizer of this conspiracy. *See United States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993) ("The leadership enhancement addresses ... [defendant's] role *within the group of coconspirators*.") (emphasis added). None of the 7 factors support an aggravating role enhancement:

- Factors 1, 2, 5, and 7. Peake was not around at the creation of the conspiracy and had no involvement whatsoever in the planning and organization of the offense. Instead, Leonard Shapiro and Peter Baci from Sea Star created the agreement with Horizon. After Peake was brought into the conspiracy more than three years into it, he was an occasional participant who Baci conferred with "[m]aybe a maximum of every three months." *See* Tr. Jan. 17, 2013 at p. 28. Baci, Glova, and Gill were in charge of pricing at their respective companies. They were intimately aware of the shipping rates, contracts, and customers. Consequently, they ran the conspiracy on a daily basis. They made decisions regarding which customers would be affected, and knew the details of the conspiracy network. Peake, on the other hand, had a minimal role in these activities. He was not the master, mastermind, or coordinator of the offense or the offenders.

- Factor 3. Peake did not recruit the other participants. He came into the company long after the offense was under way. Baci was the one to bring in subordinates who worked beneath him in the pricing department. Peake never directed Baci on other participants and never said he would or could fire someone if they did not participate in the conspiracy.

- Factor 4. Peake did not claim the right to a larger share of the fruits of the crime. In fact, he did not claim *any* share in the fruits of the crime.

- Factor 6. The nature and scope of illegal activity related to one small part of Peake's overall responsibilities at Sea Star, did not occupy a substantial portion of his time, and were not designed for personal benefit but rather for the benefit of the company that employed him.

Moreover, we object to footnote 6 of the PSR listing the five alleged Sea Star participants, including Fred Schloth, Ed Pretre, and Mike Nicholson. Peter Baci specifically testified that Fred Schloth was not involved in the Sea Star/Horizon conspiracy. *See* Tr. Jan. 17, 2013 at p. 34, lines 15-18 ("He had knowledge but was not involved in it."). Equally, Ed Pretre was not a *participant* in the conspiracy as required by § 3B1.1(a). *Id*. at 33. Although Baci stated that Mike Nicholson

had very limited participation and only general knowledge, he gave no specifics or examples as evidence to prove Nicholson was a co-conspirator. *Id.* at 35. Certainly, no one from Horizon ever discussed customers, prices, or bids with these individuals. Peter Baci said he was Schloth's, Pretre's, and Nicholson's boss; there was no evidence that Frank Peake recruited, led, or managed these people. And the government has never charged them or included their names in any pleadings as co-defendants. Therefore, the PSR's inclusion of these people as participants is patently wrong.

There is not a single factor that suggests Peake was a leader or organizer of the conspiracy. Rather, the facts establish – and the jury agreed – that Peake had a mitigating role and that his sentencing guideline range should be reduced. According to U.S.S.G. § 2R1.1, Note 1: "For purposes of applying § 3B1.2 (Mitigating Role), an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy." This describes Peake's alleged role perfectly. As discussed with regard to the factors addressed above, Peake was in no way responsible for entering Sea Star into the conspiracy agreement, nor did he shape it, determine its scope, or participate in its day-to-day implementation. His involvement was a paradigmatic example of "minor." *See also* Section II.A. in Peake's Sentencing Memorandum. Therefore, his guideline range must be reduced by another 2 levels pursuant to §3B1.2

WHEREFORE, Frank Peake respectfully requests that the above objections be sustained.

Respectfully Submitted,

MARKUS & MARKUS, PLLC

DAVID OSCAR MARKUS
Florida Bar Number 119318
Dmarkus@markuslaw.com

A. MARGOT MOSS
Florida Bar Number 091870
Mmoss @markuslaw.com

40 N.W. 3rd Street
Penthouse One
Miami, Florida 33128
Telephone (305) 379-6667
Facsimile (305) 379-6668
www.markuslaw.com

By: /s/ David Oscar Markus
David Oscar Markus

/s/ Francisco Rebollo-Casalduc
Francisco Rebollo-Casalduc
P.O. Box 195571
San Juan, P.R. 00919
USDC # 205603
Tel (787) 765-0505
Fax (787) 765-0585
rebollo@onelinkpr.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed this 13th day of August 2013, and served on all appropriate parties through that system.

/s/ David Oscar Markus
David Oscar Markus