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

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| **UNITED STATES OF AMERICA,**<br>Plaintiff,<br><br>v.<br><br>**FRANK PEAKE,**<br>Defendant. | Criminal No. 03:11-cr-00512 (DRD) |

**UNITED STATES' SENTENCING MEMORANDUM**

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## I. INTRODUCTION

On January 29, 2013, a jury sitting in the District of Puerto Rico returned a guilty verdict against defendant Frank Peake for his participation in a conspiracy to fix the prices of Puerto Rico freight services in violation of 15 U.S.C. § 1. The evidence at trial established that Peake participated in the conspiracy on behalf of Sea Star Line ("Sea Star") from 2003 until 2008. The conspiracy was carried out largely through email, telephone, and face-to-face communications during which competing companies agreed on the prices they would charge their customers for Puerto Rico freight services. Large and small businesses alike – companies like Walgreens, Walmart, Rovira Foods, Bacardi, Office Max, and Burger King – were victimized by the conspiracy. Those businesses relied on the conspiring shipping companies to get their freight to and from Puerto Rico.

The conspiracy for which Peake was convicted affected the largest volume of commerce of any domestic U.S. antitrust conspiracy prosecuted by the Justice Department. Billions of dollars of freight shipments between the continental United States and Puerto Rico were affected. Likewise, the collusive conduct engaged in by the conspirators, including Peake, is among the most egregious and far reaching in any antitrust conspiracy. The conspiracy was so pervasive that it directly affected virtually every container of freight shipped to and from Puerto Rico by the conspiring shipping companies for six years.

Because the punishment imposed under the Sherman Act is meant to reflect the seriousness of the offense, Peake is facing significant penalties. He was well aware of that before trial. Imposing those penalties here is warranted because (1) they are supported under the Sentencing Guidelines and by the 18 U.S.C. § 3553(a) sentencing factors, (2) they reflect the massive harm Peake and his co-conspirators caused, and (3) they will send a strong and

necessary deterrent message to other corporations and executives, cautioning against entering into similar conspiracies to defraud U.S. consumers.

Frank Peake was characteristic of many white collar offenders. He is well educated, was a very well paid senior executive of an important company, and was a prominent member of his community. Those characteristics do not make him a sympathetic figure or warrant a reduced sentence, however. Peake had every advantage. But he abused those advantages. His was not a crime of need or desperation. Simply put, his crime was the product of greed and control over a service that his victims required. He used his position and its advantages to advance an egregious conspiracy that profited him personally and inflicted significant harm on its victims, who had few alternative options for transporting cargo to and from Puerto Rico.

For those reasons, the United States recommends that the Court sentence defendant Frank Peake to a prison term of 87 months – a sentence at the bottom of the Guidelines sentencing range – and that he be fined at least $20,000.

## II. PROCEDURAL BACKGROUND

On November 17, 2011, a Puerto Rico grand jury returned an Indictment charging Peake with a one-count violation of the Sherman Act, 15 U.S.C. § 1. The trial began with jury selection on January 10, 2013, and the presentation of evidence began on January 14, 2013. The government called six witnesses, introduced more than 125 exhibits, and rested after seven court days, on January 23, 2013. Peake did not present evidence in his defense. The case went to the jury at the end of the day on January 25, 2013. The jury returned a guilty verdict after about a day and a half of deliberations.

## III. OVERVIEW OF THE CONSPIRACY AND FRANK PEAKE'S PARTICIPATION

### A. Overview of the Conspiracy

In the mid-1990's, the primary providers of coastal water freight transportation between the continental United States and Puerto Rico were self-propelled "fast" ship carriers Horizon Lines ("Horizon") and Navieras de Puerto Rico ("Navieras") and barge carriers Crowley Liner Services ("Crowley") and TrailerBridge. In 1998, Sea Star, another fast-ship company, was formed and entered the Puerto Rico trade lane. Tr. Vol. 4 at 132.

Shortly thereafter, Navieras began facing increasing financial woes and drastically cut rates in order to improve its cash flow. Navieras's lower rates resulted in a "rate war" between the competing shipping companies, and ultimately, in 2002, Navieras went bankrupt and liquidated its assets. *See* Tr. Vol. 4 at 162.

The remaining Puerto Rico trade lane carriers saw Navieras' exit from the market in early 2002 as an opportunity to reduce capacity and to raise rates. Tr. Vol. 4 at 162-63. Immediately after the liquidation of Navieras, the two remaining fast-ship companies – Horizon and Sea Star – began to fix the rates they charged to carry freight in the Puerto Rico trade lane. *Id.* at 164. Crowley later joined the conspiracy, and the collusion between the three companies affected 85% of the freight moving between the continental United States and Puerto Rico. Tr. Vol. 4 at 142-43, 165. In furtherance of the conspiracy, the conspirators: (1) agreed to fix their contract prices and fuel and other surcharges to customers; (2) agreed not to compete for each others' customers; and (3) agreed to submit coordinated bids to the government and commercial companies to manipulate the competitive bidding process. Tr. Vol. 2 at 62-63, 69; Tr. Vol. 5 at 8-9, 11-12, 14-15.

As discussed in more detail below, the conspiracy could not have succeeded without Peake, who oversaw and encouraged Sea Star's participation. On a day-to-day basis, however, the conspiracy was primarily carried out by the pricing directors at each company: Peter Baci, Peake's direct subordinate and the Senior Vice President of Yield Management at Sea Star; Kevin Gill and later Greg Glova, the Pricing Directors of the Puerto Rico Division of Horizon; and Tom Farmer, the Vice President of Yield Management at Crowley. Tr. Vol. 4 at 139; Tr. Vol. 7 at 56, 64. The case against Peake focused primarily on the conspiratorial communications and agreements between Sea Star and Horizon, the only two "fast" ship carriers in the Puerto Rico trade lane. The evidence presented at trial overwhelmingly proved the pervasive and systematic nature of the conspiracy.

The pricing directors of Sea Star and Horizon communicated on an almost daily basis by telephone, secret email accounts, and periodic meetings. Tr. Vol. 2 at 48-50, 55; Tr. Vol. 5 at 3-6. There were hundreds of telephone calls between the pricing directors during the conspiracy and almost daily emails using the secret accounts. *See, e.g.*, Tr. Ex. 281 (summary of telephone calls between Baci and Glova). During these communications, the conspirators agreed on how market share would be divided, which shipping company would take the lead in price negotiations with particular customers, which shipping company would win the majority of the customer's business, the price increase they would seek in negotiations, and price increases that would be sought from entire customer or commodity segments or types of cargo, such as refrigerated cargo. Tr. Vol. 2 at 64-66; Tr. Vol. 5 at 10-13.

The conspiracy affected every component of the rates that the shipping companies charged their clients, including the base rate (charged on a per container basis), fuel and security surcharges, and charges for overland transportation by truck or rail. Tr. Vol. 2 at 63; Tr. Ex. 296;

Tr. Vol. 4 at 150. As a result of the conspiracy, Sea Star's rates increased dramatically, and the company became profitable for the first time in its existence. Tr. Vol. 4 at 151-52. Baci, who was Sea Star's Senior Vice President of Yield Management and a participant in the conspiracy from beginning to end, testified that the rate increases during the conspiracy were "90 percent plus" attributable to the pricing agreements reached between the shipping companies. *Id.* at 151. Because Sea Star had never before been profitable and its employees received bonuses only if the company was profitable, Sea Star's employees, including Peake and Baci, received bonuses only during the conspiracy. *See id.* at 151-52. Peake's bonuses during his charge period totaled $412,560 and were based in part on the profitability of the company, which was the result of the conspiracy. Tr. Ex. 93, 283.

The conspiracy ended on April 17, 2008, when the Federal Bureau of Investigation ("FBI") executed search warrants on Sea Star, Horizon, and Crowley. Tr. Vol. 2 at 78; Tr. Vol. 4 at 150. Each of the corporate coconspirators – Sea Star, Horizon, and Crowley – pled guilty and paid criminal fines. Five executives at Sea Star and Horizon also pled guilty more than four years before Peake went to trial and provided cooperation to the government's investigation in return for reduced prison terms.[1]

[1] Peake's direct subordinate at Sea Star, Peter Baci, was sentenced to 48 months in prison and fined $20,000. *United States v. Baci*, 08-cr-350 (M.D. Fla. 2009) (Dkt. 43). Peake's counterpart at Horizon, Gabriel Serra, was sentenced to 34 months in prison and fined $20,000. *United States v. Serra*, 08-cr-349 (M.D. Fla. 2009) (Dkt. 43). Kevin Gill, who was Baci's counterpart at Horizon for the first three and a half years of the conspiracy, was sentenced to 29 months in prison and fined $20,000. *United States v. Gill*, 08-cr-351 (M.D. Fla. 2009) (Dkt. 38). Gregory Glova, who was Baci's counterpart at Horizon for the last two and a half years of the conspiracy was sentenced to 20 months in prison and fined $20,000. *United States v. Glova*, 08-cr-352 (M.D. Fla. 2009) (Dkt. 40). Additionally, Alexander Chisholm, who reported to Baci at Sea Star, pled guilty to obstruction of justice and was sentenced to 7 months in prison. *United States v. Chisholm*, 08-cr-353 (M.D. Fla. 2009) (Dkt. 38).

**B. Frank Peake's Participation in the Conspiracy**

Peake previously was employed at Horizon, but he left to join Sea Star as Chief Operating Officer in July 2003 and was promoted to CEO and President of Sea Star in October 2004. Tr. Vol. 5 at 20-21; Tr. Vol. 7 at 47-48. Peake's counterpart at Horizon was Gabriel Serra, who had responsibility for Horizon's Puerto Rico Division. Tr. Vol. 5 at 21; Tr. Vol. 7 at 49. Peake had been close friends with Serra at Horizon for several years. Tr. Vol. 7 at 47. The evidence at trial established that Peake became involved in the conspiracy almost immediately after starting his job at Sea Star in July 2003. Tr. Vol. 5 at 23-24; Tr. Vol. 7 at 79.

The conspiracy could not have succeeded without Peake. The evidence at trial proved that Baci at Sea Star and Gill and Glova at Horizon had responsibility for pricing and the day-to-day details of the conspiracy, which ran smoothly most of the time. There were times, however, when problems and disputes arose between them that they could not resolve. On those occasions, the problems and disputes were escalated to their bosses – Peake and Serra – for resolution. Tr. Vol. 2 at 57-59; Tr. Vol. 5 at 17-21, 24-26; Tr. Vol. 7 at 56-59, 85-86. For instance, when Glova requested customer pricing information from Baci but did not receive it, he informed Serra, who communicated with Peake, who in turn ensured that the information was provided to Horizon. *See* Tr. Exs. 33-35 (Peake confirming that Baci had forwarded pricing for the Transnow account in Chicago after a complaint from Serra that Baci had not provided Sea Star's pricing). As another example, Peake became involved when there was a dispute that Sea Star was not getting its agreed upon 50% share of the cargo that was moved on the fast-ships between Florida and Puerto Rico. *See, e.g.*, Tr. Exs. 73, 182.

Additionally, there were pricing "policy" issues that could not be decided by Glova and Baci, which were escalated to Serra and Peake for resolution. For instance, for many years the

shipping companies had charged the same bunker fuel surcharge on all shipping routes to Puerto Rico (from Elizabeth, New Jersey; Jacksonville, Florida; and Houston, Texas) despite the fact that some routes were longer and resulted in higher fuel consumption. Peake advocated for and obtained an agreement from Horizon to charge higher fuel surcharges on the longer routes from Elizabeth, New Jersey, and Houston, Texas. Tr. Vol. 2 at 121-23; Tr. Vol. 4 at 91-97; Tr. Vol. 7 at 156-57; Tr. Exs. 49-56 (Peake and Serra reaching agreement that Sea Star would match Horizon's May 2007 bunker fuel surcharge increase in return for Horizon's agreement to adopt a higher fuel surcharge on longer routes the next time the bunker fuel surcharge changed).

On another occasion, Walgreens, which historically moved a substantial amount of its cargo on Sea Star's ships, decided to start moving that cargo on Horizon's ships. Walgreens' decision to switch shipping companies affected a preexisting agreement between Horizon and Sea Star to split market share for freight shipped between Florida and San Juan on a 50/50 basis. In order to effect compliance with the 50/50 agreement, Peake obtained Serra's agreement to purchase space on Sea Star's ships to, in effect, rebalance market share until Horizon could decide which customers to shift to Sea Star to restore the agreed-upon 50/50 split. Tr. Vol. 7 at 88-89; Tr. Exs. 57, 70.

Peake also participated in an October 2006 meeting with Glova, Baci, and Serra in Orlando, Florida. At that meeting, Peake and his co-conspirators reached agreements about the types of cargo that were included in the 50/50 agreement, discussed disputes regarding pricing to specific customers, and, most importantly, discussed and agreed in principle upon a rate plan that provided for specific rate increases for all commodity segments in negotiations with customers in 2007. Tr. Vol. 2 at 78-79, 109; Tr. Vol. 5 at 122-24, 130-32; Tr. Vol. 7 at 114-15, 118-21, 129-32; Tr. Exs. 1, 5-7, 24, 26.

Finally, Peake used his position as Sea Star's president to keep the conspiracy working. As Baci's boss, he could have stopped the conspiracy at any time. But he did not. Instead, Peake not only allowed the conspiracy to continue and supported Baci's participation, but he also directly participated in it and directly contributed to its success and effectiveness.

**C. Impact of the Conspiracy on U.S. Consumers**

The impact of the conspiracy on businesses and consumers in Puerto Rico was pervasive. During the conspiracy, the vast majority of consumer goods sold to and exported from Puerto Rico were transported by water between the continental United States and Puerto Rico by the conspiring shipping companies.

The evidence at trial demonstrated that Sea Star carried a wide variety of consumer and manufacturing goods on its ships to Puerto Rico, including retail products, pharmaceuticals, and fructose used to make various foods and drinks. Tr. Vol. 4 at 143. Sea Star's major customers included businesses like Walmart and Walgreens, which have stores all over Puerto Rico. *Id.* The conspiracy succeeded in raising all components of the prices for those shipments to Puerto Rico. *Id.* at 151. Customers of the shipping companies, such as Burger King, found that their shipping rates increased significantly every year during the conspiracy. *Id.* at 123. Similarly, Sea Star transported goods like rum, pharmaceuticals, and food products from Puerto Rico to the continental United States. *Id.* at 144. These goods were then sold to consumers in the U.S. and abroad.

The conspiracy, which began in 2002 and ended in 2008, affected billions of dollars of shipments to and from Puerto Rico. The Sea Star and Baci plea agreements state that Sea Star's revenues from Puerto Rico shipments during the conspiracy exceeded $1 billion. *United States v. Sea Star Line LLC*, 11-cr-511 (DRD) (D.P.R. 2011), Dkt. 16 at ¶ 4(a); *United States v. Baci*, 08-cr-350 (M.D. Fla. 2009), Dkt. 18 at ¶ 4(a). The Horizon and Serra plea agreements

acknowledge that Horizon's revenues from Puerto Rico shipments during the conspiracy were approximately $1.5 billion. *United States v. Horizon Lines LLC*, 11-cr-00071 (DRD) (D.P.R. 2011), Dkt. 22 at ¶ 4(a); *United States v. Serra*, 08-cr-349 (M.D. Fla. 2009), Dkt. 16 at ¶ 4(a). The conspiracy thus affected more than $2.5 billion of Sea Star and Horizon revenue.

Because Peake did not begin participating in the conspiracy until he joined Sea Star in 2003, he is not responsible for all of Sea Star's affected revenues during the entire conspiracy. He is responsible only for the Sea Star revenue affected during his participation, from 2003 until 2008. According to records provided by Sea Star and attached hereto as Appendix A, Sea Star earned more than $900 million in revenue from Puerto Rico freight services during Peake's participation in the conspiracy. Trial testimony by Baci proved that all of that revenue was affected by the conspiracy:

> Q. What components of the price increased during the conspiracy?
>
> A. All of them.
>
> THE COURT: What do you mean by "all of them"?
>
> THE WITNESS: Ocean freight, bunker fuel surcharge, port security charge, total assessorial charge, SED documentation charge, intermodal fuel surcharge.
>
> Q. To what extent were the price increases during the conspiracy the result of agreements reached with your competitors?
>
> A. 90 percent plus.

Tr. Vol. 4 at 151:11-23.

The cost of the conspiracy was borne not only by businesses, like Walgreens, Walmart, and Burger King, that paid to ship their freight to and from Puerto Rico but also by customers of

those businesses, who, according to witnesses interviewed during the investigation, paid higher prices as a result of the higher shipping rates.[2]

## IV. SENTENCING GUIDELINES ANALYSIS FOR FRANK PEAKE

The sentencing of individuals is addressed in Chapters Two through Five of the United States Sentencing Guidelines. Those chapters set forth guidelines for determining the appropriate prison term, fine, and restitution.

As discussed below, and consistent with the analysis of the Probation Office in the PSR, Peake's total offense level is 29:

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|---|---|---|
| (a) | Base Offense Level (§ 2R1.1(a)) | 12 |
| (b) | Submission of Non-competitive Bids | +1 |
| (b) | Volume of Affected Commerce (§ 2R1.1(b)(2)(F)) | +12 |
| (c) | Total Adjusted Offense Level | 25 |
| (d) | Victim–Related Adjustments (§ 3A) | 0 |
| (e) | Role in the Offense Adjustment (§ 3B1.1(a)) | +4 |
| (f) | Obstruction Adjustments (§ 3C) | 0 |
| (g) | Acceptance of Responsibility (§ 3E1.1(a) and (b)) | -0 |
| (h) | Total Offense Level | 29 |

Each Guideline provision is discussed below.

### A. Prison Term

#### 1. Offense-Specific Guidelines Analysis

##### a. Base Offense Level and Submission of Non-competitive Bids

U.S.S.G. § 2R1.1, which specifically governs antitrust offenses, is the applicable sentencing provision for Peake. Under U.S.S.G. § 2R1.1(a), the base offense level is 12. PSR at ¶ 66. Under U.S.S.G. § 2R1.1(b)(1), the base offense level is increased by one level, to 13,

[2] Peake objected to the introduction of that evidence at trial on the grounds of jury prejudice, and the government did not introduce any of it. However, it is not only appropriate but necessary for the Court to consider such evidence in connection with evaluating the seriousness of the offense.

because the conspiracy involved agreements to submit non-competitive bids to customers during negotiations. PSR at ¶ 67.

**b. Volume of Affected Commerce**

Under U.S.S.G. § 2R1.1(b)(2), the base offense level is adjusted upward depending on the volume of commerce attributable to the defendant. U.S.S.G. § 2R1.1(b)(2) provides: "For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." Peake objected to the volume of commerce calculation, contained in the PSR, which attributed more than $500 million of Sea Star commerce to him. *See* Dkt. 207. The government filed a detailed response to Peake's objections, demonstrating that they are wrong as a matter of law and fact. *See* Dkt. 208. The government will not revisit in detail the overwhelming case law and evidence that support the volume of commerce calculation in the PSR. Instead, the government incorporates its briefing by reference and attaches a copy hereto as Appendix A for the convenience of the Court. Suffice it to say, the Court would be required to depart from the decisions of virtually every court in order to accept Peake's arguments.

Courts have uniformly held that all sales made by a defendant during a price-fixing conspiracy should be presumed affected by the conspiracy. *United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001) (presuming all sales within conspiracy period were affected unless the conspiracy was wholly a "non-starter" or "ineffectual"); *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) (holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement, since few if any factors in the world of economics can be held in strict isolation"); *United States v. Hayter Oil Co.*, 51 F.3d

1265, 1273 (6th Cir. 1995) (concluding that "the volume of commerce attributable to a particular defendant . . . includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy.").

Peake cannot meet his burden to rebut that presumption because the uncontroverted evidence at trial established that all of Sea Star's shipping services to and from Puerto Rico from May 2002 until April 2008 were affected by the conspiracy. Baci, who had day-to-day responsibility for Sea Star's pricing, testified that all components of Sea Star's rates were affected by, and increased due to, the conspiracy. Tr. Vol. 4 at 151. Those price-fixed rate components applied to every container of freight shipped to and from Puerto Rico and, as a result, affected all of Sea Star's Puerto Rico commerce and contracts during the conspiracy. For example, the bunker fuel surcharge that was applied to every container of Sea Star cargo was routinely the subject of illegal agreements, *see, e.g.*, Tr. Vol. 5 at 14-16, thereby affecting all of Sea Star's Puerto Rico freight services.

Although the uncontroverted evidence at trial proved that Peake's participation in the conspiracy began in 2003,[3] Peake was only charged in the indictment with participating in the conspiracy from late 2005 until April 2008. The earliest incriminating trial exhibit introduced at trial that Peake authored was from June 2005. *See* Tr. Ex. 37. Sea Star's volume of affected commerce from that time until April 2008 was approximately $565 million. *See* Appendix B (summary of Puerto Rico-related revenues prepared by Sea Star); Tr. Exs. 253-55 (Sea Star's approximate freight revenues from June 2005 – April 2008). Thus, even if Peake's volume of affected commerce is limited to only the charge period, rather than the full period of his

[3] Tr. Vol. 5 at 23-24; Tr. Vol. 7 at 79.

participation, it would exceed $500 million and increase Peake's adjusted offense level by 12 levels under U.S.S.G. § 2R1.1(b)(2)(F), to offense level 25. PSR at ¶ 68.

A volume of affected commerce of $565 million is a very conservative estimate given that the Guidelines expressly state that sentences should be based ***on related, but uncharged*** conduct. *See* U.S.S.G. § 1B1.3; *United States v. Antonakopoulos*, 399 F.3d 68, 73 (1st Cir. 2005) (including loss from fraudulent, but uncharged, loans as "relevant conduct" in calculating loss amounts for sentencing purposes). Related conduct that should be considered at sentencing in a criminal antitrust case includes conduct that would increase the volume of affected commerce at sentencing. *See United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 92-93 (2d Cir. 1999) (reversing the trial court for failing to consider, in determining the volume of affected commerce, whether a floor price agreement for which the defendant was acquitted at trial had been proved by a preponderance of the evidence for sentencing purposes). Because Peake's participated in the conspiracy from 2003 until 2008, the volume of affected commerce during that entire time – $912 million – is attributable to Peake even though he was only charged for part of that time period. *See* Appendix B. That entire $912 million volume of commerce is attributable to Peake under U.S.S.G. § 2R1.1(b)(2) but would not result in a further enhancement of his adjusted offense level under U.S.S.G. § 2R1.1(b)(2)(F).

**2. Role in the Offense**

Chapter 3 of the Guidelines provides for certain adjustments to the offense level. There are no victim-related (part A) or obstruction (part C) adjustments for Peake.[4] However, pursuant to U.S.S.G. § 3B1.1(A) (Aggravating Role in the Offense), Peake's adjusted offense level should

[4] Peake arguably committed an act of obstruction under U.S.S.G. § 3C1.1 by making false statements to agents from the FBI during an interview on April 17, 2008, but the Probation Office does not recommend, and the government does not seek, a two-level enhancement under that provision.

be increased an additional four levels because he was "an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive."[5] Here, six individuals including Peake have already been convicted or pled guilty for their roles in the conspiracy.

The evidence proves that Peake was a "leader" in the conspiracy. An application note to U.S.S.G. § 3B1.1 provides that courts should consider several factors in determining whether a defendant is a leader or organizer of a conspiracy:

> [T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. . . .

U.S.S.G. § 3B1.1, cmt. 4; *see also United States v. Appolon*, 695 F.3d 44, 70 (1st Cir. 2012) (citing same factors and affirming four-level enhancement under U.S.S.G. § 3B1.1(a)). There need not be proof of each and every factor in order for a defendant to be a leader or organizer of a conspiracy. *Appolon*, 695 F.3d at 70. "A defendant acts as a leader if he or she exercises some degree of dominance or power in a criminal hierarchy and has the authority to ensure that others will follow orders." *Id.*; *accord United States v. Aguasvivas-Castillo*, 668 F.3d 7, 15 (1st Cir. 2012) ("A defendant acts as a leader where he exercises . . . some degree or dominance of power in a hierarchy and has authority to ensure other persons will heed commands.") (internal quotations and citations omitted).

Peake, as President of Sea Star, held the greatest position of control and authority over other conspirators at Sea Star. The evidence at trial indisputably established that Baci was Peake's subordinate, participated in the conspiracy, reported on his activities to Peake, and took

[5] A "participant" is defined as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, cmt. 1.

direction from Peake when issues and problems arose. This alone makes Peake a leader in the conspiracy because "a defendant needs only to have led or organized *one* criminal participant, besides himself of course, to qualify as a leader or organizer under § 3B1.1(a)." *United States v. Arbour*, 559 F.3d 50, 56 (1st Cir. 2009). But Peake's leadership role did not end with Baci. A number of Sea Star employees who reported to Baci, including Alex Chisholm and others, participated in the conspiracy and, organizationally, reported indirectly to Peake. Peake had control and authority over all of these employees, could have stopped their participation, and was ultimately responsible for their participation in the conspiracy.

Additionally, Peake took the lead in several aspects of the conspiracy, including the agreement to charge higher bunker fuel surcharges on longer routes, revisions to the 50/50 market share agreement with respect to refrigerated cargo, and Horizon's agreement to purchase space on Sea Star ships to rebalance the 50/50 market share split in the aftermath of the 2007 Walgreens auction. In addition, through his attendance at the key Orlando meeting, his other meetings with Serra, and his role in resolving conspiracy-related problems with Serra and informing Baci about those resolutions, Peake approved of Sea Star's participation in the conspiracy and, as discussed above, was involved in the planning and operation of the conspiracy. Peake also was kept informed of the ongoing conspiracy by his subordinate Baci throughout the time period charged in the Indictment and even earlier.

Moreover, Serra – Peake's counterpart in the conspiracy – also received a four-level role in the offense adjustment in connection with his plea. Thus, the four-level role-in-the-offense adjustment is appropriate and increases Peake's offense level from 25 to 29. PSR at ¶ 66.

Finally, Peake should receive no downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, which applies only where a defendant "clearly demonstrates acceptance

of responsibility." Because Peake chose to go to trial, he does not qualify for this credit: "A defendant who has elected to stand trial usually will not be able to meet this standard when he admits wrongdoing only after the jury has spoken." *United States v. Franky-Ortiz*, 230 F.3d 405, 408 (1st Cir. 2000). Moreover, Peake has not demonstrated any acknowledgement of his guilt or any contrition or remorse for his conduct. *Id.* (holding that to be entitled to an acceptance of responsibility adjustment, "he must demonstrate that he has taken full responsibility for his actions, and he must do so candidly and with genuine concern"). Any effort by Peake now, after his conviction, to claim any degree of responsibility would be untimely given that his primary defense at trial was that he never entered into illegal agreements with his competitors to fix prices, an essential element of a Sherman Act violation. *See* U.S.S.G. § 3E1.1 cmt. n.2 ("The adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."). In this case, Peake still has not admitted guilt or expressed any remorse. Thus, no downward adjustment for acceptance of responsibility is available to Peake. PSR at ¶ 72.

With no downward adjustment for acceptance of responsibility, Peake's total offense level is 29. PSR at ¶ 73. A total offense level of 29 and a criminal history category of I results in a Guidelines range of imprisonment for Peake of 87 to 108 months. PSR at ¶ 100. As reflected in the presentence report, there are no factors that warrant a departure from the Sentencing Guidelines, and none of the facts identified would support a downward variance. PSR at ¶¶ 118-19. Accordingly, the government recommends that Peake be sentenced to 87 months, the bottom of the Guidelines range.

**B. Fine**

The Guidelines fine range for an individual convicted of price-fixing is "from one to five percent of the volume of commerce, but not less than $20,000." U.S.S.G. § 2R1.1(c). As already discussed, the volume of commerce attributable to Peake is at least $500 million. This results in a fine of $5 million to $25 million. The statutory maximum fine for individuals convicted of a Sherman Act offense, however, caps the fine at $1 million, which likely exceeds Peake's financial wherewithal. The government recommends a fine above the statutory minimum of $20,000 but defers to the Court's discretion regarding the appropriate amount.

**C. Restitution**

The government recommends no restitution obligation as part of the sentence for Peake because the victims of the conspiracy are engaged in private civil suits to recover for the harm caused by the conspiracy.

## V. THERE ARE NO GROUNDS FOR DEPARTURE OR VARIANCE

Peake bears significant responsibility for overseeing and participating in the largest domestic criminal price-fixing conspiracy ever prosecuted by the Department of Justice. He played a critical role in the success of this massive conspiracy, yet he remains remorseless. As President of Sea Star, Peake not only approved of Sea Star's participation in the conspiracy, but he also participated directly in key price-fixing meetings and communications with his co-conspirators, thereby furthering the goals of the conspiracy. With Peake's approval, Baci was the central day-to-day coordinator of the conspiracy, overseeing the day-to-day operations and ensuring implementation of the price agreements to all Sea Star customers. These factors, along with the need for deterrence, call for the imposition of just punishment supported by the

Guidelines. The government, therefore, recommends that Peake receive a Guidelines sentence of 87 months, which is at the *bottom* of the Guidelines sentencing range.

**A. Application of the Section 3553(a) Factors Also Supports the Recommended Prison Term**

As already discussed, and as agreed with by Probation, no Guidelines departures are warranted in this case. In addition, the sentencing factors in 18 U.S.C. § 3553(a) support an 87-month sentence for Peake. Under 18 U.S.C. § 3553(a), "the Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). These purposes include the need for the sentence: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant . . ." 18 U.S.C. § 3553(a)(2).[6] In addition, in determining the sentence, the Court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); the Guidelines sentencing range and policy statements, 18 U.S.C. § 3553(a)(4) and (5); and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6).[7]

As noted in 18 U.S.C. § 3553(a)(4), the Guidelines range – here, 87 to 108 months – should be given considerable weight in this case. Any deviation outside the Guidelines must be "sufficiently compelling to support the degree of the variance." *Gall v. United States*, 552 U.S.

[6] A fourth factor – "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" – does not apply in this case.

[7] As already noted, the government believes that another sentencing factor – "the need to provide restitution to any victims of the offense," 18 U.S.C. § 3553(a)(7), is adequately addressed through the multiple civil cases filed by victims of the conspiracy.

28, 50 (2007). A sentence within the Guidelines range "significantly increases the likelihood that the sentence is a reasonable one." *Rita v. United States*, 127 S.Ct. 2456, 2463 (2007).

**1. The Guidelines Sentence Reflects Congress's Intent to Increase Penalties for Antitrust Offenses**

An 87-month sentence for Peake is consistent with statutory changes by Congress in 2004, which increased the maximum prison terms for antitrust violators from three to ten years.[8] In response to this new statutory maximum, the Sentencing Commission amended the antitrust guidelines, effective November 1, 2005, by raising the base offense level for antitrust offenses from level 10 to level 12 (U.S.S.G. § 2R1.1(a)) and by increasing the volume of commerce table (U.S.S.G. § 2R1.1(b)(2)). These increases recognized both that criminal antitrust violations are serious, white-collar crimes akin to mail and wire fraud and that additional deterrence to large-scale cartel violations involving billions of dollars of affected commerce is necessary.

**2. The Guidelines Sentence Reflects the Seriousness of the Offense, Will Promote Respect for the Law, and Is Necessary for Deterrence**

The relevant 18 U.S.C § 3553(a) factors also strongly support an 87-month sentence for Peake. First, an 87-month sentence reflects "the seriousness of the offense" in this case. 18 U.S.C. § 3553 (a)(2)(A). As already discussed, the Puerto Rico freight conspiracy imposed enormous harm. Virtually all goods sent between the continental United States and Puerto Rico from 2002 and 2008 were affected. In addition, the scope of the conspiracy itself was, by any measure, massive. It lasted six years, involved the top executives at the three largest and most significant shipping companies in the Puerto Rico trade lane, involved thousands of illicit communications, and affected almost every container of freight shipped by those companies.

[8] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237 (2004).

In addition, an 87-month sentence in this case is needed to "to promote respect for the law." 18 U.S.C. § 3553(a)(2)(A); *see Gall*, 552 U.S. at 28 (stating that it is a "legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law"). In this case, Peake has shown no remorse whatsoever for his leadership and active participation in conspiracy or for his approval of his subordinates' participation in the illegal conspiracy. Moreover, Peake participated in the conspiracy despite receiving considerable, periodic antitrust compliance training at Sea Star. As a result, Peake has provided no reason to believe that he will not engage in the same illegal activity again if given the opportunity.

Yet, even with certainty that Peake would not resume his criminal conduct, a very significant sentence is needed "to afford adequate deterrence to criminal conduct" by others, 18 U.S.C. § 3553(a)(2)(B), particularly other executives in the United States and around the world who are weighing the potential cost of entering into a conspiracy to defraud U.S. consumers. For many executives who weigh the costs of entering into illegal cartels with the potential for a financial windfall, the only meaningful deterrent is the risk of significant jail time. It is telling that even the 48-month sentence imposed on Peake's subordinate, Baci, which matches the longest sentence to date for a single antitrust count, has not adequately deterred large scale antitrust conspiracies. Even with that lengthy sentence serving as a warning, the government has continued to uncover and prosecute antitrust conspiracies of a similar or greater magnitude. Perhaps even an 87-month sentence will not succeed in deterring all such conduct, but it will get the attention of companies and executives around the world.

**3. No Unwarranted Sentencing Disparities Will Result**

Finally, an 87-month sentence for Peake does not present "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). First, as already noted, the scope and impact of the Puerto

Rico freight conspiracy, including billions of dollars in affected commerce in the U.S., is unprecedented among the domestic cartels that the Department of Justice has previously prosecuted. In addition, the direct and substantial participation by high-level executives, like Peake, of a large company, like Sea Star, is rare. Finally, Peake's co-conspirators (and his direct subordinate, in particular) received significant sentences even after early acceptance of responsibility and substantial cooperation. All of these factors, taken together, justify the recommended 87-month sentence.

Although Peake will no doubt point to more lenient sentences received by his co-conspirators and other antitrust offenders, Peake is among the first defendants to be sentenced in a *post-trial contested proceeding* for participating in a large cartel since the statutory maximum for antitrust crimes increased from three to ten years. Most antitrust offenders, like Peake's co-conspirators, plead guilty and receive sentencing adjustments for acceptance of responsibility and cooperation. Peake chose to forgo those adjustments. As noted earlier, the increase in the offense level and the volume of commerce table in the Sentencing Guidelines in 2005 reflects the new ten-year maximum sentence. It also recognizes that price-fixing, like other frauds, causes great harm, and that those involved must face more significant jail time.

**a. Peake's Co-Conspirators Received Substantial Sentences**

In the context of this investigation, an 87-month sentence for Peake will not create any unwarranted sentencing disparity with his co-conspirators, who received sentences ranging from 20 to 48 months. "[A] well-founded claim of disparity . . . assumes that apples are being compared to apples . . . and that the defendants being compared should be similarly situated." *United States v. Jones*, 551 F.3d 19, 24 (1st Cir. 2008) (internal quotation marks and citations omitted). Unless two defendants are "identically situated," a "defendant is not entitled to a

lighter sentence merely because his co-defendants received lighter sentences." *United States v. Rivera-Gonzalez*, 626 F.3d 639, 648 (1st Cir. 2010) (rejecting an unwarranted sentencing disparity claim where the defendant received a longer sentence than more culpable co-defendants).

Peake is not "identically situated" to his co-conspirators. "There is a 'material difference' between defendants who plead guilty and those who elect to go to trial, and any sentencing disparity that results from that difference is not unreasonable." *United States v. Rivera Calderon*, 578 F.3d 78, 107 (1st Cir. 2009) (quoting *United States v. Rodriguez-Lozada*, 558 F.3d 29, 45 (1st Cir. 2009)) (affirming this Court's more severe sentence for a non-pleading conspirator).

All other defendants sentenced in this investigation pled guilty and provided substantial assistance to the government. Each received a downward departure from their Guidelines range pursuant to U.S.S.G. § 5K1.1. The timeliness, nature, and extent of their cooperation justified the significant departures. All were key participants in the conspiracy who almost immediately admitted their guilt and accepted responsibility. All provided valuable evidence implicating others, including their own colleagues and companies. Baci, Glova, and Serra all endured lengthy direct examinations and tough cross-examinations during the trial of Peake. Without the cooperation of these individuals, the government may not have been able to successfully prosecute this cartel. Moreover, some or all of those same individuals will be providing additional cooperation in the upcoming trial of their co-conspirator, Tom Farmer.

The lesser sentences received by Peake's co-conspirators were entirely attributable to their timely acceptance of responsibility and § 5K1.1 downward departures for substantial assistance. Baci, Gill, Glova, and Serra accepted responsibility and provided substantial

cooperation, thereby earning the departures they received under the Sentencing Guidelines. Peake has done nothing to earn any departures under the Guidelines. For that reason, it would be wholly inappropriate to reduce Peake's Guidelines sentence to bring it closer to the sentences of Baci, Serra, Glova, and Gill, because it would effectively give Peake the benefit of the acceptance of responsibility and cooperative credit that they earned but he did not.

A more significant sentence for Peake is justified and does not create an unwarranted disparity "because he and his co-conspirators [are] not similarly situated: they pled guilty; he went to trial." *Id.*; *accord United States v. Flores-de-Jesús*, 569 F.3d 8, 38 (1st Cir. 2009) (holding that a 210-month sentence did not create an unwarranted disparity with co-conspirators sentenced to serve between 57 and 108 months, because "[a] defendant who chooses to enter into a plea bargain is not similarly situation to a defendant who contests the charges against him.").

Peake no doubt will argue that he does not deserve the longest prison term ever imposed on an antitrust offender. That argument is not germane to the Court's analysis. The government is not recommending an 87-month sentence because it would be the longest ever imposed. Instead, the government recommends that sentence because it is justified under the Sentencing Guidelines and 18 U.S.C. § 3553(a), no departures or variances are warranted, and it is entirely equitable in comparison to his co-conspirators.

For example, Peake's direct subordinate, Baci, who almost immediately accepted responsibility and substantially cooperated, received a 48-month sentence, which currently matches the longest prison sentence ever imposed on an antitrust offender for a single-count violation. That being the case, there is no inequity in imposing a longer sentence here because: (1) Peake was involved in the conspiracy for nearly as long as Baci; (2) Peake was Baci's boss; (3) Peake directly participated in the conspiracy; (4) Peake could have stopped the conspiracy at

any time and did not do so; and (5) Peake directly benefited from the conspiracy's success by collecting profit-based bonuses. Peake had the same opportunity as his co-conspirators to benefit from early acceptance of responsibility and cooperation, but he chose not to do so. Instead, Peake lied to the FBI agents who interviewed him and thereafter refused to accept responsibility or cooperate. If Baci and Serra received 48 months and 34 months, respectively, after early acceptance of responsibility and cooperation, it is not surprising or inequitable that Peake now faces a significantly longer sentence given his utter lack of acceptance of responsibility and cooperation. [9]

Moreover, the disparity between the recommended sentence for Peake and the 48-month sentence that Baci received is, proportionally, significantly less than the disparity in other significant antitrust cases. A comparison, because of its significant domestic component, could be made to the prosecution of Archer Daniels Midland Company ("ADM") and its top executives in the mid-1990s. ADM entered a pre-indictment guilty plea to participating in global cartels involving an animal feed additive (lysine) and a food additive (citric acid), but three of its executives went to trial, including ADM's Executive Vice President and one of its Group Vice Presidents. As in this case, ADM's co-conspirators pled guilty prior to indictment and a number of them testified at the trial of the ADM executives. The executives were convicted, and the Antitrust Division asked the sentencing court to impose the then-statutory maximum jail sentence of 36 months on the two executives. The court sentenced the two highest ranking officials to 36 and 33 months, respectively. The cooperating co-conspirator witnesses, who

[9] Baci received an enhancement for obstruction of justice for ordering his subordinate to delete emails after first learning of the investigation. Despite this initial misstep, he soon thereafter accepted responsibility and began cooperating.

entered into pleas with the Division, *received no jail time*, consistent with the sentencing recommendations in their plea agreements.

Similarly, as discussed below, the president and executive vice president of AU Optronics Corporation ("AUO") were convicted for participating in an international conspiracy to fix the prices of thin-film transistor liquid crystal display ("LCDs") panels used at the screens in flat-panel computer monitors, laptop computers, and flat-screen televisions. They received 36-month sentences that were *more than two and a half times* longer than the longest sentence (14 months) for a pleading LCD defendant. If Peake were sentenced to a prison term that was two and a half times longer than the 48-month sentence imposed on Baci, he would serve 120 months – *the statutory maximum for a Sherman Act violation*.

By comparison to the ADM and LCD cases, the disparity between the recommended sentence for Peake and sentences imposed on his co-conspirators is hardly unwarranted in light of the co-conspirators' early acceptance of responsibility and substantial, continuing cooperation.

**b. The AUO Sentences are not an appropriate benchmark**

As noted above, Peake likely will point to the 36-month sentences given to the president and executive vice president of AUO in the LCD conspiracy to argue that an 87-month sentence would be an unwarranted disparity by comparison.[10] Such a narrow comparison should be rejected. Since the enhancement of the penalties for a Sherman Act violation, very few sentences have been imposed as a result of convictions at trial, as opposed to plea agreements, and they do not offer a reliable sampling upon which to base a comparison. *See United States v. Flores-Machicote*, 706 F.3d 16, 24 (1st Cir. 2013) (holding that a defendant's statistical

[10] A third AUO executive was convicted in a retrial in December 2012 and received a 24-month sentence. In sentencing the third executive to a lesser sentence, the court recognized that he was a lower-level executive in the company and thus that there was a difference in authority and responsibility.

sampling of 25 other sentences did not prove an unwarranted sentencing disparity). "Further, such a comparison opens the door to endless rummaging by lawyers through sentences in other cases, each side finding random examples to support a higher or lower sentence, as their clients' interests dictate." *Saez*, 444 F.3d at 19.

The LCD conspiracy was similarly pervasive and egregious, it affected a greater volume of commerce than even the Puerto Rico freight services conspiracy, and the government, in fact, recommended Guidelines sentences that were even longer for those defendants. But there are differences in the LCD investigation and sentences that make it an inapt basis for comparison. Antitrust conspiracies, by their nature, involve different industries, circumstances, effects, and, most importantly, needs for cooperation that makes meaningful comparison of sentencing factors problematic. The LCD conspiracy was no exception. It involved a different industry, different conduct, a greater number of conspirators, different types of victims, different harm, a greater need for cooperation to build and pursue cases against others, and largely foreign defendants who would not have been easily subjected to U.S. jurisdiction absent their voluntary appearance. Additionally, the Puerto Rico freight services conspirators victimized a captive market – Puerto Rico businesses – in a way that few conspiracies are able to. All of these factors, as well as others, distinguish the LCD conspiracy and its conspirators from Peake. *See Flores-Machicote*, 706 F.3d at 24 (rejecting a sampling of 25 other sentences that had a variety of dissimilarities). As a result, "[c]omparing apples to oranges is not a process calculated to lead to a well-reasoned result." *Id.*

More significantly, the LCD conspiracy sentences cannot serve as a meaningful comparison because the sentences given to Peake's co-conspirators (20-48 months) are, on the whole, significantly more severe than those imposed on co-conspirators who accepted

responsibility, pled guilty, and cooperated in connection with the LCD conspiracy (6-14 months). As discussed above, the 36-month sentences imposed on the convicted defendants in the LCD conspiracy were significantly more severe than the sentences imposed on their co-conspirators, who accepted responsibility, pled guilty, and cooperated with the government in that investigation. The same should be true here.

In any event, Peake, who was convicted at trial, should not be treated more leniently than his own co-conspirators – who immediately accepted responsibility and pled guilty – merely because defendants subsequently convicted in an entirely different conspiracy received more lenient sentences than Peake's co-conspirators. This would perversely turn acceptance of responsibility and cooperation on their heads.

**B. The Juror Letter Should Not Be Considered in Sentencing**

A juror in this case submitted a letter to the Court and offered his opinion[11] regarding an appropriate sentence for Peake. Dkt. 198. The Court should exercise its discretion not to consider that letter in deciding the appropriate sentence for Peake. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1039-40 (9th Cir. 1997) (holding that the district court had discretion not to consider juror letters in sentencing), *overruled on other grounds*, 225 F.3d 1053 (9th Cir. 2000). The role of jurors in the process is limited to determination of guilt. Sentencing is the exclusive purview of the Court.

Moreover, the letter fails to take into account key sentencing factors that support the recommended sentence for Peake. The juror failed to consider that Peake, unlike his co-conspirators at Horizon and Sea Star, did not accept responsibility or cooperate with the government. Peake is not entitled to the same sentencing adjustments that his co-conspirators

[11] To the extent that the letter purports to offer the opinions of any other jurors, it is hearsay and should be disregarded on that basis.

received for their acceptance of responsibility and cooperation, and a more severe sentence for him is thereby justified. *Rivera Calderon*, 578 F.3d at 107 (affirming this Court's more severe sentence for a non-pleading conspirator).

Finally, the juror failed to consider that the Sentencing Guidelines advise more severe sentences for defendants, like Peake, who assume leadership and have authority over others in a conspiracy. *See* U.S.S.G. § 3B1.1(a). Although Peake did not have as much day-to-day "hands on" responsibility for the conspiracy as Baci, he was the President of Sea Star and Baci's boss, and, in that role, was indisputably in a position to stop the conspiracy at any time. He never did so. Instead, he chose to exercise authority over other Sea Star employees who participated in the conspiracy. As discussed above, the Sentencing Guidelines advise a more severe sentence for Peake, as a "leader" of the conspiracy, than for subordinate employees, like Baci, who merely managed or supervised the conspiracy. *Compare* U.S.S.G. § 3B1.1(a) (advising a four-level sentencing adjustment for a leader of criminal activity) *with* § 3B1.1(b) (advising a three-level sentencing adjustment for a manager or supervisor of criminal activity).

Accordingly, the Court should disregard the juror's sentencing recommendation.

## VI. CONCLUSION

For all the foregoing reasons, the United States recommends that the Court sentence defendant Frank Peake to a prison term of 87 months and that he be fined at least $20,000.

DATED this 10th day of September, 2013.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2013, a true and correct copy of the foregoing was filed electronically and to the best of my knowledge, information and belief, counsel for defendant will be notified through the Electronic Case Filing System.

Executed this September 10, 2013.

/s/ Brent Snyder
Brent Snyder, PR Attorney #G01209