NO. 14-1088

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

FRANK PEAKE
Defendants/Appellants.

On Appeal from the United States District Court
for the District of Puerto Rico
District Court Case Number 11-CR-512 (DRD)

BRIEF OF APPELLANT FRANK PEAKE

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Frank Peake respectfully requests oral argument because it will assist the Court in understanding the multiple complicated and serious legal issues presented in this appeal.

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STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The jury delivered its verdict on January 29, 2013. D.E.189. The district court entered the Judgment on December 6, 2013. D.E.234. The appeal from a final order was timely filed on December 20, 2013. Appx 37.*

* Citations to the Appendix are designated as Appx #, to the Appendix Supplement Under Seal as Appx-S #, and to the Addendum as Add #.

STATEMENT OF THE ISSUES

I. Whether Peake should be granted a new trial due to the district court's failure to transfer venue, followed by the Government's repeated argument and introduction of evidence that the conspiracy had a harmful effect on the jurors themselves.

II. Whether Peake should be granted a new trial due to the Government's introduction of evidence seized from Peake's personal electronics, when the search warrant expressly disallowed a search of these electronics.

III. Whether Peake should be granted a new trial because he was denied his theory of defense instruction.

IV. Whether Peake should be granted a new trial because the district court failed to give required guidance to the jury or grant a mistrial after the jury twice stated that it was deadlocked.

V. Whether the case should be dismissed for lack of jurisdiction due to the Government's failure to allege or prove that Puerto Rico is a state.

VI. Whether Peake should be resentenced due to improper application of the volume of commerce guideline.

STATEMENT OF THE CASE

This appeal presents an opportunity to correct numerous errors committed during the trial and sentencing of a well-regarded shipping company senior executive who was wrongly implicated, after the fact, by cooperating witnesses looking for a fall guy in order to mitigate their own punishment for their unquestionable wrongs. There is no question that an antitrust conspiracy existed among these men. The question at Frank Peake's trial was only whether he was involved. Frank Peake was entitled to a fair trial to prove that he was not, and he did not get one. His conviction and sentence should be reversed.

Background of Frank Peake

Frank Peake is a 53 year old father of three children, the son of a police officer and a stay-at-home mom. D.E.239 at 38-39. He holds a Master's Degree in Business Administration and a Bachelor's Degree in Accounting. Appx-S 82. After a long career in the international shipping industry, he was hired in 2003 as the Chief Operating Officer of Sea Star Line, and named President shortly thereafter. Appx-S 82.

Peake's responsibilities included not only oversight of Sea Star's Puerto Rican shipping operation (the subject of this case), but many other aspects of the business.

He oversaw eight different departments, of which the Puerto Rican operation was just one. D.E.179 at 39, D.E.182 at 32.

The Conspiracy and Conspirators

Most of Puerto Rico's commercial and retail commodities are purchased in the United States or elsewhere and arrive via water transportation. As a result of a U.S. law prohibiting any non-U.S. company from providing freight shipping services between the United States and Puerto Rico, in the early 2000's only five companies provided such services. Appx-S 59. These companies charged their customers a price consisting of a base rate and various surcharges including the "bunker surcharge" which related to fuel cost. *Id.* One of these companies, Navieras de Puerto Rico, was facing bankruptcy and began cutting rates substantially. As a result, all of the companies engaged in a rate war that drastically reduced prices below costs and threatened the existence of all of the companies. *Id.*

In 2002, Navieras went bankrupt. *Id.* With supply reduced, the remaining carriers were able to raise rates and began doing so in an effort to get prices back to a sustainable level. D.E.182 at 34-36. Seeking to maximize this opportunity, in early 2002 certain executives at Horizon Lines and Sea Star Line agreed upon an anticompetitive arrangement by which they would decline to undercut each other on prices and would instead compete solely on service. D.E.154 at 43-44. Long before

Peake joined Sea Star, the conspiracy between these other executives was under way. D.E.157 at 149; D.E.160 at 174-175.

The Search Warrant

On April 16, 2008, the Government submitted an Application and Affidavit for Search Warrant to Magistrate Judge James R. Klindt in Jacksonville, Florida. Appx-S 8. The Application sought authority to search Sea Star headquarters and to seize records and computers.

The Magistrate expressly disallowed a search of some of the items requested by the Government, crossing out the following paragraph:

> [T]he search will include the briefcases, laptop computers, hand-held computers, cell phones, Blackberries, and other movable document containers found on the premises described above, and in the possession of, or readily identifiable as belonging to Sea Star management, pricing, and sales personnel including, but not limited to, FRANK PEAKE, PETER A. BACI, CARL FOX, NED LAGOY, NEIL PERLMUTTER, ALEX CHISHOLM, MIKE NICHOLSON, EDWARD PRETRE, and WILLIAM BYRNES.

Appx-S 3. As a result of this manual cross-out, which the Magistrate initialed in four places, he expressly prohibited the Government from searching or seizing these items. The Magistrate also made other line edits throughout the document reflecting his careful consideration of the Government's requests and his intent to narrow and

restrict the Government's search. In addition, he hand-wrote a 30 day time limitation to complete the search of electronics. *Id.*

The FBI Raid

The next day, the Government executed its search. Notwithstanding that the warrant expressly disallowed seizure of laptop computers and Blackberries "in the possession of, or readily identifiable as belonging to . . . FRANK PEAKE," the agents seized Peake's personal laptop and his Blackberry. D.E.87. Several hours later, the Government returned these items to Peake. However, without any legal authority (or notice), it first imaged them and kept an electronic copy of their contents. *Id.*

The same day, the Government conducted a lengthy interview of Greg Glova, one of the primary conspirators at Horizon. Glova gave the agents detailed information about how the conspiracy operated and who its participants were. D.E.155 at 131-133. Based on this information, the FBI prepared a written statement summarizing Glova's interview, which named a number of participants. *Id.* at 133, 150-151. Glova was given the opportunity to review and amend the statement, and he made a number of changes and then adopted it. *Id.* at 133-135, 142, 145-6. Peake's

name did not appear in the statement; he was not mentioned in the initial form drafted by the FBI nor in Glova's handwritten modifications. *Id*. at 134-135, 146-147.[1]

In addition, on behalf of the FBI, Glova made at least six recorded calls to conspirators, seeking to implicate them. D.E.155 at 131-133, 154-162. He did not attempt to contact Peake. *Id*. at 162.

Conspirators' Proceedings

In 2008, the Government charged four individuals (including Glova) with antitrust violations and one individual with obstruction, all related to the identical conspiracy at issue in the instant case. Peake was not charged. These five cases each were heard in the Middle District of Florida (Jacksonville Division) before the Honorable Timothy Corrigan.

The five defendants entered plea agreements pursuant to Rule 11(c)(1)(c) agreeing to specific guidelines calculations. The plea agreements bound the court, leaving open only the potential for an additional reduction for substantial assistance.

The judge held two status conferences to consider these Rule 11 plea agreements, and stated concern about accepting the pleas:

[1] Although the defense was permitted to cross-examine Glova concerning this critical defense document, we were not allowed to admit it. We have not raised this and a host of other clearly erroneous evidentiary rulings due to space considerations.

> The Court will resolve its questions as to whether it should accept the plea agreements in these cases. One of the reasons not to accept the plea agreements, which essentially seek to bind the Court concerning the sentences to be imposed, is that without knowing the full scope of the government's case, including future defendants to be charged, **the Court may be agreeing to certain sentences that in retrospect will appear inappropriate.**

United States v. Baci, 3:08-cr-00350-TJC (M.D. Fla. January 30, 2009), D.E.9 (emphasis added).

After much hesitation, Judge Corrigan accepted the pleas. Peter Baci (a long term Sea Star employee), was the first to be sentenced. Baci agreed to an offense level of 29 (87 to 108 months). The judge, still concerned about the limitations of the plea agreement and the severity of the lengthy sentence required therein, again pushed back, addressing the Government as follows:

> [Y]ou know, you're the Department of Justice. I assume you're trying to seek justice. And I'm interested just to know generally from you, are these sentences markedly more harsh than the typical antitrust sentence that y'all have been giving out the last period of time? . . . . [U]nder 3553(a), I am supposed to consider whether there are unwarranted sentencing disparities amongst similarly situated defendants. . . . I don't want to feel like I'm being led down a path that is not a just path. . . . and so I think it's a fair question for me to ask you before I pronounce serious sentences on these defendants in these cases, is this – is this consistent with past policy, consistent with past sentences?

D.E. 9. Proceedings on January 30, 2009. The Government ducked the court's question regarding consistency with past sentences entirely. In his response, the

prosecutor merely asserted that the sentence was just, that the Government could have brought additional charges resulting in an even higher calculation of the guidelines, and that the volume of affected commerce was very large. *Id.* Baci received a six-level reduction for his substantial assistance to the government, resulting in a sentence of 48 months.

That evening, DOJ issued a press release with the sub-heading "Sentence is Longest Jail Term Ever Imposed for a Single Antitrust Violation." At the subsequent sentencing hearing of the remaining defendants, the judge returned to the same inquiry, referenced the Government's prior response, and stated:

> [Y]ou gave me an answer. It was a fairly long answer. It had a lot of qualification to it.
>
> What it didn't have was any statement which would have told me, in anywhere close to these terms, that the sentence that I was being asked to give Mr. Baci was, quote, the longest jail term ever imposed for a single antitrust violation, close quote. . . .

The government then tried to explain that Baci's sentence was not unique, given the facts. Judge Corrigan replied:

> [O]f course it is. Of course it is. It's the longest jail term ever imposed for a single antitrust violation. And, by the way, it's the longest sentence on an individual – it was the first time an individual was ever sentenced to more than three years for a single charge. . . .
>
> Well, let me tell you how I felt when I read [the press release]. . . . I felt like I had asked you a direct question and you had equivocated, and then

> you left this courtroom and issued a press release . . . I felt like – that I had not been dealt with in the straightforward manner that I would expect from an attorney from the Department of Justice**.** That's how I felt.

United States v. Serra, 3:08-cr-00349-TJC (M.D. Fla. May 12, 2009), D.E.44.

The Indictment

Despite the fact that the allegations against Peake were identical to the charges against the other defendants, Peake was not arrested or charged for more than three years, after all the other defendants had pled guilty and agreed to cooperate. In 2011, the Government obtained an Indictment charging Peake with a single count of conspiracy to suppress and eliminate competition in violation of the Sherman Act, Title 15 U.S.C. §1. It alleged that from late 2005 through April 2008, Peake participated in the same conspiracy to which the other conspirators had already pled guilty.

Motion for Change of Venue

Even though the Government had investigated Peake with a Jacksonville grand jury, and even though the same division of the U.S. Department of Justice and two of the same trial attorneys who brought the case against the other conspirators in Jacksonville were now bringing nearly identical charges against Peake, the Government chose to indict Peake in Puerto Rico rather than Jacksonville.

This decision appeared to be motivated by the Government's desire to avoid appearing before the judge who had felt misled by the Government during Baci's sentencing. This fact, coupled with the substantial inconvenience of proceeding in Puerto Rico, caused Peake to move for a change of venue pursuant to Fed. R. Crim. P. 21(b). D.E.16. In his motion, Peake explained that he lived and worked in Jacksonville throughout the relevant time period, that Sea Star's headquarters were located in Jacksonville, that the alleged anti-competitive meetings took place near Jacksonville, that there were no allegations that criminal activity took place in Puerto Rico, and that the vast majority of potential witnesses lived in or near Jacksonville. *Id.*

In the very first line of its response, the Government set forth that its theory of the case would be that Puerto Rico was the "singular focus of one of the largest domestic price-fixing conspiracies ever investigated by the United States." D.E.31 at 1. The Government argued that Peake was part of a massive "Puerto Rico conspiracy" whose objective was to victimize the citizenry of Puerto Rico, and that "[b]illions of dollars of Puerto Rico freight services were affected," that "[n]early every product sold in Puerto Rico that comes from the continental United States" was subject to the conspiracy, and that the Puerto Rico conspiracy "targeted *any* company that shipped goods to or from Puerto Rico." *Id.* at 1, 11-12 (emphasis added).

Upon learning that the Government intended to focus its case on the adverse consequences of Peake's alleged actions on the members of the jury themselves, Peake added a motion for a change of venue pursuant to Rule 21(a), arguing that Peake could not obtain a fair and impartial trial in Puerto Rico. D.E.33. *See also* D.E.51. The district court denied both motions. Add 45, 61.

Motion to Suppress Personal Electronics

In response to the Government's unauthorized seizure of his personal laptop and Blackberry, Peake also moved to suppress material taken from these electronics. D.E.76. Shortly after Peake filed the motion, and unbeknownst to Peake, the Government sought and obtained an *ex parte* warrant to examine the contents of the items that the Government had imaged without authority four years earlier. Rather than seeking the warrant from the Jacksonville court which had initially authorized the search, or from the district court in Puerto Rico which at that very moment was hearing Peake's case and the motion related to this very search, the Government instead *secretly* went to a judge in Washington, D.C. who had no familiarity with or involvement in the case. Upon learning of the Government's actions, Peake filed an emergency motion for protective order seeking to bar the Government from examining the material. D.E.86. The Government opposed Peake's motions, D.E.87, and the district court denied the motions. Add 78.

The Trial

Trial began on January 10, 2013. The first words uttered by the Government in its opening were that "shipping is very important in Puerto Rico." D.E.239 at 18. The Government then stated in the first minute that "[f]ood for Pueblo Supermarket, medicine at Walgreens, most things at Walmart, most things made in Puerto Rico for sale in the states" are transported by water shipment. *Id.* It followed up by arguing that prices for Burger King, Office Max, and Walgreens were all higher as a result of the conspiracy. *Id.* at 21. It drove the point home by telling the jury that these businesses passed the price increases on to their customers. *Id.* at 25. And then it went so far as to state that because the Government had to pay more for shipping, it "had less money in the school luncheon program to buy food for school children." *Id.* at 26. Peake moved, unsuccessfully, for a mistrial as a result of these improper arguments. *Id.* at 49; D.E.153, 161; Add 72.

The Government called three of the conspirators who had pled guilty and received reduced sentences as a result of their pledges of assistance. As they had promised the Government they would, each of them testified that Peake was aware of and participated in the conspiracy. Each *also* admitted a host of facts that supported Peake's innocence.

The first witness, Greg Glova, worked at Horizon. He testified that he communicated frequently with Peter Baci at Sea Star, D.E.154 at 48, but that he *never* communicated with Peake by phone or email during the three years Glova was involved in the conspiracy[2]. *Id.* at 59; D.E. 157 at 56. He also testified that he and Baci had secret gmail accounts that they used to communicate about the conspiracy, but Peake did not. D.E.154 at 60. Nor was Peake copied on the secret conspiracy emails between Glova and Baci. *Id.* at 56. Glova testified that he had maintained detailed daily journals in which he documented his conspiracy-related communications. D.E.155 at 168-172; G.Ex.85. He was not able to identify any reference in these journals to Peake. *Id.*

During Glova's testimony, Peake sought to admit Glova's signed statement which purported to summarize the information Glova provided the FBI and which did not mention Peake. The district judge wrongfully excluded the statement. D.E.155 at 143-144, 166-167. Subsequently, the judge excluded the FBI 302 of the interview

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[2] Glova testified that he met Peake only twice during the time Peake was employed at Sea Star. D.E.155 at 78. And he admitted that during these meetings, the parties discussed a legitimate non-conspiratorial subject, the existing lawful Transportation Services Agreement (TSA) pursuant to which Sea Star purchased space on Horizon's ships. D.E.154 at 23-24; D.E.155 at 123; D.E.157 at 35; G.Ex.23. These TSAs resulted in substantial communication between the parties both with regard to the renewal of the agreement and its weekly execution. D.E.157 at 36; D.Ex.77, 98; *see also* D.E.182 at 71-74.

which documented 16 people Glova had identified during the interview, none of whom were Frank Peake. D.E.183 at 3-10; D.Ex. 451.

The second testifying conspirator was Peter Baci, Peake's subordinate at Sea Star, who admitted to being one of the masterminds of the conspiracy and the primary Sea Star participant.[3] *E.g.*, D.E.157 at 135, 150; D.E.160 at 152. Baci confirmed that Peake did not have a secret gmail account. D.E.160 at 8. He also explained that while Sea Star and Horizon had improperly agreed to split the Florida business 50/50, Sea Star had a preexisting, legitimate internal goal of a 50/50 split which Peake participated in discussing and which was not anticompetitive. D.E.160 at 171-174. He admitted that Peake had instituted a number of plans and policies which were inconsistent with the conspiracy's goals, including the "slap strategy" pursuant to which Sea Star would aggressively pursue the business of any company which took Sea Star's business away. D.E.160 at 175-176. Baci acknowledged that Peake pushed hard for Sea Star to acquire a third ship to operate from Jacksonville to Puerto Rico, which would have affected the 50/50 split to which Baci had agreed. D.E.179 at 4-12; D.Ex.137,141.

[3] Baci explained that he and Peake's predecessor had entered into the conspiracy without Peake's knowledge. D.E.160 at 153.

Like Glova, Baci kept detailed journals regarding his conspiratorial communications and meetings – 29 notebooks in total. D.E.160 at 155-159; D.E.240 at 53. Like Glova, Baci could not identify a single reference in any of his journals to conspiratorial communications with Peake. (In fact, Peake is *not* mentioned in any of these notebooks in relation to any conspiratorial communications. *See, e.g.*, D.Ex. 13, 18, 19, 20, 29, 31, 23). By contrast, the other conspirators (including at least one the Government declined to charge) were repeatedly referenced. D.E.160 at 157. Baci also admitted that he had not made *any* reference to Peake in his detailed sentencing memorandum which purported to document the conspiracy and the participants. D.E.179 at 51-56; D.Ex.454.

The third conspirator called by the Government was Gabriel Serra, the senior executive responsible for Horizon's Puerto Rican operations. D.E.180 at 44. Serra (who, like the others, received a sentence reduction for his testimony) sought to incriminate Peake, but he also admitted a number of facts inconsistent with Peake's involvement. He admitted that Peake authorized lower, competitive rates and acted in a competitive manner (*id.* at 49, 61-63); that Peake sought to introduce a third ship which would have adversely impacted the conspiracy split (*id.* at 81-87); that Peake would not match Horizon's bunker fuel surcharge increases unless his own analysis determined the increase was justified (*id.* at 58-59, 64); and that Peake emphasized the

need to maintain legality in their TSA arrangements (*id.* at 66). *See also* D.Ex. 150, 173, 182, 183. Serra's calendar indicated that the meeting Peake attended was to discuss the non-conspiratorial TSA, D.E.182 at 74, and there were many emails from around the time of the meeting (and at other times) regarding the TSA (supporting Peake's argument that the meeting was legal and not conspiratorial). *Id.* at 71-74; D.Ex. 174, 76-79, 83-92, 95, 96.

The Government then turned to a series of irrelevant "victim" witnesses whose testimony was unrelated to any contested issue (given that Peake readily conceded the existence of a conspiracy affecting interstate commerce). The Government called – over objection – a witness from Caribbean Restaurants, the company that owned numerous Puerto Rican Burger Kings, and used the witness to emphasize that Burger King prices were affected by the conspiracy. D.E.157 at 95-97.

The Government also called, over vigorous defense objection, a representative of the U.S. Department of Agriculture named Ron Reynolds, who also had no knowledge of Peake's involvement in the conspiracy. The Government represented that the purpose of the witness was merely to establish that the USDA was provided shipping rates on a take-it-or-leave-it basis (itself an undisputed and irrelevant point). The Government expressly promised that if Reynolds was permitted to testify, the Government "would not go into the effect on school lunch prices." D.E.179 at 103.

The defense argued that the Government sought to use Reynolds to prejudice the jury with "a thinly veiled attempt to pull at the heart strings again, to talk about price effects for Puerto Ricans, talk about school lunches." *Id.*

Based on the Government's representation that Reynolds' testimony would be brief and would not include reference to the prices of school lunches, the court permitted Reynolds' testimony. Yet the Government asked only three questions related to the take-it-or-leave-it nature of the contract, which was the alleged purpose of the testimony. Most of Reynolds's testimony was focused on irrelevant and highly prejudicial questioning regarding the types of everyday products that were imported by the USDA, D.E.179 at 107-109, and the effect of high shipping prices on the school lunch program – the very topic the Government had promised not to address. The Government asked at least ten questions directly geared to elicit that the conspiracy resulted in higher prices for school lunches. *Id.* at 114-118. The Government capped off this inquiry with a number of irrelevant questions to elicit that the conspiracy also affected the availability of food for low income families. *Id.* at 118. The defense objected repeatedly both before and throughout this testimony. *Id.* at 102-103, 108, 115-117.

The Government's other witness was Megan Ballard, a DOJ paralegal specialist. Again over defense objection, the Government used Ballard to introduce

phone records between the conspirators and Peake, including those predating the indictment period and for conversations which undisputedly were not relevant to the conspiracy. D.E.180 at 8-12. Also over defense objection, the Government admitted through Ballard a prejudicial exhibit summarizing Peake's compensation. D.E.162, D.E.170; D.E.179 at 121-122, 126-130; D.E.180 at 4, 32-35; G.Ex. 283.

The defense introduced a number of exhibits and did not call any witnesses.

Jury Deliberations and Verdict

The jury began deliberating late on a Friday afternoon (January 25). The jury returned on Monday and issued several notes, including two indicating that they were hung. In the second such note, the jury indicated that it had reached a "final" non-unanimous verdict. Nonetheless, the district judge sent the jury back to continue deliberating without any further guidance. The next day, on January 29, 2013, the jury found Peake guilty of the Indictment's sole count. D.E.189.

New Trial Motion

On March 4, 2013, Peake moved for a judgment of acquittal or new trial. D.E.193, 199. The Government objected, D.E. 211, and the motion was denied. Add 1.

The Sentencing

The Presentence Investigation Report noted the statutory maximum of ten years, and recommended imprisonment of 87 to 108 months based on an offense level of 29. Appx-S 55.

Peake filed objections to the PSR (D.E.207, 224), and submitted a Sentencing Memorandum detailing his many positive characteristics and the overwhelming admiration and support of his friends and family. D.E.216. He filed more than 40 character letters uniformly attesting to his strength of character. As one letter stated, "I spent a great deal of time in private with Frank both professionally and socially and found him to be one of the finest men I have ever met." D.E.217. Numerous respected and distinguished individuals emphasized their admiration for Peake and discussed his numerous positive qualities. *Id.*

Peake also demonstrated that he acted at all times only for the good of his company, his employees, and his industry, and not out of any self-interest. He did not receive a higher salary or bigger bonus during the years of the conspiracy. In fact, he agreed to a reduced salary for 2007 and 2008 and worked tirelessly on capital improvements for Sea Star, substantially decreasing his bonuses. D.E.239 at 50; D.E.216 at 17.

The district court conducted a sentencing hearing on December 6, 2013. Peake was sentenced to a prison term of 60 months, followed by three years of supervised release, and a $25,000 fine. D.E.234. This 5 year sentence is the highest antitrust sentence in the history of the United States. Pending the results of this appeal, Peake remains out on bond.

Second Motion for New Trial

Nearly eight months after trial, the Government revealed that it had failed to produce a lengthy exculpating audio tape made by a government informant named William Stallings. This informant, the former head of sales at Sea Star and the individual who had initiated the government investigation in the first instance, was not called by the Government in Peake's case. The defense also declined to call him but did so without the benefit of this key piece of exculpatory evidence.

Upon receipt of the recording, Peake moved for a new trial based on the Government's failure to produce this *Brady* material. D.E.209. The Government responded, D.E.211, and the district court denied the motion without a hearing. Add 1.

Third Motion for New Trial

Several months later, Peake's counsel discovered that on January 15, 2013, – at the very same time it was trying the case against Peake – the United States had filed under seal a *Qui Tam* action against Sea Star and Horizon through William Stallings. Despite its obvious relevance, the Government did not disclose this action to the defense or the district court.

As a result of this discovery more than a year after trial, Peake filed a third motion for new trial, D.E.246, which is pending before the district court.

STANDARD OF REVIEW

This Court reviews the prejudicial effect of all errors in the aggregate, and should reverse where the cumulative effect of the errors is not harmless even if the individual errors are harmless in themselves. *United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993); *United States v. Dwyer*, 843 F.2d 60, 65 (1st Cir. 1988). The Government has the burden of establishing the harmlessness of the cumulative errors, and must show that it is "highly probable that the error did not influence the verdict." *United States v. Sanabria*, 645 F.3d 505, 516-19 (1st Cir. 2011) (internal quotation omitted).

The district court's denial of Peake's motion for change of venue is reviewed for abuse of discretion. *United States v. Walker*, 665 F.3d 212, 222 (1st Cir. 2011). The district court's evidentiary decisions are reviewed for abuse of discretion, *United States v. Brooks*, 145 F.3d 446, 454 (1st Cir. 1988), and are appropriate for reversal where, *inter alia*, there were no findings on prejudice and probativeness. *Id.* at 454-55; *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 479 (1st Cir. 2000). The district court's denial of Peake's motions for mistrial are reviewed for abuse of discretion. *United States v. Bradshaw*, 281 F.3d 278, 284 (1st Cir. 2002).

The district court's determination that the Government did not exceed the scope of the search warrant is reviewed *de novo*. *United States v. Fagan*, 577 F.3d 10, 13 (1st Cir. 2009).

The district court's refusal to give Peake's requested theory of defense instruction is reviewed *de novo*. *United States v. Baird*, 712 F.3d 623, 627-28 (1st Cir. 2013); *United States v. Earle*, 488 F.3d 537, 546 (1st Cir. 2007).

The district court's failure either to declare a mistrial or to provide additional guidance to the jury after it indicated it was hung should be reviewed for abuse of discretion. *United States v. McIntosh*, 380 F.3d 548 (1st Cir. 2004); *United States v. Vanvliet*, 542 F.3d 259, 266 (1st Cir. 2008).

This Court reviews *de novo* the district court's interpretation and application of the Sentencing Guidelines. *United States v. Stoupis*, 530 F.3d 82, 84 (1st Cir. 2008). It reviews underlying factual findings for clear error. *Id.* *See also United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 89 (2nd Cir. 1999) ("We review the district court's interpretation of the 'volume of commerce' enhancement provision of the Sentencing Guidelines *de novo*.").

SUMMARY OF THE ARGUMENT

Frank Peake's trial was fundamentally flawed, depriving him of the opportunity to prove his innocence of the charges against him.

First, the district court erred in denying Peake's motion for change of venue, and then permitting the Government to emphasize, over and over, that the jurors and their families were the victims of the very conspiracy for which Peake was being tried. From the first words out of the Government's mouth in Opening, all the way to the end of the trial, the Government repeatedly advised the jury that they paid more for practically everything they purchased as a result of this conspiracy. It called witnesses to testify that hamburgers at Burger King cost more, and that there was less money for disadvantaged children's school lunches because of the conspiracy. As a result of this improper and entirely irrelevant evidence and argument, Peake was deprived of his right to be tried in an impartial venue.

Second, the district court erred in permitting the Government to introduce evidence obtained from an unauthorized search and seizure of Peake's personal computer and cell phone. At the beginning of its investigation, the Government sought a search warrant that would have authorized the search of these items, but the issuing magistrate expressly excluded them from the scope of the search. The Government seized them anyway and surreptitiously made copies. Years later, it

obtained a new warrant from a judge in another district and then reviewed and utilized documents taken from Peake's personal electronics against him at trial. These actions violated Peake's constitutional rights and necessitate a new trial.

Third, the district court erred in denying Peake a theory of defense instruction. The basis for the district court's ruling was not that Peake's proposed instruction was somehow deficient, but that Peake was not entitled to *any* theory of defense instruction because he declined to testify and because his counsel was permitted to argue his theory of defense in closing. This is an incorrect statement of the law, and violated Peake's Fifth Amendment rights.

Fourth, the district court erred in failing to either declare a mistrial or provide adequate guidance to the jury after the jury declared it was deadlocked. The jury sent two notes indicating it was deadlocked, the second of which made clear that the jurors had given their "final individual verdict[s]." Rather than providing the guidance required under First Circuit precedent, the district court merely sent them back to continue deliberating, and they subsequently convicted. The district court's failure to provide the three elements of required guidance necessitates a new trial.

Fifth, the Government has not alleged or demonstrated an essential element of a Section 1 Sherman Act violation, which prohibits conspiracies in restraint of trade or commerce "among the several States." Because Puerto Rico is not a State, the case

must be dismissed.

Sixth, the district court erred in applying an excessively high volume of commerce enhancement. The district court improperly included in its calculation commerce that was not affected by the violation or attributable to the defendant.

ARGUMENT

I. PEAKE SHOULD BE GRANTED A NEW TRIAL DUE TO THE DISTRICT COURT'S FAILURE TO TRANSFER VENUE AND THE GOVERNMENT'S REPEATED EMPHASIS OF IMPROPER EVIDENCE AND ARGUMENT THAT THE CONSPIRACY HAD A HARMFUL EFFECT ON THE JURORS THEMSELVES.

Peake should be granted a new trial because the proceedings were infected by irrelevant and unduly prejudicial arguments that improperly biased the jury against him, in a venue in which such arguments were especially prejudicial.

After the Government revealed in response to Peake's Rule 21(b) motion that it intended to focus on the irrelevant fact that the conspiracy affected the prices that countless Puerto Ricans paid for everyday consumer items, Peake moved for a transfer of venue under Rule 21(a). In response, the Government argued that because there was no evidence of adverse pretrial publicity, the "general consumer interest of the prospective jurors" was not a basis to transfer the case. D.E.56 at 6. It also assured the district court that it would not appeal to the jurors as victims. *Id.* at 5.

But as it played out, "harm to end consumers" was the theme of the Government's case. The Government affirmatively and by design highlighted to the jury, over and over again, that the conspiracy had a direct negative effect on them and everyone they knew in Puerto Rico. Indeed, the Government's first words to the jury in its Opening laid bare the Government's plan to bias the jury against Peake, and the

Government followed up with repeated focus on the conspiracy and its effect on the jurors and their families:

- Opening line: "Ladies and Gentlemen, shipping is very important in Puerto Rico. . . . Most consumer goods travel to Puerto Rico from the shipping lanes of Jacksonville, Florida, Elizabeth, New Jersey, and Houston, Texas. Food for Pueblo supermarkets, medicine at Walgreens, most things at Walmart. Most things made in Puerto Rico for sale in the states travel through those same shipping lanes, things like pharmaceuticals, electronics and rum." D.E.239 at 18.

- "It was so significant that it affected billions of dollars of freight to and from Puerto Rico. Billions of dollars. This case is about Puerto Rico because the conspiracy affected so much of what is sold here and what is exported from here." *Id.* at 20.

- "Congress passed the Sherman Act because it was so concerned that consumers need to buy things to feed and clothe their families. ... They [consumers] try to get the best price for what they buy, especially in times when money is tight." *Id.*

- "You will hear instead that they were the victims of price fixing and they were paying more because of it. Businesses like Burger King, Office Max and Walgreens, *businesses that have stores all over Puerto Rico*, they were all paying more than they should have to ship freight to Puerto Rico because Sea Star and Horizon were conspiring, not competing." *Id.* at 21 (emphasis added)

- "You will hear from a witness . . . who owns all the Burger Kings in Puerto Rico. He will tell you that the shipping costs are factored into the costs of the whoppers sold at Burger King." *Id.* at 25.

- "[T]here will be evidence that the government used the shipping companies to ship food for the school lunch program. The federal program gives free and reduced price lunches to families who can't afford to pay for their lunches. You will hear from the Department of

> Agriculture, USDA which will tell you that *paying more for shipping meant that the government had less money in the school lunch program to buy food for school children*." *Id.* at 26 (emphasis added).

None of this was relevant to the Government's case against Peake, as the district court acknowledged when it stated that the Government's references to school lunches were "really way out of bounds." D.E.157 at 100. It was entirely unnecessary *ever* to reference the names of the particular consumer companies who shipped with Sea Star, much less to emphasize that the conspiracy raised prices for end consumers of these companies. The Government successfully moved *in limine* to prohibit Peake from referencing in any way that prices were reasonable, fair, or competitive, which prohibition should have precluded the Government from arguing the opposite. D.E.103. Yet in the face of these unmistakably improper arguments, the district court denied Peake's motion for a mistrial. *Id.* at 49; D.E.153, 161; Add 72.

Thus emboldened, the Government carried on with these improper arguments throughout the trial, simply ignoring its promise not to play the consumer card. With its conspirator witnesses, it brought out the names of popular consumer companies affected by the conspiracy in contexts not relevant to the elements of the charge. *See, e.g.*, D.E.154 at 30; D.E.155 at 23, 32, 55 (eliciting from Glova the examples of

Walmart, Walgreens, the military, and Burger King,[4] and emphasizing that the shipping containers held products destined for these stores); D.E.157 at 164 (eliciting from Baci the names of Walmart, Walgreens, Bacardi, and Johnson and Johnson along with two lesser-known companies). By contrast, the Government largely ignored the names of the many customers which would not have resonated with jurors, such as New Penn, Lynden, Arrowpac, Eaton Cutler, Western Hay, Magic Transport, and Flexitank.

Neither did the Government choose "victim" witnesses from these less well-known companies. Instead, it chose one witness designed to pull at the jury's pockets and one at its heartstrings. First, it called Gabriel Lafitte, a former executive who purchased for Burger Kings in Puerto Rico. D.E.157 at 107. Mr. Lafitte had no knowledge of Peake's alleged involvement in the conspiracy. Instead, the Government asked him about Burger King's menu items, the large number of Puerto Ricans employed by Burger King, and the fact that Burger King's prices were higher as a result of the conspiracy. Multiple defense objections to this testimony were overruled. D.E.157 at 95-97, 103-105, 108, 114, 116.

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[4] The Government went out of its way to ask Glova "what kind of restaurants did Caribbean Restaurants operate in Puerto Rico," so that the jury would know that Caribbean Restaurants (an otherwise unknown name) was Burger King. D.E.155 at 55. That question, among many others, obviously had zero relevance to the Government's case.

As its second "victim" witness, the Government called – also over objection – a witness from the United States Department of Agriculture (USDA), who also had little if anything to offer of relevance. Peake argued that it would be improper for this witness to testify about the effect of the conspiracy on school lunch prices, and that this was the Government's true purpose – indeed, its only purpose – in calling the witness. But the Government assured the court that it "wouldn't go into the effect on school lunch prices." D.E.179 at 103. With this assurance, the court allowed the Government to call the witness. Yet despite its promises, the Government very much *did* go into the effect on school lunch prices, asking the following questions:

- "You mentioned that the USDA has a need to transport goods to Puerto Rico and you mentioned some programs and one of those programs you mentioned was the school lunch program?"
- "Does the USDA purchase food for the school luncheon program?"
- (Again) "Does the USDA purchase food for the school lunch program?"
- "Does the USDA arrange for transportation for food of the school lunch program?"
- "And does the USDA receive funds to purchase the food for school lunch programs?"
- (Again) "Does the USDA receive funds to purchase food for the school lunch program?"
- "Does the USDA ever receive separate funding to arrange for the transportation of that program?"

- "From 2003 to 2008, was food for the school lunch program transported from the states, from Jacksonville to Puerto Rico, with a transport on ships operated by Sea Star and Horizon?"

- "Was food for the school lunch program transported from Jacksonville, Florida to San Juan, Puerto Rico on ships operated by Sea Star and Horizon?"

Id. at 114-117. This examination, in the face of the Government's express promise not to address the effect of the conspiracy on school lunch prices, was wholly inappropriate and unduly prejudicial. The Government then went on to emphasize the adverse effect on another sympathetic government program:

Q. Were there other programs that the USDA purchased food for?

A. Yes, there is also the food assistance to low income families, which is administered by the Puerto Rican Department of the Family.

Q. And did the USDA arrange for transportation of food for that program from Jacksonville to Puerto Rico?

A. Yes, it did.

Q. Did food for that program, was it transported on ships operated by Sea Star and Horizon?

A. Yes, it was.

Id. at 118. Peake objected throughout and renewed his motion for mistrial. D.E.157 at 167.

Contrary to the promises it made the district court, the Government expressly

alleged that the conspiracy directly affected the consumer prices paid by the citizens of Puerto Rico on nearly every consumer good. The issue went beyond the Government merely wanting the jury to *identify* with the victims of the "Puerto Rico conspiracy," which itself is strictly prohibited. *See, e.g., Granfeld v. CSX Transp., Inc.*, 597 F.3d 474, 491 (1st Cir. 2010); *Whitehead v. Food Max of Mississippi*, 163 F.3d 265, 278 (5th Cir. 1998). Instead, the Government told the jury that it *was* the victim of the conspiracy. This was one of the fundamental themes of the Government's case and thus that much more harmful. *United States v. Aguilar-Aranceta*, 58 F.3d 796, 801-02 (1st Cir. 1995).

The harm of this testimony was compounded still further by the fact that the defense was prevented from countering the Government's evidence regarding higher consumer prices with available evidence to the contrary. Before trial, the Government successfully moved in limine for an order barring the defense from introducing any evidence that prices were "reasonable, fair or competitive," arguing that such evidence was irrelevant. D.E.103, 128. Although the district court's ruling was incorrect, the defense abided by it. The Government, by contrast, did not – instead introducing back door pseudo-expert testimony on the price effect of the conspiracy (*e.g.*, D.E.157 at 147, 151, 164) which should have been barred consistent with the court's pretrial

order.[5]

Moreover, Peake should have been tried in an impartial venue in which the jurors called upon to decide his fate were not victims of the very conspiracy in which he allegedly participated. *See* Fed. R. Civ. P. 21(a) (providing that "[a] court must transfer the proceeding . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."). *See also United States v. Greer*, 285 F.3d 158, 172 (2d Cir. 2000) (providing that bias is automatically presumed, and jurors must be mandatorily removed, when the jurors were victims of the alleged crime itself); *United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997) (holding that disqualification is mandatory when jurors are victims of the alleged crime). *See also United States v. Polichemi*, 219 F. 3d 698, 704 (7th Cir. 2000) (Jurors must be excused for cause "if the juror has even a tiny financial interest in the case."). In the relatively unique circumstances of this case, the district court's failure to grant a change of venue was an abuse of discretion.

Even if venue in Puerto Rico was appropriate, these over-the-top inappropriate appeals to sympathy and bias should never have occurred in any venue. They had *no*

[5] Peake objected to the Government's introduction of testimony regarding price effects and moved for a mistrial. D.E.157 at 167-168.

relevance whatsoever to the case against Peake, which turned – solely – on the question of whether Peake was a member of the conspiracy that unquestionably existed among others. This evidence (and the Government's accompanying argument) should have been excluded pursuant to Federal Rules of Evidence 402 and 403. *See United States v. Levy-Cordero*, 67 F.3d 1002, 1016 (1st Cir. 1995) (finding evidence not relevant and therefore inadmissible under rule 402); *Aguilar-Aranceta*, 58 F.3d at 800-01 (reversing under Rule 403 where limited probative value of evidence was overshadowed by danger of unfair prejudice).

The Government should not have made any reference to the effect of the conspiracy on the jurors, made unnecessary references to the consumer companies affected by the conspiracy, or elicited irrelevant and prejudicial testimony from witnesses. *See, e.g.*, *Granfeld*, 597 F.3d at 491. Prosecutorial efforts to appeal to jurors as victims of the crime on trial have been denounced for decades by federal courts. *Viereck v. United States*, 318 U.S. 236, 247 & n.3. (1943). For example, in *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000), the Sixth Circuit condemned the prosecutor's misconduct in appealing to juror bias, including the "prosecutor's efforts to equate the jurors with the defendant's victim." *Id.* at 717-18.

Similarly, a juror also cannot be asked, directly or indirectly, to "put itself in the shoes of a plaintiff," as "[t]his so-called Golden Rule argument has been universally

condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988). Likewise, juror appeals to regionalism are improper. *See, e.g., Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992) (counsel's appeal to regional bias warrants new trial). This evidence, and corresponding Government argument, was a textbook example of the "unfair prejudice" contemplated by Rule 403 – that having an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one." Fed. R. Evid. 403, Advisory Committee Notes. *See also United States v. Varoudakis*, 233 F.3d 115, 122 (1st Cir. 2000) ("Courts use the term 'unfair prejudice' for evidence that invites the jury to render a verdict on an improper emotional basis.").

This not a case in which deference must be given to a district court's balancing under Rule 403, as the district court never conducted such an analysis in the first instance. The district court did *not* balance the (nonexistent) relevance of this evidence against the potential prejudice and conclude that relevance won out. It never had to, despite Peake's objections, because the Government conceded the inadmissibility. The district court allowed the testimony based on the Government's assurances it would not elicit the prejudicial testimony and would not appeal to bias,

e.g. D.E.56, D.E.179 at 103, but the Government went on to do exactly that. *E.g.* D.E.179 at 107-09, 114-18. The Government never offered a single explanation as to how this evidence was relevant.

The district court declined to grant a new trial as a result of this issue, but even after the fact the district court did not make a finding that the relevance of the Government's evidence outweighed any undue prejudice. Instead, the district court's post-trial order blinks reality, offering a recitation of the Government's evidence and argument that is squarely contradicted by the evidence:

> The Government did not infer that those higher prices were passed onto the victims' customers, the general populace of Puerto Rico, in a secondary manner. Simply, the United States did not argue that hamburgers and paperclips cost more as a result of the conspiracy. Similarly, while the United States did present evidence that the U.S. Department of Agriculture paid higher food prices for the school lunch program as a result of the conspiracy, the Government did not argue that school children paid higher milk prices or went without milk as a result of the conspiracy.

D.E.228 at 19.

The district court's recollection is inaccurate. The Government unquestionably *did* not only infer but very expressly state that higher prices were passed on to the consumer (for burgers in particular) and *did* very expressly argue that school children went without milk. *E.g.*, D.E.239 at 25 ("He will tell you that the shipping costs are factored into the costs of the whoppers at Burger King."); *id.* at 20 ("This case is about

Puerto Rico because the conspiracy affected so much of what is sold here and what is exported from here."); *id*. at 26 ("You will hear ... that paying more for shipping meant that the government had less money in the school lunch program to buy food for school children.").

In light of the direct conflict with the record evidence, the district court's recitation of the evidence should be entitled no deference, and in any event the district court's conclusion regarding the Government's argument is clearly erroneous under any standard. As this Court has stated, "Whether a fact tends to make another fact more or less likely depends heavily on the logic of the connection, and there is no 'discretion' to ignore a logical relationship." *United States v. Amaya-Manz Angres*, 377 F.3d 39, 44 (1st Cir. 2004). *See also United States v. Stephens*, 514 F.3d 703, 712 (7th Cir. 2008) ("[W]e cannot defer to a district court decision that ignores material portions of the record without explanation."); *Blankenship v. United States*, 159 F.3d 336, 339 (8th Cir. 1998) ("The district court did not have discretion to ignore the existing record."); *Leclaire v. Blackstone Valley Elec. Co.*, 104 F.3d 348, at *3 (1st Cir. 1996) (unpublished) ("While the district court (and this court on review) must view the evidence in the light most favorable to the non-movant, the analysis does not necessitate the complete disregard of uncontroverted evidence that happens to be unfavorable to that party.").

Neither was the harm cured by the district court's instructions. The district court excused the import of any potential harm by pointing to the curative instructions it gave to the jury in which it instructed the jury that it was not to decide the case based on "pity and sympathy." D.E.157 at 102. Indeed, the district court judge recognized at several turns that the government's actions were improper, but its efforts to cure the problem were insufficient. *see, e.g., id.* at 100 ("That gives the impression that the children are affected, you, know, and that is really out of bounds. . . . That is really way out of bounds."), 171 ("It is one thing to say . . . this case comes to Puerto Rico. It is another thing to say that the United States should be able to exploit arguments and exploit emotion and sympathy."). Given the direct and substantial prejudice caused by the Government's argument, which went to the very core of the jury's impartiality towards Peake, the curative instructions were inadequate to address the harm. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123, 132 (1968) (noting that limiting instructions are not always sufficient).

The Government's repeated evidence and arguments are precisely the kind of explicit prejudicial material that the jury cannot "possibly be expected to forget [] in assessing the defendant's guilt," especially given that this material was pervasive and constituted one of the Government's primary themes. *Richardson v. Marsh*, 481 U.S. 200, 206-208 (1987); *Bruton*, 391 U.S. at 126 (reversing conviction despite

instruction to jury because of the substantial risk that the jury would consider improper statements); *United States v. Ayala-Garcia*, 574 F.3d 5, 21-22 (1st Cir. 2009) (reversing for improper arguments by prosecution despite instruction to disregard); *Blake v. Pellegrino*, 329 F.3d 43, 50 (1st Cir. 2003) (reversing where curative instructions insufficient to address improper evidence); *United States v. Sepulveda*, 15 F.3d 1161, 1185 (1st Cir. 1993) (presumption that jurors follow curative instructions endures only until it "appears probable that, in a particular case, responsible jurors will not be able to put the testimony to one side, and, moreover, that the testimony will likely be seriously prejudicial to the aggrieved party."); *United States v. Perocier*, 2010 WL 339046 at *4 (D.P.R. 2010) (finding that curative instruction would not be enough to cure the prejudicial effect of evidence). Here, the pervasive repetition of the government's prejudicial theme could not be cured by the court's curative instructions.

Because none of the jurors were disinterested, Peake was denied his constitutionally-guaranteed fair trial. *Estrada v. Scribner*, 512 F.3d 1227, 1239-40 (9th Cir. 2008); *United States v. Sampson*, 2011 WL 5022335, *1 & *6 (D. Mass. October 20, 2011). Under the facts of this close case, in which the improper evidence and arguments were pervasive and the jury twice indicated it was hung, there can be no "'fair assurance' that the result would have been the same absent the improper

statements," and the conviction must therefore be reversed. *Ayala-Garcia*, 574 F.3d at 21-22. The panel was irreparably tainted by the Government's actions.

II. PEAKE SHOULD BE GRANTED A NEW TRIAL DUE TO THE GOVERNMENT'S USE OF DOCUMENTS OBTAINED FROM THE ILLEGAL SEARCH AND SEIZURE OF PEAKE'S PERSONAL ELECTRONICS.

The Government's introduction of documents obtained from its improper seizure and imaging of Peake's personal electronics, which was expressly disallowed by the Jacksonville search warrant, violated Peake's constitutional rights and entitles him to a new trial. This constitutional violation was not remedied (indeed, the wrong was compounded) by the Government's improper end-run to obtain an *ex parte* warrant from a different court.

The Fourth Amendment provides that no warrants shall issue except on probable cause and "particularly describing the . . . persons or things to be seized." The particularity requirement "prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192 (1927). *See also Stanford v. Texas*, 379 U.S. 476, 485 (1965).

It is "settled law that the search and seizure conducted under a warrant must conform to the warrant." *United States v. Upham*, 168 F.3d 532, 536 (1st Cir. 1999).

As a result, the Government may not seize items which have been disallowed by the judicial officer authorizing the search. Here, the Government seized Peake's blackberry and laptop – items that the Magistrate had expressly excluded from the scope of the search – and made unauthorized copies of them. Moreover, the Government substantially exceeded the 30 day search period permitted by the warrant. The Government's seizure and imaging of these items constituted an unreasonable warrantless search. "Warrantless searches are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions," none of which apply here. *United States v. Winston*, 444 F.3d 115, 124 (1st Cir. 2006) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

Accordingly, all information gleaned from Peake's phone and laptop should have been suppressed. *See United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988); *see also Riley v. California*, __ S. Ct. __, 2014 WL 2864483 (June 25, 2014) (recognizing substantial privacy concerns implicated by warrantless search of cell phone). Yet over Peake's objection, the Government admitted at least 15 of these ill-gotten documents, D.E.123, 130, and relied on them to make its case. *See, e.g.*, D.E.240 at 33, 114. This was improper, as absent a recognized exception (which does not exist here), the "fruit" of a search exceeding the scope of a warrant should have been excluded. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

As the district court itself acknowledged, Add 80-81, the Government did not remedy its violation by obtaining an *ex parte* warrant over four years after the search, and long after the 30 day period granted by the warrant. *United States v. Ganias*, __ F.3d __, 2014 WL 2722618 (2d Cir. June 17, 2014). In *Ganias*, the Second Circuit recently held that the government does not cure a Fourth Amendment violation by obtaining a second search warrant to search an electronic copy of a computer hard drive that contains material beyond the scope of the initial warrant pursuant to which the computer was initially seized. *Id.* The *Ganias* court correctly found that to permit the Government to obtain a subsequent warrant to cure its previous warrantless seizure would decimate the protections afforded by the Fourth Amendment. *Id.* at *11 ("If the Government could seize and retain non-responsive electronic records indefinitely, so it could search them whenever it later developed probable cause, every warrant to search for particular electronic data would become, in essence, a general warrant.").

Even the district court recognized that the subsequent search warrant does not aid the Government. In what reads as a veiled warning to the Government, the district court stated as follows:

> It goes without saying that the Government cannot obtain a search warrant after a search has been executed to justify and constitutional[ly] insulate that search and seizure. As sure as the sun will rise in the East, a warrant after an illegal search fails to cure a defendant's Fourth Amendment violation. This practice would be even more troublesome

> where a second warrant validates the search and seizure of items previously excluded during an initial search warrant where no pertinent facts [have] changed. More egregious still, would be if the Government were to move these items around the country seeking different search warrants from different Magistrate Judges and Judges that the Government deemed favorable to them. Such conduct would be gross forum shopping and simply unjust. While the Court would be outraged should any of these actions occur, the Court remains confident that that is not the case at bar.

Add 80. The basis of the district court's confidence that "this is not the case at bar" (which he reached without holding a hearing) is entirely unclear, as the record establishes that the Government did *precisely* what the district court indicated would be "gross forum shopping and simply unjust." After seizing and imaging two electronics expressly excluded from the search by the initial warrant, the Government held the images for four years and then secretly appeared before a D.C. judge unfamiliar with the ongoing proceedings, instead of either seeking permission from the Puerto Rico district judge who *at that very moment* was deciding on whether the Government had the right to image the items in the first place, or going to the Jacksonville judge who had authorized the search initially.

In litigation below, the Government attempted to justify its forum shopping by arguing that Federal Rule of Criminal Procedure 41(b)(1) supported the use of a Washington, D.C. magistrate because the ill-gotten copy of Peake's devices was located in Washington, D.C. (as a result of the Government's decision to take it there

after improperly seizing and imaging it in Jacksonville). This reasoning is entirely unavailing. The property to be searched was located in Jacksonville when seized, and at the time of the subsequent warrant it was in New Jersey. The question was not whether the Government had authority to look at the copy of Peake's item, it was whether the Government had authority to *make* the copy in the first place (and then retain it for years). The Government had no such authority, and it should have been the Jacksonville judge, or the Puerto Rico judge hearing Peake's case, who decided the question. The Government is not free to select its forum by executing a warrantless search, taking possession of the defendant's property, and moving that property to the forum of its choosing. Such a procedure would decimate Rule 41(b)(1) and the Fourth Amendment.

Given the Government's blatant violation of Peake's constitutional rights, Peake should be afforded a new trial.

III. PEAKE IS ENTITLED TO A NEW TRIAL BECAUSE HE WAS IMPROPERLY DENIED HIS THEORY OF DEFENSE INSTRUCTION.

Peake was improperly denied his theory of defense instruction. As the First Circuit has repeatedly confirmed, "[i]t is a basic tenet of criminal law that a defendant is entitled to an instruction on his theory of defense." *United States v. Powers*, 702 F.3d 1 (1st Cir. 2012). A theory of defense instruction should be given:

> so long as the theory is a valid one and there is evidence in the record to support it. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can *plausibly* support the theory of the defense. This is not a very high standard to meet, for in its present context, to be 'plausible' is to be 'superficially reasonable.'

United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998) (citations omitted) (emphasis in original).

Here, the defense's legal theory was valid, as the district court acknowledged. Add 17 ("Peake's theory that he was not involved in the conspiracy is a legitimate defense..."). And the evidence more than "plausibly" supported it. The proposed instruction was:

> *Mr. Peake does not contest that there was a conspiracy that existed between Gabriel Serra, Kevin Gill, Gregory Glova, and Peter Baci. Rather, he contends that he did not knowingly and intentionally participate in this conspiracy and did not knowingly and intentionally join the conspiracy as a member. Mr. Peake further contends that any discussions he had with Gabriel Serra were legitimate and competitive discussions and not anti-competitive conspiracy related. Mr. Peake also contends that he was competing with Horizon, including on market share and price.*
>
> *Although this is Mr. Peake's defense, the burden always remains on the government to prove the elements of the offense beyond a reasonable doubt. If you do not believe the government has proven beyond a reasonable doubt that Mr. Peake intentionally and knowingly joined the conspiracy, you must find him not guilty.*

Add 84-85.

The instruction should have been given, as it was supported by a great deal of evidence, including numerous documents and testimony from the Government's own witnesses. For example, there was substantial evidence that the key Government witnesses did not identify Peake as a conspirator in circumstances in which they would have been expected to do so, both before and after the conspiracy was revealed. Unlike the other conspirators, Peake was not mentioned in the detailed contemporaneous journals kept by Baci and Glova. D.E.155 at 168-172; D.E.160 at 155-159; D.E.240 at 53; G.Ex.85. Peake was not mentioned in Glova's written statement prepared on the day of the FBI raid, despite Glova's mention of the other conspirators. D.E.155 at 133-135, 142, 145-147, 150-151. Peake was not mentioned in Baci's Sentencing Memorandum, which described the participants of the conspiracy in detail. D.E.179 at 51-56; D.Ex.454.

In support of Peake's assertions that his communications with competitors were legitimate, for example, Gabriel Serra testified that there were many appropriate reasons that he and Peake spoke and met. *See* D.E.182 at 71, 75, 77. Numerous defense exhibits (including 76-79, 83-92, 95-96) also demonstrated the frequency and legitimacy of discussions between Peake and Serra. Gabe Serra was asked about each of these exhibits during his testimony and acknowledged they were evidence of legal,

appropriate discussions between competitors.

Moreover, there is substantial evidence of Frank Peake's desire to compete rather than collude with Horizon Lines by taking Horizon's customers, market share, and capacity. For example, Peake was extremely aggressive about putting a third Sea Star ship into the water, expecting that it would take market share from Horizon. D.E.182 at 80-83, 103-104; D.Ex.137. *See also* D.Ex.113, 127, 137, 140, 141, 142, 146, 149, 150, 159, 160, 164, 167, 168, 169, and 171. This testimony and these defense exhibits provide sufficient confirmation in the record of Peake's desire to compete and his lack of participation in a Florida 50/50 conspiracy agreement. Accordingly, there was more than sufficient corroboration to back the defense's theory that a conspiracy existed among the government's witnesses, but that the conspiracy did not include Frank Peake. The instruction was valid, factually supported, and should have been given to the jury. *Gamache*, 156 F.3d at 9.

The Government argued below that Peake was permitted to argue his theory of defense in his closing argument, thereby resolving the matter. D.E.195 at 16-17. This, of course, is incorrect. Peake's arguments to the jury did not replace or excuse the court's failure to provide an instruction required by law. The Government's argument, however, reveals that Peake's defense was, in fact, adequately supported by the evidence. For had there been inadequate evidence to support Peake's defense,

he would *not* have been permitted to argue it in closing. *United States v. Hamie*, 165 F.3d 80, 84 (1st Cir. 1999) (closing arguments may not rely on knowledge or evidence unavailable to the jury); *United States v. Lopez Garcia*, 672 F.3d 58, 64 (1st Cir. 2012) (counsel is permitted to make arguments that have evidentiary basis).

Recognizing that Peake's defense was amply supported by the evidence, the Government instead took the position that because Peake did not testify, he could not offer *any* theory of defense instruction. This was error, and is squarely inconsistent with First Circuit authority. *See Powers*, at 702 F.3d at 9-10; *Gamache*, 156 F.3d at 9; *United States v. Montanez*, 105 F.3d 36, 39 (1st Cir. 1997).

At the Government's misdirected urging, the Court made the blanket finding that Peake was not entitled to an instruction *at all* because it was "an invitation to hearsay and to put into evidence the statement of your client, without sitting your client." D.E.240 at 155-156. But there is, of course, no requirement that a defendant must testify in order to present a theory of defense instruction. This limitation unquestionably violated Peake's Fifth Amendment rights. *See Carter v. Kentucky*, 450 U.S. 288, 301 (1981) (summarizing well-settled law that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify).

IV. PEAKE SHOULD BE GRANTED A NEW TRIAL DUE TO ERRORS DURING JURY DELIBERATIONS.

The district court erred in failing to either grant a mistrial or provide adequate guidance to the jury after it indicated it had reached a final verdict and was deadlocked. In this Circuit, *any* supplemental instruction given to a deadlocked jury regarding continued deliberations must include guidance that advises of the following three principles: 1) both the majority as well as the minority can reexamine its position; 2) the government always maintains the burden of proof; and 3) the jury has the right to fail to agree. *United States v. Angiulo*, 485 F.2d 37, 39-40 (1st Cir. 1973). Here, none of this guidance was provided, and a new trial should be granted.

The jury's notes make clear that it had reached a final deadlocked verdict.[6] On Monday, January 28, the jury began its second day of deliberations at approximately 9:00am. At 2:45pm that day, after nearly 6 hours of conferring, the jury sent a note saying that it could not reach a verdict: "Members of the jury have issued their respective verdicts. After discussions and revisions to the evidence we are not able to reach a unanimous verdict." Add 90. This Court sent them back to "continue [their] deliberations" without any further guidance. *Id.* About an hour later, the jury asked to have transcripts of the trial, but when told of the procedure for acquiring those transcripts, the jury opted against it. Add 92; D.E.244 at 3-13.

[6] Post-trial, the jury foreperson revealed that the jury was split 6 to 6 during the deliberations. D.E.198

The air-conditioning in the building turned off around 6pm, but the Court did not stop deliberations for the day. After 10 straight hours of deliberation, the jury sent another note at 7:15pm saying: "After strong debates and discussions, members of the jury have expressed a *final* individual verdict. *We are still unable to reach a unanimous verdict."* D.E.244 at 13-14; Add 93 (emphasis added).

The defense objected to continued deliberations and requested a mistrial. D.E.244 at 15-16. The court denied the motion, stating that it was too soon for a mistrial. *Id. at* 17-18. This was incorrect. This Court has held that "[t]here is no per se minimum period of deliberation that must expire before a mistrial may be declared on account of a hung jury." *United States v. McIntosh*, 380 F.3d 548, 555 (1st Cir. 2004). *See also Renico v. Lett*, 559 U.S. 766, 775 (2010) ("And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time.").

Instead of declaring a mistrial, the district court sent a note to the jury once again merely advising to "continue deliberations" without any further guidance at all:

CR 11-512 (DRD)
Jury Activity
Received
January 28, 2013
4:20 pm

Your Honor

After strong debates and discussions, Members of the jury have expressed a final individual verdict.

We are still unable to reach a unanimous verdict.

7:15 1/28/13

The Court orders the jury to return tomorrow at 10:30 A.M to continue deliberations. Please drive home carefully and safely

7:23 PM

Add 93. The judge also advised the lawyers it would consider what additional instructions to provide in the morning. D.E.244 at 16-17.

Because the air conditioning system malfunctioned the next day, the jury was sent to a separate courthouse much further away, and did not start its deliberations until 11:35am. In chambers, the district judge advised the lawyers (correctly) that if the jury was at an impasse, it was obligated to give guidance and the cautionary elements. Yet the judge failed to do so, and simply ordered the jury to continue deliberating.[7] Less than three hours later, the jury convicted.

This was error. The jury very clearly indicated, twice, that it was deadlocked. There was no ambiguity in the jury's note regarding "a final individual verdict," which was provided after a 10-hour deliberation period. As a result, the district court was compelled – without discretion – to advise the jury that it was free to not reach a verdict. *See Angiulo*, 485 F.2d at 40 ("[W]henever a jury first informed the court that it is deadlocked, ***any*** supplemental instruction which urges the jury to return to its deliberations ***must*** include the three balancing elements stated above.") (emphasis

[7] In its post-trial Order, the district court stated that Peake "objected to the Court giving any form of *Allen* charge." Add 10. This is only partially correct. While it is true that Peake objected to an *Allen* charge, Peake did *not* object to the Court providing the guidance required by *Angiulo*. These conversations regarding this issue occurred in chambers outside the presence of the court reporter.

added); *United States v. Hernandez-Albino*, 177 F.3d 33, 38 (1st Cir. 1999) (court's instruction to jury after it indicated that it was at "an impasse" was error because it did not explain to the jury that it was free not to reach a verdict); *United States v. Paniagua-Ramos*, 135 F.3d 193, 198-99 (1st Cir. 1998) (finding plain error where the court did not clearly refer to the jury's right to fail to agree); *United States v. Manning*, 79 F.3d 212, 223 (1st Cir. 1996) (reversing where court did not include three required elements).

This guidance is required to ensure that the jury does not mistakenly believe it has a duty to achieve unanimity: "Any supplemental instruction in response to a jury's deadlock can have a significant coercive effect by intimating that some jury members should capitulate to others' views, or by suggesting that the members should compromise their rational positions in order to reach an agreement." *Hernandez-Albino*, 177 F. 3d at 38 (*citing Angiulo*, 485 F.2d at 39). *See also Jenkins v. United States*, 380 U.S. 445 (1965) (reversing conviction where a judge's statement to jury after they declared that they could not reach a verdict had the effect of making the jury believe that it would not be released until it reached a verdict).

There simply is no justification for the district court's failure to provide guidance. The district court defended its failure to give the *Angiulo* guidance as follows: "This cited case law is applicable to remedy the coercive effects of an *Allen*

charge, but it is inapplicable in the present case as no *Allen* charge was provided." Add 11. This is an incorrect statement of the law. *See Angiulo*, 485 F.2d at 40; *Paniagua -Ramos*, 135 F. 3d at 198-199; *Hernandez-Albino*, 177 F.30 at 38.[8] Not only an *Allen* charge, but *any* supplemental charge to a deadlocked jury (including a simple charge to continue deliberations) *must* include the three areas of guidance required by the First Circuit. This did not happen, and therefore a new trial must be ordered. *Angiulo*, 485 F.2d at 39-40.

V. PEAKE'S CONVICTION SHOULD BE REVERSED AND THE CASE DISMISSED FOR LACK OF JURISDICTION DUE TO THE FACT THAT PUERTO RICO IS NOT A STATE.

Because Section One of the Sherman Act prohibits conspiracies only "among the several States," and Puerto Rico is not a State, Peake's conviction must be vacated. The Government's case against Peake alleged solely a conspiracy to fix prices in maritime trade between the continental United States and Puerto Rico. D.E.1 at 1. Yet the Indictment did not allege, and the Government did not and cannot establish, that

[8] The district judge did not cite any case for the proposition that *Angiulo* guidance need only be provided when an *Allen* charge is given. The First Circuit case cited by the district court does not so state; rather that case found the district court did not clearly err in failing to provide guidance because the district court found that the jury was not, in fact, deadlocked. *United States v. Figueroa-Encarnacion*, 343 F.3d 23, 31-32 (1st Cir. 2003) (evaluating first note from jury four hours into deliberating after a 12 day trial, which note stated that "up to this moment we have not been able to reach an agreement."). The other case cited by the district court, *United States v. Clayton*, 172 F.3d 347, 352 (5th Cir. 1999), does not address the *Angiulo* guidance at all.

Puerto Rico is a State. Numerous authorities establish that Puerto Rico is not a State. *See, e.g.*, *Igartua v. United States*, 626 F.3d 592, 600-601 (1st Cir. 2010); *Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 137 (1st Cir. 2012); *Herman v. Hector I. Nieves Transport*, 244 F.3d 32 (1st Cir. 2001); *United States v. Medina-Ayala*, 906 F. Supp. 2d 20, 22 (D.P.R. 2012).

Accordingly, the Government has not alleged or demonstrated an essential element of a Section 1 Sherman Act violation, which prohibits conspiracies in restraint of trade or commerce "*among the several States.*" 15 U.S.C. §1 (emphasis added). This is a jurisdictional defect that requires dismissal.[9]

VI. IF PEAKE'S CONVICTION IS NOT OVERTURNED, HE SHOULD BE RESENTENCED DUE TO ERROR IN THE APPLICATION OF THE VOLUME OF COMMERCE GUIDELINE.

The district court improperly applied a 12 level volume of commerce enhancement pursuant to § 2R1.1(b)(2)(F); PSR at ¶ 68. This enhancement, which was the substantial driver of Peake's sentence, should not have been applied because there was no reliable and competent evidence that supported the volume of commerce attributed to Peake. *See, e.g.*, U.S.S.G. § 6A1.3(a). In fact, there was no evidence taken at all. The court simply adopted the Government's numbers over the defense's

[9] Although Peake did not raise this issue in the district court, a jurisdictional defect may be raised for the first time on appeal. *See United States v. DiSanto*, 86 F.3d 1238, 1244 (1st Cir. 1996).

objection, despite the fact that "[w]hen the government seeks to apply an enhancement under the Sentencing Guidelines over a defendant's factual objection, it has the burden of introducing sufficient and reliable evidence to prove the necessary facts by a preponderance of the evidence." *United States v. Isaacson*, __ F.3d __, 2014 WL 2119820, at *9 (11th Cir. May 22, 2014) (internal quotation omitted) (reversing and remanding for failure to introduce adequate evidence in support of sentencing enhancement); *United States v. Washington*, 714 F.3d 1358, 1361 (11th Cir. 2013) (same).

In determining the appropriate guideline 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.* 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*,195 F.3d at 91. Instead, sales that were unaffected by the competitor agreement are not counted for sentencing. *Andreas*, 216 F.3d at 678 ("sales 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"); *see also United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001); *SKW Metals & Alloys, Inc.*, 195 F.3d at 91.

The volume of commerce number applied by the district court was seriously flawed, as it included both types of excludable commerce: commerce not attributable to Peake, and commerce not affected by the conspiracy. Accordingly, the case should be remanded for resentencing at which the Government must satisfy its burden to prove which bids were both affected by the conspiracy and attributable to Frank Peake.[10] In making this showing, the Government must exclude sales in a number of categories, described further below, including: 1) sales pursuant to contracts signed

[10] In the First Circuit, 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).

during the time period before Peake joined the conspiracy, 2) sales related to freight and/or customers excluded from the conspiracy.

A. The District Court Failed To Exclude Revenues From The Period Before Peake's Involvement.

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." Similarly, the Government asserted at trial that Peake joined the conspiracy in late 2005. Likewise, the district court 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 D.E.180 at 16. Accordingly, the affected commerce "done by him or his principal" should not have included any Sea Star revenue arising from contracts entered into before November 2005. *See* § 2R1.1(b).

B. The District Court Failed To Exclude Commerce That Was Not Affected By The Conspiracy.

The district court also improperly included in its volume of commerce calculation certain categories of Sea Star revenue that were not "attributable to the

conspiracy."

First, the district court included commerce attributable to freight that was not included within the conspiracy. *Andreas*, 216 F.3d at 677 (referencing exclusion of product lines not within agreement). Specifically, revenue from non-container freight should have been excluded, as it unquestionably was not part of the antitrust agreement. As part of its ocean transportation service, Sea Star utilized ships that were capable of carrying all sorts of non-containerized freight. 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. *See* D.E.160 at 106-07. All revenue received from shipping non-container freight should have been excluded from the volume of commerce.

Second, there were 2,634 customers that were never discussed as part of the antitrust conspiracy. D.E.207 at 14; D.E.233 (Sentencing Exhibit 1-A); D.E.235 at 53. These were customers and contracts for 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, and should have been excluded when calculating the volume of commerce.

Third, Sea Star revenue from bunker fuel surcharges should have been 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.*, D.E.180 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 on to its customer. *Id.* at 146. 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. Had there been no conspiracy, these bunker fuel surcharged would still have existed. Consequently, the surcharge should have been excluded from the volume of commerce.

Fourth, revenues from the Transportation Services Agreements ("TSAs") should have been excluded. At trial, each government cooperating witness testified that Sea Star and Horizon were customers of each other's companies through TSAs.

In effect, the companies bought space on each others' ships. Such contracts are routine among carriers in the ocean transportation business and are entirely lawful. There is no possibility of collusion because the two companies served as the customer and shipper with no third party involved. Consequently, the revenue from these permissible contracts should have been excluded from the calculation of Peake's guidelines.

The district court simply ignored its obligation to calculate the actual volume of commerce affected by the violation and attributable to Peake, instead accepting the Government's substantially inflated number without taking any evidence. This was error.

CONCLUSION

For the foregoing reasons, Peake's conviction and sentence should be vacated or remanded for a new trial or resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contains 13,974 words, exclusive of signature block and certificates of counsel.

/s/ David Oscar Markus
David Oscar Markus

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed this 6th day of August, 2014, and served on all appropriate parties through that system.

/s/ David Oscar Markus
David Oscar Markus

ADDENDUM

UNITED STATES V. FRANK PEAKE
NO. 14-1088

ADDENDUM

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

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

OPINION AND ORDER

I. Factual & Procedural History

The instant matter involves a conspiracy amongst three freight carriers, Sea Star Line ("Sea Star"), Horizon Lines ("Horizon"), and Crowley Liner ("Crowley"), to suppress and eliminate competition by agreeing to fix rates and surcharges for Puerto Rico freight services. As part of the ongoing conspiracy, various high level employees of the freight carriers would meet and conspire to raise rates for the upcoming year and would scheme on how to handle upcoming contract negotiations with potential clients. Defendant Frank Peake ("Defendant" or "Peake"), the former President and CEO of Sea Star, was alleged to have participated in this conspiracy by acting primarily as one of the masterminds. On January 29, 2013, following a three week trial, Peake was convicted of violating U.S. Antitrust laws under 15 U.S.C. § 1.

On March 4, 2013, Defendant filed a *Motion for New Trial* under Fed.R.Crim.P. 33 ("Rule 33") and a *Motion for Judgment of Acquittal* under Fed.R.Crim.P. 29 ("Rule 29") (Docket No. 193), alleging, *inter alias*, that the Court erred in ordering the jury to continue deliberations, in refusing to give a theory of defense instruction to the jury, in allowing the United States to appeal to jury bias and prejudice, and in admitting/excluding various hearsay statements. On April 4, 2013, the United States duly opposed said motion (Docket No. 195), arguing that the evidence introduced at trial overwhelmingly supported the jury's verdict, and that Defendant's motion was a rehash of issues that were repeatedly and unsuccessfully raised at trial. On August 26, 2013, Defendant filed a *Second Motion for a New Trial* (Docket No. 209) contending that the Government had failed to timely produce exculpatory *Brady* evidence. On September 6, 2013, the Government opposed said motion (Docket No. 211), averring that the unproduced recording was not favorable to Peake and that his conviction was supported by overwhelming evidence.

II. Rule 29 and 33 Standard of Review

a) Rule 29

"Rule 29 of the Federal Rules of Criminal Procedure provides that a court may acquit a defendant after the close of the prosecution's case if the evidence is insufficient to sustain a conviction." United States v. Alfonzo-Reyes, 592 F.3d

280, 289 (1st Cir. 2010). "[T]he tribunal must discern whether, after assaying all the evidence in the light most flattering to the government, and taking all reasonable inferences in its favor, a rational fact finder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." United States v. Hernández, 146 F.3d 30, 32 (1st Cir. 1998)(citing United States v. O'Brien, 14 F.3d 703, 706 (1st Cir. 1994)); *see* United States v. Marin, 523 F.3d 24, 27 (1st Cir. 2008).

In analyzing a Rule 29 motion, "[v]iewing the evidence in the light most flattering to the jury's guilty verdict, [the Court must] assess whether a reasonable factfinder could have concluded that the defendant was guilty beyond a reasonable doubt." United States v. Lipscomb, 539 F.3d 32, 40 (1st Cir. 2008). Thus, "the jurisprudence of Rule 29 requires that a deciding court defer credibility determinations to the jury." Hernández, 146 F.3d at 32 (citing O'Brien, 14 F.3d at 706); United States v. Walker, 665 F.3d 212, 224 (1st Cir. 2011) ("we take the facts and all reasonable inferences therefrom in the light most agreeable to the jury's verdict."). Additionally, the Court "must be satisfied that 'the guilty verdict finds support in a plausible rendition of the record.'" United States v. Pelletier, 666 F.3d 1, 12 (1st Cir. 2011)(quoting United States v. Hatch, 434 F.3d 1, 4 (1st Cir. 2006)). This standard is a

"formidable" one, especially as "[t]he government need not present evidence that precludes every reasonable hypothesis inconsistent with guilt in order to sustain a conviction." United States v. Loder, 23 F.3d 586, 589-90 (1st Cir. 1994)(internal quotation marks omitted). Moreover, there is no "special premium on direct evidence." O'Brien, 14 F.3d at 706. "[T]he prosecution may satisfy its burden of proof by direct evidence, circumstantial evidence or any combination of the two." Id. (citing United States v. Echevarri, 982 F.2d 675, 677 (1st Cir. 1993)). Expressed in alternate fashion, "no premium is placed on direct as opposed to circumstantial evidence; both types of proof can adequately ground a conviction." United States v. Ortiz, 966 F.2d 707, 711 (1st Cir. 1992). As to evidentiary conflicts, "the trial judge must resolve all evidentiary conflicts and credibility questions in the prosecution's favor; and moreover, as among competing inferences, two or more of which are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." United States v. Olbres, 61 F.3d 967, 970 (1st Cir. 1995); *see* Hernández, 146 F.3d at 32 (the trial court is required to "consider all the evidence, direct and circumstantial, and resolve all evidentiary conflicts in favor of the verdict.")(citing United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997)). On the other hand, "[t]he court must

reject only those evidentiary interpretations that are unreasonable, unsupportable, or only speculative and must uphold any verdict that is supported by a plausible rendition of the record." United States v. Ofray Campos, 534 F.3d 1, 31-32 (1st Cir. 2008). *See also* United States v. Cruz Laureano, 404 F.3d 470, 480 (1st Cir. 2005) (urging the trial court "not to believe that no verdict other than a guilty verdict could sensibly be reached, but must only satisfy itself that the guilty verdict finds support in a plausible rendition of the record.")(citing United States v. Gómez, 255 F.3d 31, 35 (1st Cir. 2001).

The First Circuit reiterated the above general standard in United States v. Meléndez Rivas, 566 F.3d 41 (1st Cir. 2009) (citing Lipscomb, 539 F.3d at 40), holding that the sufficiency standard for a Motion for Acquittal under Rule 29 required the district court to determine whether, viewing the evidence in the light most favorable to the government, a reasonable fact finder could have concluded that the defendant was guilty beyond a reasonable doubt. The Court, therefore, is not to discard compliance with the requirement of the standard of "guilty beyond a reasonable doubt." However, a defendant challenging his conviction for insufficiency of the evidence faces an "uphill battle." United States v. Hernández, 218 F.3d 58, 64 (1st Cir. 2000). Nevertheless, "despite the prosecution-friendly

overtones of the standard of review, appellate oversight of sufficiency challenges is not an empty ritual." United States v. De La Cruz Paulino, 61 F.3d 986, 999 n.11 (1st Cir. 1995).

b) Rule 33

Rule 33 of the Federal Rules of Criminal Procedure provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A new trial is not warranted if the court is "satisfied that competent, satisfactory and sufficient evidence in th[e] record supports the jury's finding that this defendant is guilty beyond a reasonable doubt[.]" United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992). "In making this assessment, the judge must examine the totality of the case. All the facts and circumstances must be taken into account," and there "must be a real concern that an innocent person may have been convicted" before the "interest of justice" requires a new trial. Id. The ultimate test in adjudicating a Rule 33 motion to vacate "is whether letting a guilty verdict stand would be a manifest injustice." United States v. Snype, 441 F.3d 119, 140 (2d Cir. 2006) (internal citation and quotation omitted)).

The Court may grant a new trial if the jury's "verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice." United States v. Chambers,

642 F.3d 588 (7th Cir. 2011); *see* U.S. v. Washington, 184 F.3d 653, 657 (7th Cir. 1999) ("The focus in a motion for a new trial is not on whether the testimony is so incredible that it should have been excluded. Rather, the court considers whether the verdict is against the manifest weight of the evidence, taking into account the credibility of the witnesses."). Restated, "[t]he court should grant a motion for a new trial only if the evidence 'preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.'" U.S. v. Swan, 486 F.3d 260, 266 (7th Cir. 2007) (quoting U.S. v. Reed, 875 F.2d 107, 113 (7th Cir. 1989)). "[C]ourts have interpreted [Rule 33] to require a new trial in the interests of justice in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." U.S. v. Kuzniar, 881 F.2d 466, 470 (7th Cir. 1989), overruled on other grounds, 546 U.S. 12, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005); *see* United States v. Munoz, 605 F.3d 359, 373 (6th Cir. 2010)("it is widely agreed that Rule 33's 'interest of justice' standard allows the grant of a new trial where substantial legal error has occurred.")(internal citations omitted).

In the final assessment, a "district court's disposition of a Rule 33 motion for a new trial in a criminal case is ordinarily a 'judgment call.'" United States v. Connolly, 504

F.3d 206, 211 (1st Cir. 2007) (quoting United States v. Maldonado-Rivera, 489 F.3d 60, 65 (1st Cir. 2007)). "[A]t least where the trial judge revisits the case to pass upon the new trial motion -- an appreciable measure of respect [from the Circuit Court] is due to the 'presider's sense of the ebb and flow of the recently concluded trial.'" Id. (quoting United States v. Natanel, 938 F.2d 302, 313 (1st Cir. 1991)); *see* United States v. Falu-Gonzalez, 205 F.3d 436, 443 (1st Cir. 2000) ("We give considerable deference to the district court's broad power to weigh the evidence and assess the credibility of both the witnesses who testified at trial and those whose testimony constitutes "new" evidence.")(internal quotation omitted). In considering the weight of the evidence for purposes of adjudicating a motion for new trial, a district judge "may act as a thirteenth juror, assessing the credibility of witnesses and the weight of the evidence." United States v. Hughes, 505 F.3d 578, 593 (6th Cir. 2007) (citation omitted). Yet, in reviewing such a request for a new trial, the Court remains ever mindful that "[t]he remedy of a new trial must be used sparingly, and only where a miscarriage of justice would otherwise result." United States v. Conley, 249 F.3d 38, 45 (1st Cir. 2001); *see* U.S. v. Santos, 20 F.3d 280, 285 (7th Cir. 1994)("A jury verdict in a criminal case is not to be overturned

lightly, and therefore a Rule 33 motion is not to be granted lightly.").

III. Analysis

a) Ordering the Jury To Continue Deliberations

The jury was charged late in the afternoon on Friday, January 25, 2013. On Monday, January 28th, the jury returned for its second day of deliberations. After conferring for a total of less than six hours, the jury sent a note to the judge at 2:45 PM that read: "Members of the jury have issued their respective verdicts. After discussions and revisions to the evidence we are not able to reach a unanimous verdict." (Docket No. 190, page 4).

At 3:04 PM, the undersigned sent the following note to the jury: "Please do not inform the judge how you stand numerically or otherwise. Please continue your deliberations." Id.

At 7:15 PM that same evening, the jury sent a note saying: "After strong debates and discussions, members of the jury have expressed a final individual verdict. We are still unable to reach a unanimous verdict." (Docket No. 190, page 7).

On the basis of this note, Peake moved for a mistrial outside of the presence of the jury. The Court orally denied this motion stating that it was too soon to declare a mistrial as the jury had deliberated for slightly longer than one day. The Court considered giving an *Allen* charge, *see* Allen v. United

States, 164 U.S. 492, 501, 41 L. Ed. 528, 17 S. Ct. 154 (1896), but explicitly told counsel that it was too early to give such an instruction. After further consultation with the parties, the Court sent the following note to the jury at 7:25 PM: "The Court orders the jury to return tomorrow at 10:30 AM to continue deliberations. Please drive home carefully and safely." Id.

The following day, the Court informed the parties that it was considering giving an *Allen* charge to the jury in the afternoon if they had not heard from the jury. Defendant renewed his motion for a mistrial and objected to the Court giving any form of an *Allen* charge; the United States expressed concern about giving the *Allen* charge prior to the jury stating that they had reached an impasse.

At 2:25 PM, the jury indicated that they had reached a unanimous guilty verdict.[1]

[1] The jury's first day of deliberations began at 4:30 PM and ended at 5:10 PM (*See* Jury Note # 1). The jury then returned on Monday, January 28, 2013 at 9:20 AM for their second day of deliberations (*See* Jury Note # 2). At 2:45 PM on that second day, barely 5½ hours after starting their deliberations, the jury informed the Court that they had taken an initial vote and had failed to reach a unanimous verdict (*See* Jury Note # 4). Upon receiving said note, the Judge ordered the jury to continue deliberating. At 7:15 PM that same day, the jury once again advised the Court that they had taken a final individual verdict and were still unable to reach a unanimous decision. At 7:25 PM, the jury was discharged to continue deliberations the following morning. The jury then returned on Tuesday, January 29, 2013 at 11:35 AM for their third day of deliberations. At 2:25 PM, less than three hours later, the jury reached a final verdict. Hence, the jury deliberated less than one hour the first day, approximately ten hours the second day, and less than three hours the third and final day, for a grand total of around 13 and a half hours, in a trial that had nine full days of evidentiary hearings, including opening and closing statements.

In the pending Rule 29 and Rule 33 motion (Docket No. 193), Peake argues that the Court erred in instructing the jury to continue deliberating as the jury had informed the Court that they had reached their "final" verdict and as the Court did not inform the jury that the jury retains the right to fail to agree. Peake relies upon United States v. Angiulo, wherein the First Circuit stated:

> To mitigate these serious possibilities of prejudice [of ordering deadlocked jurors to continue deliberating], in United States v. Flannery, [51 F.2d 880, 883 (1971)], we strongly advised trial courts to balance a supplementary charge so that (1) the onus of reexamination would not be on the minority alone, saying, whenever a court instructs jurors to reexamine their positions, it should expressly address its remarks to the majority as well as the minority; (2) a jury would not feel compelled to reach agreement, saying, we expressly disapprove the [] statement that the case must at some time be decided; [a] jury, any number of juries, have a right to fail to agree and (3) jurors would be reminded of the burden of proof . . . . We think, however, that whenever a jury first informs the court that it is deadlocked, any supplemental instruction which urges the jury to return to its deliberations must include the three balancing elements stated above.

485 F.2d at 39-40 (internal quotations and citations omitted).

This cited caselaw is applicable to remedy the coercive effects of an *Allen* charge, but is inapplicable in the present case as no *Allen* charge was provided.[2] "The defining

[2] In a typical *Allen* charge, the jurors are told, *inter alia*, that absolute certainty cannot be expected in the vast majority of cases, that they have a duty to reach a unanimous verdict if they can conscientiously do so, and that

characteristic of an *Allen* charge is that it asks jurors to reexamine their own views and the views of others." United States v. Haynes, 2013 U.S. App. LEXIS 18453, at 30 (2d Cir. 2013)(quotation and citation omitted). Here, the Court did not request that the jurors examine neither their own positions nor those of their fellow jurors; in fact, the Court declined to provide an *Allen* charge because the Court did not understand the jury to be deadlocked after only deliberating for slightly longer than one day. The Court merely instructed the jury to continuing deliberating in a neutral manner. Such an instruction to continue deliberations cannot properly be considered an *Allen* charge. *See* Figueroa-Encarnacion, 343 F.3d at 32 (the Court's "instruction to continue deliberating did not contain the coercive elements of a garden-variety *Allen* charge, but was merely intended to prod the jury into continuing the effort to reach some unanimous resolution."); *see* United States v. Prosperi, 201 F.3d 1335, 1341 (11th Cir. 2000)("The instruction given here . . . cannot be properly considered an *Allen* charge. The judge's simple request that the jury continue deliberating, especially when unaware of the composition of the jury's nascent verdict, was routine and neutral. Nothing in the brief instruction suggested that a particular outcome was either

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dissenting jury members should accord some weight to the fact that a majority of jurors hold an opposing viewpoint." United States v. Figueroa-Encarnacion, 343 F.3d 23, 33 n.9 (1st Cir. 2003)(citing Allen v. United States, 164 U.S. at 501).

desired or required and it was not 'inherently coercive.'"); *see also* United States v. Akel, 337 Fed. Appx. 843, 861 (11th Cir. 2009)("Because the court's ["simple request to continue deliberating"] did not indicate that an ultimate outcome was desired or required, it was not unduly coercive and does not constitute reversible error.").

Hence, when no *Allen* charge is given, no curative language is required. In a case of nearly identical circumstance,[3] the First Circuit cogently and compelling stated:

> The salient principle is that such 'counteractive' language is only deemed necessary where a 'dynamite charge' is delivered to a deadlocked jury. Under these circumstances, mitigating instructions alleviate the prejudice to the defendant arising from the court's insistence that a presumably hung jury endeavor to reach consensus on either acquittal or conviction. Where, as here, the judge reasonably concludes that

[3] In Figueroa-Encarnacion, following a twelve day trial where the jury had deliberated for almost four hours, the jury sent the following note: "We wish to advise you that up to this moment we have not been able to reach an agreement. We understand that even if we stay deliberating for more time we will not be able to reach a verdict."

The judge, who felt it was "too early to give them an *Allen* charge," replied with the following note:

> The court received a note from you that basically says that you have not been able to reach an agreement. And you also state that even if you deliberate more time you're not going to reach an agreement.
>
> Well, after a 12 day trial some days we worked eight hours, some days we only worked four hours. But it's still 12 days of receiving evidence. I think it is too premature for the judge after 12 days of receiving evidence to accept that there is a deadlock. These matters do occur, and they occur sometimes more times than we would like, but they occur.
> So, what the Court is going to do is to send you home, relax, not think about the case and come back tomorrow at 9:30 AM and at which time I will provide you an instruction. Please do not begin any deliberation until you come back here tomorrow morning.

> the jury is not deadlocked in the first instance, the defendant is not prejudiced by a simple instruction to continue deliberating. The district court's instruction in this case did not imply a duty to achieve unanimity, nor was it addressed to jurors holding a minority viewpoint. It stands to reason that if a district court's instruction lacks the coercive elements of an *Allen* charge, it need not include the *Allen* cure. Here, the requisite coercion is simply absent and, thus, reversal on this ground is unwarranted.

Figueroa-Encarnacion, 343 F.3d at 32 (internal quotations and citations omitted). We find this reasoning to be not only compelling, but also entirely dispositive of Peake's argument that the Court was required to supply additional mitigating language to the jury emphasizing the jury's right to fail to reach consensus. *See* United States v. Clayton, 172 F.3d 347, 352 (5th Cir. 1999). Further, the Court finds nothing coercive about merely requesting that the jury continue deliberating, especially in light of the length of the trial and the relative short duration of the jury's deliberations.[4] The jury trial in the instant case lasted ten days, one day for jury selection and

[4] Peake cites a newspaper article of a post-trial interview with a juror wherein the juror states that they jury was unsure how long the Court would keep the jury deliberating if they were deadlocked. The Court notes that Federal Rule of Evidence 606(b), which bars juror testimony "as to any matter or statement occurring during the course of the jury's deliberations," prohibits the Court from delving into the interworking's of a jury outside of the context of purported juror misconduct.

Moreover, the Supreme Court has also discouraged courts from speculating into what transpired during deliberations. *See* Yeager v. United States, 557 U.S. 110, 122 (2009)("Courts properly avoid such explorations into the jury's sovereign space and for good reason. The jury's deliberations are secret and not subject to outside examination.")(internal citations omitted). Further, as the United States rightly points out, the news article is hearsay, which indeed contains hearsay within the hearsay news article, and is thus entirely improper for the Court to consider.

nine days of evidentiary hearings (including openings and closings).

Finding nothing improper with, or improperly omitted from, the Court's instructions to the jury, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

b) Refusal to Provide Theory of Defense Instruction

Peake additionally claims that the Court erred in not providing the jury with his theory of the defense instruction. Peake's proposed instruction was:

> Mr. Peake does not contest that there was a conspiracy that existed between Gabriel Serra, Kevin Gill, Gregory Glova, and Peter Baci. Rather, he contends that he did not knowingly and intentionally participate in this conspiracy and did not knowingly and intentionally join the conspiracy as a member. Mr. Peake further contends that any discussions he had with Gabriel Serra were legitimate and competitive discussions and not anti-competitive conspiracy related. Mr. Peake also contends that he was competing with Horizon, including on market share and price.
>
> Although this is Mr. Peake's defense, the burden always remains on the government to prove the elements of the offense beyond a reasonable doubt. If you do not believe the government has proven beyond a reasonable doubt that Mr. Peake intentionally and knowingly joined the conspiracy, you must find him not guilty.

Peake avers that the instruction should have been provided as substantial documentary evidence and testimony from the government's own witnesses support the instruction. Peake cites documentary evidence detailing the specifics of the conspiracy in which Peake's involvement is absent as well as testimony of

him having legitimate business related conversations with co-conspirators. Peake also makes reference to his successful efforts to place a third Sea Star vessel in the route between Florida and Puerto Rico thereby increasing the shipping capacity available, which benefitted Sea Star at the expense of its competitors. Peake additionally claims that the government's argument that providing the instruction would constitute hearsay testimony of Peake is erroneous and that by denying his instruction, the Court impermissibly penalized him for invoking his Fifth Amendment right not to testify.

"A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is legally sound and supported by evidence in the record. When a district court decides whether to give a requested instruction, it must take the evidence in the light most favorable to the defendant, without making credibility determinations or weighing conflicting evidence." United States v. Baird, 712 F.3d 623, 627 (1st Cir. 2013)(internal citation omitted); *see* U.S. v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998)("[T]he district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining

whether the proof, taken in the light most favorable to the defense can plausibly support the theory of the defense.").

Peake's proposed instruction is merely his theory of the case: there was a conspiracy, but Peake was not a part of said conspiracy. Peake was free to argue, and indeed did argue, this version to the jury. However, "defendants cannot couch their requested instructions as 'defense theories' and expect to get them read verbatim to the jury." United States v. Newton, 891 F.2d 944, 950 (1st Cir. 1989). Peake's defense theory that he was not involved in the conspiracy is a legitimate defense, but inappropriate as a jury instruction. Albeit, the Court granted an instruction clearly requiring the jury to find that Peake "knowingly joined the conspiracy." (*See* Docket 186, Jury Instruction No. 17).

Furthermore, Peake's proposed instruction states that "*any* discussions" he had with co-conspirator Gabriel Serra were legitimate and competitive discussions. This statement is not supported by the evidence on the record. Gabriel Serra testified that while he did have some legitimate conversations with his competitor, Frank Peake, he also had numerous "inappropriate communications" and customer specific discussions of internal information on agreements of prices to be charged" with Peake. Serra also testified that approximately ten percent of his communications with Peake were inappropriate. Tr. Vol. 7 at

58:8-20; Tr. Vol. 8 at 111:6-13. In fact, throughout the trial, co-conspirators Greg Glova, Peter Baci, and Gabriel Serra repeatedly identified Peake as a member of the conspiracy and testified at length about his role within the conspiracy. Accordingly, the Court cannot conclude that the requested instruction was supported by the evidence and thus was a proper instruction. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

c) Appeal to Jury Bias & Prejudice

Similar to prior arguments made during trial, Peake posits that the United States improperly appealed to the jury's bias and prejudice and therefore a mistrial is warranted. Armed with the transcript, Peake heavily cites record to argue that the Government made, and elicited statements from witnesses, to the effect that the freight companies' customers, everyday household names like Burger King and Office Max, along with the U.S. federal government itself, paid higher shipping prices as a result of the conspiracy. Peake avers that the Government's efforts constituted "over-the-top and inappropriate appeals to sympathy and bias." (Docket No. 193, page 19).

The Court previously addressed most of Peake's argument on this front in an *Amended Opinion and Order* dated January 25, 2013 (Docket No. 178); the Court therefore adopts and incorporates by reference that *Amended Opinion and Order* into

the instant *Opinion and Order*. Here, we briefly sketch the primary thrust of the Court's *Amended Opinion and Order* and, like Peake, add little to no new analysis.

As stated previously, Peake is unable to satisfy the three prong test for prejudice illuminated in United States v. Azubike, 504 F.3d 30, 39 (1st Cir. 2007). As an initial matter, the Court notes that the Government was very clear that the victims of the conspiracy were those who directly contracted with the maritime shipping companies-the Burger Kings and Office Maxes of Puerto Rico. It was these entities who paid higher anti-competitive rates. The Government did not infer that those higher prices were passed onto the victims' customers, the general populace of Puerto Rico, in a secondary manner. Simply, the United States did not argue that hamburgers and paperclips cost more as a result of the conspiracy. Similarly, while the United States did present evidence that the U.S. Department of Agriculture paid higher food prices for the school lunch program as a result of the conspiracy, the Government did not argue that school children paid higher milk prices or went without milk as a result of the conspiracy.

Notwithstanding, to the extent that a juror may have made an inference that the conspiracy resulted in secondary consumers, the general Puerto Rican population, the Court provided, not one, but two curative instructions. First, on the

third full day of trial, the Court instructed the jury as follows:

> Before we receive the remaining evidence I think it is critical that the Court provide you with an instruction. The fact that Puerto Rico may have potentially been affected or consumers and/or prices and/or business is not to be considered by [you] in your judgment as to the [guilt or not] guilt of the defendant. The effect on prices on consumers in Puerto Rico is not *per se* an element of the offense. You are not to decide this case based on pity and sympathy to Puerto Rican businesses, to Puerto Rico, or to Puerto Rican consumers. The effect on Puerto Rico only is material as to potentially establishing an effect on interstate commerce. This case is about a potential conspiracy in violation of the antitrust law, and whether or not, the defendant, Mr. Frank Peake, joined the conspiracy. Sympathy to Puerto Rico is, therefore, to play absolutely no role in your consideration of this case. Any statement that may have implied or that you have understood that this is a case relating to the effect on Puerto Rico is an erroneous interpretation. And I don't want you to have that interpretation. So, therefore, any effect on Puerto Rico is not to be considered at all.

Tr. Trans. (Jan. 16, 2013) at 101-02. The Court deems its instruction to have satisfactorily assuaged any concerns of improper prejudice. *See* United States v. Sepulveda, 15 F.3d 1161, 1185 (1st Cir. 1993) ("Swiftness in judicial response is an important element in alleviating prejudice once the jury has been exposed to improper testimony," and "appellate courts inquiring into the effectiveness of a trial judge's curative instructions should start with a presumption that jurors will follow a direct instruction to disregard matters improvidently brought before them."). Additionally, the Court also gave a

second, similar cautionary instruction to the jury prior to beginning deliberations. Jury Instruction No. 21 (Docket No. 186, Pg. 37). The Court is confident that these two jury instructions adequately provided the necessary panacea to remedy any purported prejudice.

For the aforementioned reasons, the Court concludes that the Government did not engage in any misconduct and that the evidence presented at trial did not expose the jury to any cognizable prejudice which could not be eradicated by a curative jury instruction. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

d) Admissibility of Recorded Calls and Written Interview Summary

Defendant further argues that the Court erred by: (1) admitting audio recordings of two telephone conversations between Glova and Serra; (2) excluding recorded comments between Glova and an unidentified FBI agent after the telephone calls ended; and (3) precluding the defense from introducing Glova's written statement. We take each in turn.

i) Admissibility of Recorded Calls Between Glova and Serra

At trial, the Court admitted the audio recordings of two telephone conversations between two co-conspirators, Greg Glova and Gabriel Serra, after determining that said audio recordings were non-hearsay under Fed.R.Evid. 801(d)(2)(E). In the recordings, Glova and Serra are heard arguing about charging

lower prices to clients in an attempt to decrease competition and increase profitability. At one point during the conversation, the parties briefly reference Frank Peake by name.

Defendant avers that Serra and Glova's statements in the recordings are inadmissible hearsay. The Court previously addressed most of Peake's arguments on this front in an *Opinion and Order* dated January 23, 2013 (Docket No. 174); the Court therefore adopts and incorporates by reference that *Opinion and Order* into the instant *Opinion and Order*. Here, we briefly sketch the primary thrust of the Court's *Opinion and Order* and, like Peake, add little to no new analysis.

Under Fed.R.Evid. 801(d)(2)(E), a statement offered against an opposing party is admissible if said statement was "made by the party's coconspirator during and in furtherance of the conspiracy." Therefore, a statement falls under the preamble of Rule 801(d)(2)(E) if it is "more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy." United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). It is irrelevant to whom the declarant directed said statement so long as the two elements outlined in *Petrozziello* are met. *See* U.S. v. McCarthy, 961 F.2d 972, 976-77 (1st Cir. 1992)(admitting numerous tape recorded conversations between an undercover officer and a co-

conspirator); *See also* U.S. v. Cianci, 378 F.3d 71, 101 (1st Cir. 2004)(same). Hence, a statement made by a co-conspirator directed at an undercover law enforcement agent may nonetheless be admissible under FRE 801(d)(2)(E) if said statement is made in furtherance of the conspiracy and if Defendant is still a member of the conspiracy at the time of the statement.

"A district court faced with a challenge to the admission of a co-conspirator's statement must . . . consider whether, in light of all the evidence, the following four conditions are satisfied by a preponderance of the evidence: (1) a conspiracy existed; (2) the defendant was a member of the conspiracy; (3) the declarant was also a member of the conspiracy; and (4) the declarant's statement was made in furtherance of the conspiracy." United States v. Díaz, 670 F.3d 332, 348 (1st Cir. 2012). We briefly reiterate the most important facts regarding the admissibility of the recorded calls, given that this issue was also previously addressed in a prior *Opinion and Order* during trial.

As to the first element, the Court finds that there was ample evidence presented at trial that a conspiracy existed. Testimony was heard from several co-conspirators, including Serra, Glova, and Baci, all of which testified about the collusion and coordination of price fixing between the primary large-scale waterborne shippers of goods to and from Puerto

Rico. Additionally, multiple emails sent between Peake, Baci, Serra, and Glova were presented at trial, showing that there was significant contact, communication, and coordination amongst members of the large-scale waterborne shippers to fix prices and discourage competition. Hence, the Court finds, by a preponderance of the evidence, that a conspiracy existed.

As to the second element, the Court finds that Peake was a member of the conspiracy at the time of the telephone calls. First, the Court heard testimony that Peake was a key member of the conspiracy, leading Sea Star's efforts to coordinate with competitors in setting shipping rates. The Government presented damaging emails of conversations between Peake and other co-conspirators. The bulk of those emails show conversations pertaining to the shipping rates being offered to current and potential clients, how to achieve an equal market share of the shipping routes to Puerto Rico, and how best to maximize profitability while decreasing competition. Consequently, the Court determines that Peake was still a co-conspirator at the time the two telephone calls took place, given that he was unaware that the FBI was about to search Sea Star's offices and that Glova had already been apprehended by the FBI. Lastly, there is no evidence that Peake had properly withdrawn from the conspiracy, which typically "requires either a full confession to authorities or a communication by the accused to his co-

conspirators that he has abandoned the enterprise and its goals." United States v. Piper, 298 F.3d 47, 53 (1st Cir. 2002).

The third factor in the analysis, Serra's membership in the conspiracy, is uncontested, as Serra himself testified that he was a member of the conspiracy and was involved in the price fixing scheme. The Court further finds that Serra, like Peake, was unaware of the FBI's search of Sea Star's offices for the simple fact that the search had not yet occurred at the time the calls took place. When Serra returned Glova's call at 9:16 AM on April 17, 2008, he did not have had any reason to believe that the conspiracy had ended, most likely believing that it was business as usual between him and Glova.

With regards to the fourth and final element, the Court finds that the calls were clearly designed to advance the primary objective of the conspiracy: price-fixing amongst competitors. *See, e.g.*, United States v. Rodriguez, 525 F.3d 85, 101 (1st Cir. 2008) (holding that "[a] statement is in furtherance of the conspiracy if it tends to advance the objects of the conspiracy as opposed to thwarting its purpose") (citations and internal quotation marks omitted); United States v. Fahey, 769 F.2d 829, 839 (1st Cir. 1985) (holding that a statement "fabricated to convince the [FBI] agent that the project should be allowed to continue . . . [is] made to further

the object of the conspiracy"). During the calls, Glova is clearly seeking Serra's assistance in not having to offer lower prices to a prospective client, and asks him to enlist Peake's help in the matter. Serra specifically responds that he has already discussed the matter with Peake.

Accordingly, as the evidence presented at trial showed that both Serra and the Defendant were active participants in the same conspiracy at the time of the recordings and that the statements made by Serra in the recordings were made in furtherance of said conspiracy, the Court holds that Serra's statements were admissible under FRE 801(d)(2)(E).

Defendant further avers that Glova's statements on the recordings are inadmissible hearsay, emphasizing that Glova was no longer a co-conspirator, but rather an informant, when the conversations were recorded. As such, Defendant contends that Glova's statements, as an informant, do not fall within the realm of 801(d)(2)(E). While the Court agrees that said statements are not co-conspirator admissions, they are admissible nonetheless, as the statements are not being offered for their truth but rather to provide the appropriate context for Serra's statements. *See* U.S. v. Santiago, 566 F.3d 65, 69 (1st Cir. 2009)(admitting informants' statements for the limited purpose of providing the proper context for the conversations between the informants and the defendant); United States v.

Walter, 434 F.3d 30, 34 (1st Cir. 2006) (concluding that informer's out-of-court statements during taped "sting" were admissible as context for defendant's taped responsive admissions); United States v. Cruz-Diaz, 550 F.3d 169, 178 (1st Cir. 2008) ("Out-of-court statements offered not to prove the truth of the matter asserted but merely to show context--such as a statement offered for the limited purpose of showing what effect the statement had on the listener--are not hearsay.")(citing United States v. Bailey, 270 F.3d 83, 87 (1st Cir. 2001)). Hence, the Court refuses to part from well-established First Circuit precedent regarding the admissibility of statements made by informants for the purpose of providing context to otherwise admissible statements.

For the aforementioned reasons, the Court concludes that the recorded telephone conversations between Glova and Serra were admissible. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

ii) Admissibility of Recorded Statements Between Glova and FBI Agent After Calls Ended

During Serra's cross-examination, Defendant sought to introduce two brief statements made by Glova and the FBI agent immediately after Glova left a message for Serra on April 17, 2008. After the call, an FBI agent is heard asking Glova: "Were you referring to Frank Peake?" In response, Glova stated: "Yes,

is he on your list?" Defendant's objective in seeking to introduce the statements through Serra was to impeach Glova by showing that Glova had originally neglected to mentioned Frank Peake's name to the FBI during his initial interview.[5] Defendant averred that FRE 806 allowed him to impeach Glova's testimony through Serra. The Government objected to the admissibility of said statements during Serra's cross-examination, alleging that the statements were inadmissible hearsay and that Serra lacked the requisite personal knowledge to authenticate and identify the voices on the recordings.

Rule 806 states, in part, that "when a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked … by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Therefore, the recording would be admissible to impeach Glova's hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E), if the prior statement was in fact inconsistent with what transpired between Glova and the FBI agent.

[5] At trial, Glova testified that he mentioned Frank Peake's name to the FBI during his interview, thereby implicating Peake in the conspiracy from the outset. However, Defendant posits that Glova is being untruthful, contending that it was not until Glova was offered leniency that he decided to implicate Peake in the conspiracy.

Defendant's contention, that the recording should be admitted into evidence for impeachment purposes, is unavailing for two reasons: (1) Defendant failed to show that the statements in the recording contradicted Glova's prior testimony, thereby making said statements hearsay not falling within any of the exceptions prescribed in FRE 803; and (2) the recording could not be authenticated through Serra, as he lacked personal knowledge of the events in question.

First, Defendant's argument that Glova's brief question to the FBI agent is contradictory to his trial testimony is unpersuasive. Glova merely asks the FBI agent whether Frank Peake was on their list, referring to a list being compiled by the FBI of all the individuals involved in the conspiracy. No reasonable jury could infer that Glova's testimony at trial had been inconsistent with what actual transpired during his interview simply from listening to Glova's question to the FBI.

Furthermore, Rule 806 only applies to situations where a party seeks to impeach a declarant's credibility through another witness when a declarant's statement has been admitted under FRE 801(d)(2)(C), (D), or (E) or FRE 803. The situation presented at trial was not one contemplated under FRE 806, as Defendant was merely seeking to impeach Glova's trial testimony that he mentioned Peake's name during the FBI interview. Glova's testimony that he mentioned Peake's name during the FBI

interview is neither a hearsay statement nor a statement described in Rule 801(d)(2)(C), (D), or (E), as said declaration is not an out of court statement being offered for its truth, but rather a first-hand account of what transpired during the FBI interview.

Second, even if the Court determined that the statements in the recordings were contradictory to Glova's testimony at trial, it would have been impossible for Defendant to authenticate the recording through Serra, as Serra lacked the requisite first-hand knowledge to identify the FBI agent heard speaking in the recording. Notwithstanding, the Court advised Defendant that it had the option of recalling Glova to the stand in order to question him about the statements made in the recording, an option which Defendant failed to exercise. Tr. Vol. 8 at 10:11-19.

Accordingly, the Court concludes that the recorded comments between Glova and the unidentified FBI agent were inadmissible. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

iii) Admissibility of Glova's Written Statement

At trial, the defense sought to introduce Glova's written statement to the FBI in an attempt to impeach him. The United States objected to its admissibility, arguing that the statement was hearsay under FRE 801. The Court agreed with the Government

that Glova's written statement was hearsay, but nonetheless accorded defense counsel wide discretion by allow him to cross examine Glova "line-by-line" with his written statement. Tr. Vol. 3 at 144:7-11. Although the Court has broad discretion in determining whether to admit a witness's prior inconsistent statement, and thus whether the witness may be impeached by the prior statement, the Court in the case at bar in unconvinced that Glova's testimony at trial was inconsistent with his written statement to the FBI. Udemba v. Nicoli, 237 F.3d 8, 18 (1st Cir. 2001)(internal citations omitted). In any event, by allowing Defendant to cross-examine Glova with his prior written statement, the Court cured any potential harm that Peake might have suffered from any alleged inconsistency in Glova's written statement.

Accordingly, the Court concludes that Glova's written statement to the FBI is inadmissible hearsay. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

e) Admissibility of Defendant's Compensation and Sea Star's Profits and Losses

Defendant further avers that the Court erred in admitting evidence regarding Peake's compensation and Sea Star's profitability. At trial, over Defendant's objection, the Government presented evidence of Peake's salary and compensation in an effort to show his financial motive for engaging in the

price-fixing scheme. The Court finds that evidence of Defendant's salary and bonuses, particularly evidence showing an increase in compensation as a result of Sea Star's profitability, is relevant under Federal Rule of Evidence 401 and that said evidence's probative value is substantially outweighed by the dangers of unfair prejudice to the Defendant under FRE 403. Evidence of Peake's compensation is highly probative to show not only that he had a financial interest in the success of the corporation, but also to establish a motive for why Defendant allegedly participated in the conspiracy. To minimize any bias that said evidence might bestow on Defendant, the Government did not introduce evidence of Defendant's overall net worth, assets, or lifestyle.

Peake further contends that evidence pertaining to Sea Star's profitability was erroneously admitted at trial, arguing that the Government failed to link Sea Star's profits to the conspiracy. The evidence presented at trial showed that Sea Star's profitability drastically increased after the alleged start of the conspiracy, making said evidence probative under Rules 401 and 403. Baci's testimony regarding Sea Star's finances both before and during the conspiracy provided a factual basis for the admissibility of said documents. Additionally, the financial records demonstrate that Sea Star was running a deficit before the conspiracy and subsequently

turned a profit once the conspiracy commended. Hence, the evidence may have a tendency, under FRE 401, to make the existence of the conspiracy more or less probable.

Accordingly, the Court concludes that evidence pertaining to Peake's compensation and to Sea Star's profitability is substantially more relevant than prejudicial under FRE 403. Therefore, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

f) Brady Violation Regarding Non-Disclosure of Confidential Informant Recording # 5

Defendant, in its second motion for a new trial (Docket No. 209), alleges that the Government violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), when it failed to timely produce an audio recording which it possessed for more than five years. The recording in question was made on April 8, 2008, nine days before the FBI raided Sea Star's offices, and details a long conversation between Baci, Fox, LaGoy, and William Stallings, the confidential informant ("CI"). Baci, the head of Sea Star's pricing department, was in charge of setting the prices that Fox, LaGoy, and the CI could offer to their customers during pricing negotiations. Peake did not partake in the recorded conversation and was only briefly mentioned twice. The first reference pertains to a former business contact that Peake had at Home Depot. CI Red. 5 Tr. at 66. The second merely

hints that Peake had a business lunch planned that same day with Fox.

To succeed on a post-trial *Brady* violation claim, Peake must show that: (1) the evidence at issue was favorable to him; (2) that the evidence was either willfully or inadvertently suppressed by the government; and (3) that he was prejudiced by the non-disclosure. U.S. v. Mathur, 624 F.3d 498, 503 (1st Cir. 2010); U.S. v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007); *see* Brady v. Maryland, 373 U.S. 83 (1963). To establish that he was prejudiced by the nondisclosure, Peake must show that there is a reasonable probability that the outcome of the trial would have been different had CI Recording 5 been timely produced. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995). Furthermore, if the undisclosed evidence served to impeach one of the Government's witnesses, a new trial may be warranted if said evidence suffices "[t]o undermine confidence in the outcome of the trial." *See* Connolly, 504 F.3d at 213; U.S. v. Bagley, 473 U.S. 667, 682 (1985)(applying *Brady* test to impeachment evidence).

The first prong of the *Brady* analysis requires Peake to show that the undisclosed evidence was favorable to him, a burden which he has failed to meet. The defense posits a myriad of reasons as to why the audio recording is favorable to Peake. First, they aver that the fact that Peake was not present in the meeting, that he was not invited, and that he was not mentioned

as being part of the conspiracy are all exculpatory. Second, Peake argues that his name was only referenced twice in the meeting, and that in both instances, Stallings, the CI, had the opportunity to inquire about his role in the conspiracy and failed to do so. Peake reasons that Stallings would have pushed on this point had he believed that Peake was part of the ongoing conspiracy. Third, Defendant contends that the recording clearly establishes that Baci, and not Peake, is the brains behind the operation, as Carl Fox is heard claiming on the recording that "[t]he hunt is according to what Peter [Baci] says we can hunt." CI Red. 5 Tr. at 95. Lastly, Defendant argues that it would have been able to impeach both Glova and Baci at trial with the recording, claiming that their respective testimonies with regards to numerous potential clients are inconsistent with the evidence heard in CI Recording 5.

The Government counters that the audio recording was merely a continuation of the discussion on CI Recording 2, which was provided to Peake during discovery, and that the neutral discussion focuses on various customer accounts. The Government argues that the main reason why Peake's name was barely mentioned in the meeting was because only one of the four individuals present, Peter Baci, was a participant in the conspiracy. Hence, it would have been surprising for Baci to make explicit incriminating statements about the conspiracy or

anyone involved therein to three non-conspirators. Lastly, the Government argues that the evidence contained in the recording is not *Brady* evidence, given that the meeting was not a conspiratorial discussion of the conspiracy's members and **no one stated that Peake was not a member of the conspiracy.**

The Court, in holding that CI Recording 5 is in no way favorable to Peake, agrees with the United States that the recording is cumulative evidence of the other CI recordings that were originally produced to Peake. CI Recording 5 contains references to certain accounts, such as Office Max, Aqua Golf, Caribbean Shipping, and Walgreens, which Peake avers could have been used for impeachment purposes. However, CI Recording 2 contains similar discussions about the aforementioned accounts, including an in depth discussion on Walgreens and references to Aqua Gold and Caribbean Shipping. CI Rec. 2 Tr. at 18-22 and 60:20-63:7. Had Peake wanted to cross-examine Baci about the Walgreens, Aqua Golf, and Caribbean Shipping accounts, he could have done so using CI Recording 2.

In deciding that the recording in question is not favorable to Peake, the Court strongly emphasizes that only one of the four members taking part in the sales team meeting was part of the price-fixing conspiracy. This would explain why Peake did not partake in the meeting, why there were no conversations implicating Peake in the conspiracy, and why Baci neglected to

describe the conspiracy or its participants. **The Court finds no conversations in CI Recording 5 that are potentially exculpatory or, at the very least, somewhat favorable to Peake.** Although Peake's name is mentioned twice in the recording, said references bear no relevance as to his inclusion or exclusion from the conspiracy. Furthermore, Baci testified that he was tasked with managing the day-to-day pricing for Sea Star's customers, thereby explaining Peake's absence from the meeting.

With regards to the second prong, it is undisputed that the Government inadvertently suppressed the audio recording. According to the U.S. Department of Justice, the FBI did not disclose to them that there was an additional recording in connection to the Puerto Rico water freight investigation until August 5, 2013, more than five months after the conclusion of Peake's trial.

The third prong of the analysis requires Peake to show that there is a reasonable probability that the outcome of the trial would have been different had CI Recording 5 been timely produced. *See* Kyles, 514 U.S. at 434. The Court holds that the jury verdict was supported by overwhelming evidence, including written emails signed by or addressed to Defendant Peake. Further, there is no reasonable probability that the outcome of the case would have been different had CI Recording 5 been timely produced.

At trial, the jury heard testimony from Greg Glova, Horizons' Pricing Director for Puerto Rico Freight Services, who testified that he actively participated in the conspiracy from 2005-2008. When he was promoted to director, Kevin Gill, the previous director, explained to him that Sea Star, Horizon, and Crowley had been discussing the shipping rates between them since 2002 and that the main participants in those communications were Peter Baci and Frank Peake from Sea Star and Tom Farmer from Crowley. The co-conspirators would communicate via email, using Gmail accounts with coded names, and/or by telephone. Whenever there was a dispute as to pricing, Baci and Glova's respective bosses, Peake and Gabriel Serra, would converse and make a final determination. Glova further indicated that the four of them met twice in Orlando, Florida, once in October 2006 and once in August 2007, to strategize. According to Glova, the co-conspirators would discuss the prices and rates of shipping, fuel surcharges, and port surcharges, and would conspire to let each other win certain accounts in order to make up for market share imbalance. There was also an agreement between Horizon and Sea Star whereby neither company would undercut each other for house accounts.

Through Glova, the United States admitted several email communications incriminating Frank Peake in the conspiracy. Baci and Glova, tasked with handling the majority of the day-to-day

price fixing activities, used secret email accounts in order to shield their identities.[6] The majority of the emails sent back and forth between Glova and Baci detail the inner-workings of the conspiracy, thereby demonstrating how Sea Star and Horizon were able to effectively decrease competition and increase their profitability. Baci and Glova would constantly plot how to handle bidding for new customer accounts and how to, in essence, maintain an equal market share of the freight shipping from Florida to Puerto Rico.

Peter Baci, who worked as the Senior Vice President of Sea Star Line in Jacksonville, Florida from 2002-2008, also took the stand, and testified that since 2003 he would report directly to Peake. Baci recounted how Horizon and Sea Star initially started to conspire to fix rates after Navieras' bankruptcy in 2002, and indicated that he dealt with both Kevin Gill and Glova. At first, they would communicate via telephone or fax, but they eventually began using secret email accounts with the hope of disguising their scheme.

Baci further testified that he would communicate face to face with Glova, and that Serra and Peake would communicate amongst themselves. On a number of occasions, Peake and Serra were summoned by Baci and Glova to resolve pricing disputes between Horizon and Sea Star. Additionally, Baci recounted how

[6] Peter Baci's email was lighthouse123@gmail.com and Greg Glova's email was southorange@gmail.com.

Peake became CEO and President of Sea Star in 2004 and how they would regularly discuss how to effectively increase prices in order to increase Sea Star's profitability.

Lastly, Baci attested that he, Serra, Glova, and Peake all met on at least three occasions to plan illicit antitrust conduct relating to their respective clients, thereby corroborating Glova's testimony to that effect. One of the meetings took place in Orlando, Florida in October 2006, where the parties met to discuss the 50/50 cargo shipments[7] and the planned rate increases for the following year. In 2007, all four met again in Jacksonville, Florida to discuss the handling of the upcoming contract negotiations with Aqua Golf. Similarly, Baci, Peake, and Glova met once more in 2008, this time in New York, to discuss the 50/50 rule. The testimony of Baci, standing alone, as to the three meetings, is technically sufficient to find Defendant guilty. However, there was corroborating evidence provided by other co-conspirators, as stated herein, coupled with emails signed by and received by Peake, as well as additional email communications between the other co-conspirators implicating Peake as a participant in the conspiracy.

[7] The 50/50 Rule refers to an agreement between Sea Star and Horizon, whereby both companies would strive to maintain an equal market share of all goods being shipped to Puerto Rico.

The members of the jury also heard testimony from Gabriel Serra, the former general manager of Horizon's Puerto Rico division. Serra testified that he and Peake would actively discuss price fixing in the Florida ship market, and that Peake even advocated and obtained an agreement from Horizon to charge higher fuel surcharges on longer routes. Serra also indicated that he had met with Baci, Peake, and Glova in Orlando, Florida in October 2006 to discuss the 50/50 market share agreement between Sea Star and Horizon and the rate increases for the following year.

Serra and Peake would communicate regularly via email and telephone, but, unlike Baci and Glova, they would use their work emails.[8] Numerous email conversations between Peake and Serra were admitted during the Government's case-in-chief, most of which show Defendant's involvement in the overall scheme. Dozens of emails between Peake, Baci, Glova, and Serra illustrate that Peake was actively engaged in the decision-making process, and show how the Horizon and Sea Star executives communicated, quite frequently, about jointly raising shipping rates and maintaining a leveled playing field regarding the number of customer accounts.

For example, Exhibits 21, 22, 53, 67, 126, 149, 169, 176, 222, and 239 are all prime examples of email conversations

[8] Frank Peake's email was fpeake@seastarline.com and Gabriel Serra's email was gserra@horizonlines.com.

between Baci and Glova detailing the inner-workings of the conspiracy. Said emails show how Sea Star and Horizon methodically planned out their proposals to potential clients, with the optimal goal of increasing profitability and maintaining a balanced market share between them. Both sides would email each other the proposals that they would submit to potential clients, and lay out their rate increase plans for the following years.

Additionally, Exhibits 26, 32, and 34 are email conversations involving Serra and Peake which further implicate Peake in the price fixing conspiracy.[9] [10] [11] In said emails, Peake

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[9] Exhibit 26 contains two emails constituting circumstantial evidence as to an agreement relating to market sharing. The last email in the link, sent by Serra to Baci and Glova, with a copy to Peake, ends with **"Read and delete…of course!"**

[10] Exhibit 32 contains a three email conversation between Serra and Peake in March 2008. In the first email, dated March 6, 2008, Serra confronts Peake about Sea Star's shipping rates, telling Peake that "[he] is playing into AGT's and Transnow's hand…do you want me to react? ... they've now given me Paul's numbers." The second email contains Peake's response, wherein he tells Serra "please do not ever send me an email like this again! I would like to think that **my/our performance** in the market over the past 4½ years would at least get me the benefit of the doubt…. **To my knowledge we have NOT exceeded our allocation in the NE this year. I am not sure about the reefers,** but I will check on that in the AM." **(emphasis ours)** The third and final email is Serra's response, urging Peake to "see the trend over the last few weeks and let's figure out a plan."

Hence, these three emails clearly portray that there was an already agreed upon allocation by the members of the conspiracy as to the types of services being offered in the North East and as to the reefers (refrigerated vans).

[11] Exhibit 34 also constitutes evidence of a conspiracy as to market sharing, wherein Peake informs Serra that in "the past 2 weeks you are hurting me. Flexi, Goya, Atek, and BK. If you are swinging at Crowley you are missing and hitting me. Not good!" This email is titled "Ouch!" In his second email to Serra, sent on March 22, 2008 at 7:19 PM, Peake is annoyed ("Ouch!") at the fact that "things aren't working as well as they were. Pete [Baci] has similar complaints. Flexi is about fuel and you gave them a BSC discount.

and Serra are seen arguing about client accounts, with Peake stating that "things aren't working as well as they were" and that Baci had similar complaints, in reference to their price fixing endeavors.

Furthermore, the Court notes that from August 1, 2003 to April 10, 2008, Serra and Peake communicated a total of 319 times using their personal telephones (Exhibit 279), with 215 calls being initiated by Peake, circumstantial evidence further corroborating the testimony of the three cooperators.

Accordingly, the Court finds that there was overwhelming evidence presented at trial to support Peake's conviction. Even if the United States had timely produced CI Recording 5 to Defendant, there is no reasonable probability that the outcome of the trial would have been any different. Hence, Peake's *Second Motion for New Trial* (Docket No. 209) is hereby **DENIED** on these grounds.

IV. Conclusion

For the reasons stated herein, the Court hereby **DENIES** all of Defendant's Rule 29 and Rule 33 motions (Docket Nos. 193 and 209).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 5th day of December, 2013.

Tisk tisk. Goya is about you not charging for the overweight permits. Again tisk tisk. **Same as cutting the rate in my book.**" Serra replies that he will "check them all…you are certainly not the target."

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANK PEAKE,

Defendant

Criminal No.:11-512 (DRD)

OPINION AND ORDER

The Government charged Defendant Frank Peake with one count of violating the Sherman Act, 15 U.S.C. § 1, alleging that Defendant engaged in a conspiracy to illegally fix waterborne cabotage prices between the continental United States and Puerto Rico from late 2005 through April of 2008. During that time, Defendant was the Chief Operating Officer, and later President, of Sea Star Lines, a major freight carrier providing freight services to Puerto Rico.

On December 15, 2011, Defendant moved to change venue from the District of Puerto Rico to the Middle District of Florida (Docket No. 16). On January 13, 2012, the Government opposed this motion (Docket No. 31). On January 31, 2012, the Court directed the Clerk of the Court to refer the instant matter to a U.S. Magistrate Judge for a *Report and Recommendation* (Docket No. 34) and, on the same date, the motion for change of venue was randomly assigned to Magistrate Judge Marcos E. López.

On April 26, 2012, Magistrate Judge López issued his *Report and Recommendation* (Docket No. 49) recommending that Defendant's motion be

denied. The Magistrate Judge analyzed each of the ten *Platt* factors a trial court should consider when addressing a change of venue motion:

> (1) the location of the defendant; (2) the location of possible witnesses; (3) the location of events likely to be in issue; (4) the location of documents and records likely to be involved; (5) the disruption of defendant's business if the case is not transferred; (6) the expense to the parties; (7) the location of counsel; (8) the relative accessibility of the place of trial; (9) the docket condition of each district or division involved; and (10) any other special considerations relevant to transfer.

Platt v. Minn. Mining & Mfg. Co., 376 U.S. 240, 243-44 (1964). The Magistrate Judge posited that factors two and five, Defendant's location and effect on his business, do not favor transferring the case; but that factors six, seven and eight, do weigh in favor of transfer "though not substantially so." (Docket No. 49, page 5). Magistrate Judge López further advised that the remaining factors are neutral.

Regarding the tenth catch-all factor, the Magistrate Judge was not persuaded by Defendant's argument that the Government was engaged in forum shopping because the trial judge most likely to see the case in the Middle District of Florida in the event of transfer, Judge Timothy J. Corrigan, stated that he "felt snookered" by the Government.[1] Magistrate Judge López also gave credence to the Government's argument

[1] At the sentencing hearing of another defendant implicated in the same cabotage conspiracy, Judge Corrigan asked the Government if the proposed sentence was consistent with the Department of Justice's past policy and past sentences. The Government did not directly address the Judge's question. (Docket No. 16). After Judge Corrigan accepted the plea agreement and sentenced the defendant, the Department of Justice issued a press release stating that Judge Corrigan had given the "longest jail term ever imposed for a single antitrust violation." (Docket No. 33-1). Afterwards, Judge Corrigan stated that he had "not been dealt with in the straightforward manner that [he] would expect from an attorney from the Department of Justice" and that he "felt snookered." (Docket No. 33-1). The Department of Justice attorney subsequently apologized and Judge Corrigan accepted the apology.

that this District has presided over a large multi-district litigation ("MDL") involving the instant conspiracy and that the conspiracy has a strong connection to Puerto Rico as the impact of the increased prices were borne by the inhabitants of Puerto Rico. Finally, the Magistrate Judge noted that Rule 21(a) transfers are typically granted in cases of significant pretrial publicity, which has not occurred in the instant proceeding.

On May 11, 2012, Defendant filed a 26 page objection to the *Report and Recommendation* (Docket No. 52). Therein, Defendant asserts that he will suffer prejudice, not as a result of any news coverage, but because of the Government's theory that "every citizen of Puerto Rico who has bought any product coming from the continental United States, and every Puerto Rico company that has shipped goods to or from Puerto Rico, has been a victim of this alleged six year conspiracy." (Docket No. 52, page 8). Defendant thus argues that it is impermissible for the victims to pass judgment upon him.

Defendant also avers that, contrary to the Magistrate Judge's conclusion, the *Platt* factors favor transfer. In addressing the factors, Defendant notes his significant ties to the Jacksonville area; that there are ten potential witnesses from Florida and only two from Puerto Rico; that the alleged conspiratorial meeting occurred in Florida and not in Puerto Rico; and Defendant's documents and records are located in Florida and not Puerto Rico. The Defendant argues that the fifth factor, disruption to Defendant's business, is "relatively neutral" while the Magistrate found this consideration weighs against

transfer. Defendant agreed with the Magistrate Judge that factors six, seven and eight weigh in favor of transfer.

Defendant opposed the Magistrate's finding that the ninth factor, the condition of the two districts would not "tip the balance of considerations enough to override the government's choice of venue" (Docket No. 49, page 7) even assuming that the District of Puerto Rico has a heavier criminal docket than the Middle District of Florida. Defendant notes that the Middle District of Florida has 15 active federal judges, each averaging 114 criminal cases, while the District of Puerto Rico has 6 active federal judges, each averaging 160 criminal cases.

Regarding the tenth factor, special considerations, Defendant clarifies that he is not claiming that Judge Corrigan would be biased in favor of the defense but is instead asserting that the Government is attempting to avoid Judge Corrigan because Judge Corrigan stated that he felt "snookered" by the Government. Defendant also argues that this Court's experience handling the civil MDL litigation is not one of the ten *Platt* factors and should thus be discounted.

On May 21, 2012, the Government responded to Defendant's objections to the *Report and Recommendation* (Docket No. 56). The Government asserts that Defendant's convenience argument is overplayed as both the Middle District of Florida and the District of Puerto Rico are far from his present residence in New Jersey. The Government also argues that "defendant's jury bias argument is meritless because of the absence of any adverse pretrial publicity whatsoever and because

prospective jurors were not purchasers of the collusive shipping services, meaning that any presumption of bias is entirely speculative." (Docket No. 56, page 1). The Government further posits that Puerto Rico is the "epicenter of the litigation activity related to this conspiracy" noting that this Court has presided over all of the MDL civil litigation as well as two prior criminal cases that were part of the same investigation, including Defendant's former employer, Sea Star Lines (Docket No. 56, page 2).[2]

I. REFERRAL TO THE MAGISTRATE JUDGE

The Court may refer dispositive motions to a United States Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. §636(b)(1)(B). *See also* FED. R. CIV. P. 72(b); *see also* Local Rule 72(a); *see also* Matthews v. Weber, 423 U.S. 261, 96 S.Ct. 549 (1976). An adversely affected party may contest the Magistrate's Report and Recommendation by filing its objections. FED. R. CIV. P. 72(b). Moreover, 28 U.S.C. §636(b)(1), in pertinent part, provides that

> any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

"Absent objection . . . [a] district court ha[s] a right to assume that

[2]On May 21, 2012, the Government filed a supplementary response in opposition under seal (Docket No. 57). Therein, the Government clarifies the activities of the grand jury in the Middle District of Florida and further enumerates the also substantive investigation undertaken by a San Juan grand jury.

[the affected party] agree[s] to the magistrate's recommendation." Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985), *cert denied*, 474 U.S. 1021 (1985). Additionally, "failure to raise objections to the Report and Recommendation waives that party's right to review in the district court and those claims not preserved by such objections are precluded upon appeal." Davet v. Maccarone, 973 F.2d 22, 30-31 (1st Cir. 1992); *see also* Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994) (holding that objections are required when challenging findings actually set out in a magistrate's recommendation, as well as the magistrate's failure to make additional findings); *see also* Lewry v. Town of Standish, 984 F.2d 25, 27 (1st Cir. 1993)(stating that "[o]bjection to a magistrate's report preserves only those objections that are specified"); *see also* Borden v. Sec. of H.H.S., 836 F.2d 4, 6 (1st Cir. 1987)(holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised").

The Court, in order to accept unopposed portions of the Magistrate Judge's Report and Recommendation, needs only satisfy itself that there is no "plain error" on the face of the record. *See* Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1419 (5th Cir. 1996)(*en banc*)(extending the deferential "plain error" standard of review to the un-objected to legal conclusions of a magistrate judge); *see also* Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982)(en banc)(appeal from district court's acceptance of un-objected to

findings of magistrate judge reviewed for "plain error"); *see also* Nogueras-Cartagena v. United States, 172 F.Supp. 2d 296, 305 (D.P.R. 2001)(finding that the "Court reviews [unopposed] Magistrate's Report and Recommendation to ascertain whether or not the Magistrate's recommendation was clearly erroneous")(adopting the Advisory Committee note regarding FED.R.CIV.P. 72(b)); *see also* Garcia v. I.N.S., 733 F.Supp. 1554, 1555 (M.D.Pa. 1990)(finding that "when no objections are filed, the district court need only review the record for plain error").

In the instant case, Defendant has filed several objections to the Magistrate Judge's *Report and Recommendation* (Docket No. 52). Thus, the Court reviews the portions of the *Report and Recommendation* to which objections were made *de novo* and reviews all other unobjected-to portions only for plain error.

II. Motion to Transfer

Rule 21 of the Federal Rules of Criminal Procedure provides two avenues in which a district court may transfer a defendant's trial: for prejudice or for convenience under Rule 21(a) and 21(b), respectively. Rule 21(a) provides that "the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a).[3] Rule 21(b) provides

[3] *See* Skilling v. United States, 130 S.Ct. 2896, 2913 n.11, 177 L. Ed. 2d 619 (2010)(noting that federal courts have utilized Rule 21 to move certain highly charged cases like the prosecution Oklahoma City bombing, but denied a venue-transfer request in the 1993 World Trade Center bombing).

that "the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed. R. Crim. P. 21(b).

Article III of the U.S. Constitution provides that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. In addition, the Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Federal Rule of Criminal Procedure 18 codifies these principles:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Fed. R. Crim. P. 18.

III. Analysis

The Court fully concurs with Magistrate Judge López that relief under the mandatory transfer provision of Rule 21(a) is unwarranted. "This provision has been applied almost exclusively in cases in which pervasive pretrial publicity has inflamed passions in the host community past the breaking point." United States v. Walker, 665 F.3d 212, 223 (1st Cir. 2011). Yet in the case at bar, there has been little to no publicity, "much less pervasive and inflammatory publicity." (Docket No. 49, page 11). Defendant argues that Rule

21(a) is not limited to cases with extensive pretrial publicity, but instead includes other forms of prejudice. Here, Defendant asserts that, under the Government's theory of the case, "every citizen of Puerto Rico who has bought any product coming from the continental United States . . . has been a victim of this alleged six year conspiracy" and thus "[n]o juror will be able to escape [these] prejudicial arguments." (Docket No. 52, page 8).

The Court disagrees. Even giving credence to this theory, its strains the imagination that all potential jurors would be so biased as to inhibit Defendant from receiving a fair and impartial trial and that voir dire would be unable to eliminate such prejudice. Moreover, the potential jurors are not the direct purchasers of cabotage services but may have only incurred increased prices as secondary or tertiary consumers further down the consumption chain. Defendant also notes that individual potential jurors must be struck for cause if they have even the tiniest financial interest in the case. While the Court agrees, here, a typical Puerto Rican consumer of goods from the continental United States would have absolutely no financial gain or loss in the outcome of the instant proceedings as the allegedly monopolistic practices have ceased, and again, the potential juror is not now, or has ever been, a direct purchaser of shipping services. Additionally, as Puerto Rico was the community victimized by the alleged conspiracy, it is fitting that a jury comprised of members from that community are the ones to ultimately pass judgment upon Defendant's conduct.

In regard to the *Platt* factors under Rule 21(b), Defendant does not object the Magistrate's finding that factors 6, 7 and 8 favor transfer and the Court finds no plain error with this determination. The Court agrees that the Middle District of Florida would be less costly; more convenient for Defendant's counsel who lives and works in Florida; and more accessible for Defendant as well as that locale is closer to Defendant present home in New Jersey.[4]

Defendant challenges the Magistrate's finding that the first factor, the location of the defendant, "plainly do[es] not weigh in favor of transferring the case to Jacksonville" arguing that Defendant has many friends and former colleagues in the Jacksonville area. Defendant also advances that Jacksonville would be more comfortable location for him and his family to endure a lengthy trial as Jacksonville is in the same time zone as their home in New Jersey and as the predominate language in Jacksonville is English. Although Florida and New Jersey are both in the Eastern Standard Time zone and Puerto Rico is in the Atlantic Standard Time zone, this distinction is not terribly critical as Puerto Rico is on exactly the same time as the Eastern seaboard, because Puerto Rico does not follow daylight savings time. Notwithstanding, the Court acknowledges Defendant's averment that he and his family have closer relationships in the Jacksonville area and that there would not be any language barrier in Florida where

[4]Although the Magistrate Judge found that the fifth factor, disruption of Defendant's business unless the case is transferred, to weigh against transfer, Defendant acknowledged that this factor is relatively neutral. The Court agrees that this factor does not tip the scales one way or the other.

there may be such obstacles in Puerto Rico.[5] Accordingly, the Court concludes that Jacksonville would be a more hospitable location for Defendant and thus weighs in favor of transfer.

For the second factor, the location of the witnesses, the Court is persuaded by Defendant's averments. Defendant posits that there are ten potential witnesses that reside in Florida while only two reside in Puerto Rico. Additionally, there are two other potential witnesses that are within driving distance to Florida. Hence, the Court finds that this factor also supports Defendant's motion to transfer venue.

The Magistrate Judge found that the third factor, the location of the events in question, did not support Defendant's request for transfer as the conspiracy centers around the shipment of goods between two ports. The Magistrate noted Defendant's argument that two alleged conspiratorial meetings occurred in Jacksonville, but also credited the Government's assertion that other meetings and pricing decisions of co-conspirators occurred in Puerto Rico. The Court respectfully disagrees with the Magistrate and finds that this factor favors transfer as the majority of Defendant's alleged conspiratorial conduct occurred in Florida as opposed to Puerto Rico.

Similarly, Defendant disputes the Magistrate's conclusion that the fourth factor, the location of the documents and records involved, "weighs fairly evenly." The Government's documents are located in

[5]The Magistrate Judge correctly noted that there will not be any language barrier in federal court as all proceedings are conducted in the English language pursuant to the Puerto Rican Federal Relations Act. *See* 48 U.S.C. §864 (mandating that "[a]ll pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language."); *see also* Estades-Negroni v. Assoc. Corp. Of N. Am., 359 F.3d 1, 2 (1st Cir. 2004) (stating that the Puerto Rican Federal Relations Act "incontrovertibly demands that federal litigation in Puerto Rico be conducted in English").

Washington, D.C. and the Government has stated that most of its documents have been electronically imaged. On the other hand, Defendant's documents are primarily in Jacksonville. However, in light of the "widespread use of electronic documents generally," the Magistrate Judge was unpersuaded by the physical location of Defendant's documents (Docket No. 49, page 6). The Court concurs with Defendant's objection on this factor as little to no documents are in Puerto Rico but the majority of Defendant's document are in Florida. Nevertheless, the Court is cognizant of the Magistrate Judge's well-founded point that Defendant's documents may be electronically imaged to be more easily utilized in this District. Hence, this factor is neutral.

For the ninth factor, the docket conditions of each district, the Defendant notes that the Middle District of Florida has more active federal judges that the District of Puerto Rico who, on average, carry a smaller criminal load than federal judges in this District. The Court agrees and it is the undersigned's understanding that the District of Puerto Rico has one of the most congested criminal dockets in the county. Accordingly, the Court finds that this factor supports transfer as well.[6]

However, the true measure of a judge's workload does not lie in the number of cases, but in the complexity of those cases. The

[6]The Court clarifies that of the three senior judges in the District of Puerto Rico (the undersigned, Judge Perez-Gimenez, and Judge Casellas), only one judge, Judge Casellas, does not preside over criminal matters. Hence, the number of judges entertaining criminal cases is eight instead of six as stated in Defendant's brief. Additionally, the Court notes that the undersigned is carrying a full, 100% case load of both criminal and civil cases, despite being a senior judge.

District of Puerto Rico traditionally leads the nation in multi-defendant cases. At the present time, the undersigned has the following criminal cases assigned to him that are unusually complex with greater than twenty-five defendants:

- 08-204 (111 defendants);[7]
- 10-164 (27 defendants);
- 11-241 (114 defendants);
- 11-345 (39 defendants);
- 12-132 (75 defendants); and
- 12-414 (74 defendants).

All of these matters count as one just one case for statistical purposes. These multi-defendant cases require a considerable amount of time and attention to properly adjudicate. Notwithstanding the undersigned's workload, this ninth factor is best left to the presiding judge to ascertain whether or not to accept the extra baggage of an additional criminal matter to his or her docket.

The tenth factor, special considerations, weighs strongly against Defendant. The Court is in complete agreement with the Magistrate that there is no justifiable grounds to insinuate that Judge Corrigan would be biased for or against the Government and thus the Government is engaging in impermissible forum shopping. Judge Corrigan admonished counsel for the Government, as judges do from time to time, and then proceeded to properly preside over the related sentencing in a neutral fashion. As the Magistrate pointed out, Judge Corrigan stated that the

[7] In this case, two of the 111 defendants remain at large as fugitives of justice. The other 109 defendants have all been sentenced.

Department of Justice's conduct would not influence how he does his job. Hence, the Court endorses the Magistrate Judge's assessment that "it is hardly reasonable to think—or to assume that the government would think—that Judge Corrigan would be biased towards the defense in future prosecutions." (Docket No. 49, page 9).

The Court is also strongly persuaded by this Court's prior involvement in civil MDL litigation that arose out of the alleged antitrust conspiracy. The Government, accordingly, argues that this Court is the "epicenter of litigation" regarding the cabotage antitrust matter, while Defendant asserts that the MDL panel's decision to convey jurisdiction upon this Court in civil matters should have no bearing on whether to transfer venue. Defendant also notes that the civil MDL cases settled without the need to resort to discovery. While Defendant's arguments, that the MDL panel's selection is not a traditional *Platt* factor and that discovery did not commence in the civil cabotage MDL case, are duly noted, the Court affords this factor substantial weight as the undersigned has spent literally hundreds of hours over several years learning about the alleged antitrust cabotage conspiracy. Frankly, the undersigned judge is in an excellent position to handle the present case having presided over both related civil and criminal matters; the undersigned's ability to utilize that acquired knowledge helps further the interests of judicial economy as it would take another judge, despite being very capable, longer to familiarize himself with the facts and intricacies of the present controversy. Thus, in the interests of judicial economy, the Court maintains that

this factor should be given due consideration.

Further, in analyzing the tenth catchall factor, the Court is also influenced by the fact that the harm allegedly perpetrated by the Defendant's actions occurred within the District of Puerto Rico and not within the Middle District of Florida. Accordingly, the Court believes that the community harmed by the potentially illegal conduct has a greater interest in seeing that justice is done than other communities. In fact, there may be victims of the alleged conspiracy who are entitled to testify at the sentencing hearing should the jury return a verdict of guilty. In weighing all of these considerations, the Court finds that the tenth factors weighs heavily in favor of denying Defendant's motion to transfer.

Putting all of the ten *Platt* factors together, the Court, respectfully, differs slightly from Magistrate Judge López on several factors. However, the Court is in complete agreement with the Magistrate Judge that Defendant has failed to reach the threshold required to demonstrate a substantial inconvenience as to override the Government's choice of venue. *See* United States v. Sklaroff, 323 F. Supp. 296, 324 (S.D. Fla. 1971) (a defendant must "demonstrate a substantial balance of inconvenience to himself if he is to succeed in nullifying the prosecuting attorney's choice of venue."); *see also* Walker, 665 F.3d at 223 (the "choice of venue is in the first instance a matter of prosecutorial discretion."). Here, a majority of the *Platt* factors seem to weigh in favor of transfer, based on numbers alone; the most notable factor to the Court is the number of potential witnesses that reside in or near Florida. However, the Court does not

merely count the number of factors that weigh for or against a motion to transfer. *See* United States v. Muratoski, 413 F. Supp. 2d 8, 9-10 (D.N.H. 2005)("No one [*Platt*] factor is likely to be dispositive, but all should be considered under the circumstances"). Instead, in exercising the Court's broad discretion to transfer a criminal prosecution to another district "for the convenience of the parties and witnesses and in the interest of justice," Fed. R. Crim. P. 21(b), the Court finds particularly persuasive (1) this District deep and time-intensive involvement in gaining familiarity with the alleged conspiracy; and (2) the undisputable fact that this District, and not the Middle District of Florida, is the locale victimized by Defendant's alleged nefarious conduct. Accordingly, Defendant's motion for change of venue (Docket Nos. 16) is hereby **DENIED.**

IV. Conclusion

Upon a comprehensive review of Magistrate Judge López's *Report and Recommendation* (Docket No. 49), the Court concurs with the Magistrate Judge's ultimate recommendation and hereby **ACCEPTS, ADOPTS and INCORPORATES** by reference the Magistrate Judge's *Report and Recommendation* into this *Opinion and Order*, with the exceptions set forth above. The Court hereby **DENIES** Defendant's motion for change of venue (Docket Nos. 16).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 5th day of June, 2012.

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge

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

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

REPORT AND RECOMMENDATION

Pending before the court is defendant Frank Peake's ("Peake" or "defendant") motion to transfer the case to the United States Court for the Middle District of Florida, Jacksonville division (Docket No. 16), and the United States of America's (the "government") response in opposition (Docket No. 31). For the reasons set forth below, the motion to transfer should be denied.

I. PROCEDURAL HISTORY

On November 17, 2011, Peake was indicted in the District of Puerto Rico and charged with one count of violating the Sherman Act, 15 U.S.C. § 1, by entering into a conspiracy to "suppress and eliminate competition by agreeing to fix rates and surcharges for Puerto Rico freight services." (Docket No. 1, ¶ 5). Peake's indictment was one result of a multi-defendant investigation into an alleged price-fixing scheme among the four companies that provide commercial maritime freight services between the continental United States and Puerto Rico. (See Docket No. 1; see also Docket No. 1 in Case No. 08-md-1960 (DRD)). Peake was an

employee of Sea Star Line, one of the four shipping companies, in their Jacksonville, Florida office at the time the alleged conspiracy took place.

Peake now moves under Federal Rule of Criminal Procedure 21(b) to transfer the case to Jacksonville, arguing that said forum would be more convenient for him and more appropriate for the trial. In addition to maintaining that he will incur greater travel expenses defending his case in Puerto Rico, he points out that a search warrant was issued and executed on Sea Star Lines' business premises in Jacksonville, and that five other individuals alleged to have participated in the same antitrust conspiracy were charged and tried in the Middle District of Florida, Jacksonville Division. The government, on the other hand, emphasizes that Puerto Rico was the target of the alleged conspiracy and thus has the strongest interest in adjudicating defendant's involvement therein, and contends that defendant will have to travel from his home in New Jersey whether the case is prosecuted in Puerto Rico or Florida.

II. LEGAL STANDARD

When a criminal offense may be prosecuted in more than one district, Federal Rule of Criminal Procedure 21(b) allows the case to be transferred, upon the defendant's motion, to "another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed. R. Crim. P. 21(b); see also United States v. Walker, 665 F.3d 212, 224 (1st Cir. 2011) (emphasizing that both convenience elements and "the interest of justice" must be present). Rule 21(b) provides that a court "may" transfer the case, and thus the decision of whether to grant the transfer is first and foremost "within the sound discretion of the trial court . . . ." United States v. Brandon, 17 F.2d 409, 441 (1st Cir. 1994); United States v. Rossiter, 25 F.R.D. 258, 260 (D.P.R. 1960); Holdsworth v. United States, 179 F.2d 933, 937 (1st Cir. 1950). In exercising this discretion, courts consider the following ten factors: (1) the location of the

defendant; (2) the location of possible witnesses; (3) the location of events likely to be in issue; (4) the location of documents and records likely to be involved; (5) the disruption of defendant's business if the case is transferred; (6) the expense to the parties; (7) the location of counsel; (8) the relative accessibility of the place of trial; (9) the docket condition of each district or division involved; and (10) "any other special elements which might affect the transfer." Platt v. Minnesota Min. & Mfg. Co., 376 U.S. 240, 241 (1964); see United States v. Acevedo Vila, et. al., No. 08-cr-36, 2008 WL 5130740, at *4 (D.P.R. Dec. 4, 2008) (unpublished) (citing Platt factors in adjudicating Rule 21(b) motion).

The parties do not dispute that venue is proper in both Puerto Rico and Jacksonville, Florida, under the statutory venue provisions at 18 U.S.C. §§ 3232-3244. When proper venue lies in more than one district, the "choice of venue is in the first instance a matter of prosecutorial discretion." United States v. Walker, 665 F.3d 212, 223 (1st Cir. 2011); see United States v. Bowdoin, 770 F. Supp. 2d 133, 138 (D.D.C. 2011) ("There is a general presumption that a criminal prosecution should be retained in the original district."); United States v. U.S. Steel Corp., 233 F. Supp. 154, 157 (S.D.N.Y. 1964) ("As a general rule a criminal prosecution should be retained in the original district."). The district court may only "overrule that choice in certain narrowly circumscribed circumstances." Walker, 665 F.3d at 223. Therefore, "to warrant a transfer from the district where an indictment was properly returned," a defendant must demonstrate that keeping the case there "will result in a substantial balance of inconvenience to himself." United States v. Baltimore & Ohio R.R., 538 F. Supp. 200, 205 (D.D.C. 1982) (quoting U.S. Steel Corp., 233 F. Supp. at 157; United States v. Jones, 43 F.R.D. 511, 514 (D.D.C. 1967)); see United States v. Ferguson, 432 F. Supp. 2d 559, 562 (E.D. Va. 2006) ("For a defendant to succeed on a Motion to Transfer Venue under Fed. R. Civ. P. 21(b), the defendant

must demonstrate that prosecution of the case in the district where the count was properly filed would 'result in a substantial balance of inconvenience' to the defendant.") (citations omitted); United States v. Sklaroff, 323 F. Supp. 296, 324 (S.D. Fla. 1971) (a defendant must "demonstrate a substantial balance of inconvenience to himself if he is to succeed in nullifying the prosecuting attorney's choice of venue."). To meet this burden, then, defendant must show that the balance of the ten Platt factors weigh substantially in favor of transfer. After carefully considering the arguments from both sides, the court finds that they do not.

III. ANALYSIS

Two of the factors, defendant's location and the effect on his business, plainly do not weigh in favor of transferring the case to Jacksonville. It is undisputed Peake and his family currently reside in New Jersey. Peake argues that Jacksonville is still a more convenient venue than Puerto Rico because he lived there for many years and has friends there, while he has no friends in Puerto Rico and does not speak Spanish. Regardless, Peake's current home is New Jersey, which is many miles and several hours away from both Florida and Puerto Rico. Jacksonville may be more familiar and comfortable for Peake because he has lived there, but this is not relevant to its convenience versus Puerto Rico as a venue for the criminal proceedings against him. The trial will not require Peake to move to Puerto Rico for the long term, but only to spend a limited time there for certain court proceedings. Considerations such as familiarity and social networks are more relevant to long-term relocations than to temporary stays. Moreover, defendant's lack of Spanish language skills is not an issue, as all proceedings in this court are conducted in English. Therefore, this first factor does not weigh in favor of transfer. Likewise, defendant concedes that his business will not be affected if the trial is in Puerto Rico

because he is currently unemployed. Thus the fifth factor does not support his transfer request either.

The factors related to travel expenses, on the other hand, do weigh in defendant's favor, though not substantially so. Factors six, seven, and eight require the court to consider the expense to the parties, the location of counsel, and the accessibility of the place of trial. The parties proffer divergent figures for plane ticket prices and flight times between Philadelphia (defendant's home airport) and Jacksonville and San Juan, citing internet sources of dubious evidentiary value, and without submitting printouts of the particular searches conducted on those websites. Additionally, plane ticket prices are affected by many factors, including, among others, flight dates and times, the number of connections, date of purchase, seat availability, fare class, and airline promotions, making it impossible to compare the prices that the parties have presented in a meaningful way. Regardless, the court can take judicial notice of the fact that, although Jacksonville and San Juan are both many miles and several hours of air travel away from Philadelphia, San Juan is further. However, based on defendant's own figures, holding the trial in Jacksonville instead of San Juan would save him at most a couple of hours in flight time and a few hundred dollars in airfare expenses.[1] This is a consideration to take into account but it is not significant enough, in and of itself, to justify a change in venue.

With respect to the relative accessibility of the place of trial, defendant's only additional argument is that Jacksonville is accessible from his home by car whereas San Juan is not. This is indisputably true, yet the option of a lengthy drive from New Jersey to Florida, including fuel costs, is not a significant added convenience. Therefore, this factor weighs only slightly in defendant's favor.

[1] Defendant states that a flight from his home to Jacksonville lasts two hours and thirty-two minutes and a flight to San Juan is four hours and forty-five minutes. (Docket No. 16, p. 12). He cites two sets of round-trip plane ticket

The location of counsel weighs in defendant's favor, as his principal attorney is located in Miami. Although Miami is many miles from Jacksonville, it is certainly closer than San Juan. Although defendant has local counsel in Puerto Rico, he states that his Miami attorney has been working on his case since the beginning of the investigation, which at that time was being conducted in Jacksonville. Therefore the location of his counsel weighs more than marginally in defendant's favor, whereas the expense and accessibility of the trial venue also weigh in his favor, but to a lesser extent.

The balance factors relating to the convenience of running the trial itself—namely, the location of witnesses, documents, and events at issue—weighs fairly evenly overall. With respect to the documents at issue, defendant asserts that most are located in Sea Star Lines' office in Jacksonville, while the government states that all of its documentary evidence is in Washington, D.C. However, the government also states that the vast majority of its documents have been imaged electronically and that copies have been provided to the defense on hard drives. In light of this, and of the widespread use of electronic documents generally, the fact that defendant has documents in Jacksonville is not a reason to transfer the case there. See Acevedo Vila, 2008 WL 5130740 at *5 ("[I]n light of the availability of electronic storage and transfer of relevant documents, the location of documents does not strongly favor transfer.")

Defendant asserts that "almost all" of his own witnesses reside Jacksonville and that the "great majority of the government's potential trial witnesses" live there too. (Docket No. 16, p. 8). The government, on the other hand, states that it intends to call about five to seven witnesses in its case in chief (not including custodians of records), only one whom is from Florida, and that it expects to call at least two witnesses from Puerto Rico and two from North Carolina. (Docket No. 47). The government has also anticipated calling victim witnesses, but none from Florida.

Id. at 2. Therefore, defendant has not shown with any reasonable certainty that the location of witnesses favors transfer to Jacksonville.

The events related to the alleged conspiracy occurred in both Jacksonville and Puerto Rico, as the allegations revolve around shipping of goods between the two ports. With respect to the specific acts that Peake himself carried out, the indictment alleges only that they took place "in the continental United States and Puerto Rico." (Docket No. 1, ¶ 9). Peake asserts that the two conspiratorial meetings that he is alleged to have attended both took place in Florida and that any pricing decisions were made in Jacksonville. (Docket No. 16, p. 9). The government, however, argues that relevant pricing decisions by coconspirators and other Sea Star Lines employees were made in Puerto Rico. (Docket No. 31, p. 6). Therefore, crediting both parties' assertions, neither district is more preferable than the other because the events likely to be at issue occurred in both of them. Because defendant has the burden to show that considerations weigh substantially in favor of transfer, this factor does not support his request.

It is not clear from the parties' motions which district has more preferable docket conditions, which is the ninth Platt factor, as each side cites different statistics that favor their own point of view. Engaging in a more critical statistical analysis is unnecessary, however, because even if the court assumes *arguendo* that Puerto Rico has a heavier criminal docket than the Middle District of Florida, this would still not be enough to tip the balance of considerations enough to override the government's choice of venue.

The final Platt factor requires consideration of "other special elements" that weigh for or against transfer. Of those considerations raised by the parties the court finds more significant those that weigh in favor of prosecuting the case in Puerto Rico. Defendant argues that the government's choice of Puerto Rico as a venue is an improper "forum shopping" attempt to avoid

appearing before the Honorable Timothy J. Corrigan, United States District Judge in the Middle District of Florida, Jacksonville Division, whom defendant implies would be an unfavorable adjudicator for the prosecution. Defendant submits a transcript of an exchange between Judge Corrigan and a prosecutor at the sentencing of Gabriel Serra, who Peake describes as one of the defendants convicted in Jacksonville of participating in the same conspiracy. (Docket No. 16 at 2-3; Docket No. 33-1). At that hearing, Judge Corrigan explained that he had previously sentenced one of the other defendants from the same conspiracy to a lengthy jail term taking into account the government's representation that the sentence was consistent with past policy and past sentences for the type of offense involved. (Docket No. 33-1, p. 16, l. 11-25). Afterwards, the Department of Justice published a press release saying that Judge Corrigan had given the "longest jail term ever imposed for a single antitrust violation." (Docket No. 33-1, p. 17, l. 11-12). At Serra's sentencing hearing, Judge Corrigan told the prosecutor that when he read the press release, he "felt snookered." (Docket No. 33-1, p. 22, l. 20-21). He went on to say that he was "not suggesting it was an improper sentence," but that he felt he had "not been dealt with in the straightforward manner that I would expect from an attorney from the Department of Justice." (Docket No. 33-1, p. 18, l. 18; p. 20, l. 20-22). After a discussion about the incident, the prosecutor apologized to the court, the court accepted the apology, and the hearing moved on. (Docket No. 33-1, pp. 23-26).

Defendant argues that if the case were tried in Jacksonville, it would likely be presided over by Judge Corrigan, as local rules in that district specify that cases are assigned to the judge who presided over an earlier related case. Therefore, defendant concludes that the government's decision to prosecute his case in Puerto Rico is an attempt to avoid appearing before Judge Corrigan again. Giving weight to this argument would require the court to accept defendant's

implication that Judge Corrigan would not preside over the case in an impartial manner. A review of the hearing transcript, however, shows that such a finding is unwarranted. This is especially so in light of the fact that Judge Corrigan not only denied a motion for reconsideration from the same defendant whose sentence was the subject of the press release, but also told the prosecutor that he would continue to sentence the defendants according to their plea agreements and his evaluation of their substantial assistance because "[t]he fact that the Department of Justice chose to proceed as it did cannot influence, nor will it influence, the way that I do my job." (Docket No. 33-1, p. 22, l. 6-8). Therefore, it is hardly reasonable to think—or to assume that the government would think—that Judge Corrigan would be biased towards the defense in future prosecutions. Thus, defendant's final argument does not weigh in favor of transferring the case to Jacksonville.

The government, on the other hand, raises two significant points about this case's connection to the District of Puerto Rico. First of all, a large class action brought by direct purchasers of shipping services from the same four companies that are the subject of the criminal prosecution was litigated in this district, and was based on the same facts alleged in Peake's indictment. (See Case No. 08-md-1960 (DRD)). Moreover, that case was presided over by the same district judge presiding over the instant criminal case. The class action was comprised of several cases from three different districts—the Southern District of Florida, the Middle District of Florida, and the District of Puerto Rico—which the Judicial Panel on Multidistrict Litigation consolidated and transferred to the District of Puerto Rico. (Docket No. 100-2 in Case No. 08-md-1960). In so doing, as defendant notes, the Panel observed that any of the three courts were "good options." However, it ultimately selected the District of Puerto Rico because of the number of actions already pending here and because of "favorable" docket conditions. Id.

Therefore, this court's connection with the previous parallel litigation and familiarity with the case weighs in favor of keeping the case here.

Moreover, as the government points out, the acts alleged in the indictment have a strong connection to Puerto Rico. The alleged conspiracy fixed the prices of shipments from the continental United States to Puerto Rico by the only four companies that ship to Puerto Rico by sea. Therefore, the alleged conspiracy affected the prices of all sea shipments to Puerto Rico, which, being an island, relies heavily on shipping services. Therefore, the "interests of justice" weigh in favor of keeping the case in the district that has been most affected by the misconduct alleged. With these final considerations in mind, the undersigned finds that the balance of factors do not weigh substantially in favor of defendant's transfer request.

Defendant's final contention is that the case's connection to Puerto Rico is, in fact, so strong that he will not be able to receive a fair trial here. He raises this argument via a reply to the government's response in opposition to his motion to change venue, in which he appears to bring a separate motion to change venue under Federal Rule of Criminal Procedure 21(a).[2] Rule 21(a) requires a court to transfer a case where "the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." This rule sets forth a high burden that defendant has made little progress towards reaching. See C. Wright, 2 FEDERAL PRACTICE & PROCEDURE § 343 at n. 10 ("The common judicial attitude is that relief should be granted only in exceptional cases.") (collecting cases). Rule 21(a) transfers have been granted "almost exclusively in cases in which pervasive pretrial publicity has inflamed passions in the host community past the breaking point." Walker, 665 F.3d at 223 (citing United States v. Angiulo, 497 F.2d 440, 440-42 (1st Cir. 1974)).

[2] The Local Rules of this court allow reply memoranda to be filed only with prior leave from the court and limit such replies to a maximum of ten pages. See Local Rule 7(c). Defendant's reply violates both of these rules.

Defendant has submitted no evidence of publicity regarding this case, much less pervasive and inflammatory publicity. Moreover, as the government points out, jurors are often called upon to decide cases that have had a general effect on the community at large, such as environmental or government corruption cases. (Docket No. 47, 3). The broad effects of such cases are normally not enough to presume categorical juror bias; rather, the voir dire process can be trusted to preclude any jurors who are unable to put their general interests aside to render an impartial verdict.

IV. CONCLUSION

In light of the foregoing discussion, the circumstances of the case do not justify transfer to the Middle District of Florida, Jacksonville Division. Any gain in convenience for defendant would be marginal, whereas the interests of justice favor keeping the case in Puerto Rico. Accordingly, it is hereby RECOMMENDED that defendant's motion be DENIED.

The parties have fourteen (14) business days to file any objections to this report and recommendation. Failure to file same within the specified time waives the right to appeal this report and recommendation. Fed. R. Civ. P. 72(b)(2); Fed. R. Civ. P. 6(c)(1)(B); Local Rule 72(d); see also 28 U.S.C. § 636(b)(1); Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994); United States v. Valencia, 792 F.2d 4 (1st Cir. 1986).

IT IS SO RECOMMENDED

In San Juan, Puerto Rico, this 26th day of April, 2012.

s/Marcos E. López
United States Magistrate Judge

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANK PEAKE,

Defendant

Criminal No.:11-512 (DRD)

AMENDED OPINION AND ORDER

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

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

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

> Most consumer goods travel to Puerto Rico from the

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

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

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

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

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

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

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

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

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

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

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

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

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

For the reasons stated herein, the Court ascertains that the

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

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

IT IS SO ORDERED.

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

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge

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

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

OPINION AND ORDER

On July 16, 2012, Defendant Frank Peake ("Defendant" or "Peake") moved to suppress evidence obtained from his personal electronic devices, specifically, Peake's personal laptop and Blackberry (Docket No. 76). On April 17, 2008, the FBI raided Sea Star Lines' corporate headquarters[1] in Jacksonville, Florida wherein Peake's personal laptop and Blackberry were seized.[2] On the proceeding day, April 16, 2008, U.S. Magistrate Judge James R. Klindt of the U.S. District Court for the Middle District of Florida issued a search warrant wherein the Magistrate crossed out the following paragraph in the "Description of Premises To be Searched" from the draft search warrant supplied by the United States:

> In order to minimize the prospect of the removal and subsequent destruction of any of the documents and records identified in Exhibit B to the Search Warrant, the search will include the briefcases, laptop computers, hand-held computers, cell phones, Blackberries, and other movable document containers found on the premises described above,

[1] At the time of the raid, Peake was President and Chief Operating Officer of Sea Star Lines.

[2] The Government copied the data from these devices and returned his laptop and Blackberry to Peake a few hours after the seizure.

> and in the possession of, or readily identifiable as belonging to Sea Star management, pricing, and sales personnel including, but not limited to, FRANK PEAKE . . . .

Defendant argues that as a result of this deletion, the Magistrate expressly prohibited the Government from searching and seizing these items.[3] Hence, the Government's seizure of, as well as copying of the data on, Peake's laptop and Blackberry constituted an unreasonable search as the search warrant expressly did not authorize such a seizure.

The Government opposed Peake's motion to suppress on August 2, 2012 (Docket No. 85) asserting that "[b]y crossing out language related to laptop computers and Blackberrys in Attachment A of the Sea Star warrant, the magistrate judge merely intended to remove references to personal electronics from the description of the physical premises to be searched, not preclude the seizure of those items." (Docket No. 85, page 1). In support of this contention, the Government advances that the Magistrate Judge retained other references to electronic media, including Blackberries.

The Government also informs the Court that, operating out of an abundance of caution, the Government procured a second search warrant on August 1, 2012 from Magistrate Judge Alan Kay of the U.S. District Court for the District of Columbia.[4] The Government advances that this

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[3] Though not expressly cited by Defendant, Magistrate Judge Klindt also crossed out the terms "memory calculators, pagers, personal digital assistants such as Palm Pilots hand held computers" in Attachment B, "Description of Property To Be Searched."

[4] The Government states that "[b]ecause the subject of electronic media was transferred from the Federal Bureau of Investigation's ("FBI") offices in Jacksonville, Florida to the Department of Justice's office in Washington, D.C. in early 2011, almost a year before indictment, the Subsequent Warrant was obtained from the

second search warrant clearly provides for the search and seizure of Peake's electronic devices.

In response, Peake filed an *Emergency Motion for Protective Order* (Docket No. 86) on August 3, 2012 arguing that if the Government exceeded the scope of a search warrant, the Government cannot remedy that violation by obtaining a new warrant from a different Magistrate Judge four years later.

The Government's response (Docket No. 87), filed on August 6, 2012, reiterates that the first Magistrate Judge left intact references to laptops and Blackberrys to be seized. The Government also avers that following the seizure in April of 2008, certain data from Peake's electronic devices was obtained, but inadvertently not reviewed or analyzed and that the second search warrant was sought to remedy this oversight.

It goes without saying that the Government cannot obtain a search warrant after a search has been executed to justify and constitutional insulate that search and seizure. As sure as the sun will rise in the East, obtaining a warrant after an illegal search fails to cure a defendant's Fourth Amendment violation. This practice would be even more troublesome where a second warrant validates the search and seizure of items previously excluded during an initial search warrant where no pertinent facts of changed. More egregious still, would be if the Government were to move these items around the country seeking

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nearest local magistrate judge, which was in the District of Columbia as required by Federal Rule of Criminal Procedure 41." (Docket No. 85, page 2).

different search warrants from different Magistrate Judges and Judges that the Government deemed favorable to them. Such conduct would be gross forum shopping and simply unjust. While the Court would be outraged should any of these actions occur, the Court remains confident that that is not the case at bar.

The Court finds that the first search warrant issued by Magistrate Judge Klindt properly authorized the search and seizure of Peake's laptop and Blackberry and other electronic devices, notwithstanding the Magistrate Judge Klindt's strike through of the final paragraph of the section entitled "Description of Premises To Be Searched." Peake's interpretation that the Government was prohibited from searching and seizing these items is in error as a plain reading of the four corners of the search warrant makes it abundantly clear that the Government was authorized to search and seize electronic data in many forms, which certainly encompasses Defendant's laptop as well as his Blackberry device which is mentioned by name. The warrant defines records, documents, programs, documentation, application or materials to include information that is "modified or storied in any form, including any optical, electrical, electronic or magnetic form (such as any information on an optical, electrical, or magnetic storage device), including floppy disks, hard disks, ZIP disks, CD-ROMS, optical disks . . . e-mail servers, as well as opened and unopened e-mail messages . . . ." (Docket No. 77-4, pages 7-8). The warrant also authorizes the search and seizure of "[a]ll address books (including electronic address books, such as devices commonly referred to as electronic

organizers and Blackberries); of SEA STAR management . . . including, but not limited to PEAKE . . . ." (Docket No. 77-4, page 7). With such unequivocal language, it is abundantly clear that the issued warrant permits the search and seizure of Defendant's laptop and Blackberry and that Peake's contentions to the contrary are without merit.

While the undersigned does not second-guess the decisions of Magistrate Judges to grant, deny or modify requests for warrants, it is readily apparent that by deleting the aforementioned references from the draft version of the warrant, Magistrate Judge Klindt *expanded* the Government's authorization to search and seize items and data at the Sea Star premises, and did not wish to limit, or give the impression of limiting, the Government's authorization to merely "briefcases, laptop computers, hand-held computers, cell phones, Blackberries, and other movable document containers."

For the reasons elucidated above, the Court hereby **DENIES** Defendant's motion to suppress and motion for a protective order (Docket Nos. 76 and 86).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 30th day of November, 2012.

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,)

Plaintiff,) Case No. 11-512

vs.)

FRANK PEAKE,)

Defendant.)

TRANSCRIPT OF FURTHER JURY TRIAL
BEFORE THE HONORABLE DANIEL R. DOMINGUEZ
FRIDAY, JANUARY 25, 2013
SAN JUAN, PUERTO RICO

APPEARANCES:

FOR THE PLAINTIFF: BRENT SNYDER
CRAIG Y. LEE
MICHAEL WHITLOCK
HEATHER TEWKSBURY
ASSISTANT U.S. ATTORNEYS

FOR THE DEFENDANT: DAVID OSCAR MARKUS, ESQ.
A. MARGOT MOSS, ESQ.

Proceedings recorded by mechanical stenography, transcript produced by computer.

MS. MOSS: Right.

THE COURT: So please amend this accordingly.

THE CLERK: Yes.

THE COURT: Any objections to the instructions?

MR. MARKUS: Judge, in addition to those previously filed --

THE COURT: No, no, mention all of them, mention all of them.

MR. MARKUS: The missing witness instruction. Venue beyond a reasonable doubt. Our theory of defense instruction, Your Honor. Maybe I should read that.

THE COURT: Yes, read it, I have no problem.

MR. MARKUS: "Mr. Peake does not contest that there was a conspiracy that existed between Gabriel Serra, Kevin Gill, Gregory Glova, and Peter Baci. Rather, he contends that he did not knowingly and intentionally participate in this conspiracy and did not knowingly and intentionally join the conspiracy as a member. Mr. Peake further contends that any discussions he had with Gabriel Serra were legitimate and competitive discussions and not anticompetitive conspiracy related.

"Mr. Peake also contends that he was competing with Horizon, including on market share and price.

Although this is Mr. Peake's defense, the burden always remains on the Government to prove the elements of the offense beyond a reasonable doubt. If you do not believe the Government has proven beyond a reasonable doubt that Mr. Peake intentionally and knowingly joined the conspiracy, you must find him not guilty."

THE COURT: Anything further?

MR. MARKUS: The only last one, Your Honor, was the one that I had mentioned on Page 18. I had requested that you also instruct the jury that a witness' refusal to be interviewed by the defense be something that they can consider.

THE COURT: Excuse me? Read me that instruction.

MR. MARKUS: Yes, Your Honor.

"A witness' refusal to be interviewed by one party or the other can be considered by you in determining his credibility."

THE COURT: All right. I'll take that one first, unless you have anything further.

MR. MARKUS: No, Your Honor, nothing further.

THE COURT: I think we discussed them all in good faith in the charge conference, and I think we're all prepared.

MR. MARKUS: Yes, Your Honor.

CR 11-512 (DRD)
Jury Note #1
Received/Filed
January 25, 2013
5:10 p.m.

Your Honor

The jury has selected a Fore person.

We have decided to stop for today and come back on Monday morning.

Fore person
4:55 pm 1/25/13

CR 11-512 (DRD)
Jury Note #1
Received & Filed
January 25, 2013
5:10 p.m.

Your Honor

The jury has selected a Fore person.

We have decided to stop for today and come back on Monday morning

Fore person
4:55 pm 1/25/13

CR 11-512 (DRD)
Jury Notice
Received & Filed
January 29, 2013
9:20 AM

Your Honor

All 12 of the jurors are allready here.

We are ready to recieve the documents.

Good Morning

Foreperson

All documents Admitted in evidence, the instructions and the indictment are to be delivered by the Deputy Clerk to the jury through the Deputy U.S. Marshall.

9:39 P.M.

CR-11-512
Jury Note #3
Received & Filed
May 28, 2013
12:35 PM DF

Your honor

We would like to

listen to the audio recordings

for exhibits 300 and 301

Can we have a CD player?

The Court shall provide
a computer for listening to the
jurors

CR 11-512 (DRD)
Jury Note # 4
Received & Dated
January 28, 2013
2:45 P.M.

Your Honor

Members of the jury have issued their respective verdicts. After discussions and revisions of the evidence we are not able to reach a unanimous verdict.

Please DO NOT INFORM The Judge how you stand numerically or otherwise.
Please continue your deliberations.

3:04 P.M.

Your Honor

Can we have access to the transcripts of the trial?

Received & filed
Jury Note 5
January 28, 2013
8:30 p.m.

CR 11-512 (DRD)
Jury Note #6
Received/Filed
January 28, 2013
4:45 PM AF

Your Honor

After further considerations we have decided not to use the transcripts of the trial.

Thank you

CR 11-512 (DRD)
Jury Notice #9
Received/Filed
January 28, 2013
7:20 pm AK

Your Honor

After strong debates and discussions, Members of the jury have expressed a final individual verdict.

We are still unable to reach a unanimous verdict.

7:15 1/28/13

The Court orders the jury to return tomorrow at 10:30 A.M to continue deliberations. Please drive home carefully and safely

Francisco A. Dominguez
7:25 P.M

CR 11-512 (DRD)
Received & Filed
January 29, 2013
11:45 AM
Jury Doc #190

Your Honor

All members of the jury have arrived.

We are ready to recieve the evidence.

Thank you

11:35 am

CR 11-512
Received & Clkd
January 29, 2013
2:32 pm
Jury Note #9

Your Honor

The jury has reached

a unanimous verdict.

2:25 pm 1/29/13