No. 14-1088

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.

FRANK PEAKE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(JUDGE DANIEL R. DOMINGUEZ)

BRIEF FOR THE UNITED STATES OF AMERICA

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2. Whether the court denied Peake a fair trial before an impartial jury by not (a) transferring venue; (b) excluding evidence relevant to elements of the offense; and (c) granting a mistrial based on allegedly improper prosecutor statements, when any potential unfair prejudice was remedied by a twice-given curative instruction.

3. Whether the court abused its discretion by not giving a "theory of defense" instruction that adequately incorporated in other instructions and parroted defense counsel's closing argument.

4. Whether the court erred in following First Circuit precedent deeming Puerto Rico a state for the purposes of Sherman Act Section 1.

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6. Whether the court clearly erred by relying on trial evidence to find that the offense affected more than $500 million in Sea Star commerce, increasing Peake's offense level by twelve levels.

STATEMENT OF THE CASE

From May 2002 until April 2008, the four water-borne carriers of goods to and from Puerto Rico (Sea Star, Horizon, Crowley, and Trailerbridge) conspired to fix the prices of their services. APPX559-61.[1] The conspirators, including appellant Frank Peake, regularly emailed, called, and met with one another to allocate customers, rig bids, and fix rates, surcharges and other fees. APPX113. The FBI conducted a warranted search of the carriers' offices in April 2008, ending the conspiracy. APPX181. Three carriers (the fourth, Trailerbridge, has not been charged) and most of Peake's co-conspirators have since pleaded guilty to violating Section 1 of the Sherman Act. APPX1423.

On November 17, 2011, a federal grand jury sitting in the District of Puerto Rico returned an indictment, charging Peake with fixing the

[1] APPX and APPX-S refer to the joint appendix and sealed appendix, Br. to Peake's brief, ADD to its addendum, and D.E. to docket entries.

rates and surcharges for Puerto Rico freight services. APPX38-42. Trial commenced on January 10, 2013, D.E.148, and during the three-week trial the government called three co-conspirators and two victims to testify; the defense rested without putting on any witnesses. On January 29, 2013, the jury returned a guilty verdict. APPX1478. On December 6, 2013, the court denied Peake's motion for a new trial and judgment of acquittal, APPX1477, and sentenced him to 60 months' imprisonment, APPX1628-29.

1. The shipping companies form a conspiracy that comprehensively fixes the price of freight services

In 2002, Sea Star acquired a bankrupt carrier that had operated on the U.S. mainland-Puerto Rico route. APPX583-85. Three out of the four remaining carriers—Horizon Lines, Sea Star, and Crowley—accounted for 85% of all shipping traffic. APPX117, 564. Horizon and Sea Star, Peake's employer, were particularly close competitors as the only carriers that used faster, self-propelled vessels, which commanded higher rates. APPX120-25. Sea Star and Horizon promptly "started having meetings . . . and [] started a process of organizing a conspiracy." APPX583. Crowley was also "initially involved in the conspiracy" in a limited capacity, dealing with cargo that could not be handled in

containers and "their participation in the conspiracy increased" starting in "2005 and 2006." APPX586. Trailerbridge also conspired to fix rates and surcharges for non-containerized freight. APPX598.

In early 2003, Leonard Shapiro, a senior Sea Star representative, and Gabriel Serra, a Horizon executive, sought to bring order to the price-fixing efforts by "set[ting] the framework to guide the communication that had already been going on between the companies." APPX978-79, 994-99. That "framework" remained in place throughout the half-decade conspiracy: (1) senior executives at Sea Star and Horizon would supervise the conspiracy and resolve issues that were "elevated" to them by their subordinates, who managed the conspiracy's day-to-day logistics; and (2) for shipments via self-propelled ships between Florida and Puerto Rico, Sea Star and Horizon "would equally share the business"—an arrangement known as "the Florida 50/50." APPX996-1000. The Florida 50/50 allocation was one important means of the overall conspiracy to fix rates and surcharges for Puerto Rico freight services because it guaranteed Sea Star and Horizon half of this segment of the market, thus negating the "incentive to undercut the other company on price for business." APPX177-86.

The conspiracy covered every component of all customers' shipping prices for freight between the U.S. mainland and Puerto Rico, including: (1) base rates, which varied by container size and type of commodity (e.g., refrigerated or non-temperature controlled); (2) a bunker fuel surcharge per container; and (3) a port security charge. APPX130-37, 565-72.

Base rates were fixed annually when customer contracts were due for re-negotiation. Contracts for the major customers, especially the largest, "hall of fame" accounts, were individually rigged, APPX167-75, 604-05, while the smaller customers paid rates that the conspirators fixed by commodity segment, APPX334-46, 631-35.

Other components of the shipping price, such as the bunker fuel surcharge and the intermodal fuel surcharge, could be changed unilaterally by the carriers, and thus fluctuated during the contract period. APPX568. Every time the bunker fuel surcharge was raised or lowered, the conspirators agreed "on what the level would be and [] the date that it would implemented." APPX169-71. Similarly, the conspirators "would agree upon" the intermodal charges for the train or truck segments of customer shipments from points inland in the United

States, such as Chicago, to another state's port, such as Florida. APPX171, 135. The various price-fixed surcharges applied to all shipments of all customers, and the conspiracy was responsible for 90% of the resulting price increases on all of the pricing components. APPX166-67, 572.

2. Peake joins the conspiracy and takes a leadership role

In mid-2003, Peake left Horizon and became Sea Star's Chief Operating Officer and shortly thereafter President. APPX967-70. Within a "few weeks" of joining Sea Star, Peake replaced Shapiro as the person with whom Serra would discuss issues raised by their subordinates—a welcome outcome for Serra because Peake "was a friend. I felt more comfortable." APPX1001. For the next five years, Peake and Serra supervised and coordinated the conspiracy through face-to-face meetings, emails, and phone calls and resolved any pricing or customer disputes that their subordinates could not. APPX978-81.

As Peake's direct subordinate, Peter Baci managed the day-to-day logistics of the price-fixing and customer-allocation agreements with his Horizon counterpart, Serra's direct subordinate, Greg Glova (or Glova's predecessor, Kevin Gill). APPX127, 143. Baci and Glova were "given

direction on what was expected of [them] and what [they] needed to do," and they "were expected to execute those orders and . . . work them out between the two of [them]." APPX159-60. Using telephones and pseudonymous non-company email accounts to "hide what [they] were doing," Baci and Glova communicated on "almost a daily basis" to keep the conspiracy functioning "as it was planned to work . . . in terms of communication with each other and agreement and understandings." APPX151-54, 158-60. They monitored public data and exchanged customer-specific internal data to ensure the Florida 50/50 allocation was maintained, rigging bids on upcoming customer negotiations to maintain the agreed-upon customer allocation. APPX604-09. Glova and Baci handled bid rigging and price fixing for the "majority" of the approximately 200 contracts negotiated each year. APPX168-69, 178.

But when Baci and Glova (1) had "disagreements in terms of pricing," or suspected one had "undercut" the other "to get business," or (2) believed "the price of [the] bunker surcharge would change," issues would "escalate to Gabe [Serra] and Frank [Peake]." APPX145-48, 158-60, 174-75. The subordinates followed the "chain of command"—Baci would escalate conflicts to Peake, and Glova to Serra, but they never

reached out to the other's boss. APPX162, 601-02. Peake's and Serra's attention was generally required "twice in a month," though sometimes "it might be two months." APPX161-62. To reach a resolution, "Frank and Gabe would talk and come to an understanding of what the final decision would be." *Id.*

For example, Peake enforced the Florida 50/50 allocation. While Serra had "hop[ed] [the Florida 50/50] would become a framework under which . . . we would go on our own business mindful of that share and adjust to that share" and help "eliminate" some of the communication because "it was risky" and "inappropriate," APPX998-99, at times it required executive-level involvement. The original Florida 50/50 allocation allowed two exceptions: (1) Horizon would "retain 53/54 percent of the refrigerated [cargo] market," and (2) Sea Star would retain "the higher margin" in "noncontainerized freight." APPX998. Peake consistently argued for the elimination of exceptions, and this was one of the major topics of discussion at a meeting between Peake, Serra, Baci, and Glova in Orlando in 2006. APPX698-709. At that meeting, Peake "agreed" with Serra "that [they] would freeze the

market share" at current levels, rather than the originally agreed-upon levels. APPX1037-42.

Peake also worked to maintain the Florida 50/50 when in 2006 Walgreens upset the allocation by unexpectedly awarding its entire shipping contract to Horizon, despite Baci and Glova coordinating their bids to Walgreens in an effort to get Walgreens to follow its usual practice of dividing its contracts between Horizon and Sea Star. APPX657-59, 1009-13. This award had a major impact on the Florida 50/50 allocation, immediately skewing the carriers' market shares. APPX659-60. Peake promptly confirmed with Serra "that [Serra] understood that [Horizon] would have to make up that volume by shifting cargo to [Sea Star]." APPX1011. "[I]n an attempt to minimize the negative impact to Sea Star," Serra agreed to "a short-term purchase of space on the Sea Star vessel on the Port Everglades call." APPX1011-12. Using the companies' Transportation Service Agreements (TSAs)[2] to further their conspiracy, the conspirators had Horizon pay for space on Sea Star ships even though Horizon's own

[2] TSAs are contracts commonly employed in the shipping industry to allow a space-constrained carrier to move freight with another carrier by paying a shipping fee and any related surcharges. APPX126-28.

ships could have carried the freight because "becom[ing] a customer to [Sea Star was] offset by the fact that [Horizon] would have received the revenue from the Walgreens loads that we increased." APPX1012, 278-79. While using the TSA "was a quick fix to keep the 50/50 in place under the conspiracy," APPX661-64, over the "long-term," the Horizon restored the 50/50 market split by "tak[ing] more conservative position[s] on bids and price higher" to "eventually make that shift of volume happen directly from the customers, and not by [Horizon] purchasing space" from Sea Star. APPX1011-13, 656-67, 268-89.

Peake also made the fixed surcharges more effective. For the conspiracy's first several years, the carriers charged the same bunker fuel surcharge for all freight, regardless of port of origin. APPX1078-79. Peake proposed charging different rates based on the length of the shipping route and, in response to Serra's skepticism, explained that, "[j]ust cuz we were stupid 20+ years ago, prevents us from doing the right thing? I thought you were more of an out of the box thinker than that." APPX1730. Peake's co-conspirators acquiesced to his proposal and instituted varied surcharge pricing on different routes. APPX1079-93.

By 2008, Peake bristled when Serra questioned rumored Sea Star rates, explaining: "I would like to think that my/our performance in the market over the past 4 1/2 years would at least get me the benefit of the doubt." APPX1719-20, 983-92. In response, Serra returned to the last half-decade's theme: "let's figure a plan . . . on an issue that I'd prefer to solve together," by which he meant Peake should "either raise his price or restrict the access to the space" for the large customer. *Id.*

SUMMARY OF ARGUMENT

As the district court observed at sentencing, Peake "played a critical role in the success of the conspiracy"—he "approved his subordinates' illegal conduct" and "directly participated in many key price-fixing meetings and communications." APPX1625-26. Despite "receiv[ing] training in antitrust" and having the ability to "put a stop to the conspiracy at any time," Peake "allowed it to continue and took the lead in several aspects because he was benefiting indirectly by the bonus compensation." APPX1626. Peake seeks to evade responsibility for his half-decade participation in a conspiracy that affected almost all goods shipped between the U.S. mainland and Puerto Rico by ignoring inculpatory evidence, unfavorable portions of court rulings and warrants, and controlling precedent. His strategy did not succeed below, and it should not succeed here. His claimed errors, individually and collectively, provide no basis to disturb the judgment.

Peake seeks a new trial based on the district court's refusal to suppress electronic documents copied from his laptop computer and Blackberry smartphone during a warranted search of his employer's headquarters. Peake bases his Fourth Amendment claim on the

magistrate judge's deleting references to laptops and Blackberries from the warrant's description of the premises to be searched. But Peake ignores language in the warrant's description of the items to be seized expressly authorizing the search and seizure of all relevant electronic documents stored on laptops and Blackberries. The court rightly recognized that the warrant covered the challenged documents.

Peake also seeks a new trial claiming he faced a biased jury based on the district court's failure to transfer venue and the government's presentation of supposedly "irrelevant and unduly prejudicial" arguments and evidence. Br.28. But he never discusses the standard for the mandatory venue transfer he sought and cannot make the necessary showing that he faced "so great a prejudice" that he could not have obtained a "fair and impartial trial." The court impaneled an impartial jury whose members had no financial interest in the case and no connection to the conspirators' customers who paid the fixed prices.

The evidence Peake challenges is two witnesses' testimony about what they shipped in interstate commerce (supplies for Burger King restaurants and the U.S. Department of Agriculture's school lunch program) and the prices they paid the conspiring carriers for those

shipments. This testimony was relevant to help show the conspiracy's existence and its effect on interstate commerce and to establish venue in Puerto Rico. And contrary to Peake's assertions, these witnesses did not testify about harm to end consumers. Nor did the government argue that the jury should convict because of that harm. In any event, the court eliminated the danger that the jurors would convict on that basis by giving the jurors a timely and repeated instruction that they should not consider the potential effect on consumers or prices in Puerto Rico, nor decide the case based on pity and sympathy to Puerto Rico or businesses and consumers in Puerto Rico.

Peake next seeks a new trial based on three claims of instructional error. Most of his instructional claims are raised for the first time on appeal, and none of them establish error, let alone plain error. First, the district court did not err in following this Court's decisions holding that Puerto Rico is considered a "state" for purposes of the Sherman Act's interstate commerce element and instructing the jury accordingly.

Nor did the district court err by declining to parrot Peake's proposed "theory of defense" instruction. The preliminary and final instructions adequately incorporated the defense theory by requiring the

government to prove beyond a reasonable doubt that Peake knowingly and intentionally joined the conspiracy. The court did not abuse its discretion by declining to narrate Peake's version of the contested events. Closing argument is for defense counsel to make, and here the instructions gave him the basis to make his argument.

Third, the district court did not err, much less plainly err, in giving the jury a neutral instruction to continue deliberating. Peake's claim that the court was required to accompany this instruction with an *Allen* charge's balancing language ignores this Court's precedent holding that such language is unnecessary when the jury is merely instructed to continue deliberating rather than given some form of *Allen* charge containing coercive language. The court did not abuse its discretion in giving that simple instruction and denying a mistrial when the jury had deliberated for one day after a nine-day trial and was not conclusively deadlocked.

Finally, Peake seeks resentencing, claiming the court miscalculated his range under the Sentencing Guidelines by erroneously finding that the conspiracy affected over $500 million in commerce done by his employer, Sea Star, after he joined the conspiracy. But that finding is

amply supported by the evidence presented at trial and for sentencing showing that (1) the conspiracy affected every aspect of conspirators' prices, including bunker fuel surcharges which applied to all the customers; (2) Peake joined the conspiracy in mid-2003; and (3) from then until the FBI searched Sea Star in 2008, the carrier had over $900 million in affected commerce. Peake's unsupported protestations to the contrary cannot establish clear error.

ARGUMENT

I. A valid warrant expressly authorized the search and seizure of relevant electronic documents from laptops and Blackberries

Peake seeks a new trial, arguing that the Fourth Amendment required the district court to suppress fifteen electronic documents, mostly Peake's emails, copied by the government from a laptop and Blackberry smartphone during its search of his employer's headquarters. But his argument is based on an incomplete and distorted description of the warrant. As the court explained, "Peake's interpretation 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." ADD81. The district court rightly denied Peake's suppression motion because the "first search warrant . . . properly authorized the search and seizure of Peake's laptop and Blackberry and other electronic devices, notwithstanding the . . . strike through of the final paragraph of the section entitled 'Description of Premises To Be Searched.'" *Id.*

A. Standard of review

In reviewing a denial of a suppression motion, this Court reviews the district court's factual findings for clear error and questions of law de novo. *United States v. Dunning*, 312 F.3d 528, 531 (1st Cir. 2002).

B. The government complied with the warrant when it copied electronic documents from Peake's laptop and Blackberry

On April 17, 2008, the government seized the electronic documents at issue by copying them from Peake's laptop and Blackberry during a search of Sea Star's headquarters. The day before, the government sought a warrant authorizing that search and seizure in the Middle District of Florida. The warrant application had two attachments. Attachment A, entitled "DESCRIPTION OF PREMISES TO BE SEARCHED," described the physical location of Sea Star's

headquarters and areas to be searched, but also listed various electronic devices. APPX-S190-91. Attachment B, entitled "DESCRIPTION OF PROPERTY TO BE SEIZED," identified items to be seized including any relevant records or documents stored in electronic form on any electronic storage device. APPX-S193-95. With some modifications, a magistrate judge issued the warrant with the attachments.

Peake contends that the magistrate judge excluded laptops and Blackberries from the scope of the search when he struck from Attachment A's description of the premises to be searched the statement that "the search will include the briefcases, laptop computers, hand-held computers, cell phones, Blackberries, and other movable document containers." APPX-S191.

But Peake ignores Attachment B's description of the property to be seized, which belies his contention that the magistrate judge intended to exclude documents found on laptops or Blackberries. In Attachment B, the magistrate judge left in place broader language covering relevant electronic documents, including those at issue here. The warrant authorized seizure of documents and records relating to customer allocations, market divisions, contract negotiations or bid proposals for

"[c]oastal freight transportation services between the United States and Puerto Rico." APPX-S193-94. These documents included communications among Sea Star management (expressly including Peake) and Horizon's employees or agents. *Id.*

The warrant defined documents and records to include those "created, modified or stored in any form," including "electronic" form, such as "any information on an optical, electrical, electronic or magnetic storage device," and "e-mail servers, as well as opened and unopened e-mail messages" from "any optical, electrical, electronic or magnetic storage device." APPX-S194-95. The warrant also expressly authorized the seizure of "[a]ll address books (including . . . Blackberries) . . . of SEA STAR management . . . including . . . PEAKE." APPX-S194.

From "such unequivocal language," the court correctly concluded that "it is abundantly clear that the issued warrant permits the search and seizure of [Peake's] laptop and Blackberry and that Peake's contentions to the contrary are without merit." ADD82. As the court explained, "it is readily apparent that by deleting the aforementioned references" from the description of the premises, the magistrate judge "*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.'" ADD82.

Moreover, the magistrate judge clearly intended the warrant to cover laptops and Blackberries as he handwrote on the warrant's cover: "In the event that computer equipment and other electronic storage devices must be transported to an appropriate laboratory, rather than searched on the premises," the search must be completed within 30 days and the "computer equipment and other electronic storage devices" must be "returned promptly" if "no evidence is found" or "if any electronically stored information is outside of the scope of the warrant." APPX-S189. The FBI agents, however, imaged Peake's laptop and Blackberry on-site during the execution of the warrant and thus did not transport them off-site.[3] APPX-S114; *see* APPX-S134-35 (listing for

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[3] To "image" an electronic device is to make "[a]n exact copy of an entire physical storage media (hard drive, CD-ROM, DVD-ROM, tape, etc.), including all active and residual data and unallocated or slack space on the media." *Sedona Conference Glossary: E-Discovery & Digital Information Management* 23, 27 (Sherry B. Harris et al. eds., 3d ed. 2010).

subsequent warrant, "forensic images of laptop computers" and "forensic images of Blackberry devices associated with . . . Frank Peake").

Although the FBI agents properly imaged Peake's laptop and Blackberry, the images were not immediately reviewed. FBI agents had also imaged Sea Star's corporate server and believed (erroneously) that the server "captured virtually all of the information" contained on Peake's computer and Blackberry; thus the computer and Blackberry images were not sent to prosecutors. APPX-S115-16. The FBI agents later sent all the evidence to the prosecutors in Washington, D.C., at which point the prosecutors discovered a hard drive and CD containing images of Peake's laptop and Blackberry. APPX-S116.

Because of the lapse of time between imaging the devices and review, the government (in an abundance of caution) sought an additional search warrant from the district court where the images were located, the District of Columbia. APPX-S109; *see* Fed. R. Crim. P. 41. As part of that application, the government disclosed the prior search to the D.C. magistrate judge, providing copies of the original search warrant and Peake's motion to suppress then-pending in Puerto

Rico. APPX-S109-268. The government also informed the district court in Puerto Rico of its actions and provided all relevant papers. The D.C. magistrate judge confirmed that the government could inspect the information from the devices that had been properly imaged under the initial warrant. APPX-S98. And the court in Puerto Rico hearing Peake's case determined that the documents imaged from the devices were within the scope of the initial warrant and thus admissible. ADD78-82.

Relying on *United States v. Ganias*, Peake argues that the government "did not remedy its violation by obtaining [the second] warrant." Br.44. *Ganias* held that a later warrant could not cure the illegal seizure of records that "were not covered by the [original] warrant." 755 F.3d 125, 137 (2d Cir. 2014). But here there is no violation to cure because Peake's electronic devices were imaged pursuant to a valid search warrant, and the admitted documents were within the warrant's scope. Although the original warrant required that devices transported off-site be returned within 30 days, it contained no such requirement for device images made on-site. APPX-S189.

C. The good-faith exception provides an alternative basis to affirm

This Court "may affirm the denial of a suppression motion on any ground supported by the record." *United States v. Doe*, 61 F.3d 107, 111-12 (1st Cir. 1995). Here, the Court can also affirm based on the good-faith exception to the exclusionary rule even if either or both warrants were defective.

The exception applies "where an objectively reasonable law enforcement officer relied in good faith on a defective warrant because suppression in that instance would serve no deterrent purpose." *United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001) (citing *United States v. Leon*, 468 U.S. 897, 920-21 (1984)). Illegally seized evidence therefore "will be suppressed only when the police conduct is sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *United States v. Echevarria-Rios*, 746 F.3d 39, 41 (1st Cir. 2014) (internal quotation marks omitted).

Here, there was no misconduct, deliberate or otherwise, as the government agents reasonably relied in good faith on two search

warrants.[4] There is no dispute that there was probable cause to believe that documents on Peake's laptop and Blackberry contained evidence of a price-fixing conspiracy. *See, e.g.*, APPX-S160, 171-72. The government agents reasonably believed (and continue to believe, like the district court) that Peake's laptop and Blackberry were covered by the warrant. *See* APPX-S117. The government agents also reasonably believed that the warrant's 30-day restriction "applies only to computer equipment and electronic storage devices transported offsite rather than those that were imaged at the search site," APPX-S117, and thus that they could retain (and later inspect) images made on-site.

II. The impaneled jury was impartial and not unfairly biased by evidence and argument about the conspiracy's effect

Peake also seeks a new trial based on "his right to be tried in an impartial venue," complaining that the prosecutor's statements unfairly

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[4] In *United States v. Wurie*, 728 F.3d 1, 14 (1st Cir. 2013), this Court did not consider the good faith exception when first raised on appeal. While the exception was not raised below, the Court should consider it because "the relevant *Leon* exception here requires evaluating only the four corners of the affidavit [and warrant] and an objective reasonableness standard," *United States v. Richards*, 659 F.3d 527, 559 n.11 (6th Cir. 2011), unlike *Wurie*, which involved a warrantless search incident to arrest, requiring consideration of the police officers' conduct during the arrest.

biased the jury and the district court should have transferred venue and excluded evidence regarding the conspiracy's effect. Br.25.

But Peake's complaints are again based on an incomplete and distorted description of the proceedings. The court conducted an extensive voir dire, and seated an impartial jury. Contrary to Peake's claims, the government never argued that the jurors or their families were victims of the conspiracy, and no witnesses testified that the conspiracy affected the prices paid by anyone other than companies purchasing freight services from the conspiring carriers. No juror had any connection to victimized companies or a financial interest in this case.

The government's argument and the evidence were relevant to the conspiracy's existence and its effect on interstate commerce—essential elements of the offense. And any risk of unfair prejudice was cured by the court's repeated instruction "not to decide this case based on pity and sympathy to Puerto Rican businesses, to Puerto Rico, or to Puerto Rican consumers." APPX523-24, 1379-80.

A. Standard of review

The denial of a motion for change of venue and evidentiary decisions made under Federal Rule of Evidence 403 are reviewed for abuse of discretion. *United States v. Quiles-Olivo*, 684 F.3d 177, 181 (1st Cir. 2012); *United States v. Brooks*, 145 F.3d 446, 454 (1st Cir. 1988).

Whether allegedly improper remarks "amounted to prosecutorial misconduct" is reviewed de novo and—if misconduct occurred—the court must determine "whether the prosecutor's behavior so poisoned the well" that it "likely affected the trial's outcome." *United States v. Ayala-Garcia*, 574 F.3d 5, 16 (1st Cir. 2009) (internal quotation marks omitted). Prosecutorial misconduct "warrants a mistrial . . . only where there would be a miscarriage of justice or where the evidence preponderates heavily against the verdict," and the "denial of a motion for a new trial [is reviewed] for manifest abuse of discretion." *United States v. Mooney*, 315 F.3d 54, 61 (1st Cir. 2002). Where "defendants have challenged non-constitutional inappropriate comments, the burden rests with the defendant to show that the comment was harmful, i.e., that under the totality of the circumstances they affected the trial's

outcome." *United States v. Wihbey*, 75 F.3d 761, 772 n.6 (1st Cir. 1996) (internal quotation marks omitted).

B. Peake was not entitled to a venue transfer

One month after being indicted in the District of Puerto Rico, Peake moved for a venue transfer to the Middle District of Florida under Federal Rule of Criminal Procedure 21(a),[5] claiming he could not get a fair trial in Puerto Rico.[6] Peake must demonstrate either "presumptive prejudice" due to "inflammatory" media coverage, or "actual prejudice." *Quiles-Olivo*, 684 F.3d at 182-83. Peake cannot demonstrate presumptive prejudice because the record shows the charge against him

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[5] Peake's initial venue transfer motion was based on Rule 21(b), D.E.16, which is not at issue on appeal; he first raised Rule 21(a) in his reply to the original motion, D.E.33.

[6] Peake's suggestion that prosecutors charged him in Puerto Rico to avoid the judge in Florida who sentenced Baci, Br.7-10, is irrelevant to the issue of prejudice. It is also unfounded. The court below rightly found "no justifiable grounds to insinuate that [the Florida judge] would be biased for or against the Government." ADD57. The Florida judge himself explained he had "no reason to question the professionalism, integrity, or good faith of the government lawyers in this case." Sentencing Hearing Tr. at 123-24, *United States v. Serra*, No. 3:08-cr-349 (M.D. Fla.) (May 12, 2009).

was barely noticed in the Puerto Rico media, let alone that there was a "prejudicial fog." *Id.* at 182.

Nor can he show actual prejudice. The actual prejudice analysis "hinges on whether the jurors seated at trial demonstrated actual partiality that they were incapable of setting aside," and is guided by "the trial judge, who is responsible for conducting the voir dire and to whom [this Court] defer[s] from [its] more distant appellate position." *Id.* at 183 (internal quotation marks omitted).

Here the court was scrupulous in its voir dire of the jury pool to ensure all impaneled jurors were impartial. The court had jurors fill out lengthy interrogatories, something it had never done outside of death penalty cases. APPX590. With those interrogatories and with thorough questioning, the court identified every potential juror employed by the conspiracy's direct victims (i.e., companies that purchased shipping services from the conspiring carriers) or who had a financial interest, however small, in the outcome, and those individuals were excluded. *See, e.g.*, D.E.242 at 7-8 (excluding employee of importer that dealt with carriers); 76-77 (identifying individuals with "miniscule"

financial interest due to potentially affected pensions); 109 (showing those individuals not selected).

As a result, the court explained, "the potential jurors are not the direct purchasers of [shipping] services but may have only incurred increased prices as secondary or tertiary consumers further down the consumption chain." ADD53. The district court "believed that he had impaneled a jury of twelve open-minded, impartial persons," and Peake has failed to show that "the jurors seated at trial demonstrated actual partiality that they were incapable of setting aside." *Quiles-Olivo*, 684 F.3d at 183 (internal quotation marks omitted). The cases Peake cites about juror disqualifications are inapposite and do not hold that jurors like those here cannot be impartial. Br.35, 41.[7]

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[7] *See United States v. Greer*, 285 F.3d 158, 172 (2d Cir. 2000) (holding that juror misrepresentation that he did not know defendant, even though juror's brother purchased drugs from defendant, did not deprive defendant of an impartial jury); *United States v. Torres*, 128 F.3d 38, 41-42 (2d Cir. 1997) (holding that "a category of inferable bias exists" if "facts disclosed at voir dire indicate that a prospective juror has engaged in an activity closely akin to the conduct charged," like "structuring" cash transactions); *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000) (holding that 15-year employee of the U.S. Attorney's Office prosecuting the case should be disqualified from jury pool based on "implied bias"); *Estrada v. Scribner*, 512 F.3d 1227, 1233 n.6, 1241 (9th Cir. 2008) (holding that juror's nondisclosure of

C. Evidence about the conspiracy's effects was relevant and did not unfairly prejudice defendant or bias the jury

Peake also claims that the trial was "infected by irrelevant and unduly prejudicial arguments" and evidence "that improperly biased the jury against him." Br.28. He complains that the government called a "series of irrelevant 'victim' witnesses"—a restaurateur and a U.S. Department of Agriculture bureaucrat—to testify that "Burger King's prices were higher as a result of the conspiracy" and "about the effect of the conspiracy on school lunch prices." Br.17, 31-32. But the witnesses said nothing about the conspiracy's effects on prices at Burger King or for school lunches. Rather, their testimony addressed the conspiracy's effect on the prices they paid to ship freight in interstate commerce and thus was relevant to two offense elements. APPX541-47, 881-89.

The government was required to prove three elements: (1) a conspiracy to fix prices for Puerto Rico freight services existed from 2005 until 2008; (2) Peake knowingly and intentionally joined that conspiracy; and (3) the conspiracy either affected, or occurred within the

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relationship to defendant's murder victim's family and another juror's alleged inability to "put his [own] mother's murder aside" during deliberations did not deprive defendant of an impartial jury).

flow of, interstate commerce. APPX1367-68. The challenged witnesses were presented to help prove the first and third elements.

The bureaucrat's testimony was entirely focused on (a) what the Agriculture Department shipped in interstate commerce (i.e., goods for the school lunch and assistance to low-income families programs); (b) shipping price components; and (c) the symmetrical price increases and negotiation practices of the conspirators. APPX879-94. He never testified that any school children had less for lunch or paid more for it as a result of the conspiracy.

Similarly, the restaurateur testified about (a) shipping "furniture, construction materials and paper products," as well as "beef [and] produce" in interstate commerce; (b) shipping price components; and (c) the symmetrical price increases and negotiation practices of the conspirators. APPX530-52. He was not asked any questions—nor did he give any answers—about the prices paid by Burger King customers.

The court found this evidence relevant: (1) to "whether [the conspiracy] had an impact in interstate commerce and whether these people were impacted," APPX516-18; and (2) for the purpose of corroborating co-conspirator testimony, as "the cooperators were

strongly grilled in cross-examination relating to the fact that they were cooperators and that they may have an interest in the outcome of this case." APPX540. Such findings are due "substantial deference." *Rubert-Torres v. Hosp. San Pablo, Inc.*, 205 F.3d 472, 479 (1st Cir. 2000).

Peake nonetheless contends that all "evidence (and the Government's accompanying argument)" regarding the conspiracy's existence and its nexus to interstate commerce "had *no relevance whatsoever* to the case against Peake, which turned—solely—on the question of whether Peake was a member of the conspiracy," and thus "should have been excluded pursuant to Federal Rules of Evidence 402 and 403." Br.35-36. He is mistaken. His strategy not to contest certain elements does not control what is relevant because "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle v. McGuire*, 502 U.S. 62, 69 (1991).

The government had the obligation and prerogative to present evidence of the price-fixing conspiracy's connection to, and effect on, interstate commerce—including its effect on prices. A "criminal

defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997). The customers' testimony about what they shipped in interstate commerce and the conspirators' symmetrical price increases charged to ship that freight is highly relevant. And it is not the kind of testimony that creates a danger of unfair prejudice that "substantially outweigh[s]" the evidence's "probative value." Fed. R. Evid. 403.

Peake is also mistaken that admission of this evidence contravened a pre-trial evidentiary ruling and "compounded" the "harm of this testimony" because "the defense was prevented from countering the Government's evidence regarding higher consumer prices with available evidence to the contrary." Br.34-35. The ruling did not preclude all pricing evidence. How could it in a price-fixing case? Rather it "authorized [the government and defense] to discuss the prices within the [shipping] market, Sea Star's pricing and how Sea Star made its pricing decisions," but prohibited Peake from arguing that "per se illicit conduct is in anyway justified by sound business judgments or economic sense or necessity," or that the "agreements set reasonable, fair or

competitive prices; crated real or imagined efficiencies; or were necessary to avoid ruinous competition." APPX18 at D.E.128.

Peake's assertion that "the district court's ruling was incorrect," Br.34, is refuted by Supreme Court precedent holding that the "reasonableness of the particular prices agreed upon" is no defense to a price-fixing charge under the Sherman Act. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-13, 221-22 (1940). And while a price-fixing conspiracy cannot be excused because prices were reasonable, evidence of higher and coordinated prices, admitted through co-conspirator and victim-witness testimony, is probative of the existence of a price-fixing conspiracy. *See United States v. MMR Corp.*, 907 F.2d 489, 498-99 (5th Cir. 1990). Peake essentially conceded as much at trial because, although Peake frequently objected when the prosecutor mentioned prices, *see, e.g.*, APPX572, 909-12, Peake consistently asked witnesses about shipping prices on cross-examination, *see, e.g.*, APPX429-30, 804-06.

Peake's claim that the government's theme was "harm to end consumers," Br.28, is unsubstantiated by the evidence. Nor does that

claim find any basis in the government's closing argument, which is hardly surprising because the government presented no evidence of consumer harm. The government's argument focused on the three witnesses that directly implicated Peake in the conspiracy, *see, e.g.*, APPX336-37, 614-22, 726-28, 1044-54 and the corroborating documentary evidence, including Peake's own emails, *see, e.g.*, APPX1722-23, 1645, 1709. *See* APPX1241-86, 1328-57. Thus, the district court was correct that the government "was very clear that the victims of the conspiracy were those who directly contracted with the maritime shipping companies," and "did not infer that those higher prices were passed onto the victims' customers, the general populace of Puerto Rico, in a secondary manner"; nor did the government "argue that hamburgers and paperclips cost more" or "that school children paid higher milk prices or went without milk as a result of the conspiracy." APPX1496.

Without a basis in argument or evidence, Peake resorts repeatedly to quoting a sentence from the government's opening statement: "'He will tell you that the shipping costs are factored into the costs of the whoppers sold at Burger King.'" Br.29, 38. But that sentence states

only that the restaurateur factored the shipping cost into his costs, not that he passed them along in the price of hamburgers. This Court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). This statement was not intended to inflame the jury. Nor could it. The restaurateur never testified that he factored the shipping costs into the costs of his food, let alone that he passed on that cost to his customers. As the court explained, the government did not "unduly stress or emphasize that all residents of Puerto Rico who have purchased goods from the continental United States are victims." ADD74.

Peake also resorts to quoting questions to the witness from the Agriculture Department. Br.32-33. But contrary to Peake's assertions, none of the questions were about "the effect on school lunch prices," Br.32, nor did any of the answers, which Peake omits, claim an effect on school lunch prices. Rather, these questions and answers showed the conspiracy's effect on and flow in interstate commerce. Peake

emphasizes that the prosecutor repeated some questions, Br.32, but the prosecutor repeated them in response to a witness request or following an overruled objection, not to harp on the school lunch program. APPX889-93.

Peake also relies on the opening statement's references to large customers and their connection to Puerto Rico. Br.29-30. But those references described relevant evidence to be presented at trial, and the subsequent related questions and testimony bore that out. Moreover, Peake repeatedly challenged venue and the conspiracy's connection to Puerto Rico, from extensive pre-trial briefing, *see e.g.,* D.E.16, D.E.31, to his post-trial claim that "the government failed to prove venue was appropriate in this District as no conspiratorial meeting or overt act of the conspiracy occurred in Puerto Rico," D.E.193 at 19. The government's efforts to highlight the conspiracy's connection to Puerto Rico were relevant and not improper.

Discussion of large, identifiable customers was also appropriate because the documentary trail was particularly powerful for the victims whose bids were individually rigged. Thus, the evidence included, for example, Peake's discussions with Serra about Burger King

(APPX1029-32), Walgreens (APPX1009-12), and GE (APPX1018-19), and about lesser-known customers, like Flexi (APPX1033). The government was not required to reference only obscure companies or none at all. Rather, it could make its case "with testimony [that] not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness . . . not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment." *Old Chief*, 519 U.S. at 187-88.

As a precautionary measure, however, the court gave the following instruction to the jury on the third day of trial:

> 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 innocence or 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 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 may 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.

APPX523-24. The court reiterated the instruction at the close of trial, although it noted that the effect on Puerto Rico was also relevant "to establishing venue." APPX1379-80. In addition, jurors were instructed at the outset and close of trial that "statements, arguments and questions by lawyers are not evidence. The evidence is the answer, not the question." APPX60, 1362; *see Mooney*, 315 F.3d at 60 ("these standard instructions alone are sometimes enough to neutralize any prejudice from improper remarks").

Peake argues that the jurors could not possibly abide by the court's instructions. Br.40. Here the court went beyond the standard instructions and promptly "delivered a forceful and specific limiting instruction," and this Court "presume[s] that a jury will follow such instruction." *Mooney*, 315 F.3d at 60; *see also United States v. Olano*, 507 U.S. 725, 740 (1993).

Even if the challenged statements and questions improperly appealed to juror emotion or self-interest, that appeal was not so impassioned, inflammatory, memorable, or overwhelming that the jury

instructions could not remedy it. It is a far cry from the cases Peake relies upon where the presumption was overcome. For example, in *United States v. Ayala-Garcia*, a prosecutor insinuated—without evidence—that "defendants intended a mass killing," which was "immediately followed by the prosecutor's entreaty that the jurors look at the size of the bullets" and "do your job, find the Defendants guilty." 574 F.3d 5, 19 (1st Cir. 2009). Because the case was "quite unusual, combin[ing] an undisputedly improper and significant remark, with a defense case that is forceful and well developed," including "[s]ix witnesses [who] testified that the police had fabricated" evidence, the district court's vague curative instruction was insufficient to show that the trial's outcome was likely unaffected. *Id.* at 22-24 (Boudin, J., concurring); *see also Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 277-78 (5th Cir. 1998) (jury improperly told that victim's "last thought before death would be of the rapists" and asked to picture themselves having "a knife in your side or a knife on your leg or a pistol at your neck").

Moreover, the statements Peake challenges "occurred during opening arguments, not during summation where the last words the

jury hears have significant potential to cause prejudice." *Mooney*, 315 F.3d at 60. And "any lingering prejudicial effect from the remarks pales in comparison with the overwhelming strength of the government's evidence against the defendant." *Id.*

Lastly, the references to the conspirators' well-known customers and their presence in Puerto Rico do not make this analogous to a violation of "the Golden Rule," where jurors are asked to put themselves in the shoes of the victim. Br.29-31, 36-37 (quoting *Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988)). The government never exhorted the jurors to put themselves in the victims' shoes, rather it presented relevant evidence. And the court's instruction eliminated any risk that the jurors would decide the case on an improper basis. *See Magendantz*, 848 F.2d at 308-10 (holding curative instruction was sufficient to remedy harm from lawyer's four-time request that jury put themselves "in the shoes of" plaintiffs' injured son). In a case involving the fixing of shipping rates between the U.S. mainland and Puerto Rico where venue is contested, references to Puerto Rico are not an improper appeal to regionalism.

Peake's contention that the jury was inflamed against him and punished him out of emotion is further undermined by the fact that the jury spent a day and a half reviewing the evidence and requested various types of evidence to consider in their deliberations. ADD89, 91. Peake himself acknowledges the fair hearing he received from the jury: he grounded his plea for leniency at sentencing on juror letters opining on his role in the offense and reflecting sympathy for Peake. APPX1614-15, 1560, 1590, 1598-99, 1607-08.

The court did not manifestly abuse its discretion in denying a mistrial. "[W]ithin wide margins, the potential for prejudice stemming from improper testimony or comments can be satisfactorily dispelled by appropriate curative instructions," and a "mistrial is 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"—a judgment "committed to the trial court's discretion." *United States v. Sepulveda*, 15 F.3d 1161, 1184 (1st Cir. 1993).

III. Puerto Rico is a state for Sherman Act Section 1 purposes

Peake was charged with violating Section 1 of the Sherman Act, which outlaws agreements in restraint of trade "among the several States." 15 U.S.C. § 1. Peake claims that the statute does not reach his restraint on U.S. mainland-Puerto Rico commerce because Puerto Rico is not a state. But this Court's precedent holds that it is a state for purposes of the Sherman Act.

A. Standard of review

Peake did not object to the jury instruction that "Puerto Rico is treated as a state for purposes of interstate commerce" under the Sherman Act, APPX1377, and concedes he "did not raise this issue in the district court." Br.57 n.9. Accordingly, it is waived and reviewed, if at all, only for plain error. Fed. R. Crim. P. 30(d), 52(b); *United States v. Turner*, 684 F.3d 244, 260 (1st Cir. 2012).

Peake's suggestion that it is an unwaivable "jurisdictional defect," Br.57 n.9, "confuses the constitutional limits on Congress's power with the jurisdiction of the federal courts: whether the facts of a given case present a sufficient nexus to interstate commerce to be regulated by Congress is not an issue of the federal courts' subject matter

jurisdiction." *United States v. Cruz-Rivera*, 357 F.3d 10, 14 (1st Cir. 2004). "Although the interstate commerce requirement is frequently called the 'jurisdictional element,' it . . . is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, i.e., a court's constitutional or statutory power to adjudicate a case." *United States v. Rayborn*, 312 F.3d 229, 231 (6th Cir. 2002).

B. Under Circuit precedent, Puerto Rico is a state for purposes of the Sherman Act's interstate commerce element

There is no error here, let alone a plain one. It is settled law that Puerto Rico is "considered to be a state for purposes of sections 1 through 3 of the Sherman Act." *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 66 (1st Cir. 2005) (citing *R.W. Int'l Corp. v. Welch Food, Inc.*, 13 F.3d 478, 489 (1st Cir. 1994); *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 42 (1st Cir. 1981)). These cases follow the long-established "default rule," which provides that federal laws "not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States," except "where Congress manifests an intent to exclude Puerto Rico from a law's coverage." *Colón-Marrero v. Conty-Pérez*, 703 F.3d 134, 137 n.5 (1st Cir. 2012) (quoting the Puerto Rican Federal Relations Act, 48

U.S.C. § 734). This Court's repeated holding that Puerto Rico is a state for Sherman Act purposes "is consistent with that of the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)," which determined that Puerto Rico is a "state" for the purposes of 28 U.S.C. § 2281. *Cordova*, 649 F.2d at 42.

In any event, even if there was an error, it did not affect Peake's substantial rights or seriously impair the fairness of the proceedings. The government alleged that the conspirators fixed the rates of freight that traveled "between various states and Puerto Rico." APPX41. And the uncontested evidence showed that Peake and his co-conspirators agreed, among other things, to fix rates for intermodal (land) transport between various states on the mainland, including fixing the intermodal fuel surcharge applicable only to that land transport through the mainland states. *Supra* pp. 5-6. Thus, no rational jury would have acquitted Peake on the interstate commerce element, whether or not Puerto Rico was treated as a state.

IV. The jury instructions accurately reflected Peake's legal theory of defense and did not need to parrot his factual contentions

Peake seeks a new trial, arguing that he was denied an instruction on "the defense's legal theory" because the court did not give his proposed instruction:

> 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.

Br.47. But that proposal and Peake's closing argument make clear that his defense theory was that the evidence did not prove that he knowingly and intentionally joined the conspiracy. To the extent that argument and his proposal reflect a "legal theory," it was adequately explained to the jurors when the court repeatedly and correctly instructed the jurors that to convict they must find that the evidence

established beyond a reasonable doubt the offense's second element: Peake knowingly and intentionally became a member of the conspiracy. The court was not required to narrate Peake's view of the evidence or recount Peake's closing argument.

A. Standard of review

Appellate review of claimed-error as to jury instructions is "ordinarily de novo as to questions of substantive law, while issues of phrasing and emphasis are reviewed for abuse of discretion." *United States v. Allen*, 670 F.3d 12, 15 (1st Cir. 2012) (citation omitted). Review "must [be] focus[ed] on the charge as a whole." *United States v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992) (citations omitted). A court's "refusal to give a particular instruction constitutes reversible error only if the requested instruction was (1) correct as a matter of substantive law, (2) not substantially incorporated into the charge as rendered, and (3) integral to an important point in the case," *id.* at 13, and "even then only when the error was not harmless," *Allen*, 670 F.3d at 15 (citation omitted).

B. The legal instructions Peake proposed were adequately incorporated into the charge

Peake's "theory of defense" proposal instructed that the government was required to prove "beyond a reasonable doubt" that Peake "knowingly and intentionally participate[d] in this conspiracy." Br.46-47; *see* APPX1386. The preliminary and final jury instructions covered accurately and at length this important requirement; thus it was not error for the court to refuse to "parrot the exact language that the defendant prefers." *McGill*, 953 F.2d at 12.

At the trial's outset, the court preliminarily instructed the jurors on the government's burden to prove the offense, including its second element. The "defendant is presumed innocent until proven guilty," and "the burden of proof is on the government until the very end of the case," while the "defendant has no burden to prove his innocence or to present any evidence or to testify." APPX61-62. And the standard of proof is "beyond a reasonable doubt." *Id.* Thus, "the government must prove . . . beyond a reasonable doubt [that] [t]he defendant acted knowingly and intentionally, because he became a member of the conspiracy." APPX63.

The court's final instructions reiterated and elaborated on the government's burden to prove the second element. It again instructed the jury on the presumption of innocence and the beyond-a-reasonable-doubt standard of proof. *See* APPX1359-60 (tracking Pattern Criminal Jury Instructions for the District Courts of the First Circuit, § 3.02); *see also* APPX1367-76, 1382. And the court again instructed the jurors that the government "must prove . . . beyond a reasonable doubt . . . that the defendant knowingly and intentionally became a member of the conspiracy." APPX1267-1375.

The court then explained that "[t]o act knowingly means to act voluntarily and intentionally, and not because of mistake, accident, or other innocent reason." APPX1374-75. "Therefore, before you may convict the defendant, the evidence must establish that the defendant joined the conspiracy to fix prices with intent to aid or advance the object or purpose of the conspiracy." *Id.* And the court made clear that "competitors may have legitimate, lawful reasons to have contact with each other" and that "[m]ere similarity of conduct among various persons or the fact that they may have associated with one another and may have met or assembled together and discussed common aims and

interests, does not necessarily establish the existence of a conspiracy." APPX1369-70; *see also* APPX1375-76.

From these instructions, Peake had an abundant basis to argue that he did not knowingly and intentionally join the conspiracy. Peake could and did contend—as his proposed instruction stated—"that any discussions he had with Gabriel Serra were legitimate and competitive discussions and not anti-competitive and conspiracy related." Br.47; *see* APPX1297-99, 1301-11. The jury rejected that contention not because of any instruction but because it was contradicted by the evidence, including Serra's testimony that he and Peake had inappropriate discussions about the conspiracy involving "[c]ustomer specific discussions of internal information on agreements of prices to be charged." APPX980-81; *see also* APPX1213.

C. Peake was not entitled to a judicial narrative of his interpretation of the evidence or his closing argument

Peake's proposed instructions contain various "contentions" regarding Peake's view of the facts. APPX1386. This language is not "a correct statement of the applicable law." *United States v. Passos-Paternina*, 918 F.2d 979, 984 (1st Cir. 1990). Peake was not entitled "to a judicial narrative of his version of the facts, even though such a

narrative is, in one sense of the phrase, a 'theory of the defense.'" *United States v. Barham*, 595 F.2d 231, 244 (5th Cir. 1979). It was within the court's discretion to reject a proposed jury instruction that "recount[ed] the facts as seen through the rose-colored glasses of the defense—glasses that [defendant] hoped the jurors would wear when they retired to the jury room," because a "jury argument" is "for defense counsel to make, not the Judge." *Id.* at 244-45. Peake "cannot couch [his] 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) (citation omitted).

It may be "that in some situations a court ought to focus the jury's attention on just what the defendant disputes—whether it is an affirmative defense or merely a specification of just what element of the government's case is controverted"; however, this "is mandatory only where there is some risk that the theory of the defense might otherwise seem obscure." *Allen*, 670 F.3d at 17. Here, nothing is obscure about Peake's argument that he did not join the conspiracy: "[t]hat this was [his] 'theory of defense' hardly needed any reinforcement by the judge,

let alone a separate restatement addressed" to the single count in the Indictment. *Id.* at 18.

Peake was "able to effectively present" this defense because it "was the clear theme of the defense put on by [Peake], as evidenced by its extensive coverage at closing argument." *United States v. Rosario-Peralta*, 199 F.3d 552, 568 (1st Cir. 1999). As Peake's counsel told the jury during summation: "We all know there was a conspiracy . . . This case is about whether Frank Peake knowingly joined that conspiracy. That's what this is all about." APPX1292. "The fact that the jury chose not to subscribe to this theory of the case does not mean that [Peake] w[as] precluded from effectively presenting it." *Rosario-Peralta*, 199 F.3d at 568. The "jury had the necessary tools with which to undertake its consideration of the defense theory." *Passos-Paternina*, 918 F.2d at 984.

Lastly, Peake claims that the district court erred by describing Peake's proposed instruction as "an invitation to hearsay and to put into evidence the statement of your client, without sitting your client." Br.50; APPX1390. Peake's response—that there is "no requirement that a defendant must testify in order to present a theory of defense

instruction"—is beside the point, Br.50, as it was not the basis of the court's decision. The court's reasoning was based on the fact that Peake's proposed instruction was "a categorical denial of the charges contained in the indictment and, if adopted, would have resulted in the district court informing the jury of what [Peake] would have stated if he had testified on his own behalf." *United States v. Mack*, 159 F.3d 208, 218 (6th Cir. 1998).

V. An instruction to continue deliberating does not require a new trial

Peake also seeks a new trial because on the first day of deliberations the court instructed jurors to continue deliberating after they sent notes indicating they had discussed the evidence and were still unable to reach a unanimous verdict.

Peake claims that the court erred by not including in its instruction the language that must ordinarily accompany an *Allen* charge to balance or counteract its coercive elements. Br.54 (citing *United States v. Angiulo*, 485 F.2d 37, 39-40 (1st Cir. 1973)). But "[t]he salient principle is that such 'counteractive' language is only deemed necessary where a 'dynamite charge' is delivered to a deadlocked jury," *United States v. Figueroa-Encarnacion*, 343 F.3d 23, 32 (1st Cir. 2003) (internal

citation omitted), and the court did not give a dynamite *Allen* charge. A district court is not required to provide an *Allen* charge's balancing language when it only gives a neutral instruction to continue deliberations without an *Allen* charge's coercive elements. Nor is the court required to declare a mistrial the moment a jury note indicates the jurors have encountered difficulty in reaching a verdict.

A. Standard of review

Peake's claim that the court erred by not including balancing language is reviewed for plain error because he never raised it below. *United States v. McIntosh*, 380 F.3d 548, 555 (1st Cir. 2004). He "objected to an *Allen* charge," which would have included those instructions, but now asserts that he "did *not* object to the Court providing the guidance required by *Angiulo*." Br.54 n.7. Peake "ha[d] an obligation to spell out [his] arguments squarely and distinctly" at trial, "or else forever hold [his] peace." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (internal quotation marks omitted).

Either Peake objected to the court giving an *Allen* charge which would have included the balancing language (in which case "[i]t would be Kafkaesque—and wrong—[to] allow [Peake] freely to advocate on

appeal positions diametrically opposite to the positions taken" below), or Peake gave "no indication that [he] objected" on the "ground[] asserted on appeal" (in which case he "forfeited those assignments of error"). *McIntosh*, 380 F.3d at 555. Thus, Peake must show: (1) a "plain or obvious" error was committed; and (2) that it affected "substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Hernandez-Albino*, 177 F.3d 33, 37-38 (1st Cir. 1999) (internal citation and quotation marks omitted).

Peake's mistrial claim is reviewed for an abuse of discretion. *United States v. Sepulveda*, 15 F.3d 1161, 1184 (1st Cir. 1993). A trial court is afforded "broad discretion" in determining whether to declare a mistrial when a jury is potentially deadlocked because "the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." *Renico v. Lett*, 559 U.S. 766, 774 (2010) (internal quotation marks omitted). But "the power [to order a mistrial] ought to be used with the greatest

caution, under urgent circumstances, and for very plain and obvious causes." *Id.* at 783 (internal quotation marks omitted).

B. Instructions to continue deliberations do not require balancing language

The court did not err, let alone plainly err, by instructing the jurors to continue deliberating because that instruction lacked the coercive elements of an *Allen* charge, thus making unnecessary the balancing language Peake claims was erroneously omitted. When a jury indicates it is deadlocked, courts may deliver a "supplemental jury instruction, often described as a 'dynamite' charge or an *Allen* charge, after *Allen v. United States*, 164 U.S. 492 (1896)." *Hernandez-Albino*, 177 F.3d at 37. An *Allen* charge encourages (1) the dissenting jurors to accord some weight to the viewpoint of the majority and (2) all jurors to reach a unanimous verdict. This Court requires that such encouragement be balanced by: (1) asking the majority as well as the minority to reexamine their positions; (2) coupling the exhortation to reach a verdict with an acknowledgment that the jurors "have a right to fail to agree"; and (3) reminding the jurors of the burden of proof. *Angiulo*, 485 F.2d at 39; *see* Pattern Criminal Jury Instructions for the District

Courts of the First Circuit, "Charge to a Hung Jury" § 6.06 (updated 9/23/08).

The district court did not give any form of an *Allen* charge and the jurors were not truly deadlocked or coerced into returning a verdict. On Friday, January 25, 2013, after nine days of trial (seven of which were devoted to the presentation of evidence), the court charged the jurors. APPX1392-94; ADD86. The jurors picked a foreperson that afternoon and began deliberating in earnest at 9:30 Monday morning. ADD88. Early Monday afternoon, the court received a note from the jurors stating that they "have issued their respective verdicts" and "are not able to reach a unanimous verdict." ADD90. Defense counsel requested that the court "[j]ust tell them to continue." APPX1396-B. The judge considered including a reminder not to reveal how the jury stood, and defense counsel suggested: "Please do not inform the Judge how you stand numerically and please continue your deliberations." APPX1396-C. The judge sent a note to the jury with that instruction. ADD90.

Two and a half hours later, the jury advised the court that "[a]fter strong debates and discussions, members of the jury have expressed a

final individual verdict. We are still unable to reach a unanimous verdict." ADD93. The prosecutor suggested "pattern instruction 6.06 . . . a First Circuit pattern *Allen* charge," APPX1396-N, which contains the balancing language that Peake now complains was not given. Defense counsel requested a mistrial. APPX1396-O. But the court decided to send the jury home and have them return "tomorrow refreshed, and maybe tomorrow, depending on what I hear tomorrow, I will provide an *Allen* charge. But I have never heard of a case being called a mistrial without the Court making the *Allen* charge effort." APPX1396-O-P. Defense counsel said that in the alternative to a mistrial, "there should be no instruction tonight and just say come back tomorrow." *Id.* The court returned a note to the jury that said: "The Court orders the jury to return tomorrow at 10:30 a.m. to continue deliberations. Please drive home carefully and safely." ADD93; APPX1396-Q.

Outside the jury's presence, the court explained that it did not think that the jurors had "deliberated sufficiently . . . I don't think that one day of deliberations is enough compared to seven days of trial." APPX1396-Q-R; *see also* APPX1488-89 (the court "did not understand

the jury to be deadlocked after only deliberating for slightly longer than one day"; thus "[t]he Court merely instructed the jury to continu[e] deliberating in a neutral manner").

The jurors returned to their deliberations the next day at 11:35 a.m. ADD94. As they deliberated, the court met with counsel to discuss the wording of the supplemental *Allen* charge that could be given that afternoon, if necessary. Defense counsel "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." APPX1487. An *Allen* charge proved unnecessary, however, when at 2:25 p.m. the jurors returned a note that they had reached a unanimous verdict. ADD-95.

On appeal, Peake claims that the "simple charge to continue deliberations" is a supplemental charge requiring the balancing language even when no coercive *Allen* charge is given. Br.56 (citing *Angiulo*, *Henandez-Albino*, and *United States v. Paniagua-Ramos*, 135 F.3d 193, 198-99 (1st Cir. 1998)). If correct, Peake invited the error when his counsel initially advised the court to just instruct the jurors to continue deliberating. But his claim is wrong. The cited decisions use

"supplementory charge" to refer to some form of *Allen* charge. *See Angiulo*, 485 F.2d at 38-39 (reversing where trial court gave two *Allen* charges that "departed from the formulation . . . approved by this court"); *Hernandez-Albino*, 177 F.3d at 37.

Paniagua-Ramos shows the difference between the neutral instructions here and an *Allen* charge. The jurors returned three notes indicating impasse. *Id.* at 194. As the court did here, after the first two notes the court "instructed the jury to continue trying to decide." *Id.* This Court did not fault these instructions. Rather, reversal was required by the court's response to the third note, when it gave an *Allen* charge that contained coercive language "minimiz[ing] the significance of the positions held by the individual jurors" and expressing "dissatisfaction with an indecisive verdict," without any balancing language. *Id.* at 198. The "severe deadlock" coupled with the government's weak case, indicated that the deficient *Allen* charge "intimidated [the jury] into a decision." *Id.* at 200.

Figueroa-Encarnacion makes clear that the district court did not err. Similar to this case, the jury sent a note late on the first day of deliberations, stating: "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." 343 F.3d at 31. The district court "felt it was 'too early to give them an *Allen* charge,'" and instead explained to the jury that "it is too premature for the judge after 12 days of receiving evidence to accept that there is a deadlock" and sent them home with instructions to "not begin any deliberation until you come back here tomorrow morning." *Id.* at 31-32.

This Court recognized that the "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." *Id.* at 32. It "did not imply a duty to achieve unanimity, nor was it addressed to jurors holding a minority viewpoint." *Id.* (citing *Allen*, 164 U.S. at 501). Accordingly, the Court held that "it need not include the *Allen* cure," that is, the balancing language Peake claims was erroneously omitted here, because the "instruction lacks the coercive elements of an *Allen* charge." *Id*.

As in *Figueroa-Encarnacion*, the district court "reasonably conclude[d] that the jury [was] not deadlocked." *Id.* The jurors had

deliberated for one day after a nine-day trial, had only referenced their "individual" verdicts, and upon returning the following morning, gave no indication that further deliberations were futile—instead communicating that they were present and "ready to receive the evidence." ADD93-94. The court's responses were therefore "simple request[s] that the jury continue deliberating," and "especially when unaware of the composition of the jury's nascent verdict," they were "routine and neutral," and "did not imply a duty to achieve unanimity, nor w[ere they] addressed to jurors holding a minority viewpoint." *Figueroa-Encarnacion*, 343 F.3d at 32 (internal quotation marks omitted). As the "requisite coercion is simply absent . . . reversal on this ground is unwarranted." *Id.*

Even for a true *Allen* charge, the inquiry ultimately turns on "whether the charge 'in its context and under all the circumstances' coerced the jury into convicting" the defendant. *Hernandez-Albino*, 177 F.3d at 38 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988)). The charge merely to continue deliberating contained no coercive element, nor was it given after days of deliberation.

Moreover, "additional time" between the instruction and the verdict "can help to establish an absence of coercion." *Id.* at 39. For example, in *Hernandez-Albino*, one hour of continued deliberation after the delivery of a true *Allen* charge "negate[d] any suggestion of coercion." *Id*. (citing *Green v. French*, 143 F.3d 865, 886 (4th Cir. 1998) (one-hour deliberation after *Allen* charge failed to suggest coercion); *United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir. 1997) (40-minute deliberation after *Allen* charge did not "raise the specter of coercion"); *United States v. Smith*, 635 F.2d 716, 721-22 (8th Cir. 1980) (45-minute deliberation after *Allen* charge showed no coercion)). Here, after being told they would "continue deliberations" the following morning and sent home for the night, the jurors deliberated for three hours the next day before returning their verdict. ADD93-95. There is no indication that the jurors "were coerced [] into abandoning their conscientiously held views of the evidence in order to achieve a unanimous verdict." *United States v. Vanvliet*, 542 F.3d 259, 266 (1st Cir. 2008).

Lastly, the court did not abuse its broad discretion by denying Peake's request for a mistrial. There are no grounds to find that this was a "very plain and obvious" case, or that "urgent circumstances"

existed that required declaration of a mistrial. *Renico*, 559 U.S. at 774. To the contrary, the later uncoerced verdict confirms the court's judgment that the jury was not truly deadlocked.

VI. Peake's affected commerce sentencing enhancement was well-supported by the trial record

At sentencing, the court determined that Peake's offense level was 29, which yielded an advisory range of 87-108 months imprisonment, APPX1624, but decided to sentence him "between 51 and 63" months, the range for "a level 24," to reflect Peake's personal characteristics and to avoid an unwarranted disparity with the sentence imposed on Baci, Peake's subordinate and co-conspirator. APPX1628. The court imposed a 60-month term of imprisonment. *Id.*

Despite this substantial departure, Peake challenges the guidelines' calculation, arguing that the court erroneously included a 12-level enhancement based on over $500,000,000 in Sea Star's commerce being affected by the conspiracy. Br.57-58. But the court rightly recognized that "Sea Star earned over $900 million in revenue from Puerto Rico freight services during Peake's participation in the conspiracy." APPX1477. Thus the district court did not commit clear error by finding that the affected commerce "attributed to Mr. Peake was more

than 500 million" based on the evidence presented at trial and for sentencing. APPX1623-24.

A. Standard of review

A sentencing court's interpretation of the Sentencing Guidelines is reviewed de novo, and its factual findings for clear error. *United States v. Cannon*, 589 F.3d 514, 516-17 (1st Cir. 2009); *United States v. Andreas*, 216 F.3d 645, 676 (7th Cir. 2000). "Where, as here, a defendant challenges the factual predicate supporting the district court's application of a sentencing enhancement," the reviewing court asks "only whether the court clearly erred in finding that the government proved the disputed fact by a preponderance of the evidence"; if "there is more than one plausible view of the circumstances, the sentencing court's choice among supportable alternatives cannot be clearly erroneous." *Cannon*, 589 F.3d at 517 (internal citation and quotation marks omitted).

B. All categories of contested commerce were affected by the conspiracy and attributable to Peake

For antitrust offenses, the calculation of the guidelines range turns largely on the "volume of commerce done by the [individual's] principal in goods or services that were affected by the violation." U.S.S.G.

§ 2R1.1(b). Because here the affected commerce was "[m]ore than $500,000,000," U.S.S.G. § 2R1.1(b)(2), it added twelve offense levels.[8]

Courts have "adopted a broad reading of 'affected' [commerce] in line with the realities of the economic marketplace in which few things are ever truly 'unaffected' by other market forces," because commerce can be affected "'when the conspiracy merely acts upon or influences negotiations, sales prices, the volume of goods sold, or other transactional terms [so that] it is reasonable to conclude that all sales made by defendants during that period are 'affected.'" *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) (quoting *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999)); *see United States v. Hayter Oil Co.*, 51 F.3d 1265, 1272-73 (6th Cir. 1995); *United States v. Giordano*, 261 F.3d 1134, 1145-46 (11th Cir. 2001). Once the government has proven by a preponderance of the evidence that a "conspiracy [has] been effective during a certain period," there is a

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[8] Peake's base offense level of 12 (§ 2R1.1(a)) was increased 1 level for submission of non-competitive bids (§ 2R1.1(b)(1)), 12 levels for over $500 million in affected commerce (§ 2R1.1(b)(2)(F)), and 4 levels for his leadership role (§§ 3B1.1(a), 2R1.1, app. n.1). *See* APPX1623-24; APPX-S77-78.

presumption that "all sales during that period were 'affected by' the conspiracy"; the defendant can "rebut that presumption by offering evidence that certain sales, even though made during a period when the conspiracy was effective, were not affected by the conspiracy." *Giordano*, 261 F.3d at 1146; *see Andreas*, 216 F.3d at 678-79.

Peake does not dispute the conspiracy's effectiveness, but asserts that commerce between 2003 and 2005 should not be attributed to him and certain categories of commerce were unaffected. But the court correctly found that this commerce was attributable to Peake and affected.

1. Commerce was properly attributed to Peake from 2003 when he joined the conspiracy

Peake contends affected commerce should not include Sea Star revenue from August 2003 to late 2005 because the indictment charged that he "participated in the conspiracy '[f]rom at least as early as late 2005, and continuing until at least April 2008.'" Br.60 (quoting indictment, APPX38-39). But the indictment's allegation does not foreclose the possibility that he participated earlier than late 2005 or bar consideration of his earlier participation for sentencing purposes. At trial, testimony showed that he assumed a leadership role in the

conspiracy in 2003. Baci testified that Peake participated in the conspiracy "the entire time" from when "[h]e joined the company in the summer of '03 [until] the conspiracy ended in April of '08." APPX618. And Serra testified that he started having price-fixing discussions with Peake within a "few weeks" of Peake joining Sea Star. APPX1000-01.

The Guidelines allow courts to consider relevant conduct, including "[c]onduct that is not formally charged" like Peake's pre-2005 involvement in the conspiracy. U.S.S.G. § 1B1.3, cmt., backg'd; *cf. SKW Metals*, 195 F.3d at 92-93 (directing district court on remand for resentencing to include commerce related to a conspiracy on which defendants were acquitted in guidelines calculation as relevant conduct if proven by a preponderance).

An affidavit provided by Sea Star's Regional Controller showed the affected commerce during the entire period of Peake's involvement (August 2003 to April 2008) was $912,629,000, and for the narrower period (late 2005 to April 2008) was $565,106,000. APPX1474-76. Either amount warrants the same 12-level enhancement.

2. All categories of Sea Star's commerce were affected

Peake further contends that certain categories of commerce should have been excluded because "there was no evidence" they were affected by the violation. Br.57. But as the court found, the conspirators' agreement to fix the bunker fuel surcharge "contaminated" every customer shipment between the U.S. mainland and Puerto Rico, including all categories of commerce challenged by Peake. APPX1623-1624.

The conspirators colluded frequently on both the timing and level of the surcharge, which fluctuated independently of customer contracts, "[s]ometimes it would [change] every couple of weeks. Sometimes it would be every few months." APPX681; *see* APPX1268, 137, 169-71. The Burger King witness testified that "certainly almost every month the bunker fuel went up" from 2004 to 2008. APPX544-46.

Glova testified that frequent collusion was necessary because "if one carrier made the [bunker fuel surcharge] change and the other didn't, it might have an impact on the amount of volume [the company] would handle," and "shift some business away." APPX169-71. Baci also testified that the conspirators always imposed the same bunker fuel

surcharge "to remove it from being a competitor issue," APPX610, and they were "committed to reducing [and] eliminating" any exceptions so all customers would pay the surcharge, APPX696-697. Serra also testified that the conspirators "did not want to have disalignment on the bunker fuel surcharge" or "it would incite freight to the lower bunker fuel surcharge"—i.e., "[i]f we increase our bunker fuel surcharge and they increase it a lot later, during that time that they have a lower bunker fuel surcharge, we would lose cargo and vice versa." APPX1068-78. And when Peake got word that Horizon may have cheated on the bunker fuel surcharge component of the conspiracy by reducing a customer's surcharge, he emailed Serra to scold him. APPX1722 ("Flexi is about fuel and you gave them a [bunker fuel surcharge] discount. Tisk tisk."); APPX1033.

Peake contends that the bunker fuel surcharge was originally "designed to recover the changes of cost on the fuel" and "did not result in any profit to the company." Br.62. But even if true, it does not mean the commerce was unaffected. Three co-conspirators testified that the surcharge was fixed as one way to eliminate competition and it applied to all commerce, including those categories Peake challenges. It also

became highly profitable. Peake himself emailed Serra bunker fuel surcharge data illustrating how the conspiracy meant that instead of failing to cover fuel costs, Sea Star was earning millions of dollars a year in profits. APPX1585, 1790-93.

Because fixed bunker fuel surcharges applied to all of Sea Star's commerce, it all is affected commerce. Moreover, Peake's contentions that certain categories of commerce were otherwise unaffected are meritless. First, Peake contends that commerce in non-containerized freight (e.g., cars) was unaffected because Horizon "did not compete for these loads." Br.61. But the evidence shows Sea Star colluded with Crowley and Trailerbridge on rates "with regard to used automobiles and [freight] not in container cargo." APPX598. That Horizon could not participate in this aspect of the conspiracy does not mean the commerce was unaffected.

Second, Peake contends that commerce with customers who the conspirators "never discussed" was unaffected because "there was no price-fixing or bid-rigging" for those who did not garner individualized attention from the co-conspirators, like the larger, "hall of fame" accounts. Br.61-62. An affected commerce finding "does not require a

sale-by-sale accounting." *SKW*, 195 F.3d at 91. Here the evidence showed the conspirators fixed prices by commodity segment for these smaller customers. *See, e.g.*, APPX334-46, 1703-05, 1455. It further showed that these customers were also subject to the conspiracy under the Florida 50/50 agreement, which was not limited to large customers but captured all freight between the U.S. mainland and Puerto Rico. *Id.* Peake offers no "[e]vidence of the 'rare circumstance' of a completely unaffected transaction." *Andreas*, 216 F.3d at 679.

Lastly, Peake contends that $2.7 million in revenue from TSAs, through which the conspirators purchased space on each others' ships, should be excluded because such contracts are "routine" in the "ocean transportation business and are entirely lawful." Br.62-63; APPX1578-79. While TSAs may be otherwise legal, the conspirators used them as a safety valve for maintaining balance in the conspirators' Florida 50/50 agreement. *Supra* pp. 9-10. And the conspiracy affected freight moved pursuant to TSAs because all of goods being shipped belonged to customers paying fixed freight prices, fuel surcharges, security charges and—if the goods were being transported from points inland—

intermodal transit and fuel charges. *Supra* pp. 5-6. In any event, even if excluded, it would not affect the enhancement level.

The "sentencing court's choice among supportable alternatives cannot be clearly erroneous," *Cannon*, 589 F.3d at 517 (internal citations and quotation marks omitted), and here the court's affected volume of commerce finding was fully supported by the record.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted.

October 8, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,931 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with a 14-point New Century Schoolbook font.

October 8, 2014

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CERTIFICATE OF SERVICE

I, Shana M. Wallace, hereby certify that on October 8, 2014, I electronically filed the foregoing Brief for the United States of America with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the CM/ECF System. Upon notification of the paper copy due date, pursuant to Local Rule 31.0(a)(1), I will send nine copies to the Clerk of the Court by FedEx. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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