

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CASE NO. 11-CR-512 (DRD)

UNITED STATES OF AMERICA,

vs.

FRANK PEAKE,

Defendant.

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FRANK PEAKE’S SENTENCING MEMORANDUM

Frank Peake submits this Sentencing Memorandum to assist the Court in determining the appropriate sentence.

INTRODUCTION

The government is requesting that Mr. Peake receive not only the highest sentence in this case, but the *highest sentence ever in the history of antitrust cases by almost double*. This despite the fact that the district judge who sentenced Peter Baci felt “snookered” by the Department of Justice after learning how his sentence compared to other antitrust sentences.¹ And the foreperson of Frank Peake’s jury stated that the jury as a whole thought that Frank Peake should receive a lower sentence than Baci and the other co-defendants.²

Such a jaw-dropping request should be rejected not only based on the jury’s recommendation

¹ Sentencing Hearing, Case No. 3:08-cr-349-J-32TEM, May 12, 2009, at 22.

² MLex Article, Jan. 30, 2013, Exhibit 1 (“While [Peake] was a participant, he seemed to be more of an occasional problem solver than a vital part of the conspiracy on a day-to-day basis. He didn’t stop it because all the companies involved in the trade were doing it. I don’t believe he deserves the same punishment.”).

and basic proportionality, but also for a number of “sound, case-specific reasons”³ explored in depth below, including:

- Mr. Peake’s involvement was minimal compared to the other players, as the evidence clearly showed and the jury agreed. *See* Letter to Judge Dominguez from Luis A. Torres Cordero (“There was a general consensus that Mr. Peake’s involvement in the scheme was that of an occasional problem solver and not one of the main participants.”), Exhibit 2. For this important reason, the jurors were of the view that Frank Peake should not receive an equal or higher sentence than the other conspirators. *Id.* (“Mr. Peake should not receive an equal or more severe punishment than Mr. Serra, Mr. Bacci and Mr. Glova.”)
- As the Court stated after the verdict, “this was a close case.” The jury was deadlocked twice.
- Mr. Peake’s supposed involvement with the conspiracy began much later than the others. He was not the creator or architect of the scheme, was not around when it began, did not profit from the activity, and did not direct anyone else to collude.
- A lengthy sentence is inconsistent with the overwhelming number of antitrust sentences involving significant variances and the Department of Justice stated policy regarding proportionate sentencing. Even within the last year, in other more egregious cases, high-powered executives have been sentenced well below the guidelines for considerably more participation in conspiracies affecting a much greater volume of commerce.
- Mr. Peake is an intelligent, respected, hard-working, good man, the father of three children, with no prior record, who was regarded as a consummate leader acting only for the benefit of his company, employees, and industry.
- A lengthy sentence does not comport with the goals of sentencing.

These significant facts, along with several other § 3553(a) factors weighing heavily in Mr. Peake’s favor and a comparison to other similar white-collar sentencings in the First Circuit, *see, e.g., United States v. Prospero*, 686 F.3d 32 (1st Cir. 2012) (affirming downward variance from 87 months to probation), provide that a non-incarcerative sentence is “sufficient, but not greater than necessary”

³ *United States v. Martin*, 520 F.3d 87, 91 (1st Cir. 2008).

to comply with 18 U.S.C. § 3553(a).

DISCUSSION

[A] sentencing court should not consider itself constrained by the guidelines to the extent that there are sound, case-specific reasons for deviating from them. Nor should a sentencing court operate in the belief that substantial variances from the guidelines are always beyond the pale.

United States v. Martin, 520 F.3d 87, 91 (1st Cir. 2008); *see also United States v. Milikowsky*, 65 F.3d 4 (2d. Cir. 1995) (affirming district court’s downward departure, pre-*Booker*, to probation in an antitrust case where imprisonment would have “extraordinary impact” on others, reasoning that “the Sentencing Guidelines do not require a judge to leave compassion and common sense at the door to the courtroom”) (internal quotations omitted).

This is the prototypical case in which a substantial variance from the Guidelines is appropriate. There are numerous “sound, case-specific reasons” compelling a meaningful reduction in Peake’s sentence. *Id.*

The Court is well-familiar with the law relating to *Booker* and this Court’s resulting wide discretion in sentencing criminal defendants. Pursuant to 18 U.S.C. § 3553(a), the Court is to consider a number of factors to arrive at a sentence that is sufficient, *but not greater than necessary*, to achieve the goals of sentencing: 1) the nature and circumstances of the offense and the history and characteristics of the defendant; 2) the need for the sentence to reflect the goals of sentencing, including the seriousness of the offense, deterrence, and protection to the public; 3) the kinds of sentences available; 4) the range determined by application of the Sentencing Guidelines; 5) any pertinent policy of the Sentencing Commission; 6) the need to avoid unwarranted sentence disparities; and 7) the need to provide restitution to victims. As applied to Mr. Peake, the § 3553(a) factors support a sentence substantially lower than that recommended by the Probation Office and

the government. Indeed, as the Department of Justice recently acknowledged in a letter to the Sentencing Commission, “imprisonment is a power that should be exercised sparingly and only as necessary.”⁴ A lengthy prison term is not “necessary” here.

I. Frank Peake’s Sentence Should Be Substantially Shorter Than The Other Conspirators Because He Is Less Culpable.

Despite voting to convict, some of the jurors felt for Peake, who didn’t originate the conspiracy and came into it in the middle after it was already established at both Sea Star and Horizon, the juror said.

They believe Peake shouldn’t receive the same sentence as some of the other conspirators - such as Baci who was sentenced to four years in prison or Serra who was sentenced to 34 months.

“While [Peake] was a participant, he seemed to be more of an occasional problem solver than a vital part of the conspiracy on a day-to-day basis,” the juror said. “He didn’t stop it because all the companies involved in the trade were doing it. **I don’t believe he deserves the same punishment.**”

“It was heartbreaking to hand out the verdict,” the juror added. “Even though I stand by my decision, I was rooting for the guy.”

Exhibit 1, MLex Article, Jan. 30, 2013 (emphasis added).

In order to achieve the goals of § 3553(a), less culpable defendants should receive more lenient sentences than more culpable defendants. As discussed in the objections, Frank Peake’s role in the conspiracy was *substantially* smaller than the other conspirators. He came into the conspiracy after it was already under way, did not conceive of the conspiracy, did not recruit others, and did not participate in day-to-day implementation. As such, a significant reduction pursuant to § 3553(a)(1) and (a)(6) is appropriate.

Below is a chart of the sentences imposed on the co-conspirators. Other than Leonard Shapiro, each was charged by Information for the entire length of the conspiracy – May 2002 through

⁴<http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf>, at 3.

April 2008.

Conspirator	Time Period Charged	Sentence
Peter Baci	May 2002 - April 2008	48 months
Gabriel Serra	May 2002 - April 2008	34 months
Kevin Gill	May 2002 - April 2008	29 months
Gregory Glova	May 2002 - April 2008	20 months
Leonard Shapiro	Not Charged	0 months

Frank Peake was undoubtedly less culpable than each of these defendants – both in terms of time and substance. Peake was charged for the time period of late 2005 through April 2008, more than 3 years less than the time period charged for the others. As such, he had absolutely no involvement in the brainstorming or genesis of the conspiracy. He did not start, think-up, or organize the conspiracy. Peake was not even an employee of Sea Star Lines nor involved in the Puerto Rico trade in 2002 .

Peake did not order or direct employees to communicate with competitors. He did not decide which employees would participate, which customers would be affected, and how the conspiracy would function. He did not attend the initial meetings of the conspiracy held in Charlotte, North Carolina; Dallas, Texas; and Charleston, South Carolina. He did not originate the idea of the Florida 50/50 or the coordination of bunker fuel surcharges. He did not suggest that pricing employees communicate on disposable phones, or through secret emails or furtive faxes. He did not open a gmail account and adopt a secret name. He did not communicate on a regular, daily basis with his competitor or attend monthly conspiracy meetings with his counterpart. He did not create rate plans or other conspiracy documents. He did not share bid information and coordinate increments on lowering bids. He did not recruit additional participants into the conspiracy or encourage existing ones to do anything that they were not already doing before he joined Sea Star. All these actions

were taken. But not by Frank Peake. These actions were taken by Gabriel Serra, Leonard Shapiro⁵, Peter Baci, Kevin Gill, and Gregory Glova.

Specifically, Serra and Shapiro are the ones who started the conspiracy and ensured that it continue. They were there from the very beginning and signed the handwritten “contract” at the inaugural meeting. They were the ones who ordered their subordinates to carry out the conspiracy on a daily basis. They were the masterminds who breathed life into the conspiracy.

As a result of Serra and Shapiro’s handiwork, Baci, Gill, and Glova became daily managers of the conspiracy. They are the ones who purchased and used throw-away phones. They opened Google-mail accounts with secret names.⁶ They called, e-mailed, and faxed each other constantly.⁷ They met on an almost monthly basis. They coordinated how much they would bid for customer contracts and decided which customers would be targeted during the agreement. They kept the conspiracy going and running smoothly.

On the Sea Star side, Peter Baci was the head of pricing and ran the conspiracy from its inception. He was Sea Star’s leader of the conspiracy, and would merely inform Peake about what was going on from time to time, or bring him in on an issue if Baci’s position did not carry enough weight to effectuate the change he wanted. The government, in fact, has conceded that Baci was in charge of all the pricing decisions and did not need Peake’s approval. United States’ Opposition to

⁵ Despite the fact that Shapiro was one of the masterminds and initiators of the conspiracy, he was not charged and thus obviously received no sentence at all.

⁶ Baci testified, “We started using office phones and fax lines to exchange information. After a fairly brief period of time we move to disposable phones that we would buy at a local store, use them for a while and throw them away. Then we moved to having our own Gmail accounts and we would not use the company e-mail system. We would use these Gmail accounts that we had set up.” *See* G.J. Jan. 19, 2011 at 30-31.

⁷ During a randomly chosen one month time period, Baci and Glova sent conspiracy-related emails to each other 233 times.

Frank Peake's Second Motion For New Trial (And Request for Evidentiary Hearing), D.E. 211, at

11. "The evidence at trial was that Baci had day-to-day responsibility . . . *for running the conspiracy.*" *Id.* (emphasis added). Consistent with this government concession, Baci repeatedly took credit for the continuation and success of the illegal activity:

Q. Did you think it was necessary for you to copy Mr. Peake on all of your E-mails with Horizon?

A. No, sir.

Q. Why not?

A. Because I thought I was doing a pretty good job of trying to manage *what I was trying to accomplish.*

See Tr. Jan. 17, 2013 at 29, lines 5-10 (emphasis added). The testimony clearly established that Baci controlled the Sea Star conspiracy rates and surcharges and that most ideas started with Baci. Below are examples of his leadership and command of the conspiracy.

Control of Pricing:

Q. Based on your prior testimony it sounds like you had the day-to-day responsibility of pricing?

A. *Yes, sir, totally.*

See G.J. Jan. 19, 2011 at p. 42, lines 3-5 (emphasis added).

Communication with Peake:

Q. How often would those issues come up where you would need to get him involved to get his assistance?

A. Maybe a maximum of every three months, maybe less, maybe less than that. But *I was managing it fairly well myself.*

See Tr. Jan. 17, 2013 at p. 28, lines 14-18 (emphasis added).

Control of the Conspiracy:

A. I would -- most of the time *I would prefer that I was just dealing **between myself and Mr. Glova.***

Q. Why?

A. My credibility.

Q. What do you mean by that?

A. *Most of the negotiations and handling of customers was handled directly between Greg and **myself** without having to bring other people into it frequently. So it was a personal credibility issue.*

See Tr. Jan. 17, 2013 at pp. 113-14 (emphasis added).

CARL FOX: Well, the hunt is according to *what **Peter** says we can hunt.*

See CI Recording 5, at 95 (referring to Peter Baci during meeting of co-conspirators discussing customers to pursue who are not involved in the conspiracy) (emphasis added).⁸

Bunker Fuel Surcharge:

Q. What role did you play in setting the bunker fuel surcharge for Sea Star?

A. *I was responsible for all the pricing of Sea Star. I was responsible for bunker fuel surcharge levels.*

Q. What role did Mr. Peake play in bunker fuel?

A. He was my boss, so I would tell him *what **my** plans were* with regard to the bunker fuel surcharge.

See Tr. Jan. 17, 2013 at 86, lines 17-23 (emphasis added).

Calculating the amount of Bunker Fuel Surcharge:

A. *I had a formula that I used to establish what the bunker surcharge was. I was relatively lucky because we started the company in 1998. So at that point in time I knew what the price of fuel was. It was \$70 a ton. I had a*

⁸ This quote is taken from the recorded conversation that the government just produced six months after trial.

formula that said this is what the bunker surcharge should be, and it was based on the price change, the amount of fuel that was consumed ever week and the utilization of the vessels.

So *I tried to keep the formula as much as I could on the day-to-day basis*. I had always wanted – *I really wanted to lead the increases on the bunker surcharges*.

See G.J. Jan. 19, 2011 at 21, lines 2-13 (emphasis added).

Communication of Bunker Surcharge to competitors:

- Q. When you were leading an increase, would you take any steps to make sure that other companies would go along with it?
- A. Yes, sir. *I would notify them* either telephonically or I would send them a copy of – we used a document called a trade notification, and before that document went out to our customer base, *I would make sure it got to my competitors*.

See G.J. Jan. 19, 2011 at 21, lines 16-23 (emphasis added).

Differentiation of Bunker Surcharge between the different ports:

- A. At some point, and I believe it was 2007. We had asked that the bunker fuel surcharge for northeast service and for Gulf service be higher than the bunker fuel surcharge for Florida services.
- Q. Who is we?
- A. We, Sea Star.
- Q. Who at Sea Star?
- A. *It started with me*.

See Tr. Jan. 17, 2013 at 17-18 (emphasis added).

Obtaining a contract with the military:

- A. At one point in time during the conspiracy there was an issue with regards to the 50/50 rule wherein *I felt that we were below our 50 percent* and *I went to Mr. Glova with a proposal* that was basically that we were getting ready to negotiate a contract with the military. And *I asked Mr. Glova if he could allow us to win a particular piece of business inside the military*

contract. And if he wouldn't allow us to win, the 50/50 would rebalance without any further activity having to take place, because it was a significantly large account that we were talking about.

See Tr. Jan. 17, 2013 at 21, lines 1-10 (emphasis added).

Participating in the October 2006 meeting:

Q. Were these accounts discussed at the Orlando meeting?

A. Yes, to a great extent. I don't know that every one of them was, but, yes.

Q. Who was involved in these discussions?

A. Well, *the majority of the discussions were between Peter and Greg*.

See Tr. Jan. 22, 2013 [Gabriel Serra] at 129, lines 18-24 (emphasis added).

Creating the 2007 rate plan:

Q. Can you describe for the jury what is contained in Exhibit 24 [the 2007 rate plan]?

A. It was *various increases that I thought were appropriate* to be taken during 2007.

See Tr. Jan. 17, 2013 at 134, lines 1-4 (emphasis added).

Q. Was this document presented at the Orlando meeting?

A. Yes.

Q. By whom?

A. *By Peter Baci*.

See Tr. Jan. 22, 2013 [Gabriel Serra] at 130-3 (emphasis added).

Participating in the Walgreens reverse auction:

Q. Would you know what competitor was offering what number?

A. I wasn't supposed to be able to know that, but because what happened during the reverse auction, *I had Alex Chisholm using the computer screen putting in the numbers that I dictated to him and I was actually on the phone with*

Horizon Lines.

See Tr. Jan. 17, 2013 at 66, lines 11-17 (emphasis added).

Risk of getting caught for his actions:

Baci: I'll say this to you four guys again, ***I'm not going to take the risks I'm taking if we're not going to believe the information I got.*** . . . So ***I*** got the information, we're on solid ground and that's what ***I'm*** going to run with.

See CI Recording 5, at 111 (emphasis added).

Peake allegedly attended just one or two conspiracy meetings (only one according to Gabriel Serra), while Baci and Glova met almost monthly. Additionally, during an average month, Baci and Glova sent conspiracy-related g-mails to each other over 230 times. See Exhibit 3, Chart of emails for April 2007. Using this figure to estimate, over the time period January 2006 until April 2008 (the amount of time Glova participated), they sent approximately 6,440 conspiracy emails to each other. In contrast, in preparation for trial, the government only identified approximately 30 emails between Peake and Serra or Peake and Baci that were supposedly conspiracy-related. Further, Baci is the one who generated all the conspiracy documents. For example, he created and disseminated the 2007 rate plan, the recap of Aqua Gulf volumes, Who Shot John lists, and the bunker surcharge review. Overall, Frank Peake's alleged participation in collusion pales in comparison to Peter Baci's investment and contribution to the illegal activity. The government has already conceded as much.

Moreover, Baci's sentence reflected an increase for obstruction. Once the FBI became aware of the conspiracy, Baci tried to destroy evidence. On the day of the FBI raid, Baci called his employee Alex Chisholm (not Frank Peake) and told him to shut down the g-mail system so no one could see it. See Tr. Jan. 16, 2013 at 136-37. As a result, Baci received a two-level increase to his sentencing guidelines for obstruction and was sentenced to 48 months in prison. Frank Peake did not obstruct, and should be sentenced significantly lower than Baci.

Gabriel Serra also lied to the FBI. During cross-examination, Serra admitted:

Q. In that moment of truth, the first thing you do, Mr. Serra, is you lie to them, don't you?

A. Absolutely. I deny it.

Q. You try to talk your way out of it, right?

A. I deny it.

Q. And the F.B.I. agents are looking you right in your eye and you are looking them right in the eye?

A. Yes.

Q. And you try to talk your way out of that problem, do you not?

A. Yes, for an hour probably.

Q. For a whole hour you looked them right in the eye, right?

A. I would say so, yes.

See Tr. Jan. 23, 2013 at 19-20. Although he could have been charged with violating 18 U.S.C. § 1001, the government chose to ignore this criminal behavior. For all Serra's actions – starting the conspiracy, initially structuring the conspiracy, continuing the conspiracy for nearly six years, bringing others into the conspiracy, trouble-shooting problems during the conspiracy, instructing employees to keep the conspiracy hidden, lying to the FBI – Serra was sentenced to 34 months.

Frank Peake deserves a substantially shorter sentence than these other conspirators.

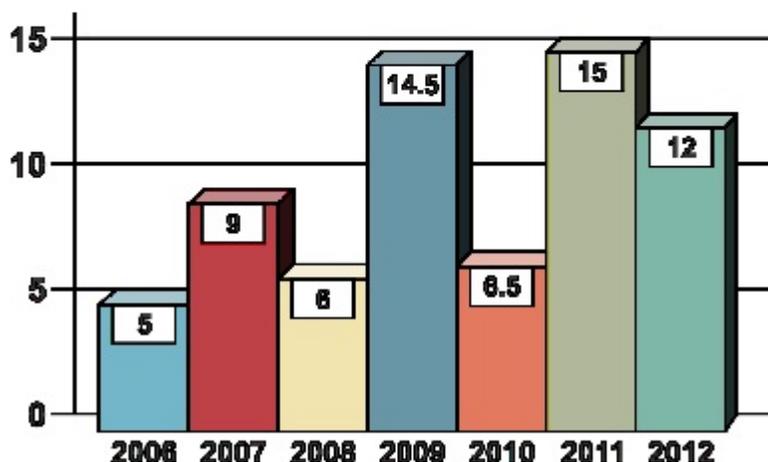
II. Frank Peake Should Be Sentenced Substantially Less Than Executives in Other Cases.

Immediately after Peter Baci was sentenced to 48 months by Judge Corrigan in 2009, the government issued a press release bragging that “[t]his is the longest jail sentence ever imposed for a single antitrust charge.”⁹ The press release failed to announce that Judge Corrigan had been forced

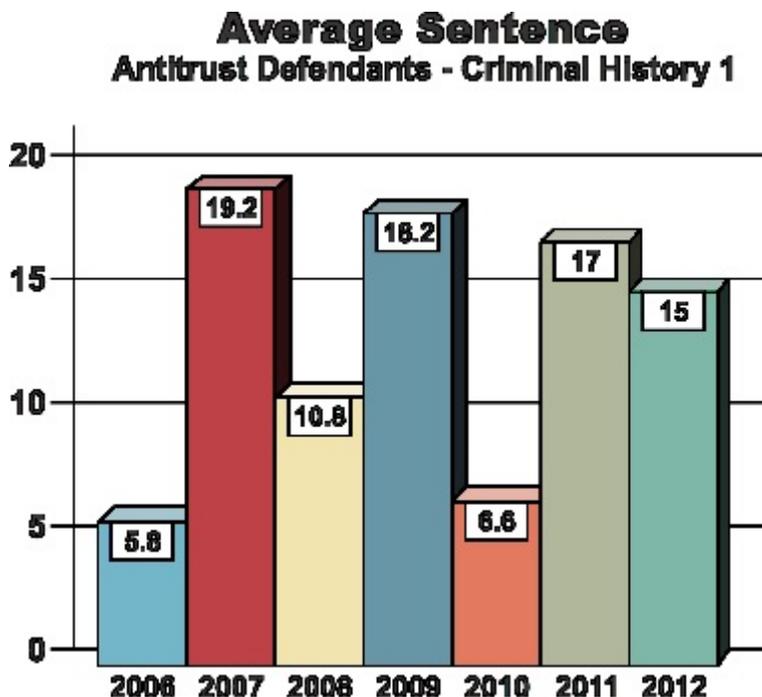
⁹ This statement is still true today.

to accept Baci's guidelines' calculations because Baci had entered a Rule 11(c)(1)(C) plea agreement. It also omitted the fact that the government misled the judge into believing that a sentence of 48 months was average for antitrust offenders.¹⁰ This was not the case. Rather, for Criminal History Category 1 antitrust offenders in 2008, the year preceding Baci's sentence, the median sentence was 6 months and the average sentence was 10.8 months.

Median Sentence Antitrust Defendants - Criminal History 1



¹⁰ As Judge Corrigan stated, referencing his pre-Sentencing question to the government about how Baci's proposed sentence compared to others, "you 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. . . . Well, let me tell you how I felt when I read [the press release]. And I, of course, didn't know anything about it until it was brought to my attention. 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 saying the sentence that you just – that Judge Corrigan – that we just talked Judge Corrigan into giving this defendant, which was actually less than – we were going to get 57 months, but he gave him less, 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." May 12, 2009 hearing before Judge Corrigan.



U.S.S.C. Sourcebooks, <http://www.ussc.gov/DataandStatistics/archives.cfm>, cited in *United States v. VandeBrake*, 679 F.3d 1030 (8th Cir. 2012). At that point in time, the median sentence *had not exceeded 9 months in any year*.

Now the government wants the Court to impose an even higher sentence (**over twice the length of Serra’s sentence**) on Frank Peake – 87 months (7 ¼ years). Peake simply should not receive the highest antitrust sentence ever. He is not the worst offender, by far – not in this case and certainly not in history. Such a sentence would be contrary to DOJ’s own stated policy on proportionality. According to Scott Hammond, the “Division ensures that its sentencing recommendation for a defendant is proportionate, not only with respect to recommendations made as to other members of the cartel, but also to similarly-situated defendants in other cartels prosecuted by the Division.” Hammond, Scott D., *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All* (October 17, 2006).

In considering the need to avoid unwarranted sentencing disparities among similarly-situated individuals, Congress intended to reduce disparity in sentencing for defendants in a single case. *United States v. Saez*, 444 F.3d 15 (1st Cir. 2006). *See also United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir. 1991); *United States v. Carr*, 932 F.2d 67, 73 (1st Cir. 1991). “But the aim was almost certainly a national uniformity focusing upon a common standard and looking to how most cases of the same kind were treated.” *See, e.g., Wogan*, 938 F.2d at 1449 (emphasis added).

With this goal in mind and after reviewing national “cases of the same kind,” a substantial variance from the guidelines is more than fair, reasonable, and proportionate for Frank Peake. Indeed, courts generally grant below-guideline sentences for most antitrust defendants. Of the 72 antitrust defendants sentenced between 2006-2011, 60 received below-guidelines sentences, 11 received guidelines sentences, and 1 was sentenced above the guidelines. *See* http://isb.usssc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table28.

The most noteworthy comparison for this Court – the AUO antitrust case which involved “the most serious price-fixing cartel ever prosecuted by the United States,” – demonstrates that the sentence requested for Mr. Peake is absurd. Top executives at AU Optronics Corporation were recently sentenced after trial to 3 years, which is 7 years less than the sentence requested by the government (10 years). *United States v. AU Optronics Corporation*, CR-09-0110 (N.D.Cal. September 20, 2012), D.E. 948 at 1 (United States’ Sentencing Memorandum). According to the government’s memorandum, from the very month the corporation was formed, defendants entered an illegal agreement “to fix the price of TFT-LCD panels contained in almost every laptop computer and computer monitor sold in the United States.” *Id.* at 2. It is clear from the pleadings filed and argument before the court that the government found the AUO conspiracy to be the most wide-

spread crime it had ever prosecuted. From its memorandum:

The conspiracy's breadth and its pernicious effect can hardly be overstated. The conspirators sold \$71.9 billion in price-fixed panels worldwide. Even conservatively estimated, the conspirators sold \$23.5 billion – AUO alone sold \$2.34 billion – in price-fixed panels destined for the United States. The conspiracy particularly targeted the United States and its hi-tech companies; Apple, HP, and Dell. But the harm extended beyond these pillars of America's hi-tech economy. The conspiracy affected every family, school, business, charity, and government agency that paid more to purchase notebook computers, computer monitors, and LCD televisions during the conspiracy.

Id. at 1 (emphasis added). And the two top executives at trial, the President and Vice-President of AUO, who participated in the “lengthy and pernicious” illegal activity, attended high-level meetings with competitors, and ordered subordinates to attend meetings, take notes, make reports, and carry out the conspiracy. *Id.* at 3. At the sentencing hearing, the same prosecutors involved in this case advocated for an unprecedented sentence of 10 years for executives Chen and Hsuing:

[T]hese defendants played pivotal roles in a global conspiracy that had an unprecedented impact on the pocketbooks of countless American consumers. Never before has the antitrust division seen a conspiracy so pervasive and affecting a product in demand within so many U.S. homes and businesses.

United States v. AU Optronics Corporation, CR-09-0110 (N.D.Cal. Sept. 20, 2012).

The court rejected the government's recommendation, and sentenced the defendants to 36 months each. The court reasoned that the government's requested sentence was disproportionate and unreasonable. Moreover, it noted that the defendants, well-respected and intelligent businessmen, acted for the benefit of their company and others in the industry. While these reasons did not excuse their crime, “they go a long way to explain it.” *Id.* As the court stated:

The defendants thought they were doing the right thing vis-a-vis their industry and their companies. They weren't, but that's what they thought at the time.

I don't mean to suggest they didn't know it was illegal. I think they did know it was illegal. But there were a lot of business pressures that they were responding to, and that's what they did.

These were poor choices. It was bad judgment. But there was no – there was relatively little personal motivation.

I contrast the case before me with, for example, some of the mail fraud and wire fraud and other kinds of fraud cases which we see that involve perhaps smaller dollar amounts but actors who took money so they could keep it and spend it. That wasn't really what happened here. . . . It was a different kind of crime from those personal fraud crimes.

Id. at 18 (emphasis added).

For the same reasons that Judge Illston departed for the AUO defendants, this Court should downward depart for Frank Peake. There is absolutely no question that Mr. Peake acted only for the good of his company, his employees, and his industry. He did not receive a higher salary or bigger bonus. In fact, he agreed to a reduced salary for 2007 and 2008 and worked tirelessly on capital improvements for Sea Star for five years that substantially decreased his annual bonuses. He did not personally profit from the illegal activity and was not financially motivated. *See also* Section III below. And, unquestionably, there were great pressures at the time Peake took over the leadership of Sea Star. All the Puerto Rico shipping companies were losing millions of dollars and were at risk of going under. This extreme financial crisis motivated Leonard Shapiro and Gabriel Serra to begin communicating for the sake of their industry and the sake of their companies. And this motivation trickled down to everyone who became responsible thereafter.

Peake felt the burden of his company's success more than any of them. The letters submitted to the Court confirm that Frank Peake worked hard to make Sea Star a great company, wanted to see it prosper, and wanted his employees to have secure jobs. Accordingly, whatever he did, he "thought [he was] doing the right thing vis-a-vis [his] industry and [the] companies."¹¹ *AU Optronics*

¹¹ Colleagues and friends of Mr. Peake have commented that "if he did engage in any wrongful acts, then I feel sure such acts could not have been done with any intent or malice." –*David Herring*, former officer in the U.S. Navy and current business owner in the containerized shipping industry.

Corporation, CR-09-0110, at 18. As Judge Illston found, this does not excuse any alleged collusion, but it goes a long way to explain it. It also contrasts this case with “other kinds of fraud cases which we see that involve perhaps smaller dollar amounts but actors who took money so they could keep it and spend it. That wasn’t really what happened here.” *Id.*

Mr. Peake’s situation merits an even lower sentence than the AUO executives because that conspiracy was much more extensive affecting a volume of commerce several times greater than the volume of commerce allegedly affected by Sea Star. As the government said over and over at the AUO hearing, the conspiracy Chen and Hsuing perpetrated was **the worst in history**. For that reason, the government believed they deserved a sentence “reserved for the worst offenders.” *AU Optronics Corporation*, CR-09-0110. And the sentence that the trial court determined was appropriate for the “worst offenders” who went to trial was 36 months.

Frank Peake is not one of the “worst offenders.” He should by all means receive much less than 36 months.

There are many other more egregious cases with much worse offenders who have received considerably lower sentences than the government is now asking for Mr. Peake. For example, in a case that the Seventh Circuit showed clear disdain for, top executives of a multi-national company were sentenced to 3 years, over 4 years less than the government is requesting for Peake. *United States v. Andreas*, 96-cr-00762 (N.D. Ill.). Furthering the business motto of their company – our competitors are our friends; our customers are the enemy – high-ranking officers from Archer Daniels Midland entered a new market to produce and sell lysine and immediately entered an illegal agreement with competitors to fix prices, thereby cheating customers. The Court commented that to achieve their objectives, defendants “spied on each other, fabricated aliases and front organizations to hide their activities, hired prostitutes to gather information from competitors, lied,

cheated, embezzled, extorted and obstructed justice.” *Andreas*, 261 F.3d at 649. The executives were sentenced after trial to 36 months and 33 months.

In the “marine hose” cases, the government alleged that executives of various marine hose manufacturers formed a global price-fixing cartel operating from “at least as early as 1999 and continuing until as late as May 2007.” *United States v. Northcutt*, 07-cr-60220 (S.D. Fl.), D.E. 81. Marine hose, a large flexible rubber hose used to transfer crude oil between tankers and storage facilities, is an industry operating throughout the world. The cartel hired a consultant, Peter Whittle, a U.K. National, to coordinate activities of the group. At the trial of two executives, Whittle admitted to making almost 7 million dollars from participating in the criminal conspiracy (none of which he forfeited to the United States), some of which he pocketed by lying to and cheating the other members of his cartel by taking double-secret kickbacks. Robert Furness, another testifying witness and conspiracy participant, treated his employer's bank accounts as his own personal piggy bank, enjoying his private yacht and exclusive country club memberships at the expense of his employer. Furness ordered others to create false financial documents during audits, and to destroy documents establishing his guilt. Despite personally profiting and obstructing justice, Whittle was sentenced to 30 months in prison and Furness to 12 months.¹²

In just the last month, 3 former UBS AG executives were sentenced who had perpetrated “a deceptive scheme to subvert competition in the marketplace.” Press Release, Department of Justice, Three Former UBS Executives Sentenced to Serve Time in Prison for Frauds Involving Contracts Related to the Investment of Municipal Bond Proceeds (July 24, 2013) (quoting New York FBI Acting Director). This was not a typical antitrust case, but one in which the executives greedily

¹² The two executives who went to trial, Val Northcutt and Francesco Scaglia, were acquitted.

received kickbacks by steering investments to specific providers. *United States v. Ghavami*, 10-CR-1217 (KMW) (S.D.N.Y. 2010). For years, the executives led a scheme that caused municipalities to pay millions of dollars more for bond deals than they should have, shortchanging cities and states and affecting the funding of schools and hospitals. In the words of the government:

In short, there was no aspect of their business that was not affected by their crimes – when UBS was the underwriter, they corrupted the selection of a broker; when UBS was a broker, they implemented kickback schemes with providers; when UBS was a provider, they rigged bids with their competitors and separately set up a kickback scheme with a broker; and when UBS was a swap counterparty, they helped a corrupt broker receive kickbacks from a corrupt provider. The common link among these schemes was their purpose -- to increase profits on their desk and, consequently, their own profits. Simply put, Defendants' crimes were the product of greed and arrogance.

Id. D.E. 374 at 2 (Government's Sentencing Memorandum). The defendants were charged with more serious charges than the Sea Star/Horizon defendants including multiple counts of mail and wire fraud, conspiracy to defraud the United States, and witness tampering. In light of the "greed and arrogance" of these executives, the government asked for sentences of 17 ½ years, 19 ½ years, and 11 years. But the Court rejected the government's sentencing requests and sentenced the defendants to 18 months, 27 months, and 16 months respectively.

The Court should also compare Mr. Peake's case to other white collar cases sentenced in this District. From 2007 to 2011, more than half of white collar defendants sentenced in Puerto Rico received no jail time, according to an analysis of sentencing data by the Transactional Records Access Clearinghouse at Syracuse University. Leah Nylen, Comment: Conviction in Puerto Rico shipping case could lead to longest individual sentence, MLex Article, Jan. 13, 2013. In fact, in this division, the average white collar sentence was 7 months, and more than half of the white collar defendants sentenced by this Court have received no jail time. *Id.*

The bottom line is that Frank Peake is not one of the worst offenders in American antitrust

history and does not deserve a sentence more than double what the worst offenders have ever received.

III. The Sentencing Guidelines, Particularly The Volume Of Commerce/Loss Amount, Overstate Frank Peake's Culpability.

Peake should receive a below-Guidelines sentence because his sentencing range substantially overstates his culpability. The First Circuit recently affirmed a sentence based on the trial court's determination that the guidelines calculation, largely driven by the loss amount, overstated the defendants' culpability. *United States v. Prosperi*, 686 F.3d 32 (1st Cir. 2012). In *Prosperi*, the defendants were convicted after trial for their participation in providing concrete that did not meet contract specifications in the Boston "Big Dig" project. Based upon a loss amount of \$5.2 million, the defendants' guidelines calculation equated to a range of 87 to 108 months in prison. The trial judge found that, while loss is important, it should not have "pivotal significance in fashioning an appropriate sentence," particularly when there were other positive factors favoring the defendants. *United States v. Prosperi*, 2010 WL 1816346, at 3 (D. Mass. 2006) (Memorandum and Order on Calculation of Loss for Purposes of Sentencing). Specifically, the district court noted that the defendants did not seek to personally enrich themselves or harm the public, but were motivated by an interest in seeing their company succeed. *Id.* In this way, the defendants were different from other typical white-collar criminals. These considerations made "the loss amount [] an unfair proxy for culpability." *Prosperi*, 686 F.3d at 44. Accordingly, the judge issued a sentence of 3 years of probation, a 100% downward variance from the guidelines sentencing range. On appeal, the First Circuit re-emphasized the *Gall* principles that a district judge must view individuals on a case-by-case basis and has wide discretion in determining an appropriate sentence. Finding that the district court had a "plausible explanation of its refusal to allow the loss estimate to control its sentencing

determination,” the appellate court held that the sentence was reasonable. *Id.*

Mr. Peake’s circumstances are exactly the same as the defendants in *Prosperi*. Like *Prosperi* and his co-defendant, Frank Peake did not intend to enrich himself personally. The government argued that Peake was motivated to participate in this conspiracy in order to get big bonuses and better compensation. However, just as the *Prosperi* judge rejected this argument, the argument should be disregarded here. There was no evidence that Peake was driven to take part in collusion because of greater bonuses. In fact, Peake’s bonus decreased considerably in the latter years of the conspiracy. Peake received nearly \$57,000 less in 2007 than he did in 2006. Equally, there was no evidence that Peake’s salary was increased because he communicated with competitors. Peake’s salary was by no means an exorbitant amount. *See* Exhibit 4, Peake Compensation Chart. Rather, as the President and Chief Operating Officer of a major shipping company with several hundred employees, Peake was paid substantially less than the Presidents of other shipping companies. And his salary increased by less than 5% each year. It is abundantly clear that, like *Prosperi*, he was not motivated by personal financial gain.

Instead, the actual evidence pointed to the opposite conclusion. Frank Peake was motivated by the desire to see Sea Star succeed – just as *Prosperi* had an interest in his company doing well.¹³ Numerous projects begun and/or continued during Peake’s tenure demonstrated that he wanted to build the best shipping company in the Puerto Rico trade. These improvements showed his long-term commitment to strengthening the company over many years. *See* Composite Exhibit 5. These projects included spending nearly \$15 million to renovate the terminal in San Juan, spending several

¹³ Even Peter Baci testified that his motivation for having illegal conversations was to benefit the company: “I was driven by the fact that unless the prices increased, that the company I worked for wouldn’t ever reach profitable – would never continue to be a viable entity. It could not be a viable entity without price increases.” *See* G.J. Jan. 19, 2011 at 70, lines 10-14.

million dollars purchasing new containers and equipment, greatly expanding the intermodal trucking company Spectrum Logistics, expending \$10 million modifying a third ship for deployment in the Puerto Rico trade, implementing a new computer system, expanding Sea Star's service into several other islands in the Caribbean, performing annual customer satisfaction surveys, and paying millions for leadership training and improvement. These are things that did not exist at a failing Sea Star before Frank Peake's arrival. But they were plans and systems that Peake implemented, fully supported, and pushed for once he accepted leadership at Sea Star. In total, the money invested in capital projects and improvements during the time Frank Peake led Sea Star was \$73 million. *See* Government Exhibits 250-255 introduced at trial (Sea Star Line Financial Statements). This was far and above the amount of investment in the company by prior Presidents. This tremendous amount of money reduced the yearly profitability of Sea Star, which in turn reduced the bonuses to its employees. In all Peake's actions with Sea Star, his incentive was "a single-minded interest in the success of [the] company," not a selfish intention to enrich himself. *Prosperi*, 686 F.3d at 45.

Peake did not receive kickbacks. He did not pay bribes. He did not launder money. He did not collude in order to line his pockets with proceeds. He did not embezzle from the company to live in a nicer home. He did not personally benefit. In this way, Peake distinguishes himself "from typical white-collar defendants" and, similar to *Prosperi*, should be sentenced with a variance well below his sentencing guideline range. *Id.* at 44.

"In a case like this it is difficult to apply a mechanical rule of sentencing." *Prosperi*, 2010 WL 1816346, at 3. Here, the guidelines place an undue emphasis on the volume of commerce amount which results in unfathomably high offense level greatly overstating Peake's culpability and involvement. Because judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," the Court should find, as the *Prosperi*

Court agreed, that Peake is deserving of a substantial downward variance. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (internal quotation marks and citations omitted).

IV. The History And Characteristics Of Frank Peake Demonstrate That He Should Be Sentenced Well-Below His Guidelines.

In our opening statement, defense counsel described Frank Peake as “the very definition of honesty, of integrity, of decency. Over and over and over again, people have said Frank Peake is one of the best men I have met. He is one of the finest men you will ever meet.” *See* Tr. Jan. 14, 2013. This was not posturing for the jury, but rather true comments about the man who stands before the Court for sentencing. It is the consistent theme which runs through the 40-plus character letters submitted on behalf of Frank. (“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.” – *Scott Semko*.) Numerous respected and distinguished individuals – including current and former maritime executives, business owners, customers of Sea Star Line, the CEO of the Jacksonville Port Authority, a Retired Rear Admiral from the U.S. Navy, a former U.S. Deputy Maritime Administrator appointed by the President, and a representative of the Seafarers International Union – have written about the great man that Frank Peake is. Repeatedly, they say that they are honored to know Frank.

Although the probation officer has detailed a personal history of Frank in the PSR that includes his birthplace, family, employment, education, etc., her report does little to portray the individual that Frank is to numerous people. For example, it does not reveal that Frank, as a dedicated son-in-law, unhesitatingly welcomed his dying mother-in-law into his home during her final months and tirelessly helped care for her. The report does not disclose that Frank attends regularly to his mother who has cancer. The PSR does not describe the anguish Frank has felt as a father trying to help his oldest child deal with a substance abuse problem. It does not capture the

gratitude people have expressed to him for his guidance and friendship over decades-long relationships. It does not show his steadfast devotion to the shipping industry that led to his sponsorship by an employer to obtain an MBA (chosen among all employees at Sea-Land), grooming for executive roles, and selection as President of a shipping company at the young age of 42. It does not demonstrate Frank's commitment to public service and his insistence that company employees become involved in community charities.¹⁴ In the words of those who know him, "Frank Peake is a decent, honorable, and good man." He is a dedicated father, mentor, professional, contributor, and a man of integrity. *See* Letters written on behalf of Frank Peake, in a separate filing.

Man of Integrity

- ▶ While he was very driven and very competitive, I never once in those seven years ever saw Frank or knew of Frank doing anything that was other than "the right thing", let alone something that was illegal. It simply was not in his DNA.
– *Paul Scott Semko*, retired Navy Rear Admiral and former Vice President of Organization Development at Sea Star Line

- ▶ In business there are always pressures, sometimes they can seem extreme. There were several occasions when I saw Frank stand for what was right and not take advantage of a situation or cut a corner, despite an opportunity or pressure to do so. One specific example involved a charter of a ship from a German ship owner. I was the Chartering Manager for Sea-Land and was negotiating with two ship owners for the use of a ship. Frank was in charge of the Profit and Loss of the plan and there was more than the usual pressure to improve profits. The market for charter ships was "falling" meaning the prices were going down, but we needed a ship in place by a certain date. I had worked the two best options with Frank and he gave me authority to commit to either one if the owner accepted our terms. On a Friday afternoon just before closing in Hamburg, Germany one owner rejected and the other owner accepted our terms. A few minutes later the rejecting owner told me he was

¹⁴ Frank served on the boards of the Boys & Girls Club of Alaska, Covenant House Alaska, Providence Alaska Foundation, Boys & Girls Club of Northeast Florida, University of North Florida's Transportation and Logistics Program, Mayor John Peyton's Transportation and Logistics infrastructure committee, Alaska Marine Exchange, Anchorage Economic Development Council, World Trade Center of Alaska, Alaska Marine Exchange, Alaska Trucking Association. Also, Frank's dedication to his community led to the Alaska Governor Frank Murkowski selecting Mr. Peake to be a part of the Governor's Transportation Transition Team.

prepared to drop his price \$1000/day to get the business and that since a “fixture recap” had not been exchanged with the other owner we were free to do so. I told Frank about it and he did not blind an eye and said, “Ed, in this business, as in life, you are only as good as your word.” It would have been so easy for him to just say “make it happen” and significantly improve his division’s bottom line – and there would have been no trace – but instead and without hesitation he chose to do the right thing. I have never forgotten this demonstration of integrity and have lived by it.

– *Edward F. Hanley*, Vice President, Maersk Line, Limited

- ▶ Frank Peake is an honorable man that always tried to do the right thing. I have always followed my gut in business and in life. When I first met Frank Peake after one meeting, I could tell he was an honest man.

– *Lisa Westerman*, Sr. Logistics Manager, Wal-mart (customer of Sea Star Line)

- ▶ Frank is the guy you would like your sister or daughter to marry. He is intelligent, hard-working, responsible, extends himself to help family and friends, and greatly appreciates the success and happiness of those close to him.

– *Dennis Nugent*, Partner, Ernst & Young U.S. LLP

Dedicated Father

- ▶ In addition to his professional and personal accomplishments, Frank will tell you that he is most proud of his family.

– *Gary L. Ritzman*, retire maritime executive

- ▶ Frank has always been a dedicated “family man” with extensive involvement in the extracurricular activities of his children. Frequently his office conversation was about the little league games or other events of his family.

– *David Herring*, former U.S. Navy officer and business owner



Mentor

- ▶ As I am sure that you can agree, there are only a handful of people in your life that have really guided you on the path that has sculpted you into the person you have become. For me, Frank stands at the top of that list. Frank took a chance by hiring and entrusting a 23 year old to a role which allowed for me to train in all aspects of the shipping world at Sea Star. Along the way, Frank, the company President who one would think would not have time for a trainee, would meet with me regularly for updates and motivational talks. He encouraged change and learning by asking questions and listening . . . All the time, Frank's words have resonated with me – always asking questions and encouraging change.

Frank is genuine and kind. His philosophy revolves around putting others ahead of himself. He is a leader and a teacher and my mentor.

– *Vilhelm Hedberg*, former Regional Manager, Wilhelmsen Shipping

- ▶ I was lucky to have Frank as my mentor. . . . His advice has been a wonderful guidance when I have struggled with how to approach my superior about I had or problems I had. I credit a large part of my successes to Frank. He is a sincere professional whom I saw guiding many others as well as myself.
– *Brenda Mullis*

*"[Does] the right thing vis-a-vis [his] industry and [his] companies."*¹⁵

- ▶ During my career, I have worked in a finance capacity for several companies where I had direct access to Senior Management including the company President. I can tell you that I have seen none who were as dedicated, hard-working, courageous, or competitive as Frank. As an employee, you knew that Frank was absolutely committed to the success of our company and committed to making Sea Star's service the best in the Puerto Rico trade. Simply put, Frank's desire to win and be the best was contagious. He united us all in our efforts to provide the best service to the people of Puerto Rico.
– *Bill Warden*, former Corporate Controller at Sea Star Line
- ▶ Frank was my biggest supporter and promoter when it came to employee and leadership development within [Sea Star Lines] and [American Shipping Group]. . . . As a leader, Frank was (and still is) widely admired. He took a company that was failing – in terms of results and substandard leadership – and turned it into one of the best companies for which to work in the Jacksonville area. Under Frank's presidency, the employees of Sea Star Line were proud to be a part of the operation. We worked hard during this time – but we were always happy to do so.

¹⁵ *AU Optronics*, CR-09-0110, at 18.

- *Susan Bowen*, founder and principal consultant for Leadership Elements, LLC; former Director of Organization Development at Sea Star Line
- ▶ Frank turned out to be the perfect leader for Sea Star when he arrived. He brought a new, fresh, youthful, upbeat positive attitude, and developed a strong atmosphere of team and family throughout the company, both on the mainland, and Puerto Rico. . . . Frank was always asking how he could help to make me/my team even more successful.
 - *John C. Emery*, former general manager of Puerto Rico operations at Sea Star Line
- ▶ My first impression was that he was a good president who was committed to improving the company. The more I got to know him, the more I recognized his engagement in doing so. . . . I always felt that he supported me and many other employees at all levels who were dedicated to improving Sea Star Line from the inside out. . . . Here’s what I learned about Frank. He cared about the employees, the customers, and the company.
 - *Lorraine Haataia, Ph.D.*, former ISO Management Representative for Sea Star Line
- ▶ I found Frank to be a man with an ego that was subordinate to the needs of his company and to the those around him. And that is a rare quality in a competitive business environment.
 - *Thomas Cowan*, former senior vice-president at CSX Lines
- ▶ Frank has a strong sense of doing what is right and just. As he was promoted through the corporate world, he brought a standard of responsibility and personal commitment to always doing the right thing for the company, his employees, his customers and his family. As part of his values, Frank always gave his employing company his strongest loyalty. He was very committed to the best use of the assets he was managing, not for his own good, but for the good of his employer and the company owners.
 - *Karen Bowman*, former CFO of Horizon Line
- ▶ Frank always displayed a positive approach to his position striving to make the company successful in every way. A great leader. Frank brought our sales/marketing and operations teams together resulting in a one team approach providing the best in class service in the industry.
 - *Phil Woare*, former general manager of sales at Horizon Line

Professional

- ▶ One needs only to review Frank’s professional resume to realize that he was the consummate professional who built a reputation for intelligence and skill. Frank is well known throughout the maritime industry and I have never met a single person who expressed any negative comments or opinions about Frank. This is remarkable, given the length of his

career and the breadth of his relationships. . . . The most common attribute I heard from his colleagues was: “good person,” “straight shooter,” “honest.”

– *John E. Graykowski*, former Deputy and Acting Maritime Administrator of the U.S. Maritime Administration

- ▶ He was an inspirational leader, guided by clear strategic direction, ethics and morality of the highest order, and the utmost concern for the well-being of both his customers and his employees. It is rare to find an executive who consistently displays such clarity of purpose and engenders such enthusiastic loyalty and support from both customers and colleagues.
– *Harold S. Resnick, Ph.D.*, Founder and CEO of Work Systems Associates, Inc.; former leadership consultant to Sea Star Line

Contributor

- ▶ [Frank] also became extremely involved in the local community. He served on the Board of Directors for the Boys & Girls Clubs of Alaska, Covenant House, Alaskans for Litter Prevention and Recycling and the Providence Hospital Foundation.
– *Gary L. Ritzman*, retired maritime executive
- ▶ We have worked together on various community projects in Alaska such as Special Olympics, Boys and Girls Club, and YMCA. He has always been active, engaged leader in all our endeavors. His competitive drive, his humility, and his willingness to dedicate precious personal time away from work on a multitude of community service programs has been awe inspiring and helped raise tremendous resources for the needy in Alaska and wherever else he has called home.
– *J. Alain Smith*, Chairman of the Board, Pacific Alaska Freightways
- ▶ I was very proud to see Frank sponsor the Boys and Girls club in Jacksonville soon after he became President of Sea Star Lines. He always remembered to give back to the communities where he was successful.
– *Brenda Mullis*

CONCLUSION

We need not stand before this Court and state that Frank Peake is a changed man now that he has been arrested and faces time in prison – as, certainly, many defendants do. Rather, it is clear that Frank Peake remains a decent, sincere, and respected individual. In undertaking the great task of the Court in sentencing this man, we urge the Court to view this case and this individual in their

entirety – to remember that Frank Peake, a notably good man, did not start the path that led to the downfall of five other businessmen. He did not create, guide, direct, manage, or lead this scheme. Those things were done by others. And he always acted with the intention of doing good for his company and his industry. *United States v. AU Optronics Corporation*, CR-09-0110 (N.D.Cal. Sept. 20, 2012) (varying down from 10 years to 3 years in worst antitrust case in history); *see also United States v. Proserpi*, 686 F.3d 32 (1st Cir. 2012) (affirming downward variance from 87 months to probation).

Frank Peake was, by no means, the worst offender in this case, much less all other antitrust cases. He does not deserve the harshest sentence in antitrust history. Even the jury who convicted him has urged this Court to sentence Mr. Peake to less than his co-defendants received. For the reasons explained in this memo, a sentence of probation is just punishment in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed this 10th day of September 2013, and served on all appropriate parties through that system.

/s/ David Oscar Markus
David Oscar Markus