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13  
14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**  
17

18 UNITED STATES OF AMERICA,  
19 Plaintiff,

20 v.

21 STARKIST CO.,  
22 Defendant.

Case No. CR-18-0513 EMC

**REDACTED VERSION OF**  
**DOCUMENT SOUGHT TO BE SEALED**

**UNITED STATES' RESPONSE TO  
STARKIST'S SENTENCING  
MEMORANDUM**

Date: June 12, 2019

Time: 2:30 p.m.

Judge: Hon. Edward M. Chen

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## INTRODUCTION

StarKist participated in a multi-year price-fixing conspiracy that harmed millions of American consumers. The guidelines fine for this criminal conduct—which has already been reduced by the application of the statutory maximum—is \$100 million. StarKist has failed to meet its burden regarding the only contested issue in this sentencing proceeding: whether it is entitled to extraordinary relief in the form of a 50% reduction of its criminal fine. StarKist’s inability-to-pay claim is based on inaccurate projections regarding its future growth and [REDACTED]. At the eleventh hour, StarKist submitted a report from a bankruptcy expert who opined about StarKist’s Loan Agreement, but that report ignores key provisions of the loan agreement that directly discredit his opinion. Moreover, the government’s forensic accounting expert—using a methodology accepted by courts nationwide in dozens of cases—has determined that StarKist can pay a guidelines fine, meet its restitution obligations, and resolve its remaining liability for other anticompetitive conduct alleged in the follow-on civil cases. On this record, no evidentiary hearing is necessary to decide the issue. StarKist should be ordered to pay a fine of \$100 million in six installments of (1) \$10 million within 30 days of judgment, and (2) five annual payments of \$18 million each on the anniversary of judgment.

## ARGUMENT

### **A. StarKist’s Bankruptcy Expert’s Untimely Opinion Ignores the Terms of StarKist’s Loan Agreement and Rests on Faulty and Incomplete Assumptions**

After participating in a price-fixing conspiracy to reap illicit profits and then manipulating its financial condition to dissipate its cash reserves, StarKist now attempts to raise the specter of bankruptcy to avoid just punishment. The Court should disregard StarKist’s scare tactics, most recently demonstrated by its untimely submission of a report from bankruptcy expert Kenneth Klee. In the report, which was not provided to Probation or the government during the four-month presentence investigation, [REDACTED]

(May 15, 2019 Expert Report of Kenneth Klee (“Klee




1 Report”), Dkt. No. 54-2 ¶¶ 31, 36.) Klee’s erroneous opinion is based on his selective reading of  
2 a single section of StarKist’s loan agreement and is utterly negated by other material terms in the  
3 Loan Agreement. [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 As set forth below, and supported the Loan Agreement, Klee’s opinion should be  
13 disregarded in its entirety. (*See* Loan Agreement.) In addition to the fact that Klee’s opinion  
14 misleadingly fails to address sections of the Loan Agreement that render his opinion baseless, the  
15 report also rests on faulty conclusions about StarKist’s finances that Klee was instructed to  
16 assume by StarKist’s attorneys. Finally, despite knowledge of the terms of the Loan Agreement  
17 and its exposure to a \$100 million criminal fine since October 2018, StarKist did not submit the  
18 Klee Report to Probation or the government during the presentence investigation. It should be  
19 disregarded on this basis as well.

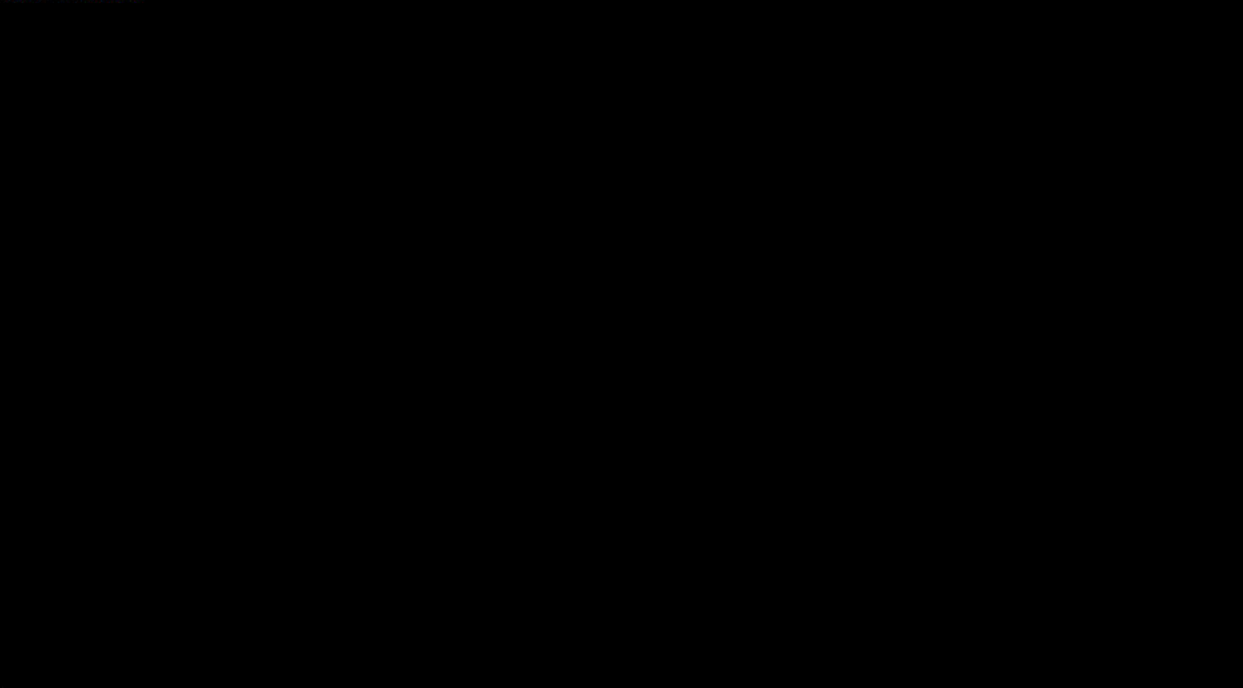
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED] The Loan Agreement is not listed among the materials he received, and he does not

1 purport to have reviewed other sections of the Loan Agreement that are fatal to his opinion.  
2 (Klee Report, Ex. 3, Materials Relied On.)

3 Klee rests his opinion on



15 With respect to both subsections, Klee's opinion ignores material provisions in the Loan  
16 Agreement. When the Loan Agreement is read in its entirety, it is clear that Klee's conclusions  
17 are wrong.



1 Dongwon, a Korean conglomerate that, according to its own website, held assets worth  
2 approximately \$4.3 billion and had \$348 million in profits for the year ending 2017.<sup>1</sup>

3 Notably, plaintiffs in the related civil antitrust actions are attempting to pierce the  
4 corporate veil to hold Dongwon liable for StarKist's conduct. As described in the Direct  
5 Purchaser Plaintiffs' Opening Statement Regarding StarKist Sentencing, [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] In the event of an evidentiary hearing in this  
11 case, the Court should explore the implications of Starkist's troubling pattern of transferring  
12 value to its parent Dongwon during the period that Starkist was or should have been aware of the  
13 potential criminal penalty.

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 ///

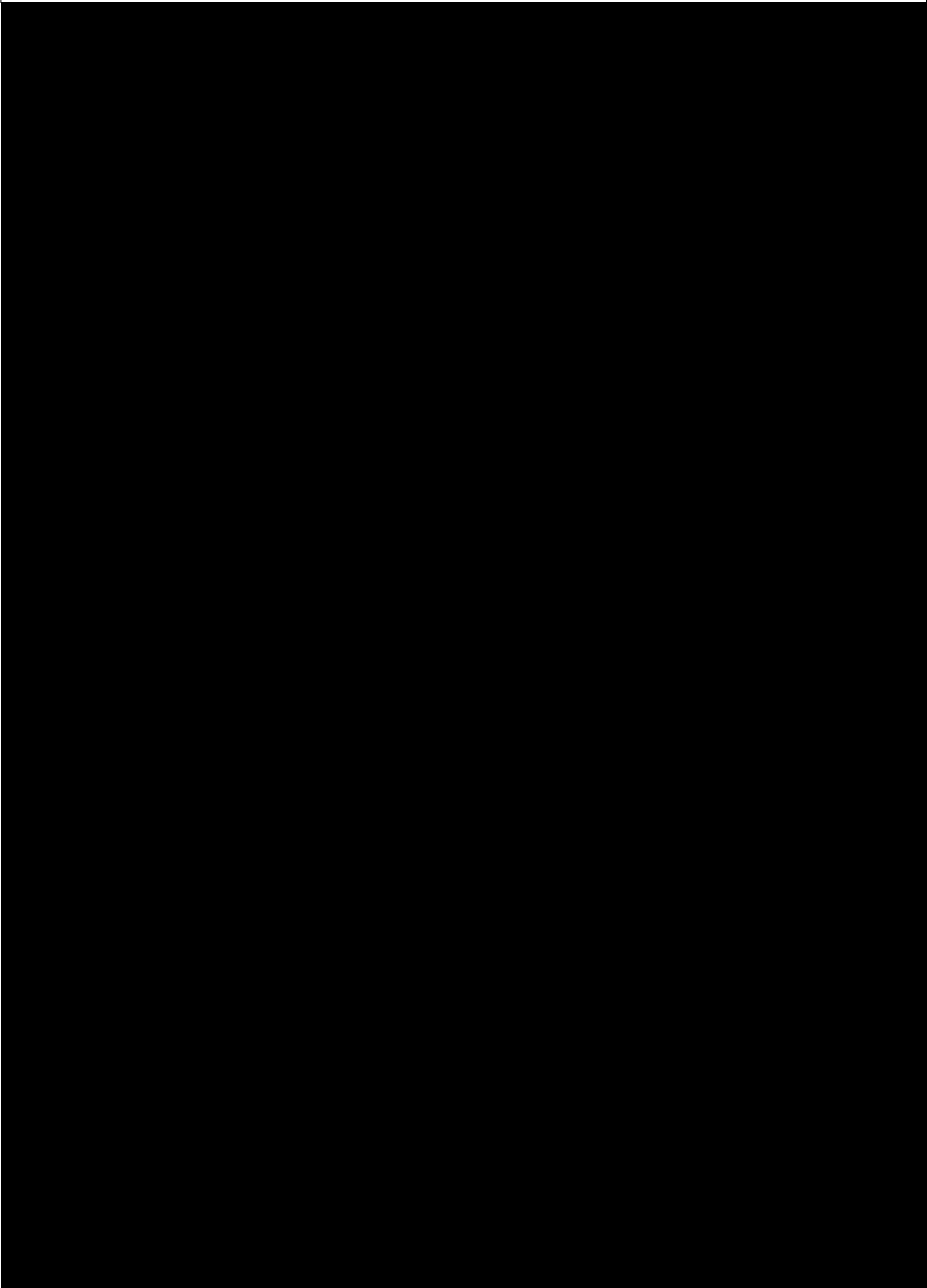
23 \_\_\_\_\_  
24 <sup>1</sup> See 2018 Dongwon Group Sustainability Report,  
25 [https://www.dongwon.com/upload/attachment/vision/Dongwongroup\\_CSR\\_report\(EN\)\\_2018.pdf](https://www.dongwon.com/upload/attachment/vision/Dongwongroup_CSR_report(EN)_2018.pdf)

26 <sup>2</sup> According to the Direct Purchaser Plaintiffs' Opening Statement Regarding StarKist  
27 Sentencing, Starkist's board of directors is comprised of several Dongwon executives. (Dkt. No.  
28 57-2 at 5-6.)

<sup>3</sup> In its Sentencing Memorandum, Starkist attempts to compare its financial situation to Bumble  
Bee. As discussed in Section F below, this provision in the Starkist loan agreement differs  
markedly from Bumble Bee's debt covenants.



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1 Because Klee's report ignores material provisions of the Loan Agreement that flatly  
2 contradict the conclusions he reaches, the Klee Report should be disregarded in its entirety. It is  
3 telling that, [REDACTED]

4 [REDACTED]  
5 [REDACTED] This is nothing more than an empty statement that a particular financial  
6 event is a possibility. In the absence of evidence that [REDACTED]

7 [REDACTED]  
8 [REDACTED] StarKist cannot carry its burden to reduce its criminal penalty.  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 [REDACTED] Klee makes no attempt to explain why the capital  
19 markets are willing to help StarKist preemptively settle a portion of its civil claims whose total  
20 magnitude is unknown, but not resolve a criminal judgment whose amount will be definitively  
21 determined by this Court. From the lender's perspective, it is a distinction without a difference  
22 that the loan proceeds are being paid to the victims of a price-fixing conspiracy instead of the  
23 government prosecuting that conspiracy.

24 Finally, as discussed in Section C below, Starkist may use current and future earnings to  
25 pay the fine while obtaining loans to finance [REDACTED] Starkist has not  
26 met its burden to show that it is unable to obtain financing either for the criminal fine or its  
27 future capital expenditures.

28 ///

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 Furthermore, Chapter 11 (as opposed to Chapter 7) bankruptcy does not  
9 require the liquidation of assets, but instead allows for a debtor to continue operating its business  
10 while it pays creditors over time. See *In re Liberate Technologies*, 314 B.R. 206, 212 (Bankr.  
11 N.D. Cal. 2004) (a “key aim” of Chapter 11 is “avoidance of liquidation”) (quoting *In re Johns-*  
12 *Manville Corp.*, 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984)).

13 [REDACTED] Thus,  
14 Klee’s opinion is just an empty statement that a company may consider  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 In *United States v. Eureka Labs., Inc.*, the Ninth Circuit  
22 affirmed the imposition of a corporate fine equal to the company’s net worth, in addition to  
23 restitution, despite the fact that an economic expert determined that the company’s financial  
24 condition was “bleak” and it would cease doing business less than a year after sentencing. 103  
25 F.3d 908, 910-11 (9th Cir. 1996). The Ninth Circuit expressly rejected bankruptcy as a reason to  
26 reduce the defendant’s fine: “Thus, even if the district court’s fine *would completely bankrupt*  
27 [defendant], neither section 8C3.3(a) nor section 8C3.3(b) precluded the court from imposing  
28 such a fine so long as the fine did not impair [defendant]’s ability to make restitution.” *Id.* at 912  
(emphasis added). [REDACTED]

4. Klee's Opinions Are Based on StarKist's Faulty and Self-Serving Assumptions

The Court should also disregard the Klee Report because it is based on faulty assumptions about StarKist's finances. Klee makes clear that he has "not performed an independent investigation" of StarKist's financial condition and was instead "instructed to assume" that [REDACTED] (Klee Report ¶ 19, 29.) Thus, Klee's opinion rests on the faulty conclusions of Rajiv Gokhale, who himself based his conclusions entirely on StarKist's self-serving Long Range Plan, which was prepared in the course of this litigation and which projects future cash flow at odds with past performance and industry predictions. *See infra* Section B.2. Because Gokhale [REDACTED] [REDACTED] Klee's derivative opinion regarding StarKist's solvency should not be given any weight. The Court should not credit opinions that are entirely reliant on Starkist's self-serving projections prepared during the pendency of this case.

5. Klee's Untimely Expert Report Should Be Given No Weight

Klee's report was not submitted to Probation or the government even though StarKist has been aware of both the terms of its Loan Agreement and the potential criminal fine since October 2018, before this Court even ordered a presentence investigation. Accordingly, if the Court is remotely inclined to credit Klee's report, before the Court grants StarKist's request for an evidentiary hearing, the government requests an opportunity to submit a rebuttal expert report.

**B. StarKist's Inability-to-Pay Claim is Premised on Faulty Assumptions about StarKist's Growth**

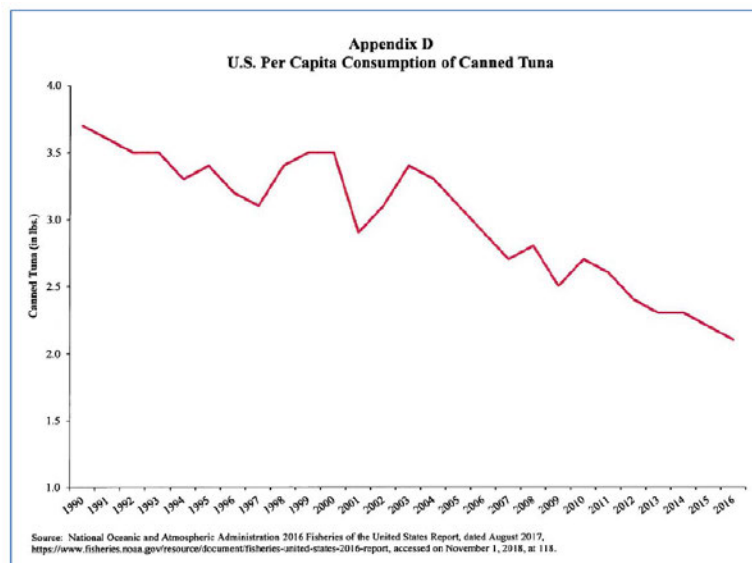
1. StarKist's Projections Are Misleadingly Based on the Units of Tuna Sold

StarKist's [REDACTED] is based on trends regarding the quantity (units) of product it sells rather than the income it derives from those sales. Using units instead of income, StarKist asserts its "growth rate" in 2018 was a mere 1.0%, and that from 2009 to 2018 its average growth rate was just 1.9%. (StarKist Sentencing Mem. at

///

14.) These numbers are meaningless because they reflect only the quantity of goods sold and do not account for the revenue StarKist earned.<sup>5</sup>

The fact that StarKist may be selling fewer cans of tuna is irrelevant if the price of the same cans of tuna is increasing. Decreasing numbers of units sold is also a pointless metric if StarKist is switching its sales model from cans to the increasingly popular and significantly higher margin pouch product. StarKist's compound annual growth rate ("CAGR") in 2018, measured by net sales, was 6.6%—significantly higher than its purported 1.0% CAGR measured in cases of tuna sold. (May 14, 2019 Expert Report of Dale Zuehls ("Zuehls Report"), Dkt. No. 52-1 ¶ 35.) If the chart StarKist included in its Sentencing Memorandum showing the decline in consumption of canned tuna is juxtaposed with StarKist's profits, a more accurate picture of StarKist's financial health emerges:<sup>6</sup>



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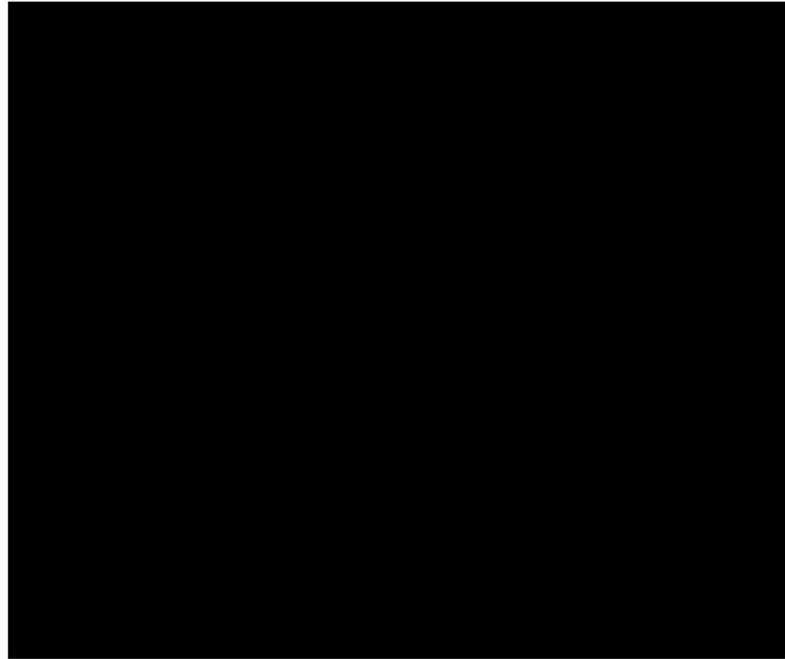
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<sup>5</sup> Unlike Walmart, which resolved its civil antitrust claims against StarKist for a monetary settlement coupled with free product, StarKist cannot pay its criminal fine with cans of tuna. Therefore, any relevant growth rate (past or projected) should be measured in dollars, not cases of tuna sold.

<sup>6</sup> StarKist included the chart titled U.S. Per Capita Consumption of Canned Tuna in its Sentencing Memorandum. (StarKist Sentencing Mem. at 4.) The government used data provided by StarKist to create the chart titled StarKist Annual Gross Profits. (Gokhale Report, Ex. 2.)





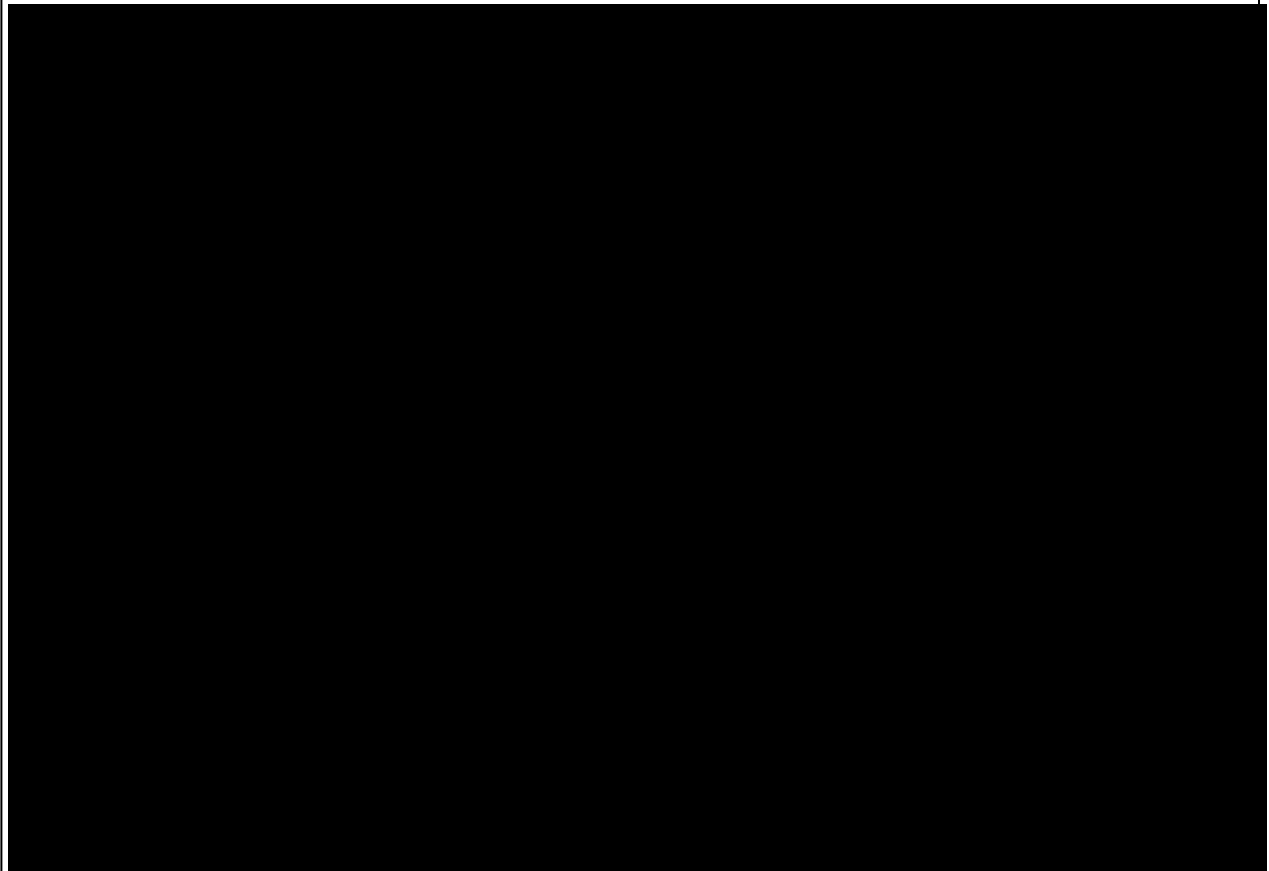
This comparison demonstrates why it does not make sense to measure the health of a company by quantity of product sold without consideration of earnings. The fact that StarKist presents CAGRs based on the quantity of cases sold, as opposed to the income it receives, is telling. Because StarKist's actual growth numbers (as measured in dollars) do not support its inability-to-pay claim, it is attempting to distort its financial viability by relying on irrelevant and misleading figures. Whether or not consumption of tuna by unit is declining, StarKist's profits are increasing. Dollars, not cans of tuna, are the only relevant metric to a company's ability to pay a criminal fine. Thus, StarKist has not established an inability to pay a guidelines fine.

2. StarKist Cannot Establish Its Inability to Pay Through Unsupported and Self-Serving Assertions

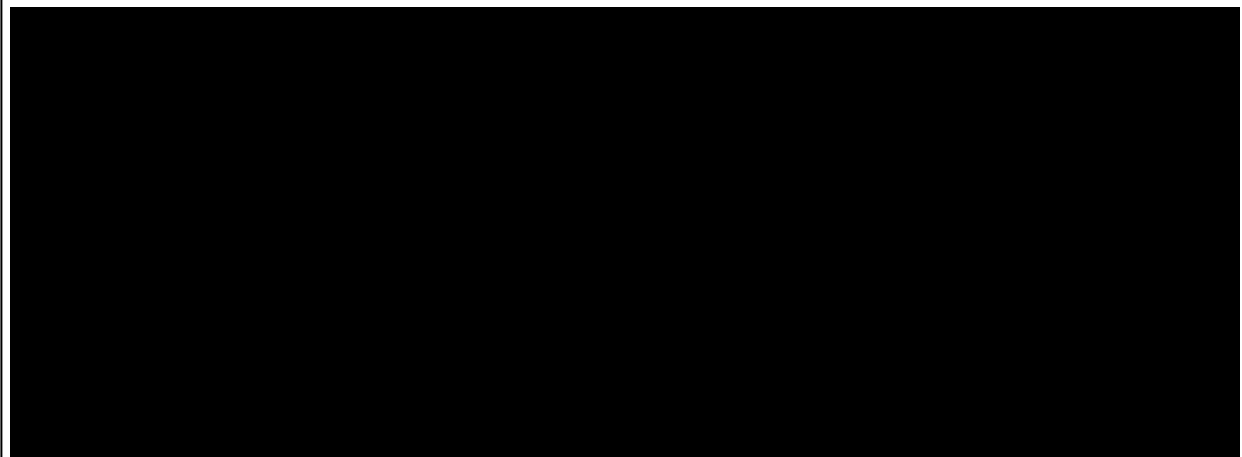
StarKist has maintained healthy growth over the past five years. Both industry reports and

StarKist's unsupported assertions to the contrary and Long Range Plan prepared during this litigation do not prove otherwise.

StarKist's Long Range Plan is not "the best tool to forecast StarKist's free cash flow." (StarKist Sentencing Mem. at 13.) It is self-serving, unreliable, and contradictory. The Long Range Plan



15 The Long Range Plan is also contradicted by numerous industry reports. (Zuehls Report  
16 ¶ 36.) The fact that industry reports analyzed the global or combined Americas market is  
17 irrelevant. The United States is a leading consumer of packaged seafood and StarKist does not  
18 contend otherwise. (Zuehls Report ¶ 32.) It is StarKist's burden to meet, and it has not provided  
19 any industry reports that support [REDACTED]  
20 [REDACTED] StarKist's claim that global industry reports are irrelevant is further undermined by the



fact that Dongwon holds StarKist out as a “global tuna brand.”<sup>10</sup> If anything, the industry reports that informed Zuehls’ projected growth rates understate the likely level of growth because they focus solely on the market for *canned* tuna and do not account for higher growth (and higher margin) pouch tuna, in which StarKist dominates the market.<sup>11</sup> (Zuehls Report ¶ 36; PSR ¶ 6.)

StarKist’s [REDACTED] [REDACTED] are contradicted by industry reports, StarKist’s historical performance (especially its astonishing growth over the last two years), and [REDACTED]. In sum, it has failed to meet its burden.

[REDACTED]

<sup>10</sup> See 2018 Dongwon Group Sustainability Report at 28, [https://www.dongwon.com/upload/attachment/vision/Dongwongroup\\_CSR\\_report\(EN\)\\_2018.pdf](https://www.dongwon.com/upload/attachment/vision/Dongwongroup_CSR_report(EN)_2018.pdf)

<sup>11</sup> StarKist’s unsupported assertion that pouch tuna is “far more labor intensive than canned tuna” is irrelevant. (StarKist Sentencing Mem. at 15.) Similarly, StarKist’s assertion that 2017 was an abnormally high-growth year because of three major hurricanes is not supported by any evidence. The Presentence Report suggests that StarKist did not present this argument to Probation.

[REDACTED]

Regardless, it is not the government's burden to show lenders are willing to loan StarKist money; it is StarKist's burden to prove that they are not. It has failed to meet that burden. Furthermore, to the extent that StarKist complains about the terms of its credit if it were to obtain financing, that is of its own doing. That the terms of StarKist's loans might be less onerous than if StarKist had not engaged in a criminal conspiracy to cheat American consumers is not a reason to reduce its fine.

[REDACTED]

///

///

[REDACTED]

In fact, between 2013 and 2015, when StarKist's overall debt exceeded \$200 million, StarKist maintained positive net income. (Zuehls Report ¶ 71.) Thus, it is not surprising that StarKist [REDACTED]

3. StarKist Has Already Recorded \$40 Million for the Criminal Fine

StarKist's claim that it cannot obtain additional financing is further undermined because in 2017 StarKist recorded a \$40 million liability for the criminal fine on its balance sheet. Therefore, if it receives a \$100 million fine, the impact on Starkist's balance sheet will be only the additional \$60 million. Because StarKist has already recorded a portion of its criminal fine as a liability (but has yet to pay anything), its balance sheet is stronger than it otherwise appears. Stated differently, StarKist only needs to record an additional \$60 million to pay its fine. Even assuming StarKist's projections and [REDACTED]

[REDACTED] Additionally, StarKist recorded that portion of its fine in 2017 and [REDACTED]

///



1 Thus, the evidence demonstrates that StarKist has the ability to borrow money if needed  
 2 to finance its operations, and that fact is fatal to its inability-to-pay claim. The Court should  
 3 require StarKist to pay the \$100 million guidelines fine.

4 **D. The Statements Filed by the Civil Plaintiffs Do Not Justify Reducing StarKist's Fine**

5 Two groups of plaintiffs suing StarKist for antitrust violations—the Direct Purchaser  
 6 Plaintiffs (DPPs) and End Purchaser Plaintiffs (EPPs)—filed victim statements in anticipation of  
 7 StarKist's sentencing. Neither of the statements filed by the plaintiffs justify reducing StarKist's  
 8 criminal fine.

9 The DPPs appear to generally agree with the government that StarKist has adequate  
 10 capital to pay a full criminal fine and settle its remaining claims with the DPPs. (*See* Direct  
 11 Purchaser Plaintiffs' Opening Statement Regarding StarKist's Sentencing, Dkt. No. 57 at 5-7.)

12 The DPPs demonstrate StarKist's strong financial health by chronicling how [REDACTED]  
 13 [REDACTED] The  
 14 plaintiffs are also pursuing claims against Dongwon, Starkist's parent company, under a veil-  
 15 piercing theory, which would allow them to obtain damages from Dongwon. Nevertheless, the  
 16 DPPs propose that if the Court is concerned about StarKist's ability to satisfy its civil obligations  
 17 in the face of a \$100 million criminal fine, it should impose a \$50 million criminal fine on  
 18 StarKist with an additional \$50 million structured as a dollar-for-dollar credit against any future  
 19 class settlements. The EPPs take no position on the amount of StarKist's criminal fine, but  
 20 request that StarKist be ordered to deposit \$65 million with this Court or the Southern District of  
 21 California (where the civil litigation is pending) as a condition of StarKist's sentence. Neither of  
 22 the plaintiffs' statements justify reducing StarKist's fine.

23 The DPP's proposal is unnecessary given StarKist's strong financial health, as  
 24 demonstrated above and in the DPP's statement. The proposed set-aside is unnecessary to  
 25 ensure payment of civil settlements. Instead, the Court should impose the guidelines fine of  
 26 \$100 million. If, in the future, conditions change and StarKist is unable to pay civil settlements  
 27 and the unpaid installments on the criminal fine, it can request that the government petition the  
 28 Court to defer the criminal payments under 18 U.S.C. § 3571, as discussed further below.

1 The EPP's proposal, which amounts to a restitution fund in the criminal case, is contrary  
 2 to the terms of Plea Agreement, which allows Starkist to withdraw from the Plea Agreement if  
 3 restitution is imposed. (Plea Agreement, Dkt No. 24 ¶ 10(c).) The Court must either accept or  
 4 reject the Plea Agreement pursuant to its terms, but cannot impose a sentence inconsistent with  
 5 the Plea Agreement without providing Starkist an opportunity to withdraw its guilty plea. *See*  
 6 Fed. R. Crim. P. 11(c)(1)(C).

7 Neither measure proposed by the civil plaintiffs is necessary, because StarKist has  
 8 sufficient capital to pay a \$100 criminal fine as well as civil damages without jeopardizing its  
 9 continued viability. Thus, there is no basis to reduce StarKist's fine under U.S.S.G. § 8C3.3(b).  
 10 Nor is a fine reduction under § 8C3.3(a) required because StarKist's ability to make restitution  
 11 payments is not jeopardized by a \$100 million fine. As previously discussed in the government's  
 12 Sentencing Memorandum, restitution in this case is significantly less than the damages alleged in  
 13 the civil cases because the civil claims allege that StarKist fixed prices of products beyond  
 14 canned tuna and for a longer duration than the conspiracy charged in the Information. Given  
 15 StarKist's estimate that its civil damages will not exceed [REDACTED] only a fraction of which  
 16 comprises criminal restitution, § 8C3.3(a) is not applicable here. (*See* U.S. Sentencing Mem. at  
 17 18.)

18 **E. A \$50 Million Fine Would Not Satisfy Section 3553(a) Because StarKist Has Not**  
 19 **Established Its Inability to Pay**

20 Absent a finding of inability to pay, any fine under \$100 million fine does not satisfy the  
 21 considerations set forth in 18 U.S.C. § 3553(a). First, StarKist incorrectly states that its fine  
 22 must be compared with Bumble Bee's \$25 million fine. That comparison is inapt. As discussed  
 23 in Section F, Bumble Bee's fine reflected an inability-to-pay reduction based on Bumble Bee's  
 24 financial exigencies. That Bumble Bee met its burden of demonstrating an inability to pay based  
 25 on specific and unique financial circumstances is irrelevant to a determination of whether  
 26 StarKist's guidelines fine is "sufficient, but not greater than necessary" to comply with the  
 27 purposes of § 3553. In addition, Bumble Bee's fine reflected a downward departure of over \$50  
 28 million for substantial assistance under U.S.S.G. § 8C4.1—a reduction that Starkist did not earn

1 or receive. Thus, Bumble Bee's fine is distinguishable under Section 3553(a). If anything, the  
 2 \$50 million fine sought by StarKist would disproportionately undervalue the timing and nature  
 3 of Bumble Bee's cooperation.

4 Second, StarKist misleadingly cites to its annual operating income during the conspiracy  
 5 as relevant to a Section 3553 determination. This ignores the considerable profits that it earned  
 6 during the conspiracy by overcharging American consumers. *See supra* Section B.2 StarKist's  
 7 statement that a \$50 million fine will allow it to continue to provide high-quality products at low  
 8 prices is irrelevant—there is no evidence that the fine amount has any relationship with Starkist's  
 9 quality and prices. (StarKist Sentencing Mem. at 24.) StarKist has failed to meet its inability-to-  
 10 pay burden, and quality and price of goods sold is not a § 3553 factor.

11 Third, StarKist's attempt to minimize its participation in the price-fixing conspiracy to  
 12 which it has pleaded guilty is improper and discredited by the facts set forth in the government's  
 13 Sentencing Memorandum. (Dkt. No. 51 at 2-3.) Probation agrees. (PSR ¶¶ 10-15.) In order  
 14 “to promote respect for the law,” the Court should not reward StarKist's efforts to minimize  
 15 responsibility for its actions.

16 Finally, a \$50 million fine would not afford adequate deterrence to criminal conduct.  
 17 Instead, it would demonstrate to other corporate defendants that they can escape just punishment  
 18 for their crime by spending money on anything and everything—  
 19 —other than the penalty for that crime.

20 **F. No Evidentiary Hearing Is Necessary Because Starkist Has Clearly Failed to Meet**  
 21 **Its Burden**

22 StarKist's request for an evidentiary hearing should be rejected. Probation suggested that  
 23 the Court should consider holding an evidentiary hearing to “allow StarKist the further  
 24 opportunity to meet its burden of proof.” (PSR Sentencing Recommendation at 4.) StarKist,  
 25 however, has had ample opportunity to meet its burden establishing its inability to pay and has  
 26 utterly failed to do so. No evidentiary hearing is necessary to reach that conclusion.

27 ///

28 ///

1 By way of background, contested sentencing hearings regarding inability to pay are  
 2 extremely rare in criminal antitrust cases, as defendant acknowledges. (StarKist Sentencing  
 3 Mem. at 16.) The vast majority of inability-to-pay claims in criminal antitrust cases are resolved  
 4 by joint recommendation by the government and the defendant. The government's recent  
 5 practice in this district reflects this approach. The government agreed to an inability-to-pay  
 6 reduction for Bumble Bee, StarKist's co-conspirator. *United States v. Bumble Bee*, No. 17-CR-  
 7 249, United States' Sentencing Mem. and Mot. for Departure at 12-15, (Dkt. No. 25).<sup>13</sup> Bumble  
 8 Bee's fine reflected an inability-to-pay reduction based on Bumble Bee's precarious financial  
 9 situation, which involved more than \$618 million in loans, with an imminent maturity and none  
 10 of which were guaranteed, being downgraded to a negative bond rating prior to the sentencing  
 11 hearing.<sup>14</sup> The loans were obtained years before the criminal investigation began, when Bumble  
 12 Bee's criminal fine exposure could not have been disclosed to lenders, unlike StarKist's.  
 13 Consequently, in that case the government agreed to recommend a reduced fine for Bumble Bee.

14 In this case, however, StarKist's claims did not pass muster. Nevertheless, if  
 15 circumstances materially change after sentencing, the government will work with StarKist (as it  
 16 would any corporate defendant) to obtain a reduction of the imposed fine under 18 U.S.C. §  
 17 3571. It did so in this district in the prosecution of defendant Hynix in the DRAM investigation.  
 18 In 2005, Hynix was sentenced to a \$185 million fine payable in six installments over five years.  
 19 (See Mast Response Decl., Ex. 2 ¶ 3, Declaration of Niall Lynch in Support of United States'  
 20 Petition for Modification of Fine Imposed on Defendant Under 18 U.S.C. § 3573 in *United*

21 ///

22  
 23 <sup>13</sup> The government also agreed to significant inability-to-pay reductions for two of the corporate  
 24 defendants in its recent capacitors investigation, as well three defendants in the aftermarket auto-  
 25 lights prosecution. See, e.g., *United States v. Rubycon Corp.*, No. 16-CR-367 JD (N.D. Cal. Jan.  
 26 25, 2017), Sentencing H'rng Tr. 11:17-16:22 (Dkt. No. 37); *United States v. Elna Co., Ltd.*, No.  
 27 16-CR-365 JD (N.D. Cal. 2016) (capacitors). See also *United States v. Eagle Eyes Traffic Indus.*  
 28 *Co.*, No. 11-CR-488-RS-2 (N.D. Cal. 2011); *United States v. Maxzone Vehicle Lighting Corp.*,  
 No. 11-CR-653 RS (N.D. Cal. 2011); *United States v. Sabry Lee (U.S.A.), Inc.*, No. 11-CR-599  
 RS (N.D. Cal. 2011) (aftermarket auto lights).

<sup>14</sup> Global Credit Research, Moody's Downgrades Bumble Bee's CFR to Caa2, Moody's  
 Investors Service (Mar. 10, 2017), [https://www.moody.com/research/Moodys-Downgrades-Bumble-Bees-CFR-to-Caa2-Ratings-under-review--PR\\_363391](https://www.moody.com/research/Moodys-Downgrades-Bumble-Bees-CFR-to-Caa2-Ratings-under-review--PR_363391).



1 *States v. Hynix Semiconductor Inc.*, No. 05-CR-249 PJH (Dkt. No. 31).<sup>15</sup> After Hynix made its  
 2 first four payments, in 2009 it returned to the government and requested a modification of its  
 3 remaining fine payments. (*Id.* ¶ 4.) As with this case, the government retained Zuehls, who  
 4 conducted a thorough review of the company's finances and analysis of the relevant industry. In  
 5 that case, Zuehls concluded that Hynix would not be able to make the remaining payments on the  
 6 imposed schedule without substantially jeopardizing its continued viability. (*Id.* ¶ 7.) In light of  
 7 this conclusion, the government petitioned the court for a deferment of the remaining  
 8 installments. (*Id.* ¶ 9.) The Court agreed and deferred the two remaining payments. (Order re:  
 9 Modification of Fine, June 12, 2009, Dkt. No 33.)

10 An evidentiary hearing is not needed to resolve any remaining disputes between the  
 11 parties because Starkist has fallen well short of its burden. The credibility of the expert opinions  
 12 is apparent from the submissions. Zuehls was retained by the government to conduct an  
 13 independent analysis without a predisposition to find an ability to pay. He has done this same  
 14 analysis over 40 times in the past, using the same methodology applied in this case, and more  
 15 often than not, he has reached the conclusion that a company truly had an inability to pay the  
 16 guidelines fine.<sup>16</sup> By contrast, Gokhale simply accepted StarKist's self-serving Long Range Plan  
 17 at face value, and Klee was instructed to assume Gokhale's conclusions were correct.<sup>17</sup>

18 StarKist erroneously alleges that Zuehls has been criticized by other judges in this  
 19 district, citing an inability-to-pay sentencing proceeding before Judge Donato in another price-

20  
 21 <sup>15</sup> Defense counsel is familiar with the Antitrust Division's commitment to ensure corporate  
 22 defendants remain viable. StarKist's counsel previously served as government counsel when the  
 23 government petitioned to modify Hynix's fine.

24 <sup>16</sup> Nor is an evidentiary hearing necessary for StarKist to probe the bases and underlying  
 25 assumptions in Zuehls's report. After Zuehls completed his final report, the government  
 26 provided StarKist with the underlying calculations used by Zuehls to project StarKist's inability  
 27 to pay. Therefore, StarKist is fully able to discuss Zuehls' conclusions in its response to the  
 28 government's sentencing memorandum.

<sup>17</sup> StarKist has not tendered Klee as a witness at the evidentiary hearing it requests. Even if it  
 did, an evidentiary hearing would not be necessary because Klee's report makes clear that he was  
 instructed to assume Gokhale's faulty conclusions were correct, and his opinions with respect to  
 the Loan Agreement are flatly contradicted by other provisions in the Agreement that his report  
 ignores. The Loan Agreement is before the Court (*see* Mast Response Decl., Ex. 1), and no  
 evidentiary hearing is required to determine that it contradicts Klee's opinions.



fixing prosecution brought by the government. StarKist's allegation misconstrues the nature of that proceeding. The *Elna* case was an uncontested sentencing in which the government and defendant jointly recommended an inability-to-pay reduction to the guidelines fine. In that case, Judge Donato's concern was whether there was sufficient evidence meeting *defendant's* burden on inability to pay, precisely the deficiency in StarKist's claim here. The court observed that inability to pay is "defendant's burden, and it should be the defendant's resources that are expended in proving to [the Court], not to Dr. Zuehls, but proving to the Court the inability to pay." *United States v. Elna Co., Ltd.*, No. 16-CR-365 JD (N.D. Cal. June 14, 2017), Initial Change of Plea Tr. at 22:5-8, Dkt. No. 21. Judge Donato did not believe that the parties' submission adequately explained Zuehls's methodology<sup>18</sup> in agreeing to the reduced fine and was concerned about "reaching an independent evaluation of the fairness of the sentence or whether the interests of justice are being served" without the defendant bearing its legal burden. (*Id.* at 21:17-18.)

The court's concerns in *Elna* did not go to the reliability of Zuehls's underlying analysis. Instead, they demonstrate that an inability-to-pay reduction is an extraordinary measure, and that whether the government agrees or disagrees with the defendant, the defendant's burden to make a sufficient showing remains high. Gokhale's decision to accept at face value StarKist's Long Range Plan without testing any of its assumptions—assumptions that are contradicted by historical performance, industry projections, and StarKist's own projected expansion—does not and cannot meet that burden. No evidentiary hearing is required to make that determination.

Nor is an evidentiary hearing required so that two StarKist employees can testify about StarKist's Long Range Plan and its projected future capital expenditures. Any disputes can be resolved on the papers. The Long Range Plan was prepared during this contested sentencing and

contrary to multiple industry reports, past performance, and

Likewise, StarKist does not dispute that it intends to pay for

<sup>18</sup> Here, Zuehls's methodology has been explained thoroughly in his 22-page report, the government's sentencing submissions, and the detailed Presentence Report.

1 [REDACTED]  
2 [REDACTED] It simply states that if [REDACTED] it will be at a “competitive disadvantage.”  
3 (StarKist Sentencing Mem. at 21.) That is not a basis for an inability-to-pay reduction.

4 Finally, Probation suggests an evidentiary hearing might allow the Court to determine an  
5 appropriate installment payment schedule. But the installment payment schedule is not in  
6 dispute. Both parties agree the appropriate schedule is installments made over five years with no  
7 interest. They simply disagree as to the amount of those payments. StarKist has not met its  
8 burden to show an inability to pay, and no live testimony will allow it to meet that burden.

9 **CONCLUSION**

10 For the foregoing reasons, StarKist has failed to meet its burden to reduce the fine due to  
11 inability to pay. The Court should impose a \$100 million fine.

12  
13 DATED: May 29, 2019

Respectfully submitted,

14  
15 /s/ Andrew J. Mast  
16 Andrew J. Mast, Trial Attorney  
17 U.S. Department of Justice  
18 Antitrust Division  
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