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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STARKIST CO.

Defendant.

Case No. CR-18-0513 EMC

REDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED

**UNITED STATES' SENTENCING
MEMORANDUM**

Date: June 12, 2019

Time: 2:30 p.m.

Judge: Hon. Edward M. Chen

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1 **I. INTRODUCTION**

2 StarKist, Co. is [REDACTED] to take responsibility for selling hundreds of
3 millions of dollars' worth of price-fixed tuna to consumers in the United States. It has entered
4 into a Rule 11(c)(1)(C) plea agreement in which it has agreed to a guidelines fine of \$100
5 million, capped by the statutory maximum of \$100 million. But for the statutory maximum,
6 StarKist's guidelines range would be \$120 million to \$240 million. The parties further agree that
7 a fine of \$100 million is an appropriate disposition in this case and comports with the sentencing
8 factors articulated in 18 U.S.C. § 3553. The Plea Agreement provides that the only dispute
9 between the parties is whether StarKist's fine should be *further* reduced based on its claimed
10 inability to pay.

11 The Court, like Probation, should reject defendant's attempt to escape punishment for the
12 crime it committed. StarKist's claimed inability to pay is based on financial projections created
13 during pending litigation that grossly inflate its hypothetical future civil damages and
14 substantially undervalue its estimated future earnings. StarKist's actual financial performance

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] In other words, StarKist is depleting its
19 cash reserves by accelerating business-related expenditures in an attempt to avoid paying a
20 guidelines fine. StarKist, however, committed a crime, and should not be permitted to spend
21 money on itself at the expense of paying the price for its criminal acts. Just as an individual
22 defendant cannot avoid a criminal fine by transferring assets to a spouse, StarKist's deliberate
23 choice to spend down its cash reserves does not justify an inability-to-pay reduction.

24 StarKist cannot carry its burden to show the reduction in its criminal fine is necessary,
25 which the guidelines reserve for only the most extraordinary situations. As the government's
26 independent expert concluded, StarKist has more than sufficient funds to pay the guidelines
27 criminal fine of \$100 million, in reasonable installments without interest, without jeopardizing
28 either its ability to pay restitution or its continued viability. After a lengthy presentence

1 investigation involving the submission of expert reports, Probation reached the same conclusion.
 2 For these reasons, the government respectfully requests that the Court deny StarKist's inability-
 3 to-pay request, and impose the guidelines fine of \$100 million.

4 **II. BACKGROUND**

5 **A. Company Background**

6 StarKist is wholly owned by Dongwon Industries Co. Ltd., a global supplier of seafood
 7 based in Seoul, South Korea. From November 2011 to December 2013, the time period charged
 8 in the Information, StarKist sold approximately \$1.4 billion in shelf-stable tuna products to
 9 customers in the United States. While StarKist sells directly to large retailers and wholesale
 10 distributor companies, its products were ultimately purchased by millions of American
 11 households and businesses at inflated prices.

12 Shelf-stable tuna can be sold in cans or foil pouches.¹ StarKist is the overwhelming
 13 market leader among the three major suppliers of shelf-stable seafood in the United States. This
 14 dominance is particularly apparent in pouch tuna, where StarKist controls approximately 80% of
 15 the market. Pouch tuna is a high-growth product and a higher margin product than canned tuna.

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]

19 In addition to tuna, StarKist sells canned salmon, which is growing in popularity by
 20 StarKist's own admission. (May 14, 2019 Expert Report of Dale Zuehls (Zuehls Report) ¶ 43,
 21 Attach. 1 to the Declaration of Andrew J. Mast (hereinafter Mast Decl.)) StarKist has also
 22 recently introduced a new line of pouch chicken that is currently being sold at most major
 23 retailers. (*Id.* ¶ 34.)

24 **B. Role in Conspiracy**

25 As the national leader in shelf-stable seafood, StarKist's participation in the conspiracy
 26 was essential to its success. Executives at Bumble Bee said it was particularly important to have
 27 StarKist participate in coordinated list price increases because it was the market leader; a

28

¹ StarKist was not charged with conspiring to fix prices of pouch tuna.

1 coordinated price increase would not be effective without StarKist. (PSR ¶ 8.) Further,
2 maintaining agreed-upon pricing guidance and promotional pricing levels between the three
3 companies also depended on StarKist's participation in the conspiracy. (*Id.*)

4 During the period charged in the Information, StarKist's participation occurred through a
5 high-level executive: Stephen Hodge, StarKist's then-Senior Vice President of Sales. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 StarKist's participation in the charged conspiracy ended when Hodge left the company in
15 December 2013 for reasons unrelated to the investigation. (PSR ¶ 14.) [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 [REDACTED] (Mast Decl. ¶ 5.) Hodge could not recall receiving formal antitrust training while
21 working at the company. (PSR ¶ 38.) The Presentence Report concludes that StarKist did not
22 have an effective antitrust compliance and ethics program during the relevant period. (*Id.*)

23 C. Plea Agreement

24 StarKist pleaded guilty on November 14, 2018 pursuant to a Plea Agreement filed under
25 Federal Rule of Criminal Procedure 11(c)(1)(C). (Dkt. 24, hereinafter "Plea Agreement.") The
26 Plea Agreement stipulates to a volume of affected commerce, the resulting sentencing guidelines

27 ///

28 ///

calculation, and other elements of the sentence relevant to determination of the guidelines fine.² The resulting, agreed-upon guidelines calculation is attached hereto as Appendix A. The parties agree that a fine based on the agreed-upon volume of affected commerce would be \$120 million to \$240 million, and, thus, that the guidelines fine is \$100 million due to the statutory maximum for Sherman Act offenses. The guidelines calculation contained in the Presentence Report is consistent with the Plea Agreement.

The sole basis upon which StarKist can seek a reduction from the agreed-upon \$100 million fine is pursuant to U.S.S.G. §8C3.3. (Plea Agreement ¶ 11.) U.S.S.G. §8C3.3 requires StarKist to prove that it cannot pay the guidelines fine, even with a reasonable installment schedule, without impairing its ability to make restitution to victims or without substantially jeopardizing its continued viability.

D. StarKist's Financials and the Zuehls Report

1. An Independent Expert Evaluated StarKist's Ability to Pay

The government retained Dr. Dale Zuehls, a forensic accounting expert, to independently evaluate the veracity of StarKist's claim that it cannot pay the guidelines fine of \$100 million. Zuehls is a principal at the consulting firm of Zuehls, Legaspi & Company. He is a Certified Public Accountant with a PhD in Accounting and a Juris Doctor degree. He has over 40 years of experience in complex accounting, fraud, forensic, tax, and consulting matters. (Zuehls Report, Ex. A.)

The government has retained Zuehls on over 40 occasions to assess ability-to-pay claims by antitrust defendants. He has provided an independent assessment of a defendant's financial condition and ability to pay in matters involving, for example, the airline cargo and passenger industries, the computer memory industry, the domestic freight industry, the aftermarket auto lights industry, and the electrolytic capacitors industry, as well as for another pleading defendant in this packaged seafood conspiracy. (Zuehls Report ¶ 3.)

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² Pursuant to the Plea Agreement, the government agrees not to request probation, though the other terms of the Plea Agreement remain enforceable even if the Court orders probation. (Plea Agreement ¶ 10(c).)

After the government retains Zuehls, he conducts an independent analysis of the defendant's ability to pay a guidelines fine. Zuehls's mandate is to reach whatever conclusion he believes is supported by the financial data he analyzes according to a methodology of his own choosing. The government does not specify a desired outcome for Zuehls's analysis. (*Id.* ¶ 6.) At times, as here, Zuehls recommends that a company can pay its fine, but on other occasions he concludes that a company is unable to pay a guidelines fine, as he did with Bumble Bee, StarKist's coconspirator. *United States v. Bumble Bee*, No. 17-CR-249, United States' Sentencing Memorandum and Motion for Departure, at 12-15 (Dkt. 25); *see also United States v. Rubycon*, No. 16-CR-367 JD (N.D. Cal.), Sentencing H'ring Tr. 11:17-16:22 (Dkt. 37).

The methodology Zuehls used to assess StarKist's ability to pay is set forth in his report. (Zuehls Report ¶¶ 5-7.) First, he reviewed and analyzed StarKist's historical and current financial data, including historic performance, current financial position, and the strength of its balance sheet. Second, he reviewed the company's financial forecasts. Finally, he created his own forecasts of future earnings to test the company's ability to pay a \$100 million fine under a range of financial circumstances that could occur over the next five years. To do so, he prepared multiple iterations of StarKist's future cash flows by modifying certain assumptions of future events. Zuehls' assumptions are based on StarKist's historical performance, industry projections of future performance for the packaged-seafood industry as a whole, the likelihood of occurrence of particular events, and other relevant factors. In this case, the relevant assumptions that Zuehls tested in preparing his iterations were: StarKist's future compound annual growth rate ("CAGR"), the amounts of the civil settlements in the follow-on cases, and capital expenditures, including whether those expenditures were paid in cash or debt financed. In total, Zuehls performed 35 iterations of StarKist's possible future earnings to account for a range of future financial scenarios for the company.³ After examining StarKist's projected annual earnings over the next five years under each of the 35 iterations, Zuehls opined that the company would be able

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³ The government has provided StarKist with these iterations as well as the iterations Zuehls performed in evaluating the ability to pay of Bumble Bee.

to pay a \$100 million criminal fine in addition to civil damages while maintaining its business operations.⁴ (*Id.* ¶¶ 82-88.)

StarKist also retained an expert to assess its ability to pay claim, Mr. Rajiv B. Gokhale. Unlike Zuehls, Gokhale did not conduct an independent analysis of StarKist's financial condition. Instead of testing StarKist's self-serving conclusions about its future performance or accounting for more than one possible future financial scenario for his client, Gokhale accepted at face value the single financial projection contained in StarKist's "Long Range Plan." This is an internal document prepared by StarKist in the course of this prosecution, and which contains a parade of horrors about StarKist's future that are contradicted by StarKist's recent historical performance, independent industry analysts, and common sense.⁵ (February 1, 2019 Expert Report of Rajiv B. Gokhale (Gokhale Report) ¶ 13, n. 18, Attach. 2 to the Mast Decl.; *see also* Pouch Justification Summary, Attach. 3 to the Mast Decl.)

2. Dr. Zuehls's Conclusions

Zuehls concludes that StarKist has the ability to pay a \$100 million fine in six interest-free installment payments made over a five-year period, make restitution to the victims, and continue as a viable enterprise. (Zuehls Report ¶¶ 4, 89-90.) His conclusions are summarized below and his report is attached as Attachment 1 to the Mast Declaration.

Zuehls's conclusion that StarKist can pay the \$100 million guidelines fine is based on four primary points of disagreement with StarKist's financial projections: (1) StarKist's projected CAGR; [REDACTED] (3) the likely amount of future settlements paid to the victims of StarKist's price-fixing conspiracy; and
///

⁴ Zuehls initially performed 20 iterations, which provided the bases for his conclusions in a report submitted to Probation. [REDACTED]

[REDACTED] Zuehls used the [REDACTED] to determine StarKist's ability to pay coupled with differing CAGRs and financing rates for capital expenditures. (*Id.* ¶ 23.)

⁵ StarKist asserts that it prepared its Long Range Plan in the ordinary course of its business. The LRP relied upon by Gokhale was prepared in January 2019, after StarKist had raised its inability-to-pay claim.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 Third, Zuehls concludes that StarKist's initial assumptions regarding the amounts of the
5 civil settlements are inconsistent with (1) settlements that it has already made and (2) Zuehls'
6 considerable experience estimating future civil settlements in antitrust cases. (*Id.* ¶¶ 49-57.)
7 StarKist has already settled with its largest customers. StarKist settled with Walmart (which
8 includes Sam's Club) for \$20.5 million, half of which is for "favorable commercial terms" (i.e.,
9 future discounts). (*Id.* ¶ 50, Ex. J.) [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 Finally, Zuehls concludes that StarKist has taken several recent actions to reduce its
25 working capital, so that it has less cash on hand to pay the criminal fine. [REDACTED]
26
27

28 ⁶ In addition to being sued by the direct purchasers, StarKist has been sued by indirect purchasers, who purchased tuna at inflated prices from StarKist's direct customers.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 • Disguised Dividends: StarKist paid millions of dollars of disguised dividends to
9 its parent company and related subsidiaries.

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 After performing a series of 35 iterations on StarKist's future earnings in which he
23 accounts for various possibilities in growth rates, civil damage settlements, and capital
24 expenditures, Zuehl's concludes that StarKist's future cash flows will be more than sufficient to
25 allow StarKist to pay the \$100 million guidelines fine, remain a viable enterprise, and pay its
26 civil damages. (*Id.* ¶¶ 83-89.)

27 ///

28 ///

1 **III. LEGAL STANDARDS**

2 **A. Sentencing Guidelines**

3 Although the guidelines are advisory, a district court judge should begin all sentencing
4 proceedings by correctly calculating the applicable range under the Sentencing Guidelines along
5 with the other sentencing factors listed in 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S.
6 38, 49-50 (2007); *United States v. Booker*, 543 U.S. 220, 256-60 (2005).

7 Here, the parties agree that the fine based on the agreed-upon volume of affected
8 commerce would be \$120 to \$240 million, well over the statutory maximum fine of \$100
9 million, and that the guidelines fine is thus \$100 million. (*See* Appendix A.)

10 **B. Inability to Pay**

11 As discussed above, the Plea Agreement makes clear that the only basis upon which
12 StarKist can seek a reduction from its \$100 million guidelines fine is if it can meet its burden of
13 demonstrating an inability to pay that fine pursuant to U.S.S.G. § 8C3.3. The guidelines permit a
14 sentencing court to adjust a criminal fine after taking into consideration the organization's ability
15 to pay. U.S.S.G. § 8C3.3.

16 The defendant bears the burden of proving its inability to pay. *United States v. Nathan*,
17 188 F.3d 190, 215 (3d Cir. 1999). A company may only seek a fine reduction based on an
18 inability to pay if paying a full fine impairs its ability to make restitution or threatens the
19 company from remaining financially viable. Courts employ different standards depending on
20 whether victims or the company are threatened by the fine. A court is required to reduce a
21 defendant's fine if imposing the fine would impair the defendant from paying restitution to the
22 victims of the offense. U.S.S.G. § 8C3.3(a). Restitution, however, is only coextensive with the
23 charged criminal conduct, meaning a fine is only required to be reduced if it impairs a defendant
24 from making restitution for the losses resulting from the charged criminal conduct. *See* 18
25 U.S.C. § 3664(f)(1)(A) and U.S.S.G. § 8B1.1.

26 In contrast, a court *may* reduce a defendant's fine if imposing the fine would jeopardize
27 the ongoing financial viability of the company. U.S.S.G. § 8C3.3(b). As long as a defendant can
28 pay restitution, however, the court has discretion to impose a fine regardless of whether it could

jeopardize the financial viability of a company. Compare U.S.S.G. § 8C3.3(b) with U.S.S.G. § 8C3.3(a). In *United States v. Eureka Laboratories, Inc.*, 103 F.3d 908, 912 (9th Cir. 1996), the Ninth Circuit made clear that “Guideline Section 8C3.3 does not prohibit a court from imposing a fine that jeopardizes an organization’s continued viability.” *Id.* Further, the Ninth Circuit held that “even if the district court’s fine would completely bankrupt [defendant], neither section 8C3.3(a) nor section 8C3.3(b) preclude[] the court from imposing such a fine so long as the fine did not impair [defendant’s] ability to make restitution.” *Id.*⁷

IV. ARGUMENT

Based on a comprehensive analysis of StarKist’s financials, Zuehls concluded StarKist has an ability to pay a guidelines fine of \$100 million from future net cash flows. Zuehls analysis was based on StarKist’s financial outlook alone and he did not assume that that StarKist’s parent, Dongwon Industries, would necessarily provide loans or capital to StarKist to ensure its solvency despite Dongwon’s ability to do so. (Zuehls Report ¶¶ 13-14.) Even ignoring the possibility of a bailout from its parent, however, StarKist has an ability to pay a guidelines fine and thus has not met its burden to demonstrate that a fine reduction is appropriate under either section 8C3.3(a) or (b). The Probation Office reaches the same conclusion.

A. StarKist Cannot Establish that a \$100 Million Fine Would Threaten its Ongoing Financial Viability

StarKist’s latest Long Range Plan—prepared during the pendency of this litigation—

effectively manipulating its forecasts to make it appear that the company cannot pay the guidelines fine. StarKist’s actual performance, supported by industry projections of future growth, shows a vastly different picture.

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⁷ Although this is the applicable legal standard, the government is not asking the Court to bankrupt StarKist; as set forth below, Zuehls’s analysis makes clear that StarKist can pay the guidelines \$100 million fine, make full restitution to the victims of its criminal conduct, and continue as a healthy and viable enterprise.

1. [REDACTED] is Contradicted By Industry Projections,
Its Past Performance, and Its Own Business Decisions

[REDACTED] That stagnant figure bucks industry reports, StarKist's historical and current performance, the outlook of its competitors, and its own projected future business decisions. Thus, it should be disregarded by the Court when evaluating StarKist's ability to pay its criminal fine.

First, as explained in the Zuehls Report, industry reports project growth in the *canned* tuna market of between 3.8% and 4.7% over the next five years. Those projections do not account for rapid growth in pouch tuna, where StarKist controls 80% of the market. StarKist's competitors agree: Bumble Bee has indicated that pouch sales present "a runway for growth [that] is exceptionally long." (Zuehls Report, Ex. N.) [REDACTED] but ignore the extreme growth in pouch and its own dominance in that market segment. Indeed, StarKist admits that it has maintained a CAGR of 10.4% in pouch tuna over the past five years [REDACTED]

StarKist's anemic CAGR projection is further undermined by the fact that any decline in canned tuna sales is offset by increased sales in canned salmon. StarKist's expert admits as much (but fails to appreciate its significance) when he notes "the growing popularity of canned salmon has outweighed the decline of tuna, helping this segment grow during the period." (*Id.* ¶ 11, n. 12.) Profits to be reaped in the increasingly popular canned salmon market are also available to pay a criminal fine. Furthermore, Gokhale outright ignores StarKist's new line of *Chicken Creations*, which are currently being sold at most major retailers. (Zuehls Report ¶ 34.) Because StarKist sells products beyond canned tuna, its profitability does not hinge on the consumption of canned tuna alone.

///

1 Moreover, a decline in per-unit sales does not correspond to a decline in profits. Pouch
2 tuna is a much higher margin product, so a decline in sales of canned tuna offset by sales of
3 pouch tuna increase StarKist's margins. (*Id.* ¶¶ 42, 44.)

4 Second, StarKist's own performance further underscores the unreasonableness of its
5 projected CAGR. In 2017 and 2018, StarKist maintained CAGRs of 13.4% and 6.6%,
6 respectively. (*Id.* ¶ 35.) StarKist has not put forth an adequate justification for the dramatic
7 reversal between the actual growth rates 2017 and 2018, and the projected growth rates in the
8 next five years—all years during which it would have to pay a criminal fine. [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 This does not meet StarKist's burden to show an inability to pay.

13 Third, [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 For the foregoing reasons, StarKist will have more than sufficient future cash flows to
27 pay a \$100 million fine, [REDACTED]

28 ///

1 [REDACTED]—and remain financially healthy.⁸ (*Id.* ¶ 83-89.) Not
2 only that, but Zuehls concluded StarKist has an ability to pay a \$100 million fine using a CAGR
3 of 1.0%—a CAGR he does not conclude is likely, as it is well below both well below historic
4 performance and industry projections of future performance—[REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 ///

22 ///

23 ⁸ StarKist argues that the industry reports relied on by Zuehls are based on the global or North
24 American sales of tuna, while nearly all of StarKist's sales are in the United States; and, thus,
25 that the reports cannot be relied on. (Gokhale Report ¶ 30.b.) But StarKist has not provided any
26 independent industry analysis regarding the packaged-seafood industry that pertains to the
27 United States alone, or otherwise justified its claim that a United States-specific CAGR would
28 differ so significantly from more global estimates. Indeed, the United States is typically the
leader in the consumption canned seafood. Therefore, for StarKist's projected CAGR to be
accurate, the rest of the Americas would have to project extremely high CAGRs to make up for
the U.S.'s stagnated sales. StarKist bears the burden to establish [REDACTED] It
has failed to do so.

[REDACTED]

Yet it bears the burden to establish an inability to pay. *Nathan*, 188 F.3d at 215.

[REDACTED]

Moreover, nothing in the guidelines requires the Court to consider whether a guidelines fine will prohibit a corporation from being as profitable as it could be. See *Eureka Laboratories, Inc.*, 103 F.3d at 912. Put differently, StarKist committed a crime, and is [REDACTED] in lieu of paying the price for its criminal activity.

[REDACTED]

StarKist admits it engaged in a price-fixing conspiracy impacting hundreds of millions of dollars in commerce, and a delay in profitability is a reasonable and foreseeable consequence of this criminal conduct.

[REDACTED]

///

1 Additionally, plaintiffs in the civil case are seeking to pierce the corporate veil and hold
 2 StarKist's parent, Dongwon, liable for StarKist's actions. [REDACTED]

3 [REDACTED]
 4 [REDACTED] If plaintiffs succeed in piercing the corporate veil, that provides an entirely
 5 new and substantially larger well from which civil damages can be paid.⁹

6 4. StarKist Artificially Reduced Its Assets to Avoid Paying a Criminal Fine

7 StarKist should also not be allowed to pay down debts to avoid paying a criminal fine.
 8 StarKist maintained an average of \$217 million of debt from 2012-2017.¹⁰ [REDACTED]

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] Thus, StarKist has the ability to pay a guidelines fine
 15 without substantially jeopardizing its continued viability; it simply would rather spend those
 16 funds elsewhere. But StarKist has committed a crime of significant magnitude against American
 17 consumers and, like any other criminal defendant, does not have the right to seek reduction of an
 18 owed criminal penalty because it would rather use its money in an alternative fashion.

19 Thus, as the Presentence Report notes after a lengthy discussion, StarKist has failed to
 20 establish that a \$100 million fine will jeopardize its ongoing financial viability.

21 **B. StarKist Cannot Establish that a \$100 Million Fine Would Impair its Ability**
 22 **to Pay Restitution**

23 Just as a \$100 million fine will not threaten StarKist's ongoing financial viability, so too
 24 can StarKist pay its fine without impairing its ability to pay victims of its offense. StarKist's

25 _____
 26 ⁹ Under the doctrine of piercing the corporate veil, plaintiffs can hold shareholders personally
 27 liable for the actions and debts of a corporation if they establish a unity of interests between the
 28 two corporate entities and an inequitable result if the corporate entity is upheld. *Firstmark*
Capital Corp. v. Hempel Financial Corp., 859 F.2d 92, 94 (9th Cir. 1988).

¹⁰ [REDACTED]

arguments to the contrary [REDACTED]

[REDACTED] Those arguments also misinterpret the inability-to-pay analysis under the Sentencing Guidelines by conflating possible civil damages arising from a much broader conspiracy alleged in the follow-on civil cases with the restitution owed on the much narrower criminal conspiracy alleged in this case.

StarKist has not, and cannot, demonstrate an inability to pay based on its need to pay restitution to the victims of the criminal offense. In arguing for a fine reduction under U.S.S.G. § 8C3.3(a), StarKist erroneously conflates civil damages with restitution.

Restitution remedies the harm from the criminal conduct, and as such, is limited only to conduct within the scope of the criminal charge. *See* 18 U.S.C. § 3664(f)(1)(A) and U.S.S.G. § 8B1.1. Here, the conduct charged in the Information is narrower than the conduct alleged in the civil lawsuits. For example, many of the civil claims allege StarKist's conspiratorial conduct extended for a longer time period and included other packaged-seafood products (such as pouch tuna) than the conspiracy charged in the Information. For this reason, the potential civil damages in the civil lawsuits exceed the scope of StarKist's criminal restitution and are not the proper basis for a reduction under § 8C3.3(a).

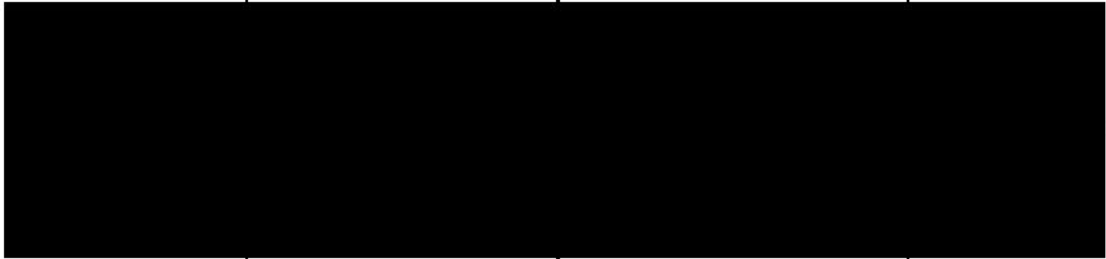
Here, "in light of the civil cases filed against the defendant[.]" the Plea Agreement allows payment of certain damages in the civil cases to substitute for StarKist's obligation to pay criminal restitution.¹¹ (Plea Agreement ¶ 10(c).) But it does not follow that *all* of the damages StarKist pays in the civil litigation become criminal restitution. StarKist's restitution obligations, as measured by the charge period and products in the Information, are significantly lower than the entirety of its potential civil damages:

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¹¹ Under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the government has notified crime victims of the plea and sentencing on June 12, 2019. The government will continue to comply with its obligations under the Crime Victims' Rights Act, including notifying crime victims of any public court proceedings in connection with this matter.

	Criminal	Civil	Difference
Charge/Class Period	Nov. 2011 to Dec. 2013	Oct. 2008 to 2015 or 2017	4-7 years
Products	Canned tuna	All tuna (pouch, food service, private label)	
VOC	\$744M	\$7.06B	\$6.316B
	<i>Restitution</i>	<i>Damages</i>	
			

Thus, even by StarKist's inflated estimates of the overcharges arising from the conspiracy, the high end of its potential criminal restitution would be \$74.4 million. StarKist's actual restitution payments are substantially less than that, however. For example, StarKist settled with Walmart—its largest customer—for \$20.5 million, but the civil settlement encompassed a longer conspiracy time period and included more products than the Information included. Additionally, the Walmart settlement accounted for an overcharge assumption of just 2.69%. Were that overcharge applied to StarKist's total volume of commerce, StarKist's restitution obligation would be approximately \$20 million. StarKist cannot claim that a fine reduction is *required* in order to pay restitution under 8C3.3(a) because it has sufficient money to pay a criminal fine and the smaller portion of its civil settlements that supplement restitution. Because StarKist has sufficient money to pay a criminal fine and restitution to its victims, there is no basis for reduction of the guidelines fine under § 8C3.3(a).

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¹³ These figures were provided by StarKist as estimates of its civil exposure.

C. The Government Can Petition to Lower StarKist's Fine if StarKist's Dire Economic Predictions Come to Fruition

StarKist has not met its burden of demonstrating that the cataclysmic events it predicts—zero growth, astronomical civil settlements, and inability to finance capital expenditures—will come to pass. The Court should not assume that they will, as every defendant will hypothesize a future financial catastrophe to avoid payment of the guidelines fine. Nonetheless, the government has recommended that StarKist's \$100 million fine be paid in six installment payments over five years. If, in that time, StarKist's doomsday forecasts materialize, the government can petition the Court to reduce StarKist's fine. As page 5 of the Presentence Report notes, upon a petition by the government under 18 U.S.C. § 3573 showing that “reasonable efforts to collect a fine or assessment are not likely to be effective, the court may, in the interest of justice—(1) remit all or part of the unpaid portion of the fine or special assessment, including interest and penalties; (2) defer payment of the fine or special assessment to a date certain or pursuant to an installment schedule; or (3) extend a date certain or an installment schedule previously ordered.”

Here, under the installment schedule proposed by the government, StarKist is obligated to pay \$10 million within a month of judgment and \$18 million paid each year for the next five years.¹⁴ (Zuehls Report ¶ 90.) While Zuehls's current analysis of StarKist's likely future financial position indicates that it will be able to shoulder a \$100 million criminal fine and continue as a viable and healthy enterprise, if StarKist's viability is truly threatened by future developments—whether those it predicts in this proceeding or some other unforeseen catastrophe—StarKist can request that the government petition the Court for a reduction in StarKist's fine. *See, e.g., United States v. Horizon Lines, LLC*, No. 11-CR-71 DRD, (D.P.R. Apr. 28, 2011) (Dkt. 36) (Order Granting Motion for Modification of Fine Pursuant to 18 U.S.C. § 3573). Consistent with the principles of § 3573, however

¹⁴ The government recommends that StarKist be exempted from paying interest on its criminal fine. *See* 18 U.S.C. § 3612(f)(3)(1).

1 [REDACTED]
2 [REDACTED]
3 The ability for the government to petition for a lower fine under § 3573 does not alter the
4 importance of sentencing StarKist now. Every criminal defendant would rather do anything than
5 serve its sentence, and StarKist is no different. StarKist has demonstrated that it will continue to
6 do anything to avoid paying its criminal fine. [REDACTED]

7 [REDACTED] It should not be permitted
8 to continue making business decisions that allocate its cash for voluntary expenditures to avoid
9 its punishment. Delaying sentencing would only decrease the likelihood that StarKist would be
10 sentenced to a criminal fine commensurate with its criminal actions.

11 **D. An Evidentiary Hearing is not Necessary**

12 An evidentiary hearing is not necessary to determine that StarKist has the ability to pay a
13 \$100 million fine. A defendant does not have a right to an evidentiary hearing at sentencing.
14 See Fed. R. Crim. P. 32(i) (“The court *may* permit the parties to introduce evidence on the
15 objections [to the presentence report].”) (emphasis added).

16 Here, there is no reason to expend judicial resources on an evidentiary hearing litigating
17 StarKist’s meritless inability-to-pay claim. Most evidentiary issues are not in dispute. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 Neither scenario provides a basis to avoid its criminal fine. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 No evidentiary hearing is necessary.

26 Additionally, the credibility of each expert is apparent from the parties’ submissions.
27 Zuehls is an independent expert, retained by the government to evaluate StarKist’s finances and
28 test the assumptions contained therein, without a predisposition to find an ability to pay. He

1 conducted an independent analysis of the industry in reaching his conclusions. In the more than
 2 40 inability-to-pay analyses completed by Zuehls, more often than not he has concluded that the
 3 defendant was unable to pay the guidelines fine. Put simply, he does not have his finger on the
 4 scale for the government.

5 Zuehls reached his conclusion only after looking at various possibilities in the key
 6 variables that [REDACTED]

7 [REDACTED] Consistent with the
 8 forensic accounting principles that he has applied in over 40 prior cases, Zuehls tested 35
 9 different financial projections after giving careful consideration to how each of these variables
 10 could play out over the next five years. His iterations on CAGR—a critical factor in StarKist’s
 11 future earnings during the payment period—are illustrative: [REDACTED]

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] taking into account the most likely possibilities for this variable based
 15 on his review of the industry literature. By accounting for a range of such possibilities, Zuehls’s
 16 methodology is far more reliable than Gokhale’s singular financial projection.

17 Gokhale has never completed an inability to pay analysis in a criminal case, and he
 18 simply accepted StarKist’s self-serving Long Range Plan at face value without testing the
 19 assumptions and conclusions reached within. An evidentiary hearing is not required to
 20 understand the methodologies of each expert and whether StarKist has sustained its burden to
 21 demonstrate a true inability to pay.

22 **E. The Parties Agree that a \$100M Guidelines Fine Satisfies 18 U.S.C. § 3553**

23 Pursuant to the Plea Agreement, the only basis for any reduction of the \$100 million
 24 guidelines fine is defendant’s inability to pay, which StarKist has failed to prove. The parties
 25 agree that the \$100 million guidelines fine satisfies the § 3553 factors and that no further
 26 reduction below \$100 million is appropriate under § 3553. Therefore, § 3553 does not provide a
 27 basis to lower (or raise) StarKist’s fine, but remains relevant in order for the Court to evaluate, as
 28 in any proposed sentence pursuant to a (c)(1)(C) agreement, whether the sentence proposed by

1 the parties comports with § 3553. Here, the proposed \$100 million criminal fine comports with §
2 3553.

3 Section 3553(a) directs a court to impose a sentence “sufficient, but not greater than
4 necessary” to comply with the purposes set forth in subparagraph two of § 3553(a): the need for
5 the sentence imposed to, among other things, reflect the seriousness of the offense, promote
6 respect for the law, provide just punishment for the offense, and afford adequate deterrence. A
7 court should also consider additional factors such as the nature and circumstances of the offense,
8 the history and characteristics of the defendant, and the need to avoid unwarranted sentencing
9 disparities. Here, these factors demonstrate that the \$100 million guidelines fine is reasonable.

10 StarKist engaged in a multi-year price-fixing conspiracy affecting millions of American
11 consumers, many of whom purchase tuna as an economical source of protein. StarKist is the
12 largest supplier of shelf-stable tuna in the country. For this reason, its participation in the
13 conspiracy was particularly important: witnesses have said that the conspiracy would not have
14 functioned effectively without StarKist’s participation. (PSR ¶ 8.) While the number of
15 individual participants at StarKist may have been lower than at the other corporate
16 coconspirators, the number of executives at StarKist who participated in the conspiracy is of no
17 moment to the application of the § 3553(a) factors. StarKist has acknowledged its participation
18 in the charged price-fixing conspiracy, thereby admitting it lacked the necessary corporate
19 controls or compliance program to prevent, stop, or report the illegal conduct. In fact, StarKist
20 did not begin to accept responsibility for its actions until Hodge entered his guilty plea in May
21 2017 [REDACTED]

22 The \$100 million guidelines fine also avoids sentencing disparities between StarKist and
23 the other corporate pleading defendant, Bumble Bee. Bumble Bee was sentenced to pay a \$25
24 million fine, which escalates to a maximum fine of \$81.5 million in the event of a qualifying
25 transaction. For purposes of this sentencing, the appropriate point of comparison is between
26 StarKist’s \$100 million guidelines fine and Bumble Bee’s maximum possible fine of \$81.5
27 million; Bumble Bee’s \$25 million fine was calculated based on its own circumstances
28 indicating an inability to pay a fine above \$25 million unless a qualifying transaction occurs.

StarKist's \$100 million guidelines fine reflects a volume of commerce that is nearly a third larger than Bumble Bee's volume of commerce (\$744 million as compared to \$567.7 million). Additionally, Bumble Bee provided substantial and timely assistance in the investigation, justifying the government's 40% downward departure—Bumble Bee's guidelines fine was \$136.2 million before the application of the substantial assistance reduction. By comparison, the government is not moving for a substantial assistance downward departure for StarKist, finding that StarKist has not provided cooperation to the investigation that would warrant any such recommendation. Finally, StarKist's \$100 million guidelines fine already reflects a reduction in light of the cap imposed by the statutory maximum fine because the low end of its fine range would otherwise be \$120 million.

V. CONCLUSION

StarKist has failed to meet its burden of demonstrating that it is unable to pay the guidelines fine of \$100 million. Instead, StarKist has attempted to obscure its cash flows by paying down its debt and providing disguised dividends to its parent company, without business justification. It has projected massive settlements in private-plaintiff actions that now appear likely to settle for less than a third of initial estimates, even by StarKist's own admission. It has projected zero growth in its forecasts at the same time that it has expanded its inventory and allocated cash for significant capital expenditures to expand its capacity. And, without providing any documentation, it insists it cannot finance these capital expenditures despite its admission that its parent company guarantees all of its loans and that it has financed civil settlements. StarKist can pay, and deserves to pay, a \$100 million fine.

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1 The government respectfully requests that the Court accept the Plea Agreement reached
2 between the parties and sentence StarKist to pay the guidelines fine of \$100 million on the
3 installment schedule proposed by the government.
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5 DATED: May 15, 2019

Respectfully submitted,

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7 /s/ Andrew J. Mast
8 Andrew J. Mast, Trial Attorney
9 U.S. Department of Justice
10 Antitrust Division
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