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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA,)

Plaintiff,)

VS.)

NO. CR 18-00513 EMC

STARKIST COMPANY,)

Defendant.)

San Francisco, California

Wednesday, June 12, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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U.S. DEPARTMENT OF JUSTICE
Antitrust Division
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BY: **ANDREW J. MAST**
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(Appearances continued on following page)

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1 Wednesday - June 12, 2019

2:37 p.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling criminal action 18-513, United
5 States of America versus Starkist Company.

6 Counsel, please come to the podium and state your
7 appearances for the record.

8 **MR. MAST:** Good afternoon, Your Honor. Andrew Mast on
9 behalf of the United States.

10 **THE COURT:** All right. Thank you, Mr. Mast.

11 **MR. LYNCH:** Good afternoon, Your Honor, Niall Lynch on
12 behalf of Starkist Co. With me is Ashley Bauer, my partner
13 working with me on this matter. We also have three
14 representatives of the company here today who are prepared to
15 allocute if the Court permits. We have the current CEO of
16 Starkist Co., Andrew Choe, if he can stand up.

17 **THE COURT:** Thank you, Mr. Choe.

18 **MR. LYNCH:** We also have Scott Meece, the current
19 General Counsel of Starkist. He is also present.

20 **THE COURT:** All right. Thank you.

21 **MR. LYNCH:** And we also have Archie Soliai, who has
22 flown for more than 20 hours from American Samoa to be here
23 because he would like the Court to hear how the fine in this
24 case might impact the workers in American Samoa, and he is also
25 in attendance. So if he can also stand up.

1 **THE COURT:** All right. Great. And he did. Thank
2 you.

3 We have others.

4 **MS. SPITALIERI:** Good afternoon, Your Honor. Jill
5 Spitalieri, U.S. Probation.

6 **THE COURT:** All right. Thank you, Ms. Spitalieri.

7 **MS. MANIFOLD:** Betsy Manifold, Wolf Haldenstein on
8 behalf of the End Payer Plaintiffs. We are the crime victims,
9 the End Payer Plaintiffs.

10 **MS. CARACUZZO:** And Bethany Caracuzzo, Pritzker
11 Levine, also on behalf of End Payer Plaintiffs.

12 **THE COURT:** Thank you.

13 **MR. SIX:** Good afternoon, Your Honor. Steve Six of
14 Stueve Siegel Hanson. I represent two direct action Plaintiffs
15 in the MDL and Southern District. Also appearing under the
16 Crime Victims Rights Act, and we have filed a pleading that we
17 sent to the Court on May 24th. It was filed May 24th.

18 **THE COURT:** That's the direct purchaser's --

19 **MR. SIX:** Joining the direct purchaser's motion and
20 with a slight clarification.

21 **THE COURT:** Okay.

22 **MR. LEBSOCK:** Good afternoon, Your Honor. Chris
23 Lebsock from the Hausfeld firm for the direct purchaser class;
24 and we are here to answer any questions that the Court might
25 have about our submission or proposal.

1 **THE COURT:** All right. Thank you.

2 **MR. CUNEO:** Your Honor, Jonathan Cuneo. And I'm here
3 under the Crime Victims Rights Act on behalf of Commercial Food
4 Preparers, but I'm not a member of the bar of this court. I'm
5 a member of the District of Columbia Bar and the New York Bar,
6 and I was hoping the Court would let me briefly address it at
7 an appropriate moment.

8 **THE COURT:** So you are here to represent under the
9 Crime Victims Act --

10 **MR. CUNEO:** Correct.

11 **THE COURT:** -- the Commercial Food Preparers?

12 **MR. CUNEO:** Correct.

13 **THE COURT:** And that case -- has that settled, or what
14 is the situation with it?

15 **MR. CUNEO:** Your Honor, there are three families of
16 Defendants in that case, and the Commercial Food Preparers have
17 a proposed settlement with one of them.

18 **THE COURT:** Okay. Just one?

19 **MR. CUNEO:** Correct, and not Starkist.

20 **THE COURT:** Okay.

21 **MR. CUNEO:** And we are --

22 **THE COURT:** All right. And your case is also in
23 San Diego?

24 **MR. CUNEO:** Yes, sir.

25 **THE COURT:** All right. The first question I have is

1 procedural, and that is how should we conduct these proceedings
2 in view of the fact that there was a fair amount of
3 confidential and sensitive information which is material which
4 is likely to be discussed, and I'm trying to figure out a
5 way -- whether there is an easy way to sort of talk around it
6 in code, but I don't see how we can avoid numbers and this sort
7 of thing. But on the other hand, the public has a very strong
8 interest in these matters. So why don't we hear the parties'
9 thoughts about procedural --

10 **MR. MAST:** Yes, Your Honor. What the Government would
11 propose is I think certain numbers that are sealed, such as the
12 settlement offers or projected civil settlements that are sort
13 of the highest confidential nature, that I would refer
14 Your Honor to numbers either in the pleadings or on pages.

15 For some of the other numbers that are sealed, the
16 Government's view is that it is not so sensitive that it can't
17 be listed or stated in open court. It is one thing to remove
18 it from a pleading that is filed on the docket and available
19 for -- in perpetuity, but it is another thing to conduct a
20 proceeding, as Your Honor stated.

21 So if the Court is willing, we would propose referring to
22 some of the numbers that are sealed.

23 **THE COURT:** Well, would that include the projected
24 growth?

25 **MR. MAST:** From the Government's perspective we think

1 it would be helpful to be able to refer to those numbers. If
2 Defense objects strongly, we can try and proceed by way of,
3 like I said, referring to numbers in the pleadings as we go.

4 **THE COURT:** All right.

5 **MR. LYNCH:** Your Honor, I think to the extent we can
6 keep information under seal, we would like to. We understand
7 that that is probably not practical. The primary area we are
8 focused on in terms of confidentiality is our estimated civil
9 liability, and those are, I think, relatively discrete. We are
10 prepared to talk about our -- the CAGR and growth issues
11 publicly.

12 **THE COURT:** Okay. All right. That's fine.

13 **MR. LYNCH:** There were two issues I was just -- there
14 are other parties in litigation, Chicken of the Sea and
15 Bumblebee, and some of their financial information is referred
16 to, and I can't speak on their behalf in terms of protecting
17 their confidentiality. I will try to keep that information
18 confidential as much as possible, but we also don't want it to
19 impact our ability to, you know, effectively advocate on behalf
20 of Starkist.

21 **THE COURT:** All right. So why don't we try to proceed
22 along those lines. And if I slip up or if you hear something
23 that probably should not be made public, anyone, please feel
24 free to speak up and I will try to adjust.

25 Yes, Mr. Cuneo.

1 **MR. CUNEO:** Your Honor, I have an idea for the Court's
2 consideration -- and that is speaking merely for the CFPs -- we
3 are victims, and we would love the Court to take into account
4 our views before the Court imposes a sentence; makes up its
5 mind. If we were to go early, I would get up and leave and
6 that way there wouldn't be an issue.

7 **THE COURT:** Okay. Well, that's a possibility. I
8 could take the input because it is on a discrete issue,
9 although that's the part that is most sensitive in terms of
10 confidentiality.

11 **MR. CUNEO:** I agree with you. And there are certain
12 things that, as you know, we petitioned the Court for small
13 bits -- small bits to be unsealed or made available at least,
14 under some protective rule in the civil litigation. But that's
15 not something that we intend to argue anymore than just making
16 our point and explain to you why we think that is important.

17 If that was the case and the Court would hear us, then I
18 would -- speaking just for the Commercial Food Preparers --
19 leave, and you wouldn't have to worry about anything that
20 crossed my ears.

21 **THE COURT:** Let me ask if the other crime victim
22 representatives share that view procedurally.

23 **MS. MANIFOLD:** Good afternoon, Your Honor. We would
24 be more than happy to speak first. I think it is appropriate
25 to hear from the victims first so the Court has that on its

1 mind in terms of hearing the other evidence.

2 I think it would be fine for us to stay. My preference
3 would be to stay, not leave the courtroom.

4 **THE COURT:** You have no problem presenting your
5 client's perspective at the outset of this hearing?

6 **MS. MANIFOLD:** I have no problem with that,
7 Your Honor.

8 **THE COURT:** All right.

9 **MR. LEBSOCK:** Chris Lebsock for the direct purchaser
10 Plaintiffs.

11 I think that would be fine from our perspective too, and I
12 would be extremely brief unless the Court has specific
13 questions for me.

14 **THE COURT:** All right. Well, maybe we should do that
15 in case we find ourselves in a situation where we do need to
16 take the rather extreme step of closing the hearing, that won't
17 affect people who want to and have the right to say something.

18 **MR. LYNCH:** I think that's fine, Your Honor. I would
19 prefer not to close the hearing at any point.

20 **THE COURT:** I'm hoping not to.

21 **MR. LYNCH:** Right. And we are not dealing with
22 witness safety and the like.

23 **THE COURT:** Right.

24 **MR. LYNCH:** We are dealing with financial numbers.

25 **THE COURT:** Right.

1 All right. Well, why don't I go ahead and take that
2 suggestion and hear -- now, this is all in the context of the
3 two provisions that we are all aware of in terms of the Court's
4 power or obligation to reduce the fine. One is that there is
5 mandatory duty to reduce the fine if -- to the extent necessary
6 to prevent an impairment of the ability to make restitution, I
7 understand there is a legal question whether the -- in the plea
8 agreement sort of foregoing formal criminal restitution in
9 favor of the civil payments, whether this really is restitution
10 within the meaning of the sentencing guideline.

11 But there is also the discretionary provision under
12 Section 8C3.3(b), which gives the power and the authority of
13 the Court -- but not the obligation -- to reduce the fine if
14 necessary to avoid substantially jeopardizing the continued
15 viability of the organization.

16 Now, those two kind of dovetail to a certain extent
17 because even though the Court is not obligated and could impose
18 a fine even if it does jeopardize the continued existence of an
19 organization. It is my preference to keep in mind the
20 payments -- whether you call it restitution, damages --
21 available to the victims as a high priority here.

22 So whether it is under the first provision or the second
23 provision, my intent is to be mindful of the sort of hierarchy
24 of things here, and I think payment -- whether by way of
25 settlement or whether you call it restitution or whatever -- is

1 an important factor.

2 So with that backdrop, whether it is under the mandatory
3 provision or the discretionary provision, I think it is
4 relevant to hear. And I have seen, you know, the briefs; and
5 we are going to get into what the ability to pay is.

6 And I will say in advance that I think I have indicated,
7 as my clerk has indicated to you, that I'm reserving the
8 possibility of actually hearing some live testimony because
9 right now I feel like there are some ships passing through the
10 night, and there may be some advantage to have a focused
11 evidentiary hearing; and I have certain things that I would
12 like to focus on.

13 Before we get there, why don't I hear from the victims?

14 **MR. LEBSOCK:** Very well, Your Honor.

15 **MR. LYNCH:** Should I sit down?

16 **THE COURT:** Yeah, you may.

17 So who wants to go first?

18 **MS. MANIFOLD:** Mr. Cuneo.

19 **MR. CUNEO:** Thank you very much, Your Honor. I thank
20 you for letting me appear and speak, and I found your remarks
21 to be extremely heartening.

22 I want to start by saying that the Crime Victims Rights
23 Act affords my clients certain rights, and one of them has been
24 the right to confer with the attorney for the Government in the
25 case. And as a litigant and as a citizen, I would report to

1 the Court that I believe the Government has done an exemplary
2 job of that.

3 I have had several conversations with Mr. Mast. I met him
4 about a minute and a half ago, but he has been responsive and
5 most helpful in providing guidance. I just thought I would say
6 that.

7 **THE COURT:** Good. Thank you.

8 **MR. CUNEO:** Okay. Now, our position is that -- and I
9 think the Court has already given its views, so I'm not going
10 to try to address the question of what amount of set-aside or
11 what procedure should be employed.

12 Looking at the pleadings that have been before the Court,
13 from our perspective is a little bit like watching two dogs
14 fight under a rug. I mean, I can't tell who is winning and
15 exactly who is right. And the Court has that information, and
16 we don't. And our choice there is to trust in the Court, which
17 we do.

18 And our second request -- our second point I wanted to
19 make is there are certain very narrow categories of information
20 that are directly relevant to the continued prosecution of the
21 case; whereas, we can hope that we can achieve a settlement
22 with Starkist. There is no certainty of that. And we are not
23 seeking to unseal all of the financial information, but rather
24 narrow categories that deal with fund payments and transfers to
25 its parent, which is -- that is directly at issue in the civil

1 case.

2 Right now, for the moment, both Starkist and its parent
3 are in the case. And as our expert, Mr. Rossi, explains, the
4 fund transfers are directly relevant to his analysis of the --
5 to the transactions with the parent, which, in turn, are
6 relevant under the law to whether the parent can be held
7 liable.

8 So that's Item Number 1. And those are more fully
9 described in our papers. And really, you know, we say we want
10 the unredactions on page 8 and 9. It is really only on page 9.
11 The 8 is in error.

12 **THE COURT:** And you are asking precisely for what?

13 **MR. CUNEO:** For the portion of the information on
14 page -- that is designated in Mr. Rossi's declaration -- but on
15 page 9, specifically the first one -- to be made available,
16 either in the civil proceeding, subject to a protective order.
17 We are certainly willing to abide by that, but that is
18 something that is directly relevant to -- possibly relevant to
19 the liability of the parent in the civil case.

20 **THE COURT:** All right. I'm not sure I have
21 jurisdiction over that part. Why wouldn't that be under
22 Judge Sammartino's, because it doesn't -- your access to that
23 doesn't -- it is not obvious to me how that affects what is
24 before me now, which is the appropriate level of the fine to be
25 assessed against Starkist.

1 **MR. CUNEO:** First of all, I'm not sure
2 Judge Sammartino has this information.

3 Second, the purpose of this proceeding --

4 **MR. LYNCH:** Your Honor, can the Court just identify
5 what section he is referring to? It may be something they
6 already have.

7 **THE COURT:** Okay. Maybe you can be more specific.

8 **MR. CUNEO:** I'm referring to pages -- page 9.

9 **MR. LYNCH:** Of what document?

10 **MR. CUNEO:** Of Document Number 51, which is the
11 redacted version -- I'm sorry, it's the United States
12 sentencing memorandum.

13 **THE COURT:** Of the U.S. sentencing memorandum?

14 **MR. CUNEO:** Yeah. I'm sorry, Your Honor.

15 **MR. LYNCH:** I gather that is not a Starkist document
16 you are referring to?

17 **MR. CUNEO:** It is a United States document.

18 **THE COURT:** All right. That's --

19 **MR. CUNEO:** I misspoke.

20 **THE COURT:** All right. That's the one that has
21 discussion about debt, dividends and --

22 **MR. CUNEO:** Correct. Right.

23 And the second one is on page 15 -- this is explained by
24 Mr. Rossi -- again, lines 13 through 20. And the third one is
25 on page 18 where there are restitution and damage figures that

1 have been blacked out.

2 Now, the overall purpose of the Crime Victims Rights Act
3 is to help crime victims. We got a letter. We are a crime
4 victim. We are not seeking anything that is radical. We are
5 not see seeking to turn over -- go on a fishing expedition. We
6 are just trying to get these three simple bits of information.
7 Just as simple as that, Your Honor. And Mr. Rossi's expert
8 declaration supports that.

9 **THE COURT:** So it is page 9 and page 15, which line?

10 **MR. CUNEO:** Page 13 through 20.

11 **THE COURT:** And then on page 18, it is the lines 17
12 through 19, or --

13 **MR. CUNEO:** On page 18, sir, it is 7 through 10.

14 **THE COURT:** On the table?

15 **MR. CUNEO:** Yes.

16 Mr. Rossi also notes -- I don't have it right before me --
17 but page 16, lines 8 through 14, I think.

18 **THE COURT:** What is Starkist's view of this?

19 **MR. LYNCH:** A couple things, Your Honor.

20 The Plaintiffs are here trying to re-litigate the very
21 issue we litigated here a couple weeks ago when they asked to
22 get access to information in the pre-sentence report.

23 Mr. Cuneo wasn't present for that, but the DPPs and IPPs were;
24 and that was in regard to their request to be heard but also to
25 get an unredacted version of the pre-sentence report of which

1 much of this information is contained.

2 Your Honor, you ruled against them on that point, and this
3 is simply an effort just to re-litigate the issue. But more
4 broadly, the overall issue of the relationship between Starkist
5 and its parent is an issue that is central to the matter before
6 Judge Sammartino.

7 Plaintiffs' counsel refers to their expert. We have filed
8 our expert report. Professor Daines from Stanford Law School,
9 he has reviewed the relationship between Don Juan and Starkist
10 and found it to be completely appropriate. We are troubled by
11 the fact without doing its own internal -- its own
12 investigation, the DOJ has simply adopted the arguments in the
13 Plaintiffs' briefs without actually trying to analyze whether
14 the allegations are true. There is nothing improper about the
15 relationship between Don Juan and Starkist.

16 **THE COURT:** All right. But I'm -- in terms of
17 resolving that, the merits question, though, my question is:
18 This request for unredaction is not particularly pertinent or
19 directly pertinent to what is before me right now.

20 **MR. LYNCH:** Not at all, Your Honor.

21 **THE COURT:** It may be relevant to the San Diego
22 litigation, but right now this court is the repository of this
23 information; and I'm just not sure who is the -- if this can't
24 be resolved short of motion work -- it is interesting -- I'm
25 not sure who is --

1 **MR. LYNCH:** This is the first time --

2 **THE COURT:** -- who is the decision maker.

3 **MR. LYNCH:** This is the first time we have ever heard
4 about it, these specific requests. And so we think this could
5 be resolved outside of this particular proceeding. We think it
6 is an issue for Judge Sammartino and the issues there. They
7 have full discovery to get requested information about the
8 relationship we produced --

9 **THE COURT:** Because the interested parties in this
10 information really are the requester and Starkist. It is not
11 of any particular interest to the Government, right, one way or
12 the other?

13 **MR. MAST:** That's correct, Your Honor.

14 I would note generally that the CVRA does not provide an
15 avenue for discovery. It gives the victims an opportunity to
16 be heard.

17 **THE COURT:** That's why it feels like this is not the
18 right venue.

19 **MR. LYNCH:** I agree.

20 **THE COURT:** Except for the fact that the information
21 resides here. So I don't know if Judge Sammartino, how she
22 feels about issuing an order about this Court's file. I will
23 indicate that given that the Government has no particular
24 interest, it doesn't affect the proceeding here. So I would be
25 neutral, and I would -- frankly, for the record -- state that

1 if this issue were to be brought before Judge Sammartino and
2 she were to decide -- as any other custodian of a record -- if
3 she thinks it is appropriate, I would comply and accommodate
4 whatever order.

5 So I guess I'm telling you that I don't feel comfortable
6 making this decision because it may turn on what the balance of
7 interests are in the -- for the need for it in the underlying
8 litigation in San Diego. I don't know what the calculus would
9 be, but it wouldn't shock me that this is all contextual. So
10 your access to information on that suit may turn on relevancy
11 questions, may turn on need questions, all of that informed by
12 the facts and proceedings before Judge Sammartino of San Diego,
13 of what I have almost no knowledge.

14 So it is weird, frankly, for me to try to opine on that.
15 I'm sitting here simply as the custodian of this information.

16 **MR. LYNCH:** I would say in one issue you are the
17 appropriate venue, and that is with regard to information that
18 he has referred to that is actually contained in the
19 pre-sentence report or that was presented to probation as part
20 of this sentencing hearing. And in that regard, we litigated
21 this issue about a month ago when the direct purchaser
22 Plaintiffs and end purchaser Plaintiffs requested to get an
23 unredacted copy of the sentencing report, and you denied that
24 request. This is simply an end run around that same request.

25 **THE COURT:** Well -- and I stand by my ruling at the

1 pre-sentence report for reasons that this Court has an interest
2 in will remain absent some, you know, further litigation in
3 this court.

4 The fact that there may be information contained in the
5 pre-sentence report that finds itself elsewhere does not
6 necessarily preclude another court from saying that is
7 relevant. So I'm not saying that all information is
8 privileged. That document is sort of privileged, if we use
9 "privileged" in the loose sense.

10 So I will state for the record that I will defer to
11 whatever Judge Sammartino -- if she is the appropriate one -- I
12 think her court would be -- to resolve this conflict with
13 respect to access to otherwise hereto for confidential
14 information, that I -- a decision either way will not affect, I
15 don't think, this Court's mission at this point, which is to
16 render the appropriate sentence. So I will defer to
17 Judge Sammartino.

18 **MR. CUNEO:** Thank you.

19 **MR. LYNCH:** Thank you, Your Honor.

20 **THE COURT:** Thank you. All right.

21 Who would like to present?

22 **MR. LEBSOCK:** Thank you, Your Honor. Chris Lebsock,
23 again, for the direct purchaser Plaintiffs.

24 **THE COURT:** Yes.

25 **MR. LEBSOCK:** First of all, thank you for allowing us

1 the opportunity to speak. We appreciate that.

2 For the most part I'm going to rely on the papers we
3 submitted. And if the Court has any questions, of course, we
4 can attempt to answer that.

5 But the Court last time we were here asked why -- what is
6 our motivation. And our motivation, as we laid out in the
7 papers was, number one, we have an interest, I think, to ensure
8 that Starkist is fined in an appropriate manner that does not
9 compromise the -- Starkist's ability to appropriately resolve
10 the situation with its victims, our Plaintiffs. And so that is
11 our interest.

12 We do not agree with Starkist that they are the least
13 culpable party in this conspiracy. They have pled guilty.
14 That required them to acknowledge the fact that what they did
15 was knowing and voluntary, and so we don't agree that they are
16 the least culpable party here.

17 That said, we do not have access to all of the current
18 financial information, and we leave it to this Court to decide
19 what the appropriate fine is going to be. If the Court decides
20 that \$100 million is too much, under all of the facts and
21 circumstances, we ask that the Court give a credit of some
22 amount that can be used to resolve the case with the victims.
23 And fundamentally, that is our position.

24 **THE COURT:** All right. Thank you.

25 I have a -- I do have a couple of questions. I actually

1 wanted to get the response of Starkist and the Government to
2 your procedural suggestion of sort of a dollar-for-dollar
3 credit kind of idea.

4 Before we get there, I do have a question about the
5 current status. So who -- a number of obviously large entities
6 have opted out of the class and there have been -- you know, a
7 fairly significant number of folks who have settled. How
8 many -- what is the size of your class at this point? I'm
9 just --

10 **MR. LEBSOCK:** Well, that's a complicated question, I
11 think. It depends, because there have been settlements --
12 Mr. Lynch may know a little more than I do, frankly, on some of
13 this; but there have been a number of large settlements. But
14 it is not at all clear to me at the moment whether all of those
15 large purchasers have settled with all of the Defendants.

16 We are learning some about that as time goes by and that
17 some big purchasers -- I think, Wal-Mart might be an example of
18 that -- has fully settled with all of the Defendant groups.
19 But if you are asking, I can't tell you exactly who has settled
20 with whom as we sit here today. I do have an idea of what I
21 think the damages to the direct purchasers are.

22 **THE COURT:** Outside of those who have brought their
23 own --

24 **MR. LEBSOCK:** Outside of those who have brought their
25 own cases.

1 **THE COURT:** And what would that prosecution --

2 **MR. LEBSOCK:** It is roughly \$135 million, to my
3 recollection.

4 **THE COURT:** Is that in the complaint or is that --

5 **MR. LEBSOCK:** It is not in the complaint.

6 **THE COURT:** And is that prior to any enhancement --

7 **MR. LEBSOCK:** Yes, that would be single damages.

8 **THE COURT:** All right. And the status of the case, I
9 understand there is a motion for class certification pending
10 before Judge Sammartino?

11 **MR. LEBSOCK:** That is true.

12 **THE COURT:** It has been argued already.

13 **MR. LEBSOCK:** It has been argued. And we are coming
14 up on approximately six months. So from our perspective we
15 think something is coming soon.

16 **MR. LYNCH:** Your Honor, I can elaborate on the number
17 of settlements that have occurred to date.

18 **THE COURT:** Sure.

19 **MR. LYNCH:** So currently in the courtroom today are
20 primarily the three classes -- the direct purchaser class, the
21 end pair class and the food -- Commercial Food Preparer class.
22 This was a unique case in which there were literally hundreds
23 of separate direct action Plaintiffs who filed their own
24 complaints. I mean, he mentioned Wal-Mart, Kroger -- the
25 company that owns Safeway -- Ralph's and virtually every major

1 supermarket in the United States filed their own independent
2 lawsuits. And we have settled the vast majority of them.

3 I think by our estimate -- and this is, again, an
4 estimate -- roughly 75% of the direct sales of -- during the
5 relevant period have been settled. So Starkist has actively
6 sought to settle these matters; has been quite successful in
7 settling them with the direct action Plaintiffs. We have not
8 settled them with the direct action -- the classes at this
9 point, and still face substantial civil liability from these
10 classes.

11 **THE COURT:** Are there very many direct action suits
12 left?

13 **MR. LYNCH:** There are three, one of which is here.
14 AWG is one. Winn-Dixie is another. And the final is W. Lee
15 Flowers. So very, small minor but still, you know, engaged in
16 the litigation.

17 **THE COURT:** And those are all before Judge Sammartino
18 as well?

19 **MR. LYNCH:** Yes.

20 **THE COURT:** And obviously they are not affected by
21 class certification, but they are waiting for the next event?

22 **MR. LYNCH:** Well, I mean, all I can say is -- and I
23 think it is a general concern about the Plaintiffs'
24 interactions here -- all the settled companies -- companies
25 that we have settled with are not here complaining. They are

1 completely satisfied. We have resolved our claims for them.

2 I am concerned that many of the lawyers here are actually
3 using this as a vehicle to, you know, exert undue pressure on
4 Starkist to settle.

5 I think the DPPs are a perfect example. We have met with
6 them. We have been waiting for them to give us an offer for a
7 settlement. We met with them in person in March. I have
8 repeatedly asked them for a response and not gotten one, and
9 instead we have got filings in this case.

10 And I just think this is an inappropriate venue for them
11 to try to litigate issues that are before Judge Sammartino or
12 unfairly exert pressure on Starkist, which has been more than
13 willing to settle with all of its major customers, but has
14 faced more obstacles with some of the classes.

15 **THE COURT:** So how is that -- I want to make sure I
16 understand what you are saying.

17 Their potential use of this suit as to exert pressure on
18 Starkist seems to me from the filing -- one of the proposals,
19 for instance, is a, you know, kind of a designated
20 dollar-for-dollar credit. I mean --

21 **MR. LYNCH:** We don't object to that.

22 **THE COURT:** I was going to say, it may be you are on
23 sort of the same side of the fence. It is not clear to me how
24 they are using this as leverage.

25 **MR. LYNCH:** Well, I will say certain other aspects of

1 their filings -- Starkist is the least culpable entity here.
2 They have, I think, unfairly identified former employees as
3 being engaged in conduct that are not charged. The Department
4 of Justice had the full cooperation of Chicken of the Sea,
5 which got full immunity. It had the full cooperation of
6 Bumblebee, in which they gave them a 40% cooperation discount.
7 And at the end of the day, they charged Starkist, the last
8 company to plead guilty, with the shortest period of time
9 involving conspiratorial conduct and only a single individual.

10 So I think the charges speak for themselves that we are
11 the least culpable. And on that point, I do want to draw the
12 Court's attention to information that the Plaintiffs have in
13 the civil litigation that the EPPs filed, and I would like to
14 present the Court with a copy of it because since they were
15 filed under seal, they are harder to identify by way of a
16 document number, but if I could hand up to the Court a document
17 that the EPPs filed in this case.

18 **THE COURT:** In this case?

19 **MR. LYNCH:** In this case.

20 This was attached as an expert report by the EPPs. This
21 is a page from that report. They were filed under seal so we
22 don't know the exact ECF number. It was indirect purchaser end
23 pair Plaintiffs' statement in connection with Defendant
24 Starkist co-evidentiary hearing. This is an interrogatory
25 response from one of the other companies involved in this

1 investigation identifying all the agreements they reached with
2 particular other companies. So this was submitted by a
3 cooperating company under a sworn affidavit, and they lay out
4 all the agreements they reached, and it is clear --

5 **THE COURT:** "They" being --

6 **MR. LYNCH:** At the top of the list, if you look, it
7 says: Table 1, COSI.

8 **THE COURT:** Yep.

9 **MR. LYNCH:** They allege agreements that did not
10 involve Starkist that occurred years before Starkist's
11 participation in 2011.

12 So I bring this up only to rebut the repeated claims that
13 somehow Starkist is not the least culpable. We believe we are,
14 and we believe that is relevant to the 3553 factors that the
15 Court needs to consider as well.

16 **MR. MAST:** Your Honor, if the Government might respond
17 to some of what has just been stated.

18 **THE COURT:** Yeah.

19 **MR. MAST:** As we will address, the only issue before
20 the Court right now is whether Starkist has the ability to pay
21 its fine. Its culpability and relative culpability has already
22 been negotiated, and the plea agreement addresses the factors
23 set forth in 3553(a), and Starkist has agreed that a fine of
24 \$100 million satisfies the factors set forth in 3553(a). So,
25 frankly, it is irrelevant.

1 But I will also state that Starkist was the largest
2 employee involved -- company involved. Multiple employees were
3 involved in the criminal conduct. That is documented by the
4 PSR as well as the submissions by the Plaintiffs. And it is
5 improper to raise those arguments here when really what this
6 hearing is supposed to be about is Starkist's ability to pay a
7 criminal fine.

8 **THE COURT:** Let me make that clear. That is the focus
9 of what I'm doing.

10 Whatever the arguments -- exculpatory, inculpatory with
11 respect to degree of culpability -- largely water under the
12 bridge as far as I'm concerned. I think the key, as I stated
13 at the outset, is to impose a fine frankly that is closer -- is
14 close to the guideline range is one starting point here, but
15 the biggest factor is the ability to pay; and the range has
16 already been prescribed by the plea agreement here.

17 And I have understood that the low range of 50 million
18 is -- would be based on ability to pay and not jeopardizing
19 restitution or payment as opposed to the other 3553 factors. I
20 mean, some of that -- I'm not going to ignore those because
21 there are arguments about unwarranted disparity, and I think
22 relative culpability has some relevance to this; but the
23 driving factor here that I'm looking to first and foremost in
24 my mind is the ability to pay. That's what I'm trying to apply
25 here, Section 8-- Section 3.3 factors.

1 **MR. LYNCH:** I agree, Your Honor.

2 I just -- Starkist is entitled to defend itself to what we
3 think are false allegations of greater culpability, and it
4 was -- we didn't make that argument. DPPs made that. This was
5 something that was submitted by the EPPs. We think it is
6 relevant to the Court to consider. And we also think it is
7 relevant to rebut some of the claims from the Government as to
8 our level of culpability. They have said in their papers that
9 this conspiracy could not have existed without Starkist.

10 **THE COURT:** All right. We will get into that later.
11 We are getting sidetracked here. I did want the Government's
12 response to this procedure mechanism that has been suggested by
13 the DPP of structuring a fine in a way to sort of accommodate
14 and maybe hedge the bet with respect to preserving -- there has
15 been one proposal, set-aside a fund, et cetera, et cetera; but
16 the DPP proposal is, for instance, to assess the maximum fine
17 but to allow credit based on payments made. And that can be
18 structured many ways. That can be payments over an expected --
19 for instance, one could say if the expected ultimate settlement
20 amount is 75,000 -- 75 million, or 80 million, whatever the
21 number is -- you could structure it so that there is a sort
22 of -- I don't know, can you? Can the Court structure that? I
23 don't even know if it is legal.

24 **MR. MAST:** The issue the Government has with the
25 Plaintiffs' proposal for a set-aside fund or a

1 dollar-for-dollar credit is what the Government hopes to
2 demonstrate today is that Starkist has the ability to settle
3 all of its civil damage claims and pay a fine of \$100 million
4 and remain a viable company. And any dollar-for-dollar
5 settlement fund would amount to a windfall for Starkist because
6 it would not pay more than \$100 million.

7 What the Government proposes is a \$100 million fine, and
8 that Starkist hasn't met its burden establishing an inability
9 to pay; and it will have more than sufficient funds to settle
10 all of the remaining civil liability, which I note have come in
11 drastically at lesser amounts than Starkist originally
12 estimated.

13 So the Government's position is that the Plaintiffs are
14 not in any jeopardy of not being paid --

15 **THE COURT:** I understand that's the Government's
16 position, and I may or may not agree with that.

17 But if the Court had some questions about that or some
18 reluctance, for instance, and decided that, Well, there is a --
19 you know, there are certain risk ranges in here, and depending
20 on what parameter used, a growth factor you used whether it is
21 0.1 or some other -- or 3.9 may make a difference in depending
22 on cap X and everything else that has to be done, it may come
23 into a range where it is close. Let's say it is a close call.

24 Is it legally possible for the Court to structure a
25 fine -- I know you don't like it, and maybe -- but is it

1 legally permissible to do it that way?

2 **MR. MAST:** Well, first of all, I very much hope to
3 convince the Court that it is not a close call.

4 But second, the plea agreement doesn't provide for
5 restitution. And, in fact, it is 11C1(c) plea agreement. And
6 so if the Court departs from the terms specified in the plea
7 agreement, then Starkist has the right to withdraw its plea,
8 and the Government has the right to withdraw its plea.

9 **THE COURT:** Of course, that depends on whether you
10 consider this restitution or not, as opposed to ability to pay.

11 For instance, let's say it is not just payment, but let's
12 say it is key to some other risk factor out there -- I guess as
13 we sort of did in the Bumblebee tuna case. I mean, can the
14 sentence -- the fine imposed have certain contingencies,
15 conditions? It seems like we did. We already did it once to
16 some extent.

17 **MR. LYNCH:** I agree, Your Honor.

18 **THE COURT:** I just want to know legally if there are
19 any prescriptions in that regard, other than the terms of the
20 11C1(c)plea agreement.

21 **MR. MAST:** Right. The terms of the 11C1(c) plea
22 agreement, I believe, govern -- the Court has the option to
23 either accept the terms or reject the terms; and any deviation
24 from that, really starts us from anew. It starts us fresh.

25 **THE COURT:** Let's put that aside for a moment. Are

1 there any statutory or regulatory prescriptions?

2 **MR. MAST:** The Government is not aware of any
3 statutory restrictions on those proposals.

4 **MR. LYNCH:** In fact, Your Honor, there are other -- I
5 don't have the cites with me. There are other resolutions and
6 other contexts. SCC, DOJ, and other non-antitrust contexts
7 where there have been funds created. We have proposed --
8 again, we obviously strongly disagree, but one case is
9 *Nacchio* -- *SCC versus Nacchio* apparently had a fund situation.
10 That is just one example.

11 But the notion of setting aside a \$50 million fine and a
12 \$50 million fund, or whatever you want to call it, is to
13 recognize, as the Court said at the very beginning, the primacy
14 of restitution and providing the victims of this conduct --

15 **THE COURT:** Careful of your use of the word
16 "restitution." You are going to run into the 11C1(c).

17 **MR. LYNCH:** Okay. Compensation to the victims of this
18 conduct. And that is the primary concern for Starkist, and it
19 is also the primary concern of the Court and under the
20 sentencing guidelines. And the Government seems concerned
21 solely with getting its \$100 million fine, regardless of what
22 happens to the victims.

23 And one example is that -- of that is in the reply brief,
24 their rather cavalier attitude towards Starkist having to file
25 for bankruptcy. They suggest it is a casual event, Chapter 11,

1 re-org. But what they don't mention is that Chapter 11 will
2 completely undermine the claims of all the other Plaintiffs,
3 and the Plaintiffs will get pennies on the dollars of any
4 compensation. So that would not be true to the sentencing
5 guidelines or the statute that says compensation for victims
6 should come first.

7 **MR. MAST:** And, Your Honor, I hope we can address
8 Starkist's assertion that it might file claims for bankruptcy
9 in more detail later, but the Government sees it basically as
10 an empty scare tactic. It submitted a report from Kenneth
11 Klee, their expert, after the PSR was finalized. It was not
12 submitted to probation. The argument was not hashed out during
13 the pre-sentence investigation report. And, frankly, it
14 doesn't have any merit.

15 The expert who submitted the report doesn't even -- did
16 not appear to review the entirety of the loan agreement for
17 which he opines a 100 million fine -- \$100 million fine would
18 result in an event of a default.

19 But I want to discuss that in the context of our broader
20 argument, which is that Starkist has the ability to pay a
21 \$100 million fine and plenty of room left over to settle its
22 claims.

23 **THE COURT:** I understand that is your position. I
24 understand the argument about the Klee report being incomplete
25 because, as I recall, it does not take into account the

1 guarantee that is signed by the parent.

2 **MR. MAST:** It doesn't take into account the guarantee.
3 It doesn't take into account the fact that Starkist disclosed
4 its potential liability when it obtained the loan. This loan
5 agreement was obtained by Starkist after it signed the plea
6 agreement. And during the course of discussions with its
7 lender, it disclosed the fact that it was facing a \$100 million
8 fine.

9 The notion that something that is disclosed in
10 anticipation, the lender goes in with eyes wide open, and then
11 would see a \$100 million fine and trigger the event of default
12 provision is meritless. And Dr. Klee didn't review that
13 correspondence. He didn't review the guarantee.

14 So, yes, our opposition is that Starkist is -- certainly
15 has not established -- met its burden that it is facing any
16 jeopardy of Chapter 11 bankruptcy.

17 **MR. LYNCH:** Your Honor, I don't know if this is the
18 appropriate --

19 **THE COURT:** No.

20 **MR. LYNCH:** But we disagree.

21 **THE COURT:** I understand that.

22 Is there anything more that you want to --

23 **MR. LEBSOCK:** I have nothing more, Your Honor. If you
24 have any other questions, I'm happy to answer them.

25 **THE COURT:** Well, I mean, the other question -- and

1 this is a redaction -- a substantial portion of your brief
2 referring to exchange of funds and transfer of funds as you see
3 it; and I know that is a big issue in the civil litigation.
4 But it does -- that question does touch and it was touched on
5 by the whole Techpack thing.

6 It does go to the question of, you know, assets available
7 or not, I suppose, to a certain extent. I don't -- I'm
8 hesitant to get into too many specifics here because it is
9 confidential, but there are additional transactions referred to
10 in the DPP brief that go beyond what the Government -- which
11 was focused on the Techpack --

12 **MR. LYNCH:** And I'm prepared to answer each and every
13 single one of them. In fact, our expert report,
14 Professor Daines, addresses each of them. So let's take
15 Techpack.

16 **THE COURT:** Yeah. Let me know -- the critical
17 question on Techpack that maybe I missed, you say in your brief
18 that it was not transferred --

19 **MR. LYNCH:** Correct.

20 **THE COURT:** -- to the parent.

21 **MR. LYNCH:** Correct.

22 **THE COURT:** But the Government says -- and I forget
23 whether the DPP says this or not -- it was transferred to a
24 subsidiary.

25 **MR. LYNCH:** That's incorrect too. It is completely

1 wrong. So if I could describe what happened, I think it will
2 clarify.

3 In 2014 Starkist made an investment into a company
4 called -- a preexisting company called Techpack, which is an
5 innovative packaging company. They are a minority owner of it.
6 The majority owner is another Don Juan entity called Don Juan
7 Systems. So it is important that -- we own it. We own part of
8 it. There is no transfer of assets. It is an asset on our
9 books. And the investment was done because -- for strategic
10 reasons, because we actually buy packaging from Don Juan
11 Systems, and we are looking forward to the possibility of using
12 maybe some of the innovations that Techpack has in packaging.
13 We don't currently buy from Techpack, but we are an owner of
14 it. We own shares in it. It is an asset. And the first
15 time --

16 **THE COURT:** There has been no transfer?

17 **MR. LYNCH:** No.

18 **THE COURT:** Of any interest?

19 **MR. LYNCH:** No, not at all. That is completely false,
20 that allegation.

21 The other thing is the initial investment was done in 2014
22 before this investigation even came up. So the idea that
23 somehow we were hiding assets in 2014 for an investigation we
24 didn't know about is absurd.

25 The second point is we made a second investment in 2017.

1 It was not a transfer. It was a further investment. We have
2 shares in it, and there are -- it is a valuable asset. It is a
3 strategic asset of ours. And I think it is interesting that
4 Dr. Zuehls, in reviewing all of our assets, indicated that that
5 was not an asset that could be sold; that we didn't have any
6 non-key assets.

7 **THE COURT:** The 2017 purchase?

8 **MR. LYNCH:** Yes -- no, that was just a further
9 investment.

10 **THE COURT:** In Techpack?

11 **MR. LYNCH:** Correct, yeah.

12 The other investment we made, which was of a smaller
13 amount, 12 million in Silver Bay -- that is a salmon company --
14 and we sell salmon. It is a strategic additional investment.

15 And let me just address a couple other points --

16 **THE COURT:** And none of those have been transferred
17 out of the ownership --

18 **MR. LYNCH:** Correct.

19 **THE COURT:** -- ownership interest currently or held by
20 Starkist has been transferred?

21 **MR. LYNCH:** Correct.

22 The one -- another reference they make is to a dividend
23 that was given in 2016 of \$20 million from Starkist to Don Juan
24 Industries, our parent.

25 Now, they suggest something improper with that. Starkist

1 Industries is our sole shareholder. They own the company.
2 They are seeking some returns on their investment. There have
3 been no dividends in 2017. There has been no dividends in 2018
4 or '19. There was no dividends in 2015 or '14.

5 This is one dividend that stands out as a return on
6 investment. We did well in 2015, and they decided to give part
7 of it back to the parent as part of the return on their
8 investment.

9 Doctor -- Professor Daines has analyzed the types of
10 dividends that have been given to other subsidiaries throughout
11 the United States and analyzed that, in fact, the dividends
12 that Starkist gave to Don Juan Industries are actually below
13 the average of what typical subsidiaries in the United States
14 provide to their parents. There is absolutely nothing improper
15 about what occurred.

16 Now, I don't want to belabor this because these are issues
17 before Judge Sammartino; but the fact that the Government and
18 the Plaintiffs keep identifying this require us to really shut
19 these down because they are completely improper, and they
20 really go to a larger issue, which I think is really unfair for
21 Starkist, which is some effort to have Don Juan Industries pay
22 for the fine of Starkist. That is not something they did with
23 Bumblebee.

24 Bumblebee is owned by a very large and profitable private
25 equity company called Lion Capital. They never sought Lion

1 Capital's assets. They specifically said in the Bumblebee plea
2 that the Court could only look at Bumblebee's assets and not
3 Lion Capital. The same should apply to us. We should be
4 looked at our assets in Starkist and not Don Juan.

5 **THE COURT:** Let me get a factual response about the
6 transfer or not.

7 **MR. MAST:** Yes, Your Honor.

8 So, Your Honor, the reason the Government assumed that the
9 Techpack investment had been transferred is because Starkist's
10 expert, Rajiv Gokhale, indicated that he did not count the
11 entirety of that investment in his analysis of Starkist's
12 finances because he assumed it would be transferred to an
13 entity affiliated with Don Juan Industries.

14 The fact that Starkist now claims that it sits on its
15 books at the value it claims it sits on its books indicates
16 beyond any doubt that Starkist can pay its criminal fine. It
17 states it has the value on its books, and its expert did not
18 consider that investment as part of its inability to pay
19 analysis at all.

20 So whether Starkist transferred the funds -- transferred
21 the investment, what that would reflect, if it did, would show
22 that Starkist's finances are actually much stronger than their
23 balance sheets purport to be. But if Starkist has not
24 transferred the asset, which is our understanding now from
25 Starkist's response to our sentencing memo, if that's the case,

1 then Techpack needs to be liquidated. It needs to be sold or
2 Starkist needs to be reimbursed for that investment which
3 amounted to more than sufficient funds to pay the criminal
4 fine, and we can end this hearing now. Because Starkist --

5 **THE COURT:** Essentially you are saying Starkist wants
6 it both ways.

7 **MR. MAST:** Exactly.

8 **MR. LYNCH:** No.

9 **THE COURT:** So let me ask for the response.

10 **MR. LYNCH:** This is absurd. We have the Department of
11 Justice telling Starkist how it should run its business, what
12 strategic assets it shouldn't own and which assets it should
13 own.

14 **THE COURT:** No. I think they are saying it should be
15 accounted for if your expert doesn't account for anything.

16 **MR. LYNCH:** It is accounted for. I'm not sure what he
17 is referring to.

18 **MR. MAST:** Your Honor --

19 **THE COURT:** Wait. Hold on. One at a time.

20 **MR. LYNCH:** I am not sure what he is referring to. I
21 mean, this may just, again, raise the reason why an evidentiary
22 hearing is needed, because I think there is -- he is now
23 stating that he got it wrong; that he got it wrong; that we
24 didn't transfer the assets, which is correct.

25 Now, the question is should we litigate it? It is a

1 strategic asset. I mean, you could have said --

2 **THE COURT:** Look, the critical question now is it
3 accounted for in terms of the assets and therefore the
4 equity --

5 **MR. LYNCH:** No. It was clearly identified in our
6 audited financial statements as an asset. So it was
7 considered. I don't know exactly what he is referring to with
8 regard to --

9 **THE COURT:** Is the value attributed to this asset?

10 **MR. LYNCH:** Yes. Yes, it is valued at something
11 between 120 and \$150 million. It has actually increased in
12 value.

13 But let me address the liquidation issue. We can't
14 liquidate the asset under our current senior facility
15 agreement, our loan agreement. The loan agreement prevents the
16 sale of any asset more than \$30 million; otherwise, that will
17 require the full repayment of the loan.

18 Banks are not going to loan money with the company as
19 collateral and then have a company start selling off parts of
20 its business. So there is a contractual prohibition against
21 Starkist selling off assets more than \$30 million. So this
22 notion of liquidating it is a non-starter. We are not allowed
23 to do it.

24 **MR. MAST:** Your Honor, if I might respond.

25 And I do want to direct the Court's attention to

1 specifically where Starkist's expert indicates that he is not
2 counting this investment. It is in Rajiv Gokhale's report,
3 paragraph 20.

4 **THE COURT:** The original report?

5 **MR. MAST:** The original report, note 34. And it
6 discusses both the Silver Bay investment as well as the
7 Techpack investment.

8 **THE COURT:** What page?

9 **MR. MAST:** 10. Your Honor, I apologize. Bear with me
10 one moment, Your Honor.

11 (Pause in proceedings)

12 **THE COURT:** You said footnote 34 about Silver Bay?

13 **MR. MAST:** And it carries onto the next page,
14 I believe.

15 This starts on page 10 and carries on to page 11.

16 **THE COURT:** All right. The bottom line, last point is
17 Due to the related nature of these equity investments to
18 Starkist's operations and prospects, we did not separately
19 include the value of these investments in our ATP analysis.

20 **MR. MAST:** So, Your Honor, according to Starkist's own
21 inability to pay report, their own expert, they didn't count an
22 asset that is sufficient to pay the entirety of their
23 criminal --

24 **THE COURT:** Except counsel is saying it is a liquid
25 asset. It can't be liquidated because of the facility of the

1 loan.

2 **MR. MAST:** And I hope we can discuss the loan
3 agreement, because the loan agreement provides for exceptions,
4 specifically --

5 **THE COURT:** Well, we may do that. We may do that in
6 an evidentiary hearing. But right now I have got counsel
7 standing here.

8 Do you have a further factual response to transfer or not
9 as to the --

10 **MR. LEBSOCK:** As of the information that we have in
11 the civil litigation, we have no evidence that there was any
12 transfer of the interest in Silver Bay or Techpack to any other
13 entity within the Don Juan Starkist conglomerate.

14 **THE COURT:** I appreciate that. Thank you for your
15 presentation.

16 **MR. LEBSOCK:** Thank you.

17 **THE COURT:** Let me hear from -- who is next?

18 **MS. MANIFOLD:** Good afternoon, Your Honor. Betsy
19 Manifold, Wolf Haldenstein, on behalf of the in-payer
20 Plaintiffs.

21 **THE COURT:** Yes.

22 **MS. MANIFOLD:** Again, thank you for the opportunity to
23 be heard.

24 We represent what are often referred to as the ultimate
25 victims, the consumers in 31 states who purchased Starkist tuna

1 and paid elevated prices as a result of the conspiracy. I have
2 the pleasure of representing the Plaintiffs in deposition and
3 in testimony in the civil case. We represent teachers. We
4 represent professors. We represent single mothers. We
5 represent the myriad of consumers that actually overpaid for
6 canned tuna. So thank you for the opportunity to tell this
7 Court about these people and make them aware of the damages
8 that they have suffered.

9 I noticed that Starkist's Counsel pulled out a part of our
10 expert report that sets forth confidentially what we calculate
11 our damages to be, and I would just merely refer the Court to
12 that. It follows a little bit after page 12 that the Starkist
13 Counsel pulled out. So we do set forth in some detail the
14 damage that our class suffered and how we calculate that. We
15 also calculate the dollar amount that breaks out as to
16 Starkist.

17 I agree with Mr. Cuneo from the Commercial Food Preparers.
18 We are a little bit in the dark about the details of Starkist's
19 financial situation. It is a little bit like coming in in the
20 middle of the conversation. You are not really quite sure what
21 is going on. I appreciate the Court's comments early on that
22 there is discretion on behalf of the Court, and we agree that
23 the Court can exercise that discretion to somehow formulate a
24 response as to how the payments are going to be made or how a
25 set-aside might be provided to the victims in this case so that

1 we can be assured that we can be paid.

2 We don't really know if Starkist has the ability to pay or
3 if it is going to interfere with the financial viability of the
4 company. So I would request that the Court, as I'm sure it
5 will, provide careful scrutiny to the financial information
6 that has been provided. Look at the transfer of assets that
7 are set forth in Table 4 in the DeMaio report which the direct
8 class Plaintiffs provided -- and to review all the information
9 provided to the Court.

10 In the end, to us it doesn't matter about the financial
11 health of Starkist or about the viability of the corporation.
12 I mean, those things are relevant, but the important thing to
13 us is that our client receive some sort of payment. And I
14 don't want to use the word "restitution," but in the hopes that
15 there be some sort of set-aside here that the victims can be --
16 that can recover.

17 And I think that's really it in a nutshell. If the Court
18 has any questions for me, I would be happy to answer. And
19 thank you again for the opportunity to tell the Court about the
20 ultimate victims here.

21 **THE COURT:** All right. I appreciate that.

22 Let me ask the Government about that mechanism. It is
23 sort of similar to the dollar-for-dollar credit. But what the
24 EPPs are asking for is an actual sort of set-aside fund as part
25 of the structure.

1 So do you have any legal opinion about the legal
2 permissibility about something like that?

3 **MR. MAST:** Again, Your Honor, I'm not aware of any
4 statutory prohibition about the creation of a set-aside fund of
5 the nature described by any of the classes of the Plaintiffs.
6 What I can say is that the Government's strong position is that
7 Starkist has the ability to pay its fine as well as civil
8 damages that will then exceed \$100 million.

9 If it gets a \$100 million fine and pays damages, even at
10 the new range established by Starkist -- and I won't refer to
11 the numbers -- but even at the new updated range established by
12 Starkist, if it fits into that range of civil damages, it is
13 not going to have any problem paying a \$100 million fine. And,
14 therefore, any set-aside funds would amount to a windfall for
15 Starkist.

16 Because really the Court is capped at \$100 million in
17 this, pursuant to the terms of the plea agreement, it can't
18 order restitution pursuant to the terms of the plea agreement.
19 So any set-aside funds can't exceed the amount of criminal --
20 you know, the criminal fine set forth in the plea agreement.
21 And given that it would cap at \$100 million, it would amount to
22 a windfall for Starkist.

23 **MR. LYNCH:** Your Honor, just one quick comment on
24 this.

25 **THE COURT:** Yeah.

1 **MR. LYNCH:** Regardless of the legal ability of the
2 Court to do this, factually it is impossible. We don't have
3 the cash. We have six -- approximately \$6 million in the bank
4 today. This is something actually that we agree with the
5 Government's expert, Dr. Zuehls.

6 Dr. Zuehls says in his report that Starkist does not have
7 the money to pay a fine, to pay civil restitution or civil
8 damage claims. Doesn't have the ability to borrow it. And, in
9 fact, the sole basis on which it can pay a fine is through
10 future cash flows.

11 So that's the way we had put forward a proposal that we
12 would be agreeable to a fine of 50 million under an installment
13 plan as outlined in our papers, and that we would also -- with
14 future cash flows so we don't have the money now -- with future
15 cash flows we would allocate 50 million to resolving the claims
16 against the remaining civil litigants, and we would update the
17 Court and the DOJ regarding our progress.

18 If we were able to settle them for less than 50, then the
19 difference would revert back to the DOJ in an increased fine.
20 That is our proposal. But it is important for you to know we
21 don't have the money. We have 6 point -- I think we have
22 \$6 million currently. It was just checked today by the CEO;
23 \$6 million in the bank.

24 **THE COURT:** So your proposal is 50 over time, and then
25 anything less than 50 paid out --

1 **MR. LYNCH:** In the civil claims.

2 **THE COURT:** In civil -- well --

3 **MR. LYNCH:** So 50 million is the fine. We are --

4 **THE COURT:** And you are not saying 50 over some base
5 number. Just 50?

6 **MR. LYNCH:** Correct.

7 **THE COURT:** Which -- above and beyond what has already
8 been agreed to or are you talking about --

9 **MR. LYNCH:** So we have put down already -- we have
10 settled -- I will say it -- approximately \$55 million we spent
11 in settlements. We agree to pay the Government a \$50 million
12 fine, paid out without interest in installments over five
13 years. And we lay that out in our initial sentencing
14 memorandum on, I think, the first footnote.

15 In addition, we agree that with -- through future cash
16 flow -- that is as our business progresses -- we will set aside
17 another 50 million to pay off civil claimants. And we will
18 update the Court on the progress of that, and the DOJ, if, for
19 some reason -- say, for example, we are able to settle our
20 civil claims for 30 million, the remaining 20 million would
21 revert back to the DOJ as a further penalty to increase the
22 amount of the fine. That's our proposal.

23 **THE COURT:** And that's 50 beyond the settlement
24 already made of 55?

25 **MR. LYNCH:** Correct. Correct.

1 **MR. MAST:** And as you see, Your Honor, it caps
2 Starkist's total liability for its conduct at \$100 million.

3 **MR. LYNCH:** Their expert says our civil liability is
4 as low as 67 million.

5 **MR. MAST:** And --

6 **THE COURT:** Well, it caps it at 100, but the reality
7 is it is going to be less than that because something is going
8 to be paid.

9 **MR. MAST:** It is going to be less than that. And my
10 understanding is that the civil settlements, at least portions
11 of them, are tax deductible. You can write that off, as
12 opposed to a criminal fine. If that proposal comes to
13 fruition, I don't expect the Government to see a penny over
14 \$50 million, even though Starkist has substantial assets --

15 **THE COURT:** I understand. I understand the
16 Government's position.

17 **MR. LYNCH:** And if they don't get more than 50, then
18 all the better. That means that the Plaintiffs in the civil
19 case have been compensated.

20 **THE COURT:** Well, unless, in fact, Starkist has
21 additional capacity and reserves and that becomes unfined, so
22 to speak.

23 **MR. LYNCH:** Correct. And that's the basis --

24 **THE COURT:** That's the Government's concern.

25 **MR. MAST:** Your Honor, this does bring me to an

1 important point because the Government has the ability and
2 proposes an installment schedule and has the ability to
3 petition the Court --

4 **THE COURT:** I understand that. They don't want to be
5 at your mercy. They want to be -- if they were able to
6 petition, they would probably feel a little better, but right
7 now you have the discretion --

8 **MR. LYNCH:** Absolutely, Your Honor.

9 **THE COURT:** -- to petition, and you would say you
10 would exercise that discretion, as you have in the past
11 responsibly, to make sure that the company is not driven out of
12 the business, to make sure that -- I understand those
13 arguments.

14 **MR. LYNCH:** Thank you, Your Honor.

15 **THE COURT:** Let me ask Counsel, do you have anything
16 more to add to this?

17 **MS. MANIFOLD:** I don't -- I can't really comment on
18 the exchange just because we don't have access to the financial
19 information to make that determination.

20 **THE COURT:** Right.

21 **MS. MANIFOLD:** So we wish the Court well.

22 **THE COURT:** Thank you.

23 Yes.

24 **MR. SIX:** Good afternoon, Your Honor. Steve Six. I
25 represent Associated Wholesale Grocers. It is the nation's

1 largest grocery cooperative serving 35 states, independent
2 grocery providers in those states. I will be exceedingly brief
3 and make two points.

4 First, as we indicated in our filing, if the Court does a
5 set-aside or a fund, we request that it applies to all
6 Plaintiffs, not just class Plaintiffs because the classes may
7 or may not get certified.

8 Second, at the plea hearing, prior counsel for Starkist
9 was here saying that restitution was important. I heard
10 Your Honor say that restitution was important. Mr. Lynch said
11 that restitution was important. And on behalf of his clients
12 it was important.

13 And, of course, in this context what we are talking about
14 is payment for overcharge in the civil case pending in the
15 Southern District, not criminal restitution here.

16 And I think the message, given that we have Starkist here,
17 that certainly I think it might be appropriate if the Court
18 thought so, to deliver to Starkist, is it is settling civil
19 cases under a preponderance of the evidence standard for
20 overcharges that they imposed. What Starkist has -- the
21 approach they were taking in the civil case so far -- and I
22 won't talk about settlements -- but through their expert
23 reports is their constraining their civil liability to the same
24 period as the guilty plea period. And, of course, if the
25 Government was prosecuting under a preponderance of the

1 evidence standard, we might be talking about 2008 to 2016, not
2 2011 to 2013.

3 So I think if Starkist really is interested in getting the
4 Court's leniency on this, they ought to commit to the Court and
5 commit to the civil Plaintiffs that they are going to make
6 payment for that preponderance of the evidence standard in the
7 civil case and not constrain it to what I think is an
8 artificial constraint imposed by beyond a reasonable doubt and
9 the negotiations that obviously occurred leading to the guilty
10 plea period.

11 And that's all I have, Your Honor. Thank you.

12 **THE COURT:** All right. Well, I assume, then, for
13 counsel for Starkist who are negotiating the civil complaint
14 are aware of the appropriate standard of proof therein; and I
15 assume there has been a lot of back-and-forth about risks on
16 both sides, and the whole question about certifiability and not
17 on the class side in terms of -- and causation analysis and
18 economic analysis of loss and all that.

19 But everybody knows that is done under a civil standard in
20 that context.

21 **MR. SIX:** Yeah. I just make the point, because we did
22 recently get expert reports; and the focus of those reports is
23 on 2011 to 2013, the guilty plea period. And I think that's
24 just not quite apples-to-apples in terms of the other case,
25 but --

1 **THE COURT:** Right. Well, your point informs the
2 potential magnitude of the civil risk -- the civil financial
3 risk to Starkist; that they are facing claims for an extended
4 limitations period under a lower standard of proof than
5 criminal. And so -- and I understand that, and I assume they
6 understand that as well.

7 **MR. SIX:** I'm --

8 **THE COURT:** We are in the business here of trying to
9 predict; and this is, you know, what the numbers are going to
10 be. So I understand that.

11 **MR. SIX:** Thank you, Your Honor.

12 **THE COURT:** Thank you.

13 Let me ask at this point a -- an important procedural
14 question. We can get into the merit stuff. There is a lot of
15 stuff to talk about. But it is apparent that -- and I know the
16 Government's position is no matter sort of what the ultimate
17 payout is and settlements are in the civil range -- if it is
18 anywhere near even what the Defendant predicts, there is still
19 plenty of cash flow and everything, that may be subject to some
20 debate.

21 But I guess the question is: Would it make sense for the
22 Court to defer imposing sentence to see what gestates with
23 respect to the civil cases, particularly since Judge Sammartino
24 has had the class certification motion, which I assume is a
25 major piece of -- major decision-making tree -- it always is in

1 class actions, in my experience -- to -- and I assume if she
2 had it -- someone said for six months -- that some decision
3 will be forthcoming soon.

4 And to see, you know, how that is playing out in that
5 arena so at least -- we have got probably three or four big
6 variables which we are going to talk about. This is one of
7 them. And I understand the Government feels like it kind of
8 doesn't matter. It is not a material variable, but it may be
9 depending on how the other variables are treated.

10 And since there is no restitution in this action -- and
11 that often is a reason not to defer judgment because that
12 defers restitution justice to the victims -- here, that is
13 being worked out in the civil arena. This is really the
14 punitive -- important, but it does not involve restitution.

15 What is the harm, I guess, in let's say continuing this
16 hearing for some period of time? And I will back that up with
17 the notion that I am inclined to perhaps take some testimony.
18 I'm not going to have a multi-week trial on this, but there are
19 some specific issues of contention that may be worth hearing
20 from some of the witnesses on and which would give us time to
21 then put that on.

22 **MR. MAST:** Well, Your Honor, I don't think it is
23 necessary. And I do hope to go through a full presentation of
24 the Government's points regarding Starkist's ability to pay.

25 Deferring sentencing is not necessary because, first, it's

1 Starkist's burden to establish its inability to pay. If it is
2 talking about projected speculative civil settlements -- which
3 were initially estimated to be drastically higher than they
4 have settled -- Starkist hasn't met its burden of establishing
5 an inability to pay.

6 But even more importantly, Starkist, in its own long-range
7 plan, projects paying down its debt by more than \$100 million
8 from the beginning of 2019. Starkist would rather spend its
9 money on anything but a criminal fine. So the longer this
10 waits -- the longer this proceeds, the more Starkist is able to
11 spend money on anything but a criminal payment.

12 And then they can come back and say, Well, in 2019 our
13 long-range plan was pretty bad; but now it is actually much,
14 much worse. And the reason -- and this isn't just with debt
15 pay-downs. Starkist between year-end 2017 and year-end 2018
16 dramatically purchased additional inventory, which presumably
17 only makes sense if you intend to sell that inventory.

18 So it is inconsistent with Starkist's projections of zero
19 growth, but it is also a way that Starkist has the ability to
20 turn what could be liquid assets into illiquid assets in the
21 form of purchasing fish that it can then can and sell.

22 So deferring sentencing -- every Defendant before
23 Your Honor would presumably love to defer sentencing for as
24 long as possible, but Starkist pleaded guilty to a multi-year
25 antitrust conspiracy; and it has failed to established its

1 burden establishing its inability to pay. And there is no
2 reason to defer sentencing, waiting to see what speculative
3 hypothetical civil settlements --

4 **THE COURT:** Well, let's talk concretely. If we were
5 to defer for, let's say, 90 or 120 days -- I'm not talking
6 about a year or something longer -- the risk you are contending
7 with is not so much fraudulent transfers as much as turning
8 liquid assets into illiquid assets or paying down debt and
9 thereby reducing cash flow or cash availability.

10 It seems like that is something that the Court could take
11 into account because this is discretionary at this point. If I
12 don't count this as restitution, I have discretion to say, Hey,
13 I don't care if you are going to go bankrupt.

14 **MR. MAST:** And I think, Your Honor --

15 **THE COURT:** I have the ability to not reduce the fine,
16 and I can take that into account.

17 **MR. MAST:** And I think, Your Honor, if you look at
18 Starkist's debt levels in 2011 -- and some of this might be
19 under seal.

20 **THE COURT:** They have a very good ratio.

21 **MR. MAST:** Yes. And by the end of the forecast
22 period, by 2024, Starkist is projecting a fraction of that
23 amount of debt.

24 **THE COURT:** Well, of course, the Government's argument
25 is that with that great ratio, they should be able to get a

1 loan if they need to refinance. I understand there is an
2 instrument that has got a cap and everything; but if things are
3 going well, it seems like the Government is saying, Well, they
4 get financing to build a \$77 million plant here. They can
5 get -- so, I mean, if worse comes to worse and I impose, let's
6 say, the \$100 million fine you ask for, you seem confident that
7 even if they don't have liquid assets, they will figure out a
8 way to --

9 **MR. MAST:** Your Honor, the Government is confident
10 that 90 days from now Starkist would have the ability to pay
11 its fine, but it's fundamentally -- every Defendant before
12 Your Honor would love to defer sentencing as long as a
13 period --

14 **THE COURT:** I understand. Justice delayed is justice
15 denied.

16 **MR. MAST:** Exactly.

17 **MR. LYNCH:** Can I comment on the what I call several
18 misstatements by the Government?

19 **THE COURT:** Well, I first want to get your reaction to
20 my question about deferring sentence to get more information.

21 **MR. LYNCH:** I do think it makes sense to have an
22 evidentiary hearing, and we can do that relatively soon. I
23 think you would benefit from hearing from actual witnesses who
24 actually run this company and also are our expert and also an
25 opportunity for us to rebut many of the false claims by

1 Dr. Zuehls. So in that regard, we are more than willing to
2 delay it for purposes of an evidentiary hearing.

3 With regard to a more open-ended delay, we have concerns
4 about that. The civil litigation, while we are waiting for a
5 class certification hearing, that is just one step in a very --
6 multi-year process that the civil litigation is going through.
7 After that, we are still working on expert reports and
8 depositions. We haven't even filed motions for summary yet.

9 There is a possibility of trials. We don't know when the
10 civil litigation will end. I mean, literally it could be
11 several years; and we have no control over that.

12 The notion about -- we are not trying to delay sentencing.
13 We want to be sentenced in a relatively timely way because
14 having this \$100 million possible fine hanging over our heads,
15 it is causing the company great harm. It is creating great
16 uncertainty. It is hard for the company to plan. It is hard
17 for -- the company has already decided that it probably can't
18 go forward with its plant expansion in American Samoa because
19 it doesn't have the money.

20 As long as there is continued uncertainty as to what this
21 fine will be, it will cause the company to have to restrict
22 itself in terms of its ability to be competitive, to compete,
23 to innovate, to produce new products because it doesn't know if
24 it has the money. So in that regard I would be against an
25 open-ended delay, but we are absolutely in support of an

1 evidentiary hearing.

2 But just two points that Mr. Mast raised, the claim that
3 we are somehow spending down our debt, the debt payments are
4 required by the banks. Banks are not giving us interest-only
5 loans. They are requiring a return when they lend us money,
6 much like anyone getting a mortgage or any other type of loan.

7 **THE COURT:** Is there a history of refinancing?

8 **MR. LYNCH:** Well, they refinance every three years, so
9 it is the length of the loan. We pay roughly -- we don't pay
10 the first year, but we pay \$10 million every six months; that
11 is required by the banks. Those terms are absolutely
12 consistent with the previous loans and the previous loans. It
13 has been the same loan. We have not changed them.

14 **THE COURT:** Has there been a change in the pattern of
15 intervals --

16 **MR. LYNCH:** No.

17 **THE COURT:** -- in Which refinance occurs?

18 **MR. LYNCH:** No. And, again, that is another false
19 allegation that the Government's expert report and Government's
20 initial papers that somehow we're accelerating debt payments.
21 We are not. We are paying according to what the banks require
22 us when they made the loan, and those are absolutely consistent
23 with the loan payments in the previous loans. There is no
24 difference.

25 The other point is inventory. And we have brought this to

1 the Government's attention on several occasions, but they
2 continue to raise it; and it is a complete falsehood. The
3 notion that we have uncharacteristically high inventory in
4 2018, that is simply false. We -- if you look at it as a
5 percentage of overall sales, we have roughly 37% revenue at the
6 end of 2018. It was higher in 2016 and 2015. It was closer to
7 40 percent. In 2017 it was low because we had a five-week
8 factory shutdown in order to install EPA compliance materials.
9 The factory was shut down for five weeks. Therefore, we had
10 unusually low inventories then, so it seems higher today.

11 Let me give you an example of why inventory is at probably
12 a low level now. When we supply our customers, if we don't
13 supply them in time, they penalize us. Our penalties from
14 customers for failure to deliver was at its highest in 2018
15 than it has ever been. That suggests our inventory is
16 dangerously low, not that it is high. And as a percentage of
17 sales, it is lower than it has historically been. We have
18 repeatedly clarified that to the Government, and they
19 repeatedly keep raising this false claim that our inventories
20 are unusually high. They are not. It is just simple math.

21 **MR. MAST:** Your Honor, if I might respond.

22 First of all, I think Counsel's projections about the
23 duration of the civil litigation make a 90-day deferment
24 basically meaningless. So I don't think that --

25 **THE COURT:** That assumes I buy it because in my

1 experience sometimes a decision on a class certification spurs
2 movement. Particularly if the civil litigants are aware that
3 they have some risk because if this Court imposes a fine and
4 goes ahead, let's say, in 120 days, they are well aware that I
5 could impose the maximum fine; and -- which could raise their
6 risk. So let's say -- I'm not saying anything would happen,
7 but you never know. There is a chance -- there is a window
8 there that something might stimulate some movement. So I
9 don't --

10 **MR. MAST:** I understand --

11 **THE COURT:** I'm not talking about an open-ended. I am
12 talking about-- and I understand. I'm not going to do this
13 forever, but 120 days, maybe that makes sense.

14 But go on.

15 **MR. MAST:** Your Honor, just that -- just that
16 deferring sentencing for 90 days with the hopes that some
17 speculative assertion from Starkist regarding its civil
18 liability comes to fruition indicates that Starkist hasn't met
19 its burden establishing inability to pay today, its sentencing
20 date.

21 I do want to address the inventory because it is simple
22 math. In 2017, which was a high growth year, Starkist upped
23 its inventory, at the end of 2018. So 2017 and 2018 were high
24 growth years for Starkist. And then it upped its inventory,
25 presumably with the intention to sell. Whether it is

1 historically low or historically high doesn't matter. It shows
2 that Starkist is expecting further revenue in the near term and
3 is inconsistent --

4 **THE COURT:** It goes to the question of projected.

5 **MR. MAST:** Projected.

6 **THE COURT:** I understand there are several indicators.
7 I understand. I read the briefs on that.

8 **MR. MAST:** Your Honor, with respect to just
9 projections generally, I just -- I do want to emphasize that
10 the burden lies with Starkist. It is not the Government's
11 burden to show that Starkist's projected zero growth rate is
12 reasonable. It is Starkist's burden to show it is reasonable,
13 and its growth rate -- which contradicts its own business
14 decisions, which contradicts industry reports, which
15 contradicts statements made by its competitors in terms of the
16 competitive outlook of the industry -- it is Starkist's burden
17 to show that its growth rate is reasonable.

18 Same thing with respect to financing. It is Starkist's
19 burden to show it can't borrow money. Starkist hasn't
20 indicated that it tried and failed to obtain additional loans.
21 Starkist hasn't indicated that it sought to borrow money from
22 its parent, which is explicitly authorized under the terms of
23 its loan agreement that it can borrow beyond \$50 million from
24 its parent company.

25 And so Starkist has failed to meet its burden showing its

1 inability to pay, and now is the time for sentencing because it
2 has had ample opportunity. This is not an ordinary sentencing.
3 We have had a four-month pre-sentence investigation report. We
4 have had sentencing memos and replies. We have had multiple
5 expert reports from Starkist's experts, a last-minute expert
6 report from a bankruptcy expert. And so there has been an
7 abundance of procedure giving Starkist the opportunity to show
8 that it can't afford a \$100 million fine, and it has failed to
9 do so.

10 **THE COURT:** Let's talk -- I have some specific
11 questions about the various categories here.

12 Let me first ask, there is a chart in the United States
13 response memorandum, which is on page 9, which shows the U.S.
14 per capita consumption of cans of tuna. And what I was looking
15 for -- I understand there is a difference in the expert
16 analysis in terms of whether, you know, the Government's expert
17 looked at global sales, which Starkist says is not accurate
18 because the domestic sales is a different animal.

19 Does this chart tell us sort of the direction of sales of
20 tuna, shelf-stable tuna in the U.S. that there has been a
21 decline, kind of an up-and-down but more or less steady decline
22 from the '90s to 2016?

23 **MR. LYNCH:** Yes, that's absolutely correct. It has
24 been an over 40% reduction.

25 **THE COURT:** I figured you'd say that. I mean, it is

1 in your brief, but --

2 **MR. MAST:** Yes. First of all, Your Honor, it doesn't
3 pertain to Starkist. That's a chart of overall canned tuna
4 consumption.

5 **THE COURT:** Right.

6 **MR. MAST:** And more importantly, that pertains to cans
7 of tuna sold. It doesn't pertain to profits.

8 **THE COURT:** I'm going to get to that.

9 So I had a couple of questions from that. That is canned
10 tuna?

11 **MR. MAST:** Correct.

12 **THE COURT:** Now there is the whole issue of pouched
13 tuna.

14 **MR. MAST:** Correct.

15 **THE COURT:** What percent -- maybe it is in here -- and
16 I don't know if this is private information or not. I'm trying
17 to get an understanding of the relationship in terms of percent
18 of the sales that goes relative to pouch versus how
19 important -- how big of a piece of the pie is pouched tuna
20 these days.

21 **MR. MAST:** So I think at this point of time, pouched
22 tuna represents a relatively small percentage of Starkist's
23 overall sales. However, the projections of growth in the
24 industry -- and this was alluded to by the CEO of Bumblebee in
25 public statements -- stating that the growth of the industry --

1 the outlook of the industry is strong because there is a shift.
2 Yes, canned tuna is declining, but pouched tuna is growing.
3 And Starkist is the market leader in pouched tuna.

4 **THE COURT:** So what is -- I need to know the idea of
5 the magnitude.

6 **MR. LYNCH:** Your Honor, I can identify that for you.

7 In Dale Zuehls' supplemental report -- and he attaches an
8 article regarding Bumblebee's CEO, and it has a pie chart
9 showing you the size of the market and what tuna pouches
10 account for.

11 **THE COURT:** Okay.

12 **MR. LYNCH:** They account for 16.2 percent. That would
13 be -- unfortunately I don't have a document number.

14 **THE COURT:** Okay. I just needed to know the -- that's
15 a growing number -- at least evidently, but at this point it is
16 only 16.2 percent.

17 **MR. LYNCH:** So this would be the declaration of Andrew
18 Mast in support of the United States sentencing memorandum.

19 **THE COURT:** But you are citing Zuehls' final report?

20 **MR. LYNCH:** It is a supplemental report that he
21 submitted. It is Exhibit N of the Andrew Mast declaration that
22 is part of Zuehls' supplemental report that he filed in
23 February, and it has an article.

24 **MR. MAST:** Your Honor, I think before the Court --
25 this was submitted in Starkist's submissions rather than the

1 Government's submissions. I think Defense counsel is referring
2 to what the Government may have submitted to probation.

3 **MR. LYNCH:** We think it might be ECF78.

4 **THE COURT:** And, unfortunately, I don't have --

5 **MR. LYNCH:** You know what, I can show you a copy right
6 here. I can just take it out.

7 That was attached to a supplemental report by Dale Zuehls
8 in February. It is part of an article, but it does show you
9 that canned tuna, both chunk light and solid white, are over 50
10 percent of the market. Pouches are approximately -- I think I
11 said 14 or 15 -- I forget what the number was.

12 **THE COURT:** 16.2 percent.

13 **MR. LYNCH:** Yeah.

14 **THE COURT:** Well, let -- okay. That raises the
15 question, which is -- the next question is even if sales are
16 down -- and I don't -- you know, now the sales -- has the -- is
17 there a chart here of the sales of Starkist in the tuna field?
18 This is U.S. -- is there a chart?

19 **MR. LYNCH:** I can show you -- I have a chart that I
20 think is actually rather illustrative and helpful. This is --
21 if I could bring it to the Court's attention.

22 **THE COURT:** Yep.

23 **MR. LYNCH:** This was attached -- this was part of our
24 response to the DPP and EPP submission. It is attached,
25 declaration of myself; and it is a page from Professor Daine's

1 report, and it gives a chart of Starkist net sales, gross
2 profit and operating income for 2008 to 2018.

3 Now, I think this is illustrated for a couple of reasons,
4 if I can explain. First off, revenue is misleading. As you
5 see, the green line is net sales. That's -- all the money
6 coming in from the sale of --

7 **THE COURT:** For all goods.

8 **MR. LYNCH:** Cans and pouches entirely.

9 **THE COURT:** Not just tuna but includes salmon.

10 **MR. LYNCH:** Well, salmon is .6 percent of our sales,
11 so it is very, very small. Most of what we sell -- I would say
12 98 percent of what we sell is canned tuna and pouches.

13 So if you see net sales is rather high, you know, close to
14 800 million. It seems like, Wow, that is rather profitable.
15 Then look at gross profits. Gross profits are, you know, far
16 lower, but the gross profits are not an accurate figure of what
17 we have in terms of payment.

18 You have to take away many different costs before you get
19 to what is called "operating income." And I think what is
20 interesting and is relevant to the growth issues that we talked
21 about -- so just -- I think just a very brief explanation of
22 this because it is throughout the report. So we have the green
23 line, which is net sales. You then take away the cost of goods
24 sold, which is essentially the fish cost. So the fish costs
25 minus revenue gets you gross profit.

1 **THE COURT:** Margin looks like it is around 15 percent?

2 **MR. LYNCH:** Probably less.

3 **THE COURT:** Somewhere around there.

4 **MR. LYNCH:** But, yes, you will see that in 2016 to
5 2018 revenue spiked; but there wasn't a corresponding spike in
6 gross profits because fish costs were going up. That's why
7 revenues seemed to go up. Fish costs were going up. We passed
8 on those costs, but operating profit -- I mean -- gross profit
9 remained relatively flat.

10 And then if you look at operating income -- which is gross
11 profit minus marketing, trade freight, brokerage, other general
12 expenses -- we are close to zero. And that's still not the
13 amount of money we had to pay a fine. You still have to
14 separate and subtract income taxes, appreciation, capital
15 expenditure, interest expense and principal payments on our
16 loan. You can see we are down to zero. And if you add up all
17 the other payments we add, we are really not profitable at all,
18 despite spikes in the --

19 **THE COURT:** So this operating income is before taxes
20 and debt service?

21 **MR. LYNCH:** Yeah, it is before income taxes. So gross
22 profit is exactly just revenue minus fish costs or costs of
23 good sold.

24 **THE COURT:** But operating income then takes into
25 account fixed costs and other things.

1 **MR. LYNCH:** Exactly. Marketing, trade freight,
2 brokerage and other general expenses.

3 **THE COURT:** But not debt service or taxes.

4 **MR. LYNCH:** Correct. Correct. That's -- then you get
5 down to actually cash -- free cash flow. So you take operating
6 profit and then you subtract taxes. You subtract capital
7 expenditures. So the EPA upgrades we need to make. You
8 subtract increase in working capital if we have to --

9 **THE COURT:** Are these numbers on this chart
10 substantiated, for instance, by tax returns or audited --

11 **MR. LYNCH:** Yes. We have audited financial statements
12 that we do -- I think it is KPMG does audited financial
13 statements. And these are all subject to review by them, and
14 they are audited financial records.

15 **THE COURT:** This chart, which I assume was prepared
16 for this proceeding --

17 **MR. LYNCH:** This was prepared by our expert
18 Professor Daines in the civil case.

19 **THE COURT:** Right. So my question is: Did he derive
20 these records directly from --

21 **MR. LYNCH:** Yes.

22 **THE COURT:** -- the CPA audited return or tax return?

23 **MR. LYNCH:** Yes. Absolutely. Which is also what our
24 expert, Gokhale, relied on as well.

25 And I just think it is illustrative because we are

1 throwing a lot of things at you, like revenues increasing, or
2 operating -- or gross profits increasing. But, I mean, when
3 you really look at what cash is available, it is a much, much
4 smaller amount of money. And this is something --

5 **THE COURT:** All right. Let me ask for a response
6 because you have made a big point. You have a different chart
7 in your brief, which says, Well, profits -- you can't just look
8 at sales, and sales -- you have to look at profit. And here
9 there is one chart that suggests, Well, profit is not
10 necessarily so great.

11 And yet you have -- I wonder if -- your number, it sure
12 looks different than your number on page 10.

13 **MR. LYNCH:** Yeah, I don't know where they got -- are
14 you talking about their gross profit chart?

15 **THE COURT:** Yes.

16 **MR. LYNCH:** That was something new to us. We don't
17 know how that was made or what that was based on, but I think
18 it is a misleading chart.

19 **MR. MAST:** Well, Your Honor, it is based on Starkist's
20 own financials. This is Exhibit 1 to Mr. Gokhale's report,
21 which indicates -- which indicates the profit numbers for
22 Starkist, and that even despite --

23 **THE COURT:** Which? His initial --

24 **MR. MAST:** This is --

25 **THE COURT:** The rebuttal or the original?

1 **MR. MAST:** I believe this is the original report, and
2 it's --

3 **THE COURT:** It is which? Exhibit 1.

4 **MR. MAST:** Exhibit 1. And I think if you go to the --
5 yeah, he has Appendix B before that, which is a list of prior
6 publications. And then you turn to -- I think it is the third
7 page of Exhibit 1 -- you see Starkist's unlevered free cash
8 flow.

9 So this -- these gross profit numbers came from Starkist's
10 own financials.

11 **THE COURT:** Well, that's cash -- unfortunately, I
12 think it is cut off. Is that unlevered cash flow, free cash
13 flow?

14 **MR. MAST:** No, I don't think we are looking at the
15 same, Your Honor -- oh, Starkist unlevered free cash flow is
16 the title; and it starts out with stacked cases, which are the
17 cases or cans of tuna sold, is the first line in that row. And
18 then you go down below net sales to gross profit.

19 **THE COURT:** Which line is that? Because part of my
20 thing is cut off here.

21 **MR. MAST:** One.

22 **THE COURT:** I have Exhibit 2 is the one --

23 **MR. LYNCH:** Which document are you on just so --

24 **THE COURT:** I'm on the expert report of Mr. Gokhale
25 dated February 1st. Is that right? Am I on the right one?

1 **MR. LYNCH:** That was his initial report.

2 **THE COURT:** Yeah. That's what I thought.

3 And then Exhibit 2 is something called Starkist unlevered
4 free cash flow, and it has got -- down on the column, rows 1
5 through 28.

6 **MR. LYNCH:** Let me turn to that for a second. I
7 apologize.

8 **MR. MAST:** Your Honor, I want to make sure we are on
9 the same document as well. Yes, 1 through 28.

10 **THE COURT:** Which line is the gross profit line?

11 **MR. MAST:** Line 8.

12 **THE COURT:** Line 8.

13 And that is what your chart is based on?

14 **MR. MAST:** Exactly.

15 **THE COURT:** Now, does that correspond with the other
16 chart that I was given?

17 **MR. LYNCH:** It actually -- it appears to be similar.
18 It is just the way they framed it. They made it look like a
19 dramatic spike. When you look at 2011, it does seem to be
20 close to 80 million.

21 **THE COURT:** So it is just a scale of the --

22 **MR. LYNCH:** Exactly.

23 **THE COURT:** -- segmentation of the chart.

24 **MR. LYNCH:** That's what it appears to be. And I think
25 it is misleading actually in that regard.

1 **MR. MAST:** Well, it is based on Starkist's numbers.

2 **THE COURT:** In any event, regardless of the chart, I
3 am going to look at the actual numbers. It shows a substantial
4 jump in 2013, a further jump in 2014, a further jump in 2015,
5 and then a drop in 2016, slight recovery in 2017. So it has
6 been fairly flat in the last four years from 2015 to 2018.

7 **MR. LYNCH:** Which is consistent with our growth
8 figures as well, Your Honor, which we have been having a
9 substantial debate over with the Government.

10 **MR. MAST:** Well, gross profit has been rising, albeit
11 at a slower rate than it was during the conspiracy.

12 **THE COURT:** The conspiracy period ended 20 --

13 **MR. LYNCH:** December 2013.

14 **THE COURT:** 2013.

15 So if you look at the untainted or unaffected period, you
16 know, over the four-year period, it looks like about 10 percent
17 growth -- my math isn't right.

18 **MR. LYNCH:** No. Are you looking at line 8?

19 **THE COURT:** I am looking at line 8. So 2014, 167;
20 2018, 186. That is a difference of -- that is about 12 percent
21 if I'm not mistaken.

22 **MR. MAST:** I mean, Your Honor --

23 **THE COURT:** Over four years.

24 **MR. LYNCH:** I don't know that gross profit is the
25 appropriate figure to look at. I mean, if you look at

1 operating income as a percentage of growth, if you look at
2 2015, it is .9; negative 15 in 2016; negative 38 in 2017, in
3 line 12. Gross profit is not the money we have. You have to
4 take away a lot of other expenses.

5 **THE COURT:** Right, it is one indicator.

6 **MR. LYNCH:** Yeah.

7 **THE COURT:** But you have other arising expenses.

8 **MR. MAST:** And operating income is much easier,
9 malleable. In projections they have a capital expenditure that
10 is projected at \$77 million.

11 **THE COURT:** That is my second question.

12 **MR. LYNCH:** That is after operating income. Capital
13 expenditures come after operating income, which leads to then
14 available free cash flow.

15 **MR. MAST:** Your Honor, I think this all just
16 illustrates that the Court should hold an evidentiary hearing.

17 **THE COURT:** Well, I told you at the outset I'm sort of
18 inclined because even taking that same number, you have charts
19 that appear different until you get to it; and then there are
20 things that need to be flushed out.

21 One of the other questions I have is what about the effect
22 of the decision not to invest in the Samoa facility, which
23 means that 77 million not in capital is spent. On the other
24 hand, presumably that will affect sales and profit because that
25 was for mainly pouched sales. It was a pouched facility.

1 **MR. LYNCH:** Correct.

2 **THE COURT:** If that's the big high growth area, the
3 plus from one perspective is that frees up some cash for some
4 debt obligations that would have been incurred and, therefore,
5 lower debt service because now you are not leveraging
6 77 million one way or another, whether by cash or by debt. But
7 one could say, Well, then the revenue is not going to be what
8 you thought it was going to be, especially for a high margin --
9 higher margin, faster growing segment.

10 So what I don't see in the reports -- maybe I missed it --
11 are both experts kind of post-decision in light of this
12 non-investment decision, how does that affect the overall cash
13 available? How does that affect the cash flow?

14 **MR. LYNCH:** We did do that analysis. This has been a
15 relatively recent decision recognizing the financial
16 difficulties of the company that they are not going to be able
17 to build this factory in the timetable that they wanted in
18 2020. It doesn't impact the EPA expenses. The EPA expenses --

19 **THE COURT:** Yeah, I understand that.

20 **MR. LYNCH:** And Mr. Gokhale did an analysis of -- and
21 he still concluded that based on his analysis that Starkist
22 would not be able to pay more than a \$50 million fine, even if
23 we forego --

24 **THE COURT:** I haven't seen Dr. Zuehls' analysis
25 post-decision.

1 **MR. MAST:** No, Your Honor. And, frankly, the --
2 Starkist's sort of pattern of behavior of putting up one reason
3 why it can't pay a criminal fine and then the Government
4 refuting it and then coming up with another reason is
5 indicative of the overall picture of its ability to pay. But
6 the Government first learned of its intention not to pursue
7 this expansion in American Samoa in its response to the
8 Government's sentencing memo. Before that time, it said it was
9 essential to its operations, essential to its plan; and
10 Mr. Gokhale did do an analysis, and he shows that Starkist,
11 with the savings from the expansion in American Samoa, that its
12 net free cash flow will be \$171.5 million.

13 **MR. LYNCH:** And if you were to subtract that number
14 from our estimated -- our minimum estimated civil liability,
15 you get to a fine of less than \$50 million.

16 **MR. MAST:** And, Your Honor, a couple points responding
17 to that.

18 First -- and this was raised in our initial sentencing --

19 **THE COURT:** But that still assumes the CAGR of .1
20 percent?

21 **MR. MAST:** Correct.

22 **MR. LYNCH:** Correct.

23 **THE COURT:** And so your argument is that given the
24 civil liability, unless the civil liability is, for instance,
25 71 million, you don't have 100 million --

1 **MR. LYNCH:** Correct. And we have already spent -- we
2 have told you the amount we have already spent towards it. So
3 given our estimate of what total civil liability will be, given
4 that free cash flow figure even without the factory in American
5 Samoa, we still can't pay more than \$50 million. In fact, it
6 is under 50 million in terms of the free cash flow.

7 **MR. MAST:** Your Honor, that is inaccurate because
8 Starkist has already borrowed money for its civil claims that
9 are not part of that free cash flow analysis.

10 Moreover, in 2017 -- and this point wasn't even responded
11 to in Starkist's response to the sentencing memo. In 2017
12 Starkist on its balance sheet recorded a \$40 million liability
13 accounting for Starkist's criminal fine. What that means is
14 Starkist's balance sheets are \$60 million stronger -- or excuse
15 me -- \$40 million stronger than they appear. Its free cash
16 flow is \$40 million weaker than it appears. It has essentially
17 already set aside that money for payment, from an accounting
18 perspective.

19 **MR. LYNCH:** That is absolutely false. It is an
20 accounting concept of setting aside a reserve. We don't have
21 40 million set aside.

22 **MR. MAST:** And Mr. Gokhale, in his report, did not --
23 when he is analyzing Starkist's balance sheets, he is
24 considering that liability already accounted for. So this
25 is --

1 **THE COURT:** This underscores why we might benefit from
2 live testimony and cross-examination.

3 Let me ask you this question: I assume he ran other
4 iterations besides .1 percent?

5 **MR. LYNCH:** Yes.

6 **THE COURT:** So if he went to another number like 1
7 percent, what would that -- instead of 171, what is that
8 number?

9 **MR. LYNCH:** I don't have the calculation in front of
10 me.

11 **THE COURT:** I had trouble, frankly, reading these
12 tables, but I want to know would it be useful to see?

13 **MR. LYNCH:** We can have him do that.

14 **THE COURT:** On both sides. If you tweaked the
15 variables, what do you end up with? Because I'm interested in
16 whether the methodology is also different or whether it is the
17 input assumptions --

18 **MR. LYNCH:** Your Honor, the Government has had ample
19 opportunity --

20 **MR. MAST:** It is not hard --

21 **MR. LYNCH:** The Government has had ample opportunity
22 to argue the merits, and I have been patient. We are clearly
23 on the merits now. I do have a few points that I want to
24 make -- in light of the way the hearing has evolved -- I
25 haven't had an opportunity to say. But I do want to comment on

1 what Mr. Gokhale did and what Dr. Zuehls did, and also just
2 overarching issues to consider when sentencing Starkist.

3 If I could just get five minutes of your time on that, if
4 that would be permissible.

5 **THE COURT:** All right. Then I will give you five
6 minutes to respond.

7 **MR. MAST:** Thank you, Your Honor.

8 **MR. LYNCH:** Okay. So, Your Honor, Mr. Gokhale
9 concluded that Starkist's five-year free cash flow is
10 \$94.8 million. You take away the civil settlements we have
11 already made, and you are already closer to 40 million.

12 **THE COURT:** How does that -- how does that compare to
13 the 171 that you --

14 **MR. LYNCH:** So the 171 is if you add the 70-some-odd
15 million of --

16 **THE COURT:** Which is now given.

17 **MR. LYNCH:** It is delayed certainly, yeah.

18 **THE COURT:** Well --

19 **MR. LYNCH:** Under -- this is pre-American Samoa
20 analysis.

21 So this must cover all -- exist all the civil settlements,
22 including the ones we have paid because we have just paid them
23 this year. So that wasn't subtracted yet, and the criminal
24 fine and any future civil settlement.

25 Dr. Zuehls -- and this analysis is based on the company's

1 information, their long-range plan, which they use to provide
2 to creditors, to lenders, and they also provide it to auditors.
3 They have no incentive to --

4 **THE COURT:** I understand that. Your position, even
5 though this was created during the course of litigation, it was
6 not a litigation-driven document. It is an internal
7 document --

8 **MR. LYNCH:** Correct.

9 **THE COURT:** -- for which Starkist has an incentive not
10 to down-play it for economic reasons?

11 **MR. LYNCH:** Correct.

12 And I think that's in contrast -- I think the Court really
13 has to take on what Dr. Zuehls has done in this case. And what
14 he has done is absolutely unreliable.

15 He has based his analysis on assumptions of growth rate
16 that are simply unreliable. His initial growth rates of 3.7 to
17 4.8, they were based on third-party reports of global canned
18 consumption, which are not reliable for the United States.
19 They are not consistent with the growth rate of Starkist over
20 the last five years, and they are also not consistent with what
21 he did with Bumblebee, which I will get to in a second.

22 Also, his civil settlement assumptions are completely off
23 point. He has, at the low end, \$67 million. And we have
24 already almost taken up that entire amount in existing
25 settlement, and we haven't even settled the classes yet.

1 We also think his analysis contains significant errors
2 that absolutely overstate our free cash flow by tens of
3 millions of dollars. And Mr. Gokhale's rebuttal report
4 identifies each of those.

5 But -- and this is critical -- Mr. -- Dr. Zuehls issued
6 his report in the beginning of this year, and he referred to 20
7 iterations he did. We specifically asked him, What were your
8 assumptions. We want to be able to test them; to look at them.
9 To see what he relied on in terms of growth and other factors,
10 and the Government refused to hand them over. They refused to
11 give them to the probation officer.

12 We repeatedly asked them by letter for them, and we also
13 asked for the Bumblebee information. Lo and behold, we don't
14 get them until we file our opening sentencing memorandum; and
15 what do they show? On their face he has now done 35
16 iterations, and one-third of them show that we cannot pay a
17 \$100 million fine. This was never disclosed to us before. It
18 was never disclosed to the Court or to the probation officer,
19 which I think really undermines the recommendations of the
20 probation officer.

21 Now, if you correct just the very obvious errors -- math
22 errors and other sort of computational errors in his
23 analysis -- all 35 show we cannot pay \$100 million. He
24 completely undermines Dr. Zuehls' report, and that is again in
25 our rebuttal report of Mr. Gokhale.

1 Also, I think this is really important, particularly under
2 3553 and disparate treatment. He did the same analysis for
3 Bumblebee, and he presented that to you; and Bumblebee got a
4 reduction down to \$25 million. But when you looked at his
5 analysis for Bumblebee, he used different growth rates. Half
6 of his iterations, he did 16 of them for Bumblebee, were
7 negative .5 percent growth rate. They ridiculed us for showing
8 flat growth rate.

9 And yet Dr. Zuehls, when he analyzes Bumblebee's
10 analysis -- and they are in the same market as us. They sell
11 to the same customers -- half of the iterations show negative
12 growth. He doesn't have that at all for Starkist. The lowest
13 in the second iteration is 1 percent.

14 Also Dr. Zuehls includes what we call a cash cushion. And
15 I have a document on it that I would like to share with the
16 Court. He basically concludes at the end of the day -- and I
17 will share this with the Court. This was given to us just I
18 think about two weeks ago by the Government, May 28th. This is
19 Dr. Zuehls' iterations on Bumblebee. And look what they show.

20 At the end of the day he has at the bottom, total possible
21 fine, 84 million. That means he thinks that Bumblebee has
22 84 million to pay a fine, but the recommendation is for a
23 \$25 million fine. So he claims that they should only pay 30
24 percent of their available cash over the next five years to pay
25 a fine.

1 When he analyzes Starkist's analysis, there is no cash
2 cushion. He analyzes our available cash as 155 million after
3 civil settlements and says we should pay 100 million, which is
4 65 percent of our available cash. It is absolutely
5 inconsistent and unfair disparate treatment for Starkist versus
6 Bumblebee.

7 And then finally on Bumblebee, look at his analysis of
8 potential civil liability. Potential civil liability is at the
9 low end of \$210 million for Bumblebee up to 520. That is
10 simply incredibly high compared to Starkist. Starkist is 67 to
11 230.

12 **THE COURT:** There is a lot more experience in actual
13 settlement now than there was at the time of Bumblebee.

14 **MR. LYNCH:** True, but we have to compete with
15 Bumblebee. We are asking for the same treatment that the
16 Government gave to Bumblebee.

17 **THE COURT:** Well, that doesn't mean you ignore
18 evidence, intervening evidence. That one I don't find very --

19 **MR. LYNCH:** Okay. But, nevertheless, what does the
20 data show on growth? And that is a key dispute.

21 We claim that we are going to have flat growth. They
22 claim we are going to have 3.7 to 8.4 percent growth. Let's
23 look at what was the actual purchases by consumers, and what he
24 looked to for; that is, the Nielsen data. Nielsen is a
25 third-party company that collects SKU data that is actually

1 like when you purchase products in a supermarket. They looked
2 at that data, and companies in the tuna industry buy this stuff
3 and look at it all the time to see growth and declines. They
4 found for the end of 2008 the total --

5 **THE COURT:** 2018.

6 **MR. LYNCH:** 2018, I'm sorry. 2018. They have found
7 that the growth of both pouched and canned combined was
8 negative .8 percent.

9 **THE COURT:** Year over year?

10 **MR. LYNCH:** Year over year, for the total industry.

11 **THE COURT:** What was it for 2017 over '16?

12 **MR. LYNCH:** I don't have that, but we can get that for
13 you.

14 But all I'm saying is that it is consistent with our flat
15 growth analysis.

16 Also --

17 **THE COURT:** Now, I'm still curious. The gross
18 operating profit showed an increase from 2014, '15, '16, '17 or
19 maybe '15, '16, '17, and '18. Whether it is figure 13 or the
20 page from Dr. Gokhale's report that we looked at earlier, and
21 yet you said, Well, cost of tuna -- the cost of fish has been
22 going up, which would suggest that if sales were flat and costs
23 were higher, you would have a decline in gross operating
24 profit; but whatever the reason is it appears that the --

25 **MR. LYNCH:** I'm not sure what line --

1 **THE COURT:** The profit -- line 8.

2 **MR. LYNCH:** Yeah.

3 **THE COURT:** -- from 2014 went from 167 to 186, with
4 some fluctuation in between, to 2018. So over that four-year
5 or five-year period, there was an increase in gross -- I
6 understand there is net profit, net operating income, et
7 cetera, et cetera. But this takes into account the rising
8 costs of goods, the fish.

9 What appears to be -- the court reporter has been going at
10 this for a long time.

11 Let me ask this one question. There has been an increase
12 in gross operating profit. And I understand that is different
13 from net operating income; but it went from -- like I said, in
14 2014, from 167 and change to --

15 **MR. LYNCH:** I'm not sure I'm looking at the same
16 document you are because I see a decline in 2016.

17 **THE COURT:** There was a decline. I'm saying overall.
18 If you take the end point and the beginning point, there is ups
19 and downs. It went up pretty good in 2015. It went down in
20 2016. It went up pretty well in 2017. Slight in 2018. Net
21 over those four years, there was a -- about a 20 million
22 increase over four years, about 5 million. It is about a 2 1/2
23 to 3 percent if you do -- just do rough, crude numbers.

24 So, you know, doesn't that support the notion that
25 notwithstanding the decline and the Nielsen survey, that

1 somehow Starkist is doing okay? At least before you take away
2 fixed expenses and everything else?

3 **MR. LYNCH:** Well, let's look at the last five years,
4 okay. If you look at the last five years -- it is in our
5 brief. It is in the report. If you analyze Starkist's growth
6 in the last five years, I think, you know, that is a fair
7 assessment. I believe the growth is -- I don't have the figure
8 in front of me. It might be around 1 percent, but that
9 includes the 2017 year, which even Dr. Zuehls recognizes was an
10 extraordinary year in terms of excess sales.

11 If you exclude that, the growth over the last five years
12 was negative. I mean, again, it depends how you look at it. I
13 think looking at overall consumer demand of canned tuna going
14 down, looking at actual purchases under Nielsen of negative .8
15 percent, I think it leads to a conclusion that flat growth over
16 the next five years is a reasonable assessment particularly if
17 we cannot expand our pouch sales like the way we wanted to
18 originally with an American Samoa plant.

19 So all of those together combine to suggest that we
20 experienced that flat growth is an accurate assessment of the
21 market.

22 **THE COURT:** All right. Let's take a brief break, and
23 I will give you your ten minutes or whatever it was.

24 **MR. LYNCH:** Your Honor, because we have visitors who
25 have come from American Samoa, if we can also just make sure we

1 allocate time for them to speak, if that's okay.

2 **THE COURT:** I will do that.

3 Let's take a ten-minute break and we will come back.

4 (Recess taken at 4:37 p.m.)

5 (Proceedings resumed at 4:53 p.m.)

6 **THE COURT:** Remind me again where the pie chart came
7 from.

8 **MR. LYNCH:** That was from Dr. Zuehls' supplemental
9 report to the probation officer that he submitted February 1st.
10 And it is attached, I believe, to our Lynch declaration in
11 support of the response. We realized that Dr. Zuehls' first
12 two reports had not been submitted by the Government so we
13 submitted them. And it is an article relating to Bumble Bee's
14 CEO.

15 **THE COURT:** All right.

16 **MR. LYNCH:** And there is some information --

17 **THE COURT:** Great. Thank you.

18 **MR. LYNCH:** Your Honor, I do want to respond to a
19 question that you asked about Nielsen data going back several
20 years.

21 **THE COURT:** Yeah.

22 **MR. LYNCH:** I was able to track down -- again, this is
23 shelf stable tuna. So it includes pouch, which has been
24 increasing, but also the decreasing canned. So this is
25 combined together and our -- my quick analysis showed in

1 2008 --

2 **THE COURT:** 2018?

3 **MR. LYNCH:** -- 2018 in the form of units, it was --
4 the Nielsen data showed that consumption was down 1.94 percent.

5 **THE COURT:** In the U.S.?

6 **MR. LYNCH:** In the U.S., correct. In 2017 according
7 to units sold, it was up 1.24 percent. In 2016 it was down
8 3.19 percent. In 2015 down .4 percent.

9 If you would like, Your Honor, we can provide that to you
10 in some sort of written submission or if there is the
11 evidentiary hearing, we can present it at the time. Again,
12 that is in terms of units sold.

13 **THE COURT:** Okay.

14 **MR. LYNCH:** I do have just two minutes of final
15 comments, and then we can move onto whatever topic; but I just
16 want to finish up.

17 Again, I have gone through the reports. The criticisms we
18 have of Dr. Zuehls, I think an evidentiary hearing would expose
19 those and show them to be unreliable. In terms of the other
20 key factor, our civil liability -- as the Court has heard from
21 the various Plaintiff classes -- we have settled a substantial
22 number of cases, but the classes haven't been settled; and they
23 are asking for a combined 1.5 billion in damages -- we have
24 given our estimates of settlements which are lower; but
25 nevertheless, we are facing huge risks at a low burden of

1 proof.

2 We do think full civil settlements are a proper substitute
3 for criminal restitution, and we would direct the Court to the
4 case citation in our response brief, Ninth Circuit, *U.S. versus*
5 *Thompson* which is 830 F3d 1049. It is from 2016, the Ninth
6 Circuit. And it stands for the proposition that in the context
7 of a conspiracy case, the Court is allowed to look -- in
8 calculating restitution or evaluating restitution -- to conduct
9 outside the four corners of the charged conduct to the overall
10 harm to the victims as long as it is related to the core
11 conduct. And in this case, it is. As you know, the civil
12 Plaintiffs have alleged broader time periods of the conspiracy.
13 We have pled to a narrower period, but the courts are allowed
14 to look to the broader period for purposes of restitution.

15 And in this case under the plea agreement, the Government
16 has agreed that the civil cases should serve as a replacement
17 for restitution.

18 Now, the probation officer did not look to restitution at
19 all as a basis to reduce the fine because we believe they
20 misapplied the law. In any event, we think that that clarifies
21 the point as to why all the civil liability should be
22 considered under Section A of the inability to pay section of
23 the United States Sentencing Guidelines.

24 Just a few final minor points regarding the pre-sentence
25 report, we are not clear -- but he wrote that it's not clear

1 that a hundred million dollar fine will necessarily
2 substantially jeopardize the organization. It is not clear to
3 us if he was applying a clear and convincing standard by using
4 that language, but the standard is preponderance as the Court
5 knows.

6 The probation officer also did not also have Dr. Zuehls'
7 most recent report or underlying iterations which suggests that
8 they did not have a complete record upon which to make a
9 recommendation.

10 And, finally, the pre-sentence report recommends probation
11 in this case; but we think it is unnecessary. Both the
12 Government and Starkist have recommended no probation. Bumble
13 Bee received no probation. And in that regard, we think that
14 is inappropriate.

15 So I do want to answer any additional questions. And if
16 we have time and opportunity for our representatives to
17 allocute, but I want to hand it back to the Court after making
18 those points.

19 **THE COURT:** I want to give Mr. Mast a chance because
20 the hour is late.

21 **MR. MAST:** Thank you, Your Honor. Your Honor, it is
22 the mission of the antitrust division to promote economic
23 competition. It takes good faith and ability to pay claims
24 seriously. It deals with them frequently. It has an
25 established process to analyze inability to pay claims. And

1 though it is not the Government's burden, it retains Dr. Dale
2 Zuehls, an outside forensic accounting expert, obtains
3 financial substantial discovery. And after reviewing the
4 various financial records, Dr. Zuehls assesses the company's
5 ability to pay its fine generally from three sources; issuing
6 stock or debt, disposable assets or capital and future
7 earnings.

8 With respect to future earnings Dr. Zuehls performs a
9 series of financial projections to determine a company's excess
10 cash flow. He doesn't rely on one single scenario. And his
11 methodology has been used in dozens of cases including this
12 one.

13 And Dr. Zuehls over the years has regularly concluded that
14 companies do not have an ability to pay. The Government is not
15 interested in criminal fines bankrupting companies. But here,
16 Starkist claims did not pass muster, and I know Your Honor is
17 inclined; but I'm going to take a stab at trying to simplify
18 things to avoid the need for an evidentiary hearing by relying
19 simply on Starkist numbers. And with your permission, I would
20 like to just put two numbers up on an easel which demonstrate
21 Starkist's ability to pay.

22 According to Starkist's own projections, it will have
23 \$171.5 million in future cash flow. According to its most
24 recent submission, it retains an investment of Techpack worth
25 \$155 million. This is not essential to Starkist's business.

1 In fact, the expert whom Starkist purported, expressly did not
2 include it as part of its inability to pay analysis. So there
3 you have a total of Starkist assets available for a fine paid
4 over installments as recommended by the Government. And
5 according to Starkist's own estimates of its potential civil
6 liability, there is ample funds available to pay both the
7 Government and to pay the civil Plaintiffs, whether we consider
8 a broader conspiracy involving more products, whether it is a
9 longer time period. According to Starkist's own estimates,
10 they have sufficient funds to pay the Government its fine and
11 to settle their civil claims based on their own projections.

12 This takes CAGRs off the table. This takes projected
13 civil settlements at Counsel's word for it, and it is
14 available. And Counsel alluded to the Government not
15 interjecting itself in Starkist's business decisions earlier.

16 Starkist has pleaded guilty to a multiyear conspiracy
17 affecting over half a billion dollars in a staple American
18 household product. It absolutely has to pay its criminal fine
19 before it gets to expand profits, make capital expenditures.

20 **THE COURT:** Is that future cash flow that is in Dr.
21 Gokhale's report, does that assume there is no cash flow coming
22 from the Techpack investment?

23 **MR. MAST:** Correct. That is what Dr. Gokhale's report
24 stated.

25 **THE COURT:** So if they were to liquidate or sell

1 Techpack somehow, that will not impact the future cash flow?

2 **MR. MAST:** According to Dr. Gokhale's report, it would
3 not. And that is essential. This is the money that is
4 undisputed. This is Starkist's own financial numbers. Now,
5 Starkist says it can't liquidate Techpack. It says it can't
6 obtain financing for loans, but the burden rests with Starkist.

7 Pursuant to the loan agreement, there are multiple
8 exceptions to borrowing money. First of all, Starkist didn't
9 raise the argument that its loan agreement prevented borrowing
10 money during the course of the pre-sentence investigation
11 report. That was raised for the first time in response to the
12 Government's sentencing memo. And when the Government looked
13 closely at that loan agreement, it noted numerous exceptions.
14 It can borrow as much money as it wants from the parent
15 company, as subsidiary debt. It can obtain written approval
16 from the lender.

17 Starkist hasn't shown that it sought to obtain a loan from
18 a lender and been turned down. Starkist hasn't established
19 that it requested to borrow money from its parent company, and
20 the burden rests with Starkist.

21 Starkist addressed the Government's methodology in Bumble
22 Bee. First of all, Starkist has already agreed that a hundred
23 million dollars fine comports with Section 3553(a). Its
24 attempt to seek or reduce fine based on Bumble Bee's finances
25 is improper under the plea agreement.

1 But, second, Bumble Bee's fine was not 25 million. It was
2 81 million assuming a prerequisite sale occurred, and this is
3 the appropriate comparison between Starkist and Bumble Bee.
4 And Bumble Bee accepted responsibility for its actions and
5 provided substantial assistance to the Government which
6 Starkist did not.

7 Importantly, Bumble Bee is not similarly situated. The
8 inability to pay analyses conducted by Dr. Zuehls occurred two
9 years prior, and Bumble Bee's finances differed drastically
10 from Starkist. You will recall looking at Starkist growth
11 figures from 2015, 2016 -- the time period under which Dr.
12 Zuehls's was analyzing Bumble Bee's inability to pay claim --
13 that was before the rapid growth rate that Starkist experienced
14 of a growth of 6.6 percent in 2018 and 13.4 percent in 2017.
15 So it is an apples-to-oranges comparison that is inappropriate
16 under the plea agreement but also irrelevant.

17 Moreover -- and most importantly -- Starkist completely
18 misunderstands Dr. Zuehls' conclusions about Bumble Bee.

19 Dr. Zuehls didn't create an \$80 million cushion or any
20 cash cushion for its inability to pay. Bumble Bee's inability
21 to pay conclusion was based -- it hinged on the terms of a
22 specific debt covenant that Bumble Bee had indicating that any
23 judgment in excess of 25 million would trigger specific events
24 of default that Bumble Bee would be unable to pay and recover
25 from.

1 Bumble Bee's debt during the pre-sentence investigation
2 report was publicly downgraded to a negative rating by the
3 ratings agencies. Bumble Bee, unlike Starkist, attempted but
4 failed to refinance existing debt. Contrast this with Starkist
5 which has successfully refinanced its existing debt after the
6 plea agreement was signed disclosing the potential of a hundred
7 million dollar fine to the -- to its lenders; and,
8 nevertheless -- based on the strength of Starkist's balance
9 sheets and the guarantee of its parent -- obtained complete
10 refinancing of its debt. Starkist hasn't indicated that it
11 sought refinancing of additional debt to relieve itself of the
12 debt covenants. In fact, Starkist entered this specific loan
13 agreement understanding that it faced a hundred million dollar
14 fine.

15 Bumble Bee, in contrast, its debt covenants existed and
16 loan agreements existed long before the investigation began.

17 So the conclusion from Dr. Zuehls was not based on these
18 relative proportions of estimated cash flow. It was based on
19 the fact that if Bumble Bee got a dollar over a \$25 million
20 fine, default would be triggered and there was no way out of
21 it.

22 **THE COURT:** Let me ask you: The current refinance you
23 say was entered into after the 11C1(c) plea agreement here?

24 **MR. MAST:** It was after the plea agreement was signed.
25 I believe it was before the plea hearing took place. But in

1 October of 2018 is when the refinance agreement was signed, and
2 those were disclosed -- the possibility of a hundred million
3 dollar fine was disclosed in clear written form -- this is with
4 our papers -- to the lenders in which they outlined the
5 prospect of a hundred million dollar fine.

6 **THE COURT:** You say lenders, plural?

7 **MR. MAST:** It is one loan agreement with multiple
8 lenders.

9 **THE COURT:** Well, let me stop right there. Is that
10 accurate, that lenders who refinanced in October 2018 were
11 aware of the plea agreement?

12 **MR. LYNCH:** Yes, they were aware of the plea
13 agreement. It was described to them accurately as between 50
14 and 100 million dollars. They were made fully disclosed.

15 I think it is important to note that after being aware of
16 it, they still insisted on some relevant terms of the loan
17 agreement. One, they insisted on a scheduled payment of
18 10 million every six months consistent with previous
19 agreements. They also said we could not borrow more than
20 50 million all with the knowledge that we were going to be
21 fined. And partly because of that, we couldn't borrow more
22 than 50 million. We are already up to that. And the Techpack
23 argument is a red herring. We can't sell Techpack under
24 this --

25 **THE COURT:** I'm going to a different place, Counsel.

1 Normally a lender isn't going to lend or refinance millions of
2 dollars without doing due diligence, correct? And their due
3 diligence would have obviously taken into account the
4 possibility of a fine of a up to a hundred million dollars.

5 They must have concluded there was enough -- in some
6 worlds you call it debt-to-value ratio or whatever it is --
7 ratios and cash flow analysis that they were comfortable enough
8 to make the refinance loan taking into account the real
9 possibility of a hundred million dollar fine. Doesn't that
10 suggest an independent third party thought this was doable?

11 **MR. LYNCH:** No, because there is a very important
12 distinction. There is a parent guarantee paid for -- we had to
13 pay for that. We had to go to our parent -- or at least,
14 I believe, Don Juan Enterprise -- and say to them, We can't get
15 a loan unless you guarantee it. And in exchange for that we
16 had to pay them for that -- for that -- the right to get that
17 guarantee.

18 So I think that suggests -- the fact that we needed a
19 guarantee suggests our financial fragility because we needed
20 that. And we negotiated an arm's length -- as we would -- even
21 though it was our parent, it was an arm's length negotiation.
22 And that -- the terms of that have been audited and found to be
23 fair market value.

24 So that's what -- I mean, that suggests the opposite which
25 is, you know, when you make a loan for a house, I mean, you

1 don't always get a guarantee. You only need a guarantee if
2 somehow there is a question as to your credit worthiness.

3 **THE COURT:** Well, let me turn it back to you,
4 Mr. Mast. If the fact that a guarantee -- if this is
5 accurate -- was required and had to be paid for, which means
6 Starkist couldn't get it on its own with the hundred million
7 dollar potential fine, doesn't that --

8 **MR. MAST:** First of all, Your Honor, Don Juan has
9 historically, as long as we are aware of, always guaranteed
10 Starkist debt. In an earlier loan agreement -- my colleague is
11 showing me -- from April 2016, Starkist's loan was guaranteed
12 by Don Juan Enterprises. It did not have the prospects of the
13 criminal fine at that point.

14 That loan agreement, likewise, contained the boiler plate
15 language of a \$50 million limitation on additional financing.
16 It was limited to \$50 million in that loan agreement. It was
17 able to refinance again and again as Counsel has stated every
18 three years.

19 Moreover, as Your Honor alluded to, the lender being aware
20 is a third party -- a neutral third party -- assessing
21 financial of Starkist. Don Juan was well aware of Starkist's
22 financial situation and signed up to guarantee a loan based on
23 the information. I mean, of all parties that would have an
24 insight into Starkist finances, Don Juan perhaps is the closest
25 insight. And, nevertheless, Don Juan agreed to guarantee the

1 debt on the terms that were set forth. Don Juan is a signatory
2 on the guarantee page. It understood the liability that
3 Starkist was facing and pledged to guarantee the loan.

4 **MR. LYNCH:** Your Honor, the existence of a guarantee
5 three years ago just again underscores that this is a
6 challenging market; that over 30 years has seen declines in
7 consumption. It means that Starkist not only needed a
8 guarantee in 2018. They needed it in 2016 and possibly before.
9 All of that suggests the weak financial state of the company
10 and the fact that it does need a guarantee; needs to pay for
11 it. It actually infers the absolute opposite point that the
12 Government is trying to make.

13 **THE COURT:** All right. Let's go back. Let me go -- I
14 interrupted you, so go on and make the rest of your points.

15 **MR. MAST:** Your Honor, the notion that Starkist can't
16 borrow additional money is completely unsupported by any
17 factual support. Bumblebee became forward and said, Here is a
18 loan we tried to obtain. We couldn't do it. And that's --
19 that is before Your Honor in the sentencing paperwork.

20 Starkist, in contrast to Bumblebee, has historic low
21 levels of debt right now. \$290 million in 2011. And it was
22 functioning, paying down its debts, growing at the rates
23 Your Honor has seen. And at the end of the projection period,
24 in 2024, Starkist asserts it is going to have \$50 million in
25 debt. If it just maintained its current level of debt, at

1 150 million, there is your -- there is your criminal fine.

2 And looking at these numbers, Techpack -- an asset that
3 wasn't even considered by Starkist's expert -- and the future
4 cash flow with the dismal CAGRs, that is more than enough money
5 to pay the criminal fine and any civil settlements, even by
6 Starkist's own projections. So, yes, there is a dispute about
7 expert -- dispute about CAGRs. There is a dispute about civil
8 settlement, and Starkist CAGRs -- the Government contends --
9 are out of step with industry reports. They are out of step
10 with Starkist's own business decisions. Until two weeks ago
11 Starkist was expanding its capacity stating -- it stated it
12 needed to expand its capacity.

13 But the bottom line is there is not a dispute right now
14 pertaining to the ultimate issue, an issue that Your Honor
15 would need to hear testimony from experts, from each side who
16 are going to parrot what their report says. Your Honor can
17 conclude beyond doubt that Starkist hasn't met its burden. It
18 is Starkist's burden to establish an inability to pay; and
19 without showing that it sought and tried to obtain refinancing,
20 without showing that it sought to liquidate Techpack, it can't
21 meet its burden. It hasn't met its burden and it can't meet
22 its burden.

23 And it has had ample opportunity to do so. A long
24 pre-sentencing report, an extended briefing where the
25 Government, Starkist, the Plaintiffs, all submitted hundreds of

1 pages of briefing. And so there is not a need for delay in
2 this matter. And Starkist ultimately can pay and deserves a
3 \$100 million fine.

4 **THE COURT:** All right. So this boils down to you are
5 taking their own word at future cash flow and adding to that
6 Techpack?

7 **MR. MAST:** Correct.

8 **THE COURT:** And your response it is an illiquid asset?

9 **MR. LYNCH:** Correct. By contract we can't sell it
10 off. It's also --

11 **THE COURT:** Contract with the lenders?

12 **MR. LYNCH:** Correct.

13 **THE COURT:** Well, what effort have you made --
14 anything can be done by consent.

15 **MR. LYNCH:** Correct. Correct.

16 **THE COURT:** So --

17 **MR. LYNCH:** But --

18 **THE COURT:** What indication is there? I understand by
19 the letter of the agreement you need consent, but what
20 indication is there that there would not be consent?

21 **MR. LYNCH:** We have not explored the idea of selling
22 off our assets. The assets we own, we believe, are strategic
23 assets that support our business, similar to our factories,
24 similar to our office buildings. We think these are strategic
25 assets that were invested as part of the business. It is a

1 packaging company. We don't want to sell off our strategic
2 assets. In fact --

3 **THE COURT:** Well, I understand it is not ideal. There
4 is -- there are future economies perhaps to be gained,
5 et cetera, et cetera. But the question ultimately is whether
6 or not you have met the burden of proof to show that this
7 reduction -- preserving this asset, Techpack -- is necessary to
8 avoid substantially jeopardizing the continued viability of the
9 organization's existential investment or a preferred
10 investment.

11 **MR. LYNCH:** We think it is a strategic key asset.

12 **THE COURT:** But it is existential to the organization,
13 to Starkist?

14 **MR. LYNCH:** I will say this: I don't know what
15 "existential" means in this context; but I will say it was
16 sufficiently important enough that even before this
17 investigation started -- before any of this started, they
18 thought it was worthwhile as a business venture to invest in
19 it, and they made that decision.

20 Now, the question about liquidation beyond the limitations
21 by contract, who would buy this? This is most valuable to
22 Starkist. If we were to have to go out and sell it, it would
23 be a fire sale. We would lose substantial value. We don't
24 even know if there would be a willing buyer out there. It is
25 not the kind of asset you can easily sell or transfer.

1 And also I think -- I come back to disparate treatment
2 between us and Bumblebee. Bumblebee was not required to sell
3 off any of its assets. It wasn't -- it has all sorts of
4 businesses. It has currently a business in Canada that is
5 being considered for sale. It has an oyster business. It has
6 all sorts of -- sells more products than Starkist does, and it
7 was not forced to sell itself off to pay its fine. And we
8 don't think we should be forced to do so either.

9 **MR. MAST:** Your Honor, this is a criminal fine. It is
10 not a question of: We think we are more profitable if we
11 maintain Starkist. It is --

12 **THE COURT:** You mean Tech --

13 **MR. MAST:** I'm sorry, if we maintain Techpack. The
14 notion that Starkist hasn't explored this opportunity
15 underscores that it hasn't met its burden. And, frankly,
16 I believe Starkist could come up with more than sufficient
17 money to reach that number -- the future cash flow number and
18 its Techpack number -- by loaning additional money pursuant to
19 exceptions within the loan agreement. The idea that they can't
20 sell Techpack, it strikes me as odd because pursuant to their
21 own reports, this investment has appreciated some-odd
22 \$30 million from the time they bought it in 2014 --

23 **THE COURT:** Is that a book value or is that -- what is
24 that value?

25 **MR. LYNCH:** A book value.

1 **MR. MAST:** The book value, 155 million. What they
2 paid for was 122 million over two payments or 122 million
3 something.

4 **THE COURT:** How do you get the 155?

5 **MR. MAST:** The appreciation of the asset.

6 **MR. LYNCH:** That was through an audited assessment of
7 its value.

8 **THE COURT:** I see. And majority of Techpack is owned
9 by a Don Juan subsidiary?

10 **MR. LYNCH:** Don Juan Systems, which we purchase
11 packaging from.

12 **MR. MAST:** So Starkist can't have it both ways. They
13 can't say, Well, this asset is beyond sellable. It is not of
14 any value. We won't be able to find a buyer; but then at the
15 same time say, This is a really important strategic business
16 for our enterprise. It is one or the other.

17 **MR. LYNCH:** No, it is strategic to us --

18 **THE COURT:** Hold on. Let him finish.

19 **MR. MAST:** And it is just -- the notion that
20 Starkist's own expert just said, Well, I'm not going to count
21 this asset because I assume it is going to be transferred to a
22 parent company or a parent affiliate of the parent company,
23 is -- the notion that that would be beyond the reach of a
24 criminal fine is -- it would not be justice for that -- for
25 that to be able to stay on Starkist's books not affecting its

1 business, it doesn't sell. It makes glass vials, according to
2 the footnote in the expert report. It is not an essential
3 asset. It is disposable and should be used to pay Starkist's
4 criminal fine.

5 **MR. LYNCH:** Your Honor, just a couple -- if I could
6 respond very briefly.

7 Techpack is just not available. We can't sell it. This
8 155 is not there for us. If we sold it --

9 **THE COURT:** The burden of proof would be on you to
10 prove that fact.

11 **MR. LYNCH:** And we would present that -- we have
12 already established that we entered into a contract with our
13 lender that says we cannot do that.

14 **THE COURT:** Without consent.

15 **MR. LYNCH:** Without consent, correct.

16 So the other thing I would say, if you take that figure --
17 even taking their inflated figure of 171 --

18 **MR. MAST:** I'm sorry, Your Honor. That is your
19 figure.

20 **MR. LYNCH:** Yeah, I'm sorry.

21 **THE COURT:** I thought that was your figure.

22 **MR. LYNCH:** Inflated in terms of adding the fact that
23 we are not expanding on the American Samoa --

24 **THE COURT:** That decision has been made, yeah.

25 **MR. LYNCH:** You separate -- you take that figure and

1 you subtract our estimated minimum civil liability, which we
2 have in our papers; and you end up with a figure less than
3 \$50 million. And that doesn't even take into account the
4 Bumblebee cash cushion that Zuehls offered to Bumblebee and
5 that he has seemingly not offered to us.

6 Now, the Government raised Mr. Zuehls and suggests that he
7 is this unimpeachable expert. However, he has been hired by
8 the Government 40 times. He has never been in a situation
9 where there was a contested plea agreement or inability to pay
10 was contested and you had another expert on the other side
11 examining his analysis; poking holes in it. It has typically
12 been in plea agreements where the -- both parties agreed, much
13 like Bumblebee. So it was not -- people didn't look under the
14 hood.

15 Moreover, more recently Judge Donato criticizes his
16 analysis in the *Capacitors* case. And if their expert is so
17 unimpeachable, why did they hide his iterations for nearly six
18 months from us? We asked for them on more than one occasion.
19 We said, What is your underlying analysis?

20 We didn't ask once. We asked twice by letter. We asked
21 for his underlying analysis on Bumblebee because we said if you
22 use different growth figures for Bumblebee than you are for
23 Starkist, that would be subject to impeachment. And they
24 didn't give it to us. And they didn't give it to the probation
25 officer until 6:00 o'clock at night. 6:00 o'clock at night the

1 day that we filed our sentencing hearing they hand over these
2 iterations, and they misleadingly put in their brief, Oh, we
3 have handed these to the Government without disclosing to the
4 Court that they handed them after -- at the end of the day,
5 before we even had a chance to review them.

6 The Bumblebee stuff, we didn't even get the actually final
7 version until the day before our reply brief. So the notion
8 that this has been fully examined and fully litigated is not.
9 We recently just got new information from them. I think that
10 is entirely unfair.

11 Now, the Government also used the word "justice." And I
12 think that is an important word and a word that has to be
13 examined in terms of 3553. The Government is looking to
14 penalize Starkist with a \$100 million fine given its financial
15 difficulties.

16 The other parties in this case -- Chicken of the Sea, is
17 getting zero fine and no criminal prosecution of its
18 individuals. Bumblebee, which was engaged in this conspiracy
19 longer than us, is getting 25 million. Three of its executives
20 have been charged including the CEO who remained the CEO up
21 until the day he was indicted. That is in stark contrast to
22 our situation where the one person who has been charged in our
23 case was fired five and a half years ago, Steve Hodge.

24 I think it is simply not fair and not justice to penalize
25 us four times Bumblebee for the same conduct, which, in fact,

1 is narrower and less culpable conduct than Bumblebee. That is
2 simply not fair. And under 3553, the Court needs to examine
3 disparate treatment between similarly situated parties.

4 It is the Government who brought up the concept of
5 justice. I think justice supports the \$50 million fine and not
6 the higher fine.

7 **MR. MAST:** Your Honor, just a few points.

8 One, Dr. Zuehls has appeared at contested sentencings. I
9 don't have the case at my fingerprints right now.

10 Second, the plea agreement already contemplates the
11 factors set forth in 3553(a). The only issue for the Court is
12 whether Starkist has met its burden proving its inability to
13 pay. That's the only issue. And my point about justice is it
14 is not just for Starkist to be able to maintain a strategic
15 investment instead of paying for a criminal fine to address its
16 wrongdoing involving a multi-year conspiracy for which it was
17 an important part of. It was not a peripheral player.

18 **MR. LYNCH:** Your Honor, we have been going quite some
19 time. I would look to you, what you would like to cover in an
20 evidentiary hearing; but also just mindful of Mr. Soliai
21 traveling from American Samoa to be here.

22 **THE COURT:** I want to hear from him. So why don't you
23 bring him up.

24 **MR. LYNCH:** Okay.

25 Mr. Soliai.

1 **MR. SOLIAI:** Good afternoon, Your Honor.

2 **THE COURT:** Good afternoon.

3 **MR. SOLIAI:** My name is Archie Soliai. I'm the HR and
4 Government Relations Manager for Starkist Samoa. I have been
5 there since 2015. And my primary responsibility in that role
6 is the recruitment and development of employees for Starkist,
7 as well as an advocate for the best interests of the company to
8 local government officials.

9 I previously served as an elected official within the
10 American Samoa legislature and the House of Representatives,
11 and I also managed a beverage distributorship for almost 20
12 years.

13 I was born and raised in American Samoa, and I have lived
14 there all my life. Starkist first opened a cannery in American
15 Samoa in 1963, and for the past 56 years it has been a staple
16 of life on the island. Starkist is currently the largest
17 private employer with approximately 2,500 employees.

18 The American Samoa Department of Commerce estimates that
19 those 2,500 jobs have an employment multiplier between 1.7 to
20 2.0. This basically means that Starkist's presence on the
21 island generates an additional 1,800 to 2,500 additional jobs
22 in related and support industries. Starkist Samoa also
23 benefits island residents by contributing to lower fuel,
24 freight and electricity costs.

25 American Samoa is a small island, and the employment

1 situation is difficult particularly after the closure of the
2 only other tuna cannery in 2016, which resulted in the loss of
3 800 jobs. Recent information provided by the Department of
4 Commerce provides that the current unemployment rate is
5 approximately 22.7 percent.

6 If the Starkist cannery ceased operations in American
7 Samoa, their estimate is that it would result in the loss of
8 approximately 5,000 jobs, which would increase the unemployment
9 rate to 35.8 percent. The American Samoa Power Authority --
10 the semi-autonomous government utility that provides utility
11 services to the island -- estimates that electricity rates
12 would increase approximately 30 percent as a result of a
13 Starkist Samoa plant closure.

14 The Starkist Samoa cannery output attributes to
15 approximately 80 percent of the island's exports and 24 percent
16 of imports. The loss of these freight volumes would also
17 result in an estimated 30 to 40 percent increase in freight
18 costs. These increased costs would be particularly impactful
19 given the corresponding increase in unemployment.

20 A closure of the Starkist Samoa cannery would also
21 drastically decrease government revenues and ultimately require
22 additional federal resources to sustain the American Samoa
23 economy.

24 The statistics relating to Starkist Samoa's impact on the
25 island are clear, Your Honor; but as a lifelong resident of the

1 island, I'm here to tell you about the impact and important
2 role that Starkist plays on a personal level.

3 Losing a job in American Samoa is not like losing a job on
4 the mainland. Unlike the U.S., American Samoa has no
5 unemployment compensation benefits to extend in hard times, nor
6 does it have monetary policy or the fiscal capabilities to
7 cushion such economic shocks. The continued viability of
8 Starkist Samoa operations in American Samoa is a necessity for
9 the livelihoods of thousands of people.

10 As the sole remaining tuna cannery and largest private
11 sector employer on the island, a plant closure or even a
12 reduction in operations, Your Honor, would undoubtedly be an
13 economic, political and social nightmare.

14 When Chicken of the Sea closed its operations in 2009, the
15 island lost close to 2,000 jobs, jobs that it never got back.
16 If these current Starkist Samoa employees were to lose their
17 jobs, they would be thrust into an economy with 30 percent
18 unemployment. They would struggle to find another job. At the
19 same time they would be faced with increased electricity, fuel,
20 freight costs, each of which has a huge impact on everyday
21 life. But for the 2,500 employees of Starkist Samoa that I'm
22 responsible for, a plant closure would change their lives
23 forever.

24 Your Honor, American Samoa is a small island with a
25 population of less than 60,000. I respectfully present this

1 statement on behalf of the thousands of people that benefit,
2 both directly and indirectly, from Starkist having its facility
3 on that island.

4 Further, I'm hopeful that the information provided in the
5 statement could provide some mitigation in your decision in
6 this matter. I thank you for the time, and I thank you for
7 allowing me the opportunity to address this Honorable Court.

8 **THE COURT:** All right. Thank you for your statement.
9 I appreciate that.

10 **MR. MAST:** Your Honor, if I might briefly respond.

11 **THE COURT:** Yep.

12 **MR. MAST:** Starkist has not come close to
13 demonstrating that the facility in American Samoa is going to
14 close as a result of a fine of either 50 million or 100 million
15 as a result of any of its civil damages exposure. That hasn't
16 been presented during any portion of the pre-sentence
17 investigation process.

18 Moreover, pursuant to the terms of the plea agreement --
19 the 11C1(c) plea agreement -- Starkist has already agreed that
20 the plea agreement, the terms satisfy the factors set forth in
21 3553(a). That information is frankly not relevant to
22 Your Honor's consideration. Your Honor's sole issue to address
23 is whether or not Starkist has the ability to pay its fine, and
24 it has not met its burden. That's all.

25 **THE COURT:** All right. Let me ask you: I had

1 initially indicated, because of the competing experts the
2 potential value of an evidentiary hearing. Now, the closing
3 presentation of Mr. Mast on behalf of the Government says that
4 even if we ignore -- essentially ignore Dr. Zuehls' competing
5 analysis and the fight over the CAGR and its accepting
6 Dr. Gokhale --

7 **MR. LYNCH:** Mr. Gokhale.

8 **THE COURT:** He is not a doctor -- Mr. Gokhale's future
9 cash analysis -- assuming that a decision has been made at
10 least for now not to build the new facility, which I'm sure is
11 a disappointment to the folks in Samoa, American Samoa -- it
12 boils down to this question of the Techpack, an asset which it
13 appeared that the Government thought, and I thought, did not
14 exist because the representation was that it had been
15 transferred out of the hands -- with or without compensation,
16 et cetera, et cetera -- to either the parent or subsidiary of
17 the parent; and now it has been represented and accepted as
18 true that it remains to be an asset and a valuable asset,
19 valued most recently at 155 million.

20 And so it does boil down to the question of whether or not
21 that asset, which kind of takes the expert dispute out of play,
22 with respect to all the things we have been talking about,
23 gross margins, projections, whether we use the global numbers,
24 whether we use Nielsen, et cetera, et cetera, because we are
25 taking Mr. Gokhale's number as given. How do we treat that?

1 And it does seem to me that ultimately the burden of proof
2 to seek the sort of discount in the otherwise available fine --
3 stipulated fine, by preponderance of the evidence is on
4 Starkist.

5 And the question of its desirability, I think the burden
6 would be to prove, number one, that sale of that asset, removal
7 of that asset, if feasible, would so jeopardize the continued
8 viability of Starkist that it could not be contemplated under
9 Section 8C3.3(b).

10 If it is not -- and I use the word "existential" in that
11 sense that trying to equate that with the 3.3(b) language, that
12 without it, Starkist would not have continued viability as an
13 economic organization -- I don't think that burden has been
14 met. Everything I have seen is that this is a desirable, a
15 smart, perhaps, and a good investment, but not one that is
16 essential to the continued existence of Starkist.

17 Then it also raised the question, can it be liquidated?
18 If it can't be liquidated, we can't count that as an asset.
19 And the arguments I've heard -- the one piece of evidence I
20 have heard in that regard has to do with the loan agreement
21 that prohibits its sale because it exceeds what the threshold
22 of 30 million -- was that the number of --

23 **MR. LYNCH:** Correct.

24 **THE COURT:** -- anything over 30 million cannot be sold
25 without the consent of the lender?

1 **MR. LYNCH:** Right.

2 **THE COURT:** But that means consent with the lender,
3 and plus given the fact that this loan is guaranteed by the
4 parent, the burden of proof would be on Starkist to demonstrate
5 that that consent could not be obtained. And given the fact
6 that this is a guaranteed loan -- loan -- guaranteed by the
7 parent, I don't see any evidence in that regard.

8 There is a question of, you know, who would buy it,
9 whether it is viable or not. But, again, I don't see any
10 evidence that a sale could not be had, even if, at this
11 advantageous terms, we will use -- call it a fire sale -- if it
12 could still fetch even a portion, half of what its value is,
13 there would be enough cash flow combined with the future cash
14 flows that have been projected by Mr. Gokhale to cover both the
15 maximum fine and the projected -- and hopefully accurate --
16 maximums with respect to the civil damages payout.

17 So I'm having trouble seeing how the Defendant has met its
18 burden of proof with respect to Techpack, to show that either
19 its simply not salable or not salable for even a fraction of
20 its value but enough to produce enough cash flow, that the bank
21 would -- it would be impossible to get the loan. So if that's
22 the case, I don't think Starkist has met its burden even
23 putting aside Mr. Zuehls' report.

24 **MR. LYNCH:** So just a couple comments on that. What
25 is the current evidence before the Court regarding Techpack?

1 It is that we have a contractual obligation not to sell it.
2 That is the current state. The Court posits -- I don't want to
3 say speculation, but the possibility that maybe we could get
4 approval. As the evidence and the record stands today, we have
5 a binding contract with our lenders that we cannot sell it.
6 And if we sell it -- it is not that we get the money. If we
7 sell it, the money, according to the terms of the contract, go
8 to pay off the loan. So it is effectively going to pay the
9 bankers. It's not like it's going to go to our pockets.

10 We have a \$150 million loan from the bank. Under the
11 terms, if we make asset sales over 30 million, we don't get to
12 keep it. It goes to pay the loan. Then we have no future
13 loan. We don't have Techpack. And we are still back to this
14 free cash flow issue and whether or not we, in the future, will
15 have money to pay our substantial civil liability and also a
16 criminal fine in the amount that the Government wants.

17 **THE COURT:** What is the amount of the current loan?

18 **MR. LYNCH:** \$150 million. That was renegotiated in
19 October. Moreover, if we default on the loan -- and that would
20 be a form of default --

21 **THE COURT:** If consent is not obtained?

22 **MR. LYNCH:** Correct. But that is total speculation at
23 this point. Under the terms of the loan, the way it works is
24 if you sell assets larger, the proceeds immediately go to
25 prepay it.

1 **THE COURT:** All right. What about that point?

2 **MR. MAST:** Your Honor, the fact that the loan
3 agreement by written consent permits the parties to waive --
4 the borrowing parties to waive these covenants and the lender
5 to waive these covenants, and the fact that Starkist has not
6 even attempted to address that issue, means it hasn't met its
7 burden. Starkist -- a lender considering Starkist's overall
8 financial picture, aware of Starkist's finances and aware of
9 the prospect of a government fine set forth a loan agreement in
10 which they refinance Starkist's debt and loaned \$150 million to
11 Starkist.

12 Techpack, they paid \$122 million for that. The notion
13 that Techpack could turn around and sell that at an increased
14 value -- or even be compensated for what it paid -- would
15 probably please the lenders because it would be financially
16 stronger. It would have cash in the place of about a
17 \$155 million asset.

18 **THE COURT:** So the question is whether they would
19 exercise the right to demand the proceeds go to the bank, and
20 whether or not they would waive that, just as whether or not
21 they would waive the ability to even sell that asset.

22 **MR. MAST:** Right. Or whether or not Starkist can
23 refinance its debt with its existing lender or another
24 lender --

25 **THE COURT:** Well, that is a third possibility, that --

1 recalled at that point, that there could be a further
2 refinance.

3 **MR. MAST:** It could be a further refinance. And I
4 remind you --

5 **THE COURT:** So the question is -- I know the response
6 is this is speculative. This is -- we don't know. We have the
7 letter of the agreement; yet you have the burden of proof by
8 preponderance of the evidence that this can't happen.

9 **MR. LYNCH:** We have an existing contract that says it
10 can't happen. What more could we show to show that?

11 **THE COURT:** Well, you can show that in the past any
12 effort to do something like that has been met with resistance
13 by the lender; that it is a practice in the industry to
14 accelerate and to apply this to the principle and not allow
15 refinance, that refinance is not possible in this market for
16 one reason or another given the situation, if this lender
17 decided not to waive that covenant --

18 **MR. LYNCH:** So, Your Honor, on that --

19 **THE COURT:** And when there is a parent guarantee,
20 which seems like a very significant fact out there.

21 **MR. LYNCH:** So on that point, again, we have the
22 burden. The burden is preponderance of the evidence. An
23 actual contract that says we can't do that, I believe, meets
24 that burden, which then switches it to the Government. The
25 Government is literally grasping at straws. They are

1 completely speculating as to whether or not we can settle it,
2 whether we can go back to the banks to renegotiate, whether we
3 can get another guarantee.

4 If we were to somehow take action that triggered the
5 repayment of the loan that would be considered as default, it
6 would make it extraordinarily difficult to borrow money again.
7 We would be viewed as very -- poor credit risk for anyone, even
8 our own parent in the future.

9 I will refer the Court to -- the declaration of Niall
10 Lynch in support of Starkist's Company's response to United
11 States sentencing memorandum. We have the actual loan
12 agreement attached as Exhibit 7, and it is paragraph 13.11,
13 restriction on sale or disposition of assets. I would also say
14 that the Government's record -- and in this regard it is Dale
15 Zuehls, their own expert -- says we have no disposable assets
16 that are not --

17 **THE COURT:** That's because he thought that the asset
18 had been disposed of already.

19 **MR. LYNCH:** Well, it is what they said, in terms of
20 meeting the burden --

21 **THE COURT:** Well, that's not --

22 **MR. LYNCH:** But I would say we stand on the terms of a
23 contract that says we can't do that. And we believe that --

24 **THE COURT:** If we were to have an evidentiary hearing
25 on, let's say, this question, what else could you produce,

1 besides -- anything else you can produce besides contract?

2 **MR. LYNCH:** Well, I guess the Techpack issue is taken
3 outside, like influence on this discussion; and we would want
4 further briefing to it -- to identify it. But we would want to
5 be able to explore this issue; have, you know, one of our
6 witnesses that we were proposing as the CEO who could testify
7 as to the viability of this.

8 I never -- certainly -- the only thing I have heard from
9 the company with regard to the lenders is that they have
10 recently raised suspicions and questions about whether or not
11 we are going to go bankrupt, and they want to ensure that
12 their -- that their assets are preserved and that their loan
13 will be paid back. So we might have people who negotiate the
14 deal, who made the loan. They would be able to articulate, and
15 possibly others who could shed light on --

16 **THE COURT:** Who speaks for the lender?

17 **MR. LYNCH:** I don't know. I mean, we could explore
18 that. The lender is -- it is a consortium of banks, but the
19 main lender is KEB Hana Bank, and they act on behalf of a
20 series of banks that join together to make the loan. So it is
21 a series of financial institutions that are listed in the loan
22 agreement.

23 **MR. MAST:** Your Honor, just to note, the contract
24 before the Court -- the evidence before the Court, is the
25 entirety of the loan agreement. It is not simply the

1 restriction of the sale of assets. It is all the exceptions
2 that come along with that. And Starkist has failed to even
3 attempt to meet those exceptions.

4 I will note that 13 --

5 **THE COURT:** What exceptions are there that doesn't
6 require consent to the lender?

7 **MR. MAST:** So with respect to debt financing, there
8 are relevant exceptions, which are that Starkist can borrow in
9 excess of \$50 million beyond the restriction from its parent
10 company; and it can borrow any amount so long as that debt is
11 subsidiary to the existing financing. So that's one exception.

12 They can go to Don Juan Industries and say, We are in a
13 jam. We need beyond \$50 million. They haven't indicated that
14 they have attempted to do that.

15 They could refinance the entirety of their debt and
16 essentially tear up the loan covenant --

17 **THE COURT:** But that is not an exception. That is not
18 a -- there is nothing --

19 **MR. MAST:** Well, in the loan agreement it is listed
20 that if they pay down the additional debt, the \$150 million,
21 they are relieved from the covenants. It is not complicated
22 and there may be minor repayment penalties; but they can pay
23 down the existing debt, 150 million, by borrowing 160 million
24 or 170 million from the bank.

25 **THE COURT:** All right. So your answer is -- it is not

1 that they can take unilateral action under the loan agreement
2 absent consent to try to get value out of Techpack. Your -- I
3 think your ultimate response is that one of the exceptions is
4 that they could borrow from the parent?

5 **MR. MAST:** They can borrow from the parent or they can
6 borrow from another bank.

7 **THE COURT:** So you would argue that it would be their
8 burden to show that a bridge loan or some other kind of loan
9 would not be available from the parent should this not work out
10 with the lenders?

11 **MR. LYNCH:** Your Honor --

12 **THE COURT:** Hold on.

13 **MR. MAST:** Frankly, the sale of assets requires the
14 majority of lenders. It doesn't require all of them. So that
15 is notable. There are multiple lenders, and it doesn't require
16 an absolute unanimous consent.

17 But my point more broadly about the loan agreement is that
18 given Starkist's financial situation -- and as outlined --
19 again, more of Starkist's numbers in Robert Daine's reports --
20 Professor Daines -- Starkist has historically low levels of
21 debt. And the notion that it has \$290 million of debt and
22 lenders weren't knocking on the door demanding payment or
23 checking in on Starkist in 2011, but now that they are down to
24 150 million, they can't obtain additional money, just based on
25 the assertion that, Oh, our loan agreement says we can't do it

1 even though the loan agreement from 2016 said they couldn't do
2 it.

3 But, then, again, in 2018, they refinanced the entirety of
4 that debt, and they could do that with Hana Bank or they could
5 do that with another bank. Frankly, to meet their burden,
6 coming back with one letter from a bank saying we have decided
7 not to refinance your loan or provide this refinancing would be
8 insufficient because there are perhaps dozens of lenders
9 available, and Starkist hasn't shown that it has contacted a
10 single one of them.

11 And the issue of Starkist's ability to borrow money has
12 been litigated and discussed from the outset of this.
13 Probation sent requests to Starkist saying, Why can't
14 Starkist's debt finance its capital expenditures.

15 **MR. LYNCH:** Your Honor, just a couple --

16 **THE COURT:** Yep.

17 **MR. LYNCH:** I know we have been going a long time.

18 We can't borrow more money than we have already borrowed.
19 We have \$50 million in the loan. We have already borrowed
20 that. DJI, Don Juan Industries, is our parent. They are a
21 publicly traded company. They can't willy-nilly just offer us
22 and lend us more money. They have shareholders that they have
23 a fiduciary right to.

24 I can tell you this: Don Juan Industries has not offered
25 to make any payments of our loans; has not offered to pay this

1 fine; has not made any kinds of offers of that nature. And
2 also I think it really comes down to an issue of fundamental
3 fairness.

4 Bumblebee is owned by an incredibly wealthy private equity
5 firm with over \$5 billion worth of assets. There was no
6 inquiry there with regard to whether or not Lion Capital would
7 lend Bumblebee money to pay the fine or whether they would bail
8 them out.

9 And simply in terms of fair and disparate treatment, we
10 should be treated the same. And, in fact, the Government went
11 out of its way in its Bumblebee analysis to say that only the
12 financial condition of Bumblebee should be examined and not
13 Lion Capital. So I think, again, just a simple sense of
14 fairness that we be treated the same way that the other
15 defendants that have been presented to you before in this very
16 same case, that the same rules apply. And I think in that
17 regard you have to show that these speculative other sort of
18 solutions aren't realistic. They are not fair. And they are
19 not sort of burdens that were imposed upon Bumblebee when they
20 were given their \$25 million fine, even though they were
21 involved in the conspiracy longer than us, even though more of
22 their individuals were involved, and their existing CEO is
23 currently facing trial and stayed at the company until the day
24 of indictment.

25 **MR. MAST:** First, a couple of points, Your Honor.

1 Again, going back to Bumblebee. Bumblebee wasn't fined
2 25 million. It was fined 81 million if a prerequisite sale
3 happened. And that took into account Bumblebee's ability to
4 pay. So the comparison between Bumblebee and Starkist is
5 inept.

6 But -- Bumblebee's parent did not guarantee Bumblebee's
7 loan. And what is more, Bumblebee's loan was obtained far in
8 advance of the investigation. Starkist's loan was obtained
9 after signing the plea agreement. Its parent went into this
10 with open eyes. Its lenders went into this with open eyes.
11 For Starkist to say, Well, just based on the contract, we can't
12 obtain any of these exceptions -- the numerous exceptions
13 listed in the loan agreement to obtain additional financing or
14 to sell off assets in excess of 30 million -- it is just
15 insufficient to meet its burden. And it has had ample
16 opportunity to do so.

17 **THE COURT:** All right. Any reason why sentence should
18 not be imposed?

19 **MR. LYNCH:** Well, Your Honor, I guess two reasons.
20 One is this issue -- this speculative issue with regard to
21 Techpack and what we could do and couldn't do as somehow
22 carrying seemingly sufficient weight with the Court that would
23 consider ignoring the plain language of the contract that we
24 think is not appropriate. We think the plain language of the
25 contract which prohibits that meets the burden of

1 preponderance.

2 If the Court is to pursue sentencing at this point, then
3 we would, again, request allocution from our CEO and General
4 Counsel who are here as well. We anticipated there may have
5 been an evidentiary hearing and we have more opportunity.

6 Again, I guess we would want to address this issue of
7 Techpack since it has turned out to be a significant issue for
8 you and explore some of the other areas that you have questions
9 on.

10 **THE COURT:** Okay. So that is a fair question because
11 now the issue of Techpack has become front and center, which I
12 didn't expect. I don't know if you expected it, Mr. Mast, as
13 we came into this hearing. It may be that the Techpack
14 question renders moot the dispute over CAGR and the dispute
15 between the two experts or it may not.

16 Although, as I sit here right now, it is hard for me --
17 based on this record, I don't think much has been shown to show
18 that Techpack could not be used to finance cash flow necessary
19 to meet the obligations of both the civil litigants, the
20 victims, which I, again, emphasize as a priority in this
21 matter, as well as the Government's fine.

22 However, because this has emerged in the context of this
23 hearing and in the interest of having full information, I'm
24 going to give the first -- a chance for the parties to further
25 brief this specific issue about -- I don't need re-briefing on

1 everything else. The question about whether or not the value
2 of Techpack can be factored in, in terms of ability to pay, now
3 that we understand that it has been valued at 155 million, that
4 it is in -- that ownership interest still resides with
5 Starkist.

6 And keeping in mind that the burden of proof is on the
7 Defendant to show inability to pay, and unless I'm convinced
8 that Starkist has met that burden with respect to, number one,
9 the feasibility of selling; number two, the ability to be able
10 to do that and not trigger the loan consequences that cannot be
11 addressed by other means -- which would include getting consent
12 from the lender, getting -- refinance is a possibility, getting
13 a loan from the parent. And that's where there is a difference
14 here because, from Bumblebee, I don't think it is disparate to
15 consider the parent's loan because the parent in this case
16 guaranteed the loan.

17 **MR. LYNCH:** Well, on that point the parent is Don Juan
18 Industries, a publicly traded company. They didn't guarantee
19 the loan. Don Juan Enterprise, another entity, did.

20 **THE COURT:** All right. Well, whatever that entity is,
21 that's --

22 **MR. LYNCH:** Yeah.

23 **THE COURT:** There is involvement of that entity.

24 So I would have to be convinced that you have shown by a
25 preponderance of the evidence that this asset cannot be

1 deployed. You do have the contract provision but there are
2 exceptions. There are alternatives. There is consent factor.

3 And, again, I would love to -- as the Government seems to
4 allude to, both the context and the history of lending, the
5 history of the relationship with the lender that I would
6 consider with respect to the credibility of any assertion that
7 it can't be done. But I need -- I think it is fair to give you
8 a chance to respond, and then give you a chance to respond.

9 And if I feel at that point I need to hear witnesses, I
10 will schedule an evidentiary hearing. If I do that, I may or
11 may not decide -- well, just in case maybe we ought to hear
12 from Mr. Gokhale and Mr. Zuehls because if we get to that
13 point, I do have some questions.

14 I still have questions about the assumption that there is
15 not going to be any growth when I see from Mr. Gokhale's own
16 chart growth at least with respect to gross operating profit.
17 I know that is different from net operating income and cash
18 flow, but that is a pretty good indicator. It's a better
19 indicator than just dead-on sales and number of units. And I
20 calculate just roughly from 2014 to 2018 about a 2.678 percent
21 annualized increase. I didn't count on it or anything, but
22 just roughly.

23 If you go back to -- that's from 2014. If you go back to
24 2013, it is even higher because the starting point in 2013 was
25 even lower, and it looks like about a 4 percent -- just roughly

1 speaking, but whatever it is, it is far in excess of .1
2 percent. So I would have to have some understanding as to why
3 I shouldn't take a hard look at that.

4 So there are several branches here. We may not get to
5 that because if I'm convinced -- as the Government argues --
6 that Techpack is a liquidable asset, even at a discount -- as I
7 say, even at a fire sale -- there seems to be a lot of value
8 there.

9 So how long do you need to put together a supplemental
10 brief and any exhibits that you need to --

11 **MR. LYNCH:** How about -- are you anticipating single
12 briefs from both sides?

13 **THE COURT:** A brief from you and a brief from the
14 Government.

15 **MR. LYNCH:** Okay.

16 **MR. MAST:** And, Your Honor, I just want to make sure
17 the record is clear that the Government does disagree with
18 Dr. --

19 **THE COURT:** I know. That's why -- even if I resolve
20 the Techpack question in Starkist's favor, that doesn't end the
21 inquiry. Then we get to what I thought we were going to talk
22 about here. That's why I reserved the authority and the
23 ability to call an evidentiary and have both experts come.

24 **MR. LYNCH:** So, Your Honor, because it contemplates
25 interacting with other people who aren't here, I would propose

1 our brief due in three weeks. Is that fine?

2 **THE COURT:** Okay.

3 And then you need two weeks after that, or what do you
4 need?

5 **MR. MAST:** Two weeks would be fine, Your Honor.

6 **THE COURT:** All right. Then why don't we schedule
7 something to come back here in seven or eight weeks from now.
8 Where does that put us?

9 End of July or early August.

10 **THE CLERK:** July 31st.

11 **THE COURT:** That looks like a bad calendar. What does
12 the August one look like? August 7?

13 **THE CLERK:** August 7.

14 **THE COURT:** Looks better.

15 **THE CLERK:** Much better.

16 **THE COURT:** All right. We will set the matter for
17 August 7th -- at?

18 **THE CLERK:** 10:00 a.m.

19 **THE COURT:** We will do it in the morning, at
20 10:00 a.m.

21 If I decide I need an evidentiary hearing, I will let you
22 know and we may change the date and figure out a date when we
23 can set aside, I would assume, about a day to hear witnesses,
24 but I won't know yet whether that's necessary.

25 **MR. MAST:** Your Honor, one point on -- if the Court is

1 inclined to open it up to a broader evidentiary hearing, the
2 Government -- in addition to the witnesses proffered or
3 tendered by Starkist, the Government has a few ideas of
4 witnesses who we would like to call in that instance.
5 Specifically the Government would like to call a bankruptcy
6 expert to respond to Kenneth Klee's report, which was submitted
7 not to probation but in Starkist's sentencing paperwork.

8 **THE COURT:** I actually -- I'm less interested in that.
9 I understand the dispute about that. What I'm most interested
10 in -- if we get into it -- are the projections. The thing that
11 is driving this thing is the projections of future cash flows,
12 and I understand the eventuality and the risk of bankruptcy and
13 the risk of not bankruptcy. I'm not -- I don't need to get
14 into that. I don't feel that I need to at this point.

15 I'm interested in the generation of these tables and these
16 projections. And, frankly, it would be useful to have the same
17 set of variables tweaked and each expert kind of look at it
18 because I don't know what the assumptions have been with
19 regards to profit margins, gross profit. I know there are
20 certain assumptions about CAGR.

21 So we just lost our mic system here. It will come back
22 on. It is a 6:00 o'clock reminder, which means we have to end.

23 I will specify in my order -- if I do want an evidentiary
24 hearing -- what it is I want to focus on. What would be most
25 useful to me, if we get into it, is to see these competing

1 projections and models because, frankly, the way it has been
2 presented, there is a lot of narrative; and the tables are a
3 bit opaque to me. But I want to see where it comes out.

4 So I want to ask the question, for instance, Mr. Gokhale
5 instead of .1, we have .5 or 1 percent instead of 171, what are
6 we looking at? Does it make a 20 million difference?

7 **MR. LYNCH:** Yeah, we can do that obviously.

8 **THE COURT:** That would be useful to know.

9 **MR. MAST:** Sure.

10 And I guess it may be that Your Honor is not interested,
11 but Mr. Ingu Park is the president of Don Juan Enterprises as
12 well as Starkist's loan signatory on the Starkist loan
13 guarantee. He also signed the plea agreement and is a member
14 of Starkist's board of directors. If we are not talking about
15 financing and obtaining refinancing and loans, perhaps he is
16 not a necessary witness.

17 However, if those issues are -- remain an area of concern
18 after this briefing schedule, the Government would potentially
19 want to call --

20 **THE COURT:** It might. It might. I mean, if we get
21 into an evidentiary hearing that I feel is necessary on the
22 question of whether Starkist has met its burden of proof on the
23 viability or not of Techpack value being factored into the cash
24 flow, that may -- those kind of witnesses -- in fact, it is
25 probably those kind of witnesses as opposed to expert

1 witnesses, I would think, that might be particularly useful.

2 **MR. LYNCH:** Well, this is the first time the
3 Government -- we have been very transparent on who we would
4 present. This is the first time we have heard --

5 **THE COURT:** This is a whole new --

6 **MR. MAST:** We are proposing an evidentiary hearing.

7 **MR. LYNCH:** But I do -- just with regards to Mr. Park,
8 he is an elderly businessman who lives in Korea. I don't know
9 that he would be directly relevant, but this is the first we
10 have ever heard about this.

11 **THE COURT:** Well, we may have to have another
12 pre-hearing hearing if we were going to go that way and talk
13 about -- on the question of Techpack, after I see the briefing,
14 what it is that is going to be particularly relevant and which
15 witnesses may be useful to have in that regard. But those are
16 the issues, as I see it, in terms of the feasibility of looking
17 to Techpack as a source of cash flow -- that is the bottom
18 line -- in light of the loan agreement, but in light of the
19 potential alternative available. That is the question.

20 **MR. MAST:** Understood, Your Honor.

21 **MR. LYNCH:** Thank you, Your Honor. And thank you for
22 your time today.

23 **THE COURT:** Thank you. This is very interesting, to
24 say the least.

25 Thank you. I appreciate both the victims' representatives

1 as well as the representative of the company and Mr. Solaia
2 coming all the way out from American Samoa. And I heard and
3 fully understood what you said. And obviously that's why the
4 statute gives the Court discretion not to impose a fine that it
5 threatens the viability of the company. So obviously I have
6 that in mind and understand that. So I appreciate that.

7 **MR. MAST:** Thank you, Your Honor.

8 **MR. LYNCH:** Thank you, Your Honor.

9 (Proceedings adjourned at 6:07 p.m.)

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13 **CERTIFICATE OF REPORTER**

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled matter.

16
17 DATE: Monday, June 17, 2019

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21 

22 Marla F. Knox, RPR, CRR
23 U.S. Court Reporter
24
25