

1 LATHAM & WATKINS LLP
2 Niall E. Lynch (CA 157959)
3 Ashley M. Bauer (CA 231626)
4 505 Montgomery Street, Suite 2000
5 San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095
niall.lynch@lw.com
ashley.bauer@lw.com

6 Sean M. Berkowitz (*pro hac vice*)
7 330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611
8 Telephone: +1.312.876.7700
Facsimile: +1.312.993.9767
sean.berkowitz@lw.com

Counsel for Defendant StarKist Co.

(Additional counsel listed on signature page)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA,
17 Plaintiff,
18 v.
19 STARKIST CO.,
20 Defendant.

CASE NO. 18-CR-0513 EMC

JOINT STATEMENT REGARDING SENTENCING

Judge: Hon. Edward M. Chen
Date: September 11, 2019
Time: 10:00 a.m.
Courtroom: 5 – 17th Floor

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 **I. INTRODUCTION**

2 Pursuant to the Court’s order for the Parties to meet and confer with one another and with
 3 the Probation Office “to determine whether conditions of probation can be fashioned to impose a
 4 \$100M criminal fine while affording some relief if that fine impairs StarKist’s ability to pay
 5 restitution” (Criminal Minutes, Aug. 7, 2019, ECF No. 163), StarKist Co. (“StarKist”) and the
 6 Department of Justice (“DOJ” or “government”) met and conferred telephonically with each
 7 other and also communicated with the Probation Office. Because StarKist and DOJ could not
 8 reach an agreement, the Parties, along with the Probation Office, submit this joint statement with
 9 separate proposals for the Court’s consideration.

10 **II. STARKIST’S STATEMENT**

11 In response to the Court’s concerns regarding StarKist’s ability to pay restitution to civil
 12 plaintiffs and its investment in Techpack Solutions Co., Ltd. (“Techpack”), StarKist proposed an
 13 alternative fining structure to DOJ. StarKist’s proposal would provide a “safety valve” that
 14 allows StarKist the flexibility it needs to pay restitution in the remaining civil cases, while still
 15 protecting DOJ’s ability to obtain a \$100 million fine if StarKist’s predictions regarding its
 16 ability to pay a criminal fine of more than \$50 million do not come to fruition. StarKist’s
 17 proposal accounts for the uncertainty regarding both civil liability and a potential sale of
 18 Techpack and is designed to satisfy the Court’s objectives. StarKist also proposed a payment
 19 schedule that would allow StarKist to pay the majority of its immediate free cash flow to civil
 20 plaintiffs with graduated fine payments to DOJ payable without interest. DOJ summarily
 21 rejected StarKist’s proposals and did not even offer a counter proposal. Therefore, StarKist
 22 presents its proposals to the Court for consideration.

23 StarKist proposes that the Company pay a fine of \$100 million unless one (or both) of
 24 two conditions occur. *First*, if StarKist settles its remaining civil claims for [REDACTED] or more
 25 (*i.e.*, the cash it will have available for criminal and civil liability after subtracting the \$50
 26 million minimum DOJ fine and [REDACTED] in civil settlements paid to date from its [REDACTED]
 27 projected free cash flow), StarKist will pay a total fine of \$50 million because all of its free cash
 28 flow will have been used on restitution. If it settles the remaining civil cases for anywhere

1 between [REDACTED], StarKist will remit the remainder of the [REDACTED] to
2 DOJ, up to a total fine of \$100 million.¹ *Second*, if StarKist sells Techpack, it will pay the
3 remaining \$50 million criminal fine to DOJ, for a total fine of \$100 million.

4 StarKist has given thought to the Court’s question regarding whether the Court has the
5 power to issue an order that provides for a fine with such a safety valve. *See* Tr. of Proceedings
6 at 52–54, Aug. 7, 2019, ECF No. 164. StarKist concludes that a safety valve is appropriate only
7 if it is based on concrete events that would allow the Court to make a finding of StarKist’s
8 current and future ability to pay at the time of sentencing and would not force the Court to
9 reopen the ability-to-pay analysis at some point in the future. Once the Court imposes the fine,
10 neither StarKist nor the Court can initiate on their own a reduction of the fine amount by
11 engaging in a new ability-to-pay analysis down the line. That would be impermissible because
12 the Court must decide StarKist’s ability to pay at the time of sentencing. *See United States v.*
13 *Robinson*, 20 F.3d 1030, 1035 (9th Cir. 1994). But, StarKist’s proposed fining structure, which
14 is similar to the Bumble Bee structure that the Court imposed, complies with the law because it
15 would allow the Court to impose a fine now based on StarKist’s ability to pay with concrete
16 triggers for additional payments if specific conditions occur.

17 DOJ argues that no safety-valve is necessary and promises to petition the Court for a
18 reduction of the fine pursuant to 18 U.S.C. §3573 if, during the next five years, StarKist can
19 convince DOJ that it cannot pay the remaining amount due on the fine. But when pressed, DOJ
20 would not agree to any specific objective milestones, such as certain threshold civil liability
21 amounts or the sale of Techpack, as a basis upon which it would guarantee StarKist that it would
22 petition the Court to reevaluate the fine. Indeed, DOJ offers no guarantee that it will ask the
23 Court to reduce the fine under any specific conditions, which is tantamount to an empty promise.
24 At a minimum, even if the Court imposes a \$100 million fine with no safety valve, the Court
25 should require DOJ to make a motion for a reduction if StarKist's civil liability and free cash
26 flow projections turn out to be accurate.

¹ The formula for determining the reversion to DOJ is available free cash flow after paying existing civil settlements and \$50 million DOJ fine minus remaining settlement amounts (\$X) = additional fine (\$Y) to DOJ (or [REDACTED] - \$X = \$Y).

1 StarKist also asks that if the Court imposes a \$100 million fine, that the installment plan
 2 take into consideration StarKist's current financial condition and its need to fund civil
 3 settlements. DOJ has asked the Court to order StarKist to pay a \$100 million criminal fine in
 4 installments, with \$10 million due in 30 days (despite the fact that StarKist's recent cash balance
 5 has dropped below \$10 million) and five equal installments of \$18 million over the next five
 6 years. DOJ's proposal does not give StarKist the flexibility that it needs in order to focus on
 7 resolving the remaining civil cases. StarKist should prioritize civil restitution and should be able
 8 to use its immediate free cash to try to resolve the remaining civil cases expeditiously.
 9 Therefore, the criminal fine should be scheduled to pay the majority of the fine, without interest,
 10 in the last half of the five-year period so that StarKist both has an opportunity to resolve the civil
 11 cases and also, if necessary, can ask DOJ to reduce the fine if the Company's ability to pay
 12 projections come true. StarKist's proposal is similar in structure to the Bumble Bee fine which
 13 was also graduated, with higher payments due in later years.

14 In order to safeguard StarKist's ability to pay restitution to civil plaintiffs and allow
 15 StarKist to be competitive in the market, StarKist respectfully requests that the Court enter
 16 judgment on StarKist's proposal and impose no term of probation.

17 **A. StarKist's Proposal**

18 To address the Court's concerns regarding StarKist's ability to make restitution to civil
 19 plaintiffs, StarKist proposes the following fining structure that accounts for two key
 20 contingencies: civil liability and the potential sale of Techpack.

21 StarKist proposes the imposition of a fine of \$100 million, which may be reduced upon
 22 the occurrence of one (or both) of two separate concrete and objective events. However, under
 23 no circumstances will the fine be less than \$50 million.

24 *First*, StarKist will use all of its projected free cash flow over the next five years towards
 25 the payment of a criminal fine and civil liability. To the extent civil liability is more than the
 26 available free cash flow, then the criminal fine will be reduced below \$100 million. Starting
 27 with StarKist's estimated free cash flow of [REDACTED], StarKist first subtracts the [REDACTED]
 28 that has been used in 2019 to settle several Direct Action Plaintiff ("DAP") lawsuits. StarKist

1 then subtracts the minimum \$50 million criminal fine, which it has already agreed to and will
 2 pay over the next five years. This leaves StarKist with [REDACTED] to pay either a criminal fine
 3 or settlements with the three remaining class action plaintiff groups and four remaining DAPs.
 4 StarKist proposes a sliding-scale structure such that if StarKist settles with the remaining
 5 plaintiffs for less than [REDACTED], then StarKist will pay DOJ \$50 million in additional fines
 6 (\$[REDACTED]), resulting in a \$100 million
 7 criminal fine. If StarKist settles its remaining civil cases for [REDACTED] or higher, then all of
 8 StarKist's free cash flow will have been spent on civil restitution and StarKist would be unable
 9 to pay an additional criminal fine. If StarKist settles for anywhere between [REDACTED]
 10 [REDACTED], StarKist would remit any remainder to DOJ. In other words, if StarKist settles the
 11 remaining cases below its estimates, DOJ's fine will increase.

12 DOJ objects that StarKist's free cash flow projections are understated and, therefore, it
 13 cannot agree to any reduction of the fine based on free cash flow estimates. As StarKist has
 14 explained, StarKist believes its free cash flow is overstated, if anything, because it assumes that
 15 StarKist can continue growing despite the fact that it will soon reach its maximum capacity and
 16 may not be able to meet demand for pouches because it does not have the capital necessary to
 17 expand its facilities in American Samoa. If the Court is not inclined to use StarKist's free cash
 18 flow estimate as the basis for assessing the amount of cash available to pay fines and settlements,
 19 StarKist requests an evidentiary hearing on the projected growth rates that the experts applied.

20 Second, with respect to Techpack, StarKist makes the following proposal: if StarKist's
 21 shares in Techpack are sold over the next five years, StarKist will pay the additional \$50 million
 22 to DOJ, for a total fine of \$100 million.

23 Unlike DOJ's and the Probation Office's proposal, StarKist's proposed structure would
 24 allow the Court to make a concrete finding on StarKist's ability to pay at the time of sentencing,
 25 consistent with *United States v. Robinson*. Just as it did in the Bumble Bee case, the Court could
 26 impose a fine of \$100 million, subject to reduction by up to \$50 million if certain specified
 27 conditions occur (*i.e.*, if StarKist settles its remaining civil cases for more than estimated,
 28 StarKist would pay less than the \$100 million fine or if StarKist does not sell Techpack, StarKist

1 would pay less than the \$100 million fine). If, and only if, one or both of those conditions occur,
 2 would StarKist's fine decrease.

3 **B. The Court May Not Modify the Fine in the Future on Its Own or at
 4 StarKist's Request**

5 The Court cannot impose a term of supervised release or probation that would allow it to
 6 modify StarKist's fine at a later date, after reconsidering StarKist's ability to pay. Structuring
 7 conditions of probation specifically to ensure that the Court can revisit the amount of the fine at a
 8 future point in time is inconsistent with the Ninth Circuit's holding in *United States v. Robinson*
 9 and clear congressional intent to the contrary. Ninth Circuit case law is clear that district courts
 10 must determine a defendant's ability to pay *before* imposing a criminal fine. *Robinson*, 20 F.3d
 11 at 1035. In *Robinson*, the Ninth Circuit squarely rejected the district court's decision to leave it
 12 up to the probation officer to make, at some time in the future, the determination of whether the
 13 defendant would be able to pay a fine. *Id.* at 1034. And once a fine is imposed, it can only be
 14 modified by government petition. *See* 18 U.S.C. § 3573. Congress's intent to limit a
 15 defendant's ability to modify the amount of a criminal fine is clear—the provision of the code
 16 that allowed a defendant to unilaterally petition to modify a fine was repealed in 1987. *See*
 17 *United States v. Hardy*, 935 F.2d 276 (9th Cir. 1991) (citing Pub. L. No. 100–185, 101 Stat. 1282
 18 (1987)).

19 The Court should not postpone the determination of StarKist's ability to pay until
 20 StarKist's financial failure becomes an absolute certainty, at which point StarKist would have to
 21 undertake, again, the costly process of proving its inability to pay. Doing so is clearly improper
 22 under both *Robinson* and the relevant statutory provisions. StarKist sought an order finding that
 23 it is unable to pay the full \$100 million fine. But in the alternative, StarKist requests a fine that
 24 sets a \$100 million fine with predetermined conditions under which the fine would be reduced.

25 **C. Probation Is Unnecessary Here**

26 DOJ and StarKist have agreed to recommend that there be no term of probation included
 27 in StarKist's sentence. *See* Plea Agreement ¶ 10(c), Nov. 14, 2018, ECF No. 24. The Probation
 28 Office recommends probation only if the Court adopts StarKist's proposed safety-valve approach

1 to the fine. If DOJ's proposal (a fine of \$100 million on a payment plan) is imposed, StarKist
 2 understands that the Probation Office agrees that probation is not necessary here.

3 Even in the event that the Court agrees with StarKist's proposal and adopts a safety-valve
 4 approach to the fine, probation is unnecessary here. StarKist—a company that pled guilty and
 5 cooperated with DOJ throughout its investigation—has already instituted a robust compliance
 6 program and has an in-house finance department to ensure StarKist's payment of a criminal fine.
 7 Additionally, imposing probation would result in another unwarranted sentencing disparity
 8 between StarKist and Bumble Bee. *See United States v. Bumble Bee Foods, LLC*, No. 3:17-CR-
 9 249-EMC, ECF No. 37.

10 In the PSR, the Probation Office recommended a term of probation “if such a sentence is
 11 necessary to ensure that changes are made within the organization in order to reduce the
 12 likelihood of future criminal conduct, and it is necessary to accomplish one or more of the
 13 purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).” Presentence Investigation Report
 14 ¶ 86, April 18, 2019, ECF No. 42 (“PSR”). As noted above, StarKist has already made
 15 significant organizational changes through the hiring of a General Counsel and the
 16 implementation of various antitrust trainings. StarKist has accepted responsibility for its former
 17 employee’s wrongdoing and has taken sufficient steps to ensure the conduct is not repeated. A
 18 \$100 million fine, without probation, surely accomplishes the purposes of sentencing set forth in
 19 § 3553, specifically the need to “reflect the seriousness of the offense” and “to afford adequate
 20 deterrence.” 18 U.S.C. § 3553(a)(2). A term of probation would in fact go against other
 21 provisions of § 3553, including the “need to avoid unwarranted sentence disparities among
 22 defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C.
 23 § 3553(a)(6).

24 StarKist also does not need probation to assess StarKist’s “ongoing ability to pay its
 25 criminal fine.” And no restrictions are necessary to “safeguard the organizations [sic] ability to
 26 make payments.” *See* PSR ¶ 44. If the Court imposes a \$100 million fine with the safety valves
 27 that StarKist proposes, StarKist would be required to prove to the Court that the safety-valve
 28 conditions have been met and will notify DOJ and the Court if it is unable to make payments.

1 StarKist also recognizes and accepts its responsibility to pay the criminal fine the Court imposes.
 2 StarKist will also comply with its obligation under 18 U.S.C. § 3572(d)(3) to update the Court if
 3 its financial condition materially changes. If StarKist's finances improve, the Court could adjust
 4 the payment schedule. StarKist has no intention to make any business decisions that would
 5 threaten its ability to make payments and understands that any decision that would draw scrutiny
 6 from DOJ or the Court would undoubtedly result in StarKist paying the maximum fine amount.

7 **D. StarKist Requests a Reasonable Payment Plan**

8 StarKist also requests that the Court approve StarKist's request for a reasonable payment
 9 schedule without interest. StarKist requests the following payment schedule so that StarKist's
 10 free cash flow would first go to restitution and then to a criminal fine: (1) an initial payment of
 11 \$250,000 due within 30 days after the Court enters a final judgment; (2) four annual payments of
 12 \$5 million, the first of which will be due one year after the Court enters a final judgment; and (3)
 13 a final payment for the remaining amount of the fine due five years after the Court enters a final
 14 judgment. This installment schedule will also give StarKist sufficient time to request that the
 15 government petition the Court to modify the fine should StarKist's financial condition prevent it
 16 from paying the entire fine.

17 StarKist made this proposal to DOJ, but DOJ indicated that it would not compromise on
 18 its proposed payment schedule. StarKist alternatively proposed to DOJ that StarKist adopt the
 19 same payment schedule as the Bumble Bee installment plan (but with all payments multiplied by
 20 up to four to reflect that the StarKist fine is up to four times higher), but DOJ also rejected that
 21 proposal. Instead, DOJ insists on its original payment schedule, which calls for StarKist to pay a
 22 fine of \$10 million within 30 days. StarKist respectfully asks that the Court reject DOJ's
 23 proposal and, at a minimum, set a payment plan that calls for an initial payment that StarKist
 24 could potentially pay from its available cash on hand. StarKist also asks that the Court consider
 25 its need to make civil restitution and its desire to reach speedy resolutions with the civil plaintiffs
 26 in scheduling the remaining installments, with graduating installments that increase over time.
 27 Doing so will comply with the statutory objectives of prioritizing civil restitution and imposing
 28 the criminal fine in the shortest installment period possible. *See* 18 U.S.C. §§ 3572(b) & (d)(2).

* * *

StarKist respectfully requests that the Court adopt StarKist's proposal and impose no term of probation.

III. STATEMENT OF THE UNITED STATES

As demonstrated over the course of these sentencing proceedings, StarKist can afford a \$100 million fine. Nevertheless, if future events threaten StarKist's ability to make restitution or remain financially viable, the government can petition the Court to modify StarKist's fine. Alternatively, StarKist—without the consent of the government—can petition to adjust its payment installment schedule (albeit without reducing its overall fine).

In all other respects, however, a fine is a final judgment. Therefore, even if the Court imposes a term of probation, StarKist cannot seek to reduce its fine by seeking to modify its terms of probation. In this case, moreover, pursuant to the plea agreement, the parties agreed not to recommend probation. Therefore, while the government appreciates that the conditions recommended by the Probation Department would help secure the payment of StarKist's fine, the government maintains that StarKist can afford a \$100 million fine and stands by its agreement not to recommend probation.

1. StarKist Fails to Justify Why It Should be Permitted to Seek Reduction of its Fine Independently or Why a Sentence Containing Financial Contingencies is Necessary

StarKist has failed to establish that it cannot afford a \$100 million fine. The combined value of Techpack and StarKist's projected future cash flow is sufficient to pay a \$100 million fine and settle the remaining civil claims against it, as estimated by StarKist. (See StarKist's Reply to U.S. Resp. to StarKist's Techpack Mem., Dkt. No. 142 at 13.) The government disputes StarKist's projected growth figures, as well as its estimate of civil damages; however, the fact that StarKist can afford a \$100 million fine even using its own growth and damages projections shows the unlikelihood that a guidelines fine will hinder StarKist's ability to make restitution or remain viable as a company. Given StarKist's projections, the Court should not be concerned that a \$100 million fine will jeopardize StarKist's ability to settle the remaining civil claims. Additionally, the plea agreement precludes imposing a sentence setting forth financial

1 contingencies that lower StarKist's fine in the event those contingencies occur. Absent a finding
 2 that StarKist has an inability to pay, the Court may not reduce StarKist's fine.

3 ***2. The Government Can Petition to Remit StarKist's Fine and StarKist Can Petition
 4 to Adjust its Payment Schedule Without the Government's Consent***

5 If future events—whether civil settlements, stagnant growth, or other unforeseen
 6 circumstances—threaten StarKist's ongoing financial viability, then, as the government has in
 7 the past, it will petition the Court to modify StarKist's fine.² *See* 18 U.S.C. § 3573 (“Upon
 8 petition of the Government showing that reasonable efforts to collect a fine or assessment are not
 9 likely to be effective, the court may, in the interests of justice, remit all or part of an unpaid fine .
 10 . . .). StarKist offers no basis to question the government's good faith when the government
 11 asserts it will petition to modify StarKist's fine if its financial circumstances materially change.

12 StarKist, however, need not rely on the government to seek relief. When a judgment
 13 imposing a fine permits a defendant to pay its fine through installments, either party may petition
 14 the court to adjust the payment schedule if the economic circumstances of the defendant
 15 materially change. 18 U.S.C. § 3572(d)(3).

16 Here, while the parties dispute the specific payment schedule, they agree that an
 17 installment schedule is necessary. Therefore, if StarKist's economic circumstances materially
 18 change, it can petition to modify its installment schedule. *Id.* While StarKist may not seek a
 19 *reduction* of its fine under this provision, it can delay payments if such a delay is in the “interests
 20 of justice.” *Id.*; *see also United States v. Duck*, No. 18-10180, 2019 WL 2473390, at *1 (9th Cir.
 21 2019) (noting that a “court may, under certain conditions, adjust a defendant's payment
 22 schedule”) (citing section 3572(d)(3)). In fact, StarKist could seek to extend its installment
 23 schedule substantially. *See* 18 U.S.C. § 3613(b) (“The liability to pay a fine shall terminate . . .

25 **²** The Antitrust Division has frequently petitioned to remit or adjust the payment schedule
 26 for corporate fines in the past. *See e.g., United States v. Asiana Airlines, Inc.*, No. 09-CR-99
 27 (D.D.C. Apr. 27, 2010), Dkt No. 19; *United States v. Cargolux Airlines Int'l S.A.*, No. 09-CR-97
 28 (D.D.C. May 7, 2010), Dkt No. 16; *United States v. Japan Airlines Int'l Co., Ltd.*, No. 08-CR-
 106 (D.D.C. Mar. 1, 2010), Dkt. No. 14; *United States v. Korean Air Lines Co., Ltd.*, No. 07-CR-
 184 (D.D.C. Aug. 8, 2012), Dkt. No. 27; *United States v. Horizon Lines, LLC*, No. 11-CR-71
 (D.P.R. Apr. 28, 2011), Dkt. No. 36; *United States v. Hynix Semiconductor Inc.*, No. 05-CR-249
 (N.D. Cal. June 12, 2009), Dkt. No. 31.

1 20 years from the entry of judgment . . . ”). Therefore, StarKist cannot seriously contend that it
2 will be forced “to rely on the potential good graces” of the government when it retains the right
3 to petition the Court without the consent of the government to modify its installment schedule.
4 (StarKist’s Resp. to U.S. Sentencing Mem., Dkt. No. 77 at 16.)

3. *Imposing a Fine as a Condition of Probation Does Not Permit StarKist to Seek to Reduce its Fine*

7 Section 3563(a) provides: “If the court has imposed and ordered execution of a fine and
8 placed the defendant on probation, payment of the fine or adherence to the court-established
9 installment schedule *shall* be a condition of the probation.” 18 U.S.C. § 3563 (emphasis added).
10 The government agrees with StarKist that the imposition of such a condition does not authorize
11 StarKist to seek to reduce its fine by moving to modify its terms of probation under section
12 3563(c). When a court imposes a criminal fine, it is a final judgment and can only be modified
13 pursuant to specified circumstances. 18 U.S.C. § 3572(c); *see also United States v. Handa*, 122
14 F.3d 690, 691 (9th Cir. 1997) (“A district court does not have inherent power to resentence
15 defendants at any time.”) (quoting *United States v. Minor*, 846 F.2d 1184, 1187 (9th Cir. 1988)).
16 Specifically, a fine can be modified upon a petition from the government under section 3573
17 (discussed above), corrected for technical error under Rule 35 of the Federal Rules of Criminal
18 Procedure, or corrected or modified on appeal under section 3742. 18 U.S.C. § 3572(c).

19 Requiring that a fine be paid or an installment plan adhered to as a condition of probation
20 does not provide defendant with an alternative avenue to seek a reduction of its fine. While a
21 district court “may modify, reduce, or enlarge the conditions of a sentence of probation at any
22 time prior to the expiration or termination of the term of probation,” 18 U.S.C. § 3563(c), it
23 cannot change the amount of the fine. Rather, any modification of probation conditions is
24 subject to “the provisions applicable to the initial setting of the conditions of probation.” *Id.*
25 One such provision is section 3572(c), which allows a district court to modify or remit “a
26 sentence to pay a fine” only “under section 3573.” 18 U.S.C. § 3572(c)(1). Cf. *United States v.*
27 *Wyss*, 744 F.3d 1214, 1218-19 (10th Cir. 2014) (holding that section 3563(c) does not authorize
28 district court to modify restitution order); *United States v. Banks*, 62 F. Supp. 3d 125, 130-31

1 (D.D.C. 2014) (same; analyzing interplay between sections 3563(c) and 3664(o)).

2 Therefore, while the Court is permitted to impose a term of probation and set payment of
 3 the fine as a condition of probation, such a sentence will not permit StarKist to petition to reduce
 4 its fine under section 3563(c).³

5 ***4. Under the Plea Agreement, the Parties Agree Not to Recommend Probation***

6 The government is ***not*** requesting that the Court impose a term of probation. Pursuant to
 7 the plea agreement, “Both parties will recommend that no term of probation be imposed.” (Plea
 8 Agreement, Dkt. No. 24 ¶ 10(c).) A sentence that includes probation, however, will not void the
 9 plea agreement. (*Id.*) Accordingly, the plea agreement does not preclude the Court from
 10 imposing a \$100 million fine and requiring payment of that fine as a condition of probation.

11 If the Court is inclined to order a term of probation, the government believes that the
 12 conditions recommended by the Probation Department would effectively “safeguard the
 13 organization’s ability to make payments.” U.S.S.G. § 8D1.1(2). The government has concerns
 14 that, while aware of the criminal investigation, StarKist has converted liquid assets to an illiquid
 15 form and transferred assets to its parent. Specifically, in 2017, *after* becoming aware of the
 16 criminal investigation and civil claims against it, StarKist invested approximately \$66 million in
 17 Techpack, which it (wrongly) contends to be a completely illiquid asset. In 2016, *after*
 18 becoming aware of the criminal investigation and civil claims against it, StarKist issued a \$20
 19 million dividend to its parent, Dongwon Industries. (Expert Report of Professor Robert M.
 20 Daines (“Daines Report”), Dkt. No. 80-1, Figure 5.) Therefore, if the Court imposes probation,
 21 the requirements recommended by Probation that StarKist “shall not waste, nor without
 22 permission of the probation officer, sell, assign, or transfer its assets” and “provide Probation and
 23 the government with (a) quarterly reports of its balance sheets, income statements and statements
 24 of cash flow, (b) annual audited financial statements, and (c) copies of any civil antitrust

25
 26 ³ In *United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000), the Ninth Circuit held
 27 that 18 U.S.C. § 3583(e)(2) allows a court to modify a fine where payment of the fine is a
 28 condition of the defendant’s supervised release. The defendant in *Miller*, however, was not
 seeking a reduction of his fine. Rather, he sought to credit costs he incurred because of
 “government conduct” against his outstanding fine balance. *Id.* Accordingly, the government
 does not read *Miller* as authorizing a defendant to seek to *reduce* a fine under section 3583(e)(2).
 Moreover, *Miller* does not address a court’s authority under section 3563(c).

1 settlements” are appropriate. (Statement of United States Probation Department.)

2 Regardless of whether the Court imposes a term of probation, assuming the Court
 3 imposes an payment schedule, the Court should require StarKist to “notify the court of any
 4 material change in the defendant’s economic circumstances that might affect the defendant’s
 5 ability to pay the fine.” 18 U.S.C. § 3572(d)(3). StarKist retains the right to petition to modify
 6 the installment schedule imposed, but should not be permitted to adjust its installment schedule if
 7 it continues to transform liquid assets into an illiquid form or issue dividend payments to its
 8 parent before paying its criminal fine or settling civil claims against it. If anything, the issuance
 9 of dividend payments would warrant accelerating StarKist’s payment schedule. *Id.* (court may
 10 “require immediate payment in full, as the interests of justice require”).

11 ***5. The Government’s Proposed Installment Schedule Is Reasonable***

12 StarKist has failed to show that its proposed back-loaded installment schedule is
 13 necessary. StarKist proposes paying only \$250,000 at the time of judgment, just \$20 million
 14 over four years, and the remaining nearly \$80 million five years from judgment. Such a back-
 15 loaded installment plan is not necessary given that the length of time over which scheduled
 16 payments can be paid “should be the shortest time in which full payment can reasonably be
 17 made.” 18 U.S.C. § 3572(d)(2).

18 The government proposes an installment schedule in which StarKist pays its fine over the
 19 course of five years, in which StarKist makes an initial payment of \$10 million followed by five
 20 annual payments of \$18 million, without accruing interest. The government’s proposed
 21 installment schedule was recommended by the government’s expert Dr. Dale Zuehls and is
 22 especially reasonable given that Zuehls’ assessment of StarKist’s ability to pay did not account
 23 for the value of Techpack and included projections that assumed StarKist’s civil liability
 24 exceeded its upper estimate. Moreover, StarKist’s growth so far in 2019 (at least as of the end of
 25 May) was substantially higher than projected by Zuehls. (StarKist’s May 31, 2019 Financials,
 26 Dkt. No. 127-2.)

27 StarKist’s proposed installment schedule is essentially a request for an interest-free loan
 28 from the government to pay its criminal fine. Such a loan is not necessary when StarKist has

1 failed to show that it cannot borrow additional money from outside lenders. And while StarKist
 2 has repeatedly cited its current cash on hand as a basis to reduce its fine, under its existing loan
 3 agreement, StarKist can borrow an additional \$20 million without permission from its lenders.
 4 (StarKist May 31, 2019 Financials.) StarKist's expert concluded in May 2019 that StarKist was
 5 not "cash poor." (Daines Report, ¶ 140.)

6 **IV. PROBATION OFFICE'S STATEMENT**

7 The probation office believes that if Starkist agrees to pay the full \$100,000,000 fine in
 8 an agreed upon structure, and the Court has no significant concerns over their ability to pay that a
 9 term of probation is not necessary to achieve the goals of sentencing pursuant to USSG § 3553.
 10 However, if there are still concerns about the ability to pay and/or the transferring/selling/etc. of
 11 large assets, it appears a short term of probation of 6 months to a year would help monitor
 12 Starkist's financial situation. A short term is recommended because it be at least until some civil
 13 liability payouts are made and the first lump sum payment is completed just to make sure they
 14 start off with a good momentum in regard to fine payments, and also to serve as public
 15 deterrence. If the Court decides to impose a special condition of, for example, community
 16 service then the probation office believes a longer term of probation of five years would be
 17 necessary to ensure completion of the condition.

18 If probation is ordered, the following standard conditions shall be imposed:

19 1) Within thirty days from the date of this judgment, the defendant organization shall
 20 designate an official of the organization to act as the organization's representative and to be the
 21 primary contact with the probation officer;

22 2) The defendant organization shall answer truthfully all inquiries by the probation
 23 officer and follow the instructions of the probation officer;

24 3) The defendant organization shall notify the probation officer ten days prior to any
 25 change in principal business or mailing address;

26 4) The defendant organization shall permit a probation officer to visit the organization at
 27 any of its operating business sites;

28

1 5) The defendant organization shall notify the probation officer within seventy-two hours
2 of any criminal prosecution, major civil litigation, or administrative proceeding against the
3 organization;

4 6) The defendant organization shall not dissolve, change its name, or change the name
5 under which it does business unless this judgment and all criminal monetary penalties imposed
6 by this court are either fully satisfied or are equally enforceable against the defendant's
7 successors or assignees; and

8 7) The defendant organization shall not waste, nor without permission of the probation
9 officer, sell, assign, or transfer its assets.

10 The following special condition is also recommended:

11 1) StarKist provide Probation and the government with (a) quarterly reports of its
12 balance sheets, income statements and statements of cash flow, (b) annual audited financial
13 statements, and (c) copies of any civil antitrust settlements.

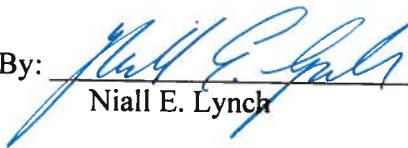
14

15 Dated: September 4, 2019

Respectfully submitted,

16 LATHAM & WATKINS LLP
17 Niall E. Lynch
18 Sean M. Berkowitz
 Ashley M. Bauer

19

20 By: 

Niall E. Lynch

21 *Counsel for Defendant StarKist Co.*

22

23

24

/s/ Andrew J. Mast
ANDREW J. MAST
Trial Attorney
U.S. Department of Justice
Antitrust Division

25

26

27

28

SIGNATURE ATTESTATION

I am the ECF user whose identification and password are being used to file the foregoing Joint Statement Regarding Sentencing. Pursuant to Civil Local Rule 5-1(i)(3) regarding signatures, I, Niall E. Lynch, attest that concurrence in the filing of this document has been obtained.

Dated: September 4, 2019

/s/ Niall E. Lynch
Niall E. Lynch (Bar No. 157959)