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10

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

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

CASE NO. 18-CR-0513 EMC

**STARKIST CO.’S MEMORANDUM OF  
POINTS AND AUTHORITIES  
REGARDING TECHPACK SOLUTIONS  
CO., LTD.**

Judge: Hon. Edward M. Chen  
Date: August 7, 2019  
Time: 10:00 a.m.  
Courtroom: 5 – 17<sup>th</sup> Floor

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1 Defendant StarKist Co. (“StarKist”) respectfully submits this Memorandum of Points and  
2 Authorities Regarding Techpack Solutions Co., Ltd. (“Techpack”) in support of its argument that  
3 StarKist is unable to pay a fine greater than \$50 million, as set forth in StarKist’s Sentencing  
4 Memorandum and Request for Evidentiary Hearing (ECF No. 53).

5 **I. INTRODUCTION**

6 Despite StarKist’s extensive and early disclosures regarding its financial condition, which  
7 included audited financial statements that explicitly state the existence and value of StarKist’s  
8 investment in Techpack, Dr. Dale Zuehls and the Department of Justice (“DOJ”) incorrectly  
9 argued that the Techpack investment was [REDACTED]

10 [REDACTED]  
11 [REDACTED] Once DOJ  
12 belatedly realized its error—after StarKist pointed to information that was clearly apparent from  
13 StarKist’s financials showing that StarKist still owns all of its equity in Techpack—DOJ  
14 changed tack at the June 12 hearing, arguing *for the first time* that StarKist should sell its  
15 strategic asset in order to pay a higher fine. DOJ’s newly minted argument directly contradicts  
16 Dr. Zuehls’ conclusion that [REDACTED]  
17 [REDACTED] Decl. of Niall E. Lynch in Support of StarKist Co.’s Response to U.S.  
18 Sentencing Mem. (“Lynch Decl. ISO StarKist’s Response”) ¶ 3, Ex. 2 (“Zuehls January 2019  
19 Report”) at 4, ECF No. 78.

20 DOJ incorrectly assumes, without support, that StarKist’s Techpack shares can be sold, at  
21 book value, in order to pay a higher criminal fine. DOJ is wrong. DOJ ignores clear evidence in  
22 the record that [REDACTED]

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 [REDACTED]. In short, there are  
3 contractual, legal, and market-related obstacles to selling StarKist's shares in Techpack.

4 There are also equitable arguments against selling Techpack. For the same reasons that  
5 the Court has not asked StarKist to value and sell its manufacturing facility in American Samoa  
6 or Ecuador (and did not ask Bumble Bee to sell its strategic assets), it should not require the sale  
7 of StarKist's other non-disposable assets in determining StarKist's ability to pay a fine greater  
8 than \$50 million.

9 Additionally, at the June 12 hearing, the Court expressed an interest in understanding  
10 StarKist's ability to obtain additional loans or refinance its current loan. [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 The Court also expressed an interest in additional expert analysis demonstrating what  
15 effect changing StarKist's projected growth rates would have on its ability to pay. StarKist's  
16 expert, Mr. Rajiv Gokhale, has completed this analysis. As set forth below and in further detail  
17 in Mr. Gokhale's accompanying supplemental report, even at higher growth rates, StarKist is still  
18 unable to pay a fine greater than \$50 million.

19 The Court should not entertain DOJ's unsubstantiated argument that StarKist's ownership  
20 interest in Techpack somehow establishes that StarKist can afford a \$100 million fine. Rather,  
21 the Court should proceed with an evidentiary hearing as it was originally inclined to do, so that it  
22 can adequately evaluate the evidence proffered by both sides before the June 12 hearing.  
23 StarKist therefore respectfully renews its request for an evidentiary hearing with respect to the  
24 Company's ability to pay a fine.

25 **II. DISCUSSION**

26 **A. Legal Standard**

27 StarKist need only establish its inability to pay a fine above \$50 million by a  
28 preponderance of the evidence. *See United States v. Robinson*, 20 F.3d 1030, 1033 (9th Cir.

1 1994). The preponderance-of-the-evidence standard is the least stringent standard of proof in the  
 2 United States legal system. *See Addington v. Texas*, 441 U.S. 418, 423–24 (1979); *see also*  
 3 *United States v. Sparkman*, 500 F.3d 678, 685 (8th Cir. 2007); *Buckwalter v. ICI Explosives*  
 4 *USA, Inc.*, No. 96-CV-4795, 1998 WL 54355, at \*6 (E.D. Pa. Jan. 8, 1998) (“Preponderance of  
 5 the evidence has never been viewed as a very difficult burden of proof—in fact it is one of the  
 6 lowest burdens available to a litigant in court.”). Under that standard, the defendant must simply  
 7 establish that it is “more likely than not” it will be unable to pay the fine imposed by the  
 8 Sentencing Guidelines. *United States v. Kadonsky*, 242 F.3d 516, 520 (3d Cir. 2001). Thus,  
 9 “[w]here a sentencing court looks to the possibility of future income to satisfy the contemplated  
 10 fine, it is crucial that the court take carefully into account the risk that such income will not in  
 11 fact be realized.” *Id.* “[S]ome remote fortuity” that a defendant might come upon a substantial  
 12 amount of money in the future is not enough to justify imposing a fine that a defendant cannot  
 13 currently afford. *United States v. Wong*, 40 F.3d 1347, 1383 (2d Cir. 1994).

14 **B. DOJ Contradicted Its Own Expert’s Report**

15 At StarKist’s sentencing hearing on June 12, 2019, DOJ stated that it was not aware of  
 16 StarKist’s ownership interest in Techpack. Tr. of Proceedings at 38:8–13, June 12, 2019, ECF  
 17 No. 105. But in January 2018, 18 months before the sentencing hearing, StarKist produced  
 18 financial statements to DOJ that clearly showed Techpack as a StarKist asset. Decl. of Niall E.  
 19 Lynch in Support of StarKist Co.’s Brief Regarding Techpack (“Lynch Decl. ISO Techpack  
 20 Brief”) ¶ 2. [REDACTED]

21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED] Dr. Zuehls  
 26 issued a new report in May 2019, the day the Sentencing Memorandum was due, in which he  
 27 again concluded that [REDACTED]  
 28 [REDACTED]

1 [REDACTED] On May 21, 2019, StarKist produced its 2018 audited financial statements to DOJ.  
2 Lynch Decl. ISO Techpack Brief ¶ 3. StarKist’s 2017 and 2018 audited financial statements  
3 clearly identify StarKist’s “ownership” interest in Techpack and its book value.

4 In its Sentencing Memorandum, DOJ argued for the first time that [REDACTED]

5 [REDACTED]  
6 [REDACTED] But DOJ did not make this argument in its January  
7 2019 submission to the Probation Office. DOJ only raised the issue after DOJ received the civil  
8 Plaintiffs’ flawed expert reports. [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] Instead, DOJ waited until the day of the sentencing hearing to make, for the first  
14 time, the argument that one of StarKist’s strategic investments must be sold in a fire sale in order  
15 to pay a criminal fine.

16 **C. DOJ’s Inaccurate Claims Distorted StarKist’s Representations**

17 At the June 12 hearing, DOJ claimed that it “assumed that the Techpack investment had  
18 been transferred . . . because Starkist’s [sic] expert, Rajiv Gokhale . . . assumed it would be  
19 transferred to an entity affiliated with [Dongwon] Industries.” Tr. of Proceedings at 38:8–13,  
20 June 12, 2019, ECF No. 105. But neither StarKist nor Mr. Gokhale has ever made that  
21 representation. And StarKist has never intended to transfer, and has not transferred, its shares of  
22 Techpack to any other entity. DOJ’s assertion to the contrary reflects a fundamental  
23 misunderstanding of the history of StarKist’s Techpack investment.

24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

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[REDACTED]

At the sentencing hearing, DOJ referenced a footnote in Mr. Gokhale’s expert report [REDACTED]  
[REDACTED] Tr. of Proceedings at  
38:8–13, June 12, 2019, ECF No. 105. Mr. Gokhale does not state, as DOJ suggests, that  
StarKist intended to transfer its interest [REDACTED] See Decl. of Niall E.  
Lynch in Support of StarKist’s Sentencing Mem. and Request for Evid. Hr’g (“Lynch Decl. ISO  
Sentencing Mem.”), Ex. 1, ECF No. 54. Rather, Mr. Gokhale states [REDACTED]

[REDACTED]

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2 [REDACTED]



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[REDACTED]

[REDACTED]

**D. Techpack Cannot Be Sold to Pay a Fine**

Regardless of DOJ's contradictions, misrepresentations, and misunderstandings, one thing is certain: StarKist cannot sell its interest in Techpack to pay a criminal fine. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] StarKist expands upon each of these

points below.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

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15 [REDACTED]

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17 [REDACTED]

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20 [REDACTED]

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25 3 [REDACTED]

26 [REDACTED]

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24 [REDACTED]  
25 [REDACTED]  
26 <sup>5</sup> During the sentencing hearing on June 12, 2019, DOJ noted that StarKist's 2016 loan contained similar restrictions. Tr. of Proceedings at 97:10–16. June 12, 2019. ECF No. 105. [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
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4 [REDACTED]  
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13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] DOJ repeatedly suggests—without economic or logical  
21 support—that StarKist could maintain its current level of debt instead of making payments on its  
22 loan. *See* Tr. of Proceedings at 55:14–23, June 12, 2019, ECF No. 105. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

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[REDACTED]

**F. Bumble Bee Was Not Forced to Sell Any of Its Assets**

Forcing StarKist to sell Techpack—which again, StarKist cannot do—would lead to unwarranted disparities between the inability-to-pay standards applied to Bumble Bee and StarKist.<sup>6</sup> DOJ now insists that StarKist sell its minority interest in Techpack. But DOJ never insisted that Bumble Bee sell any of its assets to pay its criminal fine. In fact, there is nothing in Dr. Zuehls’ analysis to suggest that DOJ ever even considered the salability of Bumble Bee’s assets in assessing Bumble Bee’s ability to pay the Guidelines fine. And recent events confirm that, at the time it was sentenced, Bumble Bee had assets it could have sold: Bumble Bee is now in the process of selling Clover Leaf Seafoods Co.<sup>7</sup> Clover Leaf is the “leading branded marketer of canned seafood in Canada, with a 46.7% share of the Canadian canned seafood market.”<sup>8</sup> Despite Bumble Bee’s apparent ability to sell Clover Leaf, DOJ was comfortable

<sup>6</sup> Per StarKist’s plea agreement, StarKist only seeks a fine reduction on inability-to-pay grounds, *see* Plea Agreement ¶ 10, ECF No. 24. However, the Court is still required to independently consider the factors set forth in 18 U.S.C. § 3553(a), including “the need to avoid unwarranted sentence disparities among defendants with similar records.” 18 U.S.C. § 3553(a)(6). A fine of \$50 million easily satisfies the § 3553 factors.

<sup>7</sup> Tom Seaman, *Amid Ocean Beauty Deal Talks, Cooke Vies with Bolton for Bumble Bee’s Canadian Ops*, Undercurrent News (June 6, 2019, 4:33 p.m. BST), <https://www.undercurrentnews.com/2019/06/06/bolton-cooke-vie-for-bumble-bees-canadian-ops/>.

<sup>8</sup> About Us, Clover Leaf, <https://www.cloverleaf.ca/en/about-us> (last visited June 28, 2019).

1 ignoring the value of that asset when it asked the Court to reduce Bumble Bee’s fine to \$25  
 2 million. With this backdrop, DOJ’s current proposition—that StarKist pay the maximum fine  
 3 because it can sell its interest in Techpack—is unreasonable and inequitable. DOJ should not be  
 4 permitted to arbitrarily pick and choose how it assesses a defendant’s ability to pay under section  
 5 8C3.3 of the Sentencing Guidelines.<sup>9</sup>

6 DOJ also incorrectly suggests that the Court should look to StarKist’s parent company,  
 7 Dongwon Industries, in making its ability-to-pay determination in this case. That suggestion is  
 8 misguided and improper. DOJ never asked the Court to consider whether Lion Capital, a \$5  
 9 billion private-equity firm and Bumble Bee’s parent, could help Bumble Bee pay its criminal  
 10 fine or outstanding debt. Indeed, it conceded that the Court lacked such authority. U.S.  
 11 Sentencing Mem. & Mot. for Departure at 14, *United States v. Bumble Bee Foods, LLC*, No. 17-  
 12 CR-249-EMC (N.D. Cal. July 31, 2017), ECF No. 25 (“[T]he financial condition of Bumble Bee,  
 13 not Lion Capital, should be used to assess the company’s ability to pay a guidelines range  
 14 criminal fine.”). So too here. Dongwon Industries’ ability to pay the fine or StarKist’s debt is  
 15 irrelevant. What matters is StarKist’s own future cash flows, and the Court should look to  
 16 nothing else.

17 **G. Mr. Gokhale’s Updated Analysis Reaffirms StarKist’s Inability to Pay a Fine**  
 18 **Greater than \$50 Million**

19 In response to the Court’s request for additional analysis of StarKist’s ability to pay at  
 20 different growth rates, StarKist asked Mr. Gokhale to reevaluate StarKist’s five-year free cash  
 21 flow with growth rates of 0.5% and 1%. As discussed in further detail in his attached report,  
 22 StarKist’s free cash flow at a growth rate of 0.5% is [REDACTED] and its free cash flow at a  
 23 growth rate of 1% is [REDACTED].<sup>10</sup> Lynch Decl. ISO Techpack Brief, ¶ 4, Ex. 1 (“Gokhale July

24 <sup>9</sup> At the sentencing hearing, DOJ said that Bumble Bee’s fine was capped at \$25 million because  
 25 a fine above that amount would trigger default provisions in Bumble Bee’s loan documents. Tr.  
 26 of Proceedings at 93:19–94:21, June 12, 2019, ECF No. 105. [REDACTED]

27 [REDACTED] If this was enough to justify reducing Bumble Bee’s fine by over \$50 million,  
 it should also be enough to show that selling Techpack is not a viable option.

28 <sup>10</sup> [REDACTED]

1 2019 Report”) ¶ 7. The present value of the [REDACTED] as of December  
 2 31, 2018 equals [REDACTED] respectively. *Id.*

3 Although these inflated growth rates have limited effect on StarKist’s future free cash  
 4 flow, StarKist remains convinced that its original five-year growth projection of [REDACTED] is  
 5 accurate. To reexamine the accuracy of its projected growth, StarKist calculated its own growth  
 6 since 2011 using company data and then, using Nielsen data, calculated the industry’s growth for  
 7 that same period. StarKist’s own historical growth—which Dr. Zuehls admits “is usually the  
 8 best indicator of likely future performance”—was consistent with its projections of future  
 9 growth.<sup>11</sup> StarKist also used Nielsen register scan data to analyze the historical growth of the  
 10 United States packaged-tuna industry as a whole.<sup>12</sup> Both data sets confirm that StarKist’s  
 11 projected growth rate is reasonable and that DOJ’s is not.

12 Internally, StarKist tracks several data points to assess its financial health. Most of these  
 13 metrics should not be used for projecting the company’s future free-cash-flow growth. Revenue,  
 14 for example, would imperfectly measure free-cash-flow growth because when a revenue increase  
 15 is paired with a corresponding increase in costs, there is no actual free-cash-flow growth (the  
 16 increased costs offset any gains for the company). In other words, looking at revenue alone  
 17 might misleadingly suggest free-cash-flow growth that does not actually exist. Gross profits and  
 18 operating income also are not accurate benchmarks of a company’s growth for similar reasons.  
 19 Neither takes into account substantial additional costs incurred by the company. For instance,  
 20 gross profits do not account for general and administrative expenses. And operating income  
 21 does not account for taxes or interest payments. The growth number that matters for the  
 22 company is its free cash, which is the profit that the company makes after paying all of its taxes  
 23 and its operating expenses. Because it is difficult to predict what will happen with respect to  
 24 input costs, when tracking its own past performance and projecting future performance, StarKist  
 25 generally focuses on the volume of units sold. Nevertheless, StarKist evaluated its historical

26  
 27 <sup>11</sup> [REDACTED].

28 <sup>12</sup> [REDACTED]



1 growth based on units sold and revenue. Both figures clearly show that StarKist’s growth  
2 projections are accurate.

3 Specifically, StarKist’s historic growth in terms of units sold (including both pouches and  
4 cans) from 2011 to 2016 was [REDACTED] Gokhale July 2019 Report ¶ 4 n.6. The industry’s  
5 growth as a matter of units sold during that period was even worse at *negative* 2.2%. *Id.* [REDACTED]

6 [REDACTED]  
7 [REDACTED] But even if

8 packaged-tuna sales from 2017 and 2018 are taken into account, StarKist’s unit sales growth  
9 [REDACTED] and the industry’s unit sales growth [REDACTED] are significantly lower than DOJ’s  
10 estimates. *Id.* Finally, when we look at revenues over the 2011 to 2016 time period, StarKist’s  
11 data and the Nielsen data both showed minimal growth [REDACTED] and *negative* 0.4%, respectively.

12 *Id.*

13 In short, the historical growth of both StarKist and the packaged-tuna industry underscore  
14 the defects in DOJ’s ability-to-pay analysis and, at the same time, confirm the accuracy of  
15 StarKist’s own growth projections.

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 **I. DOJ’s Proposed Payment Schedule Is Unworkable**

26 Regardless of the fine the Court ultimately imposes—whether it is \$50 million, \$100  
27 million, or some amount in between—StarKist requests that the Court impose a realistic payment  
28 schedule. *See* 18 U.S.C. § 3572(d) (“If the court provides for payment in installments, the

1 installments shall be in equal monthly payments over the period provided by the court, *unless the*  
2 *court establishes another schedule.*" (emphasis added)). Under DOJ's proposed payment  
3 schedule, StarKist will be required pay \$10 million within thirty (30) days of the Court's final  
4 judgment and \$18 million every year thereafter for five years. This is not feasible for StarKist.

5 As of the June 12 hearing, StarKist had approximately [REDACTED]  
6 [REDACTED] StarKist also cannot be expected to generate enough  
7 cash to afford annual payments of \$18 million. StarKist accordingly proposes the following  
8 payment schedule: (1) an initial payment of \$250,000 due within 30 days after the Court enters a  
9 final judgment; (2) four annual payments of \$5 million, the first of which will be due one year  
10 after the Court enters a final judgment; and (3) a final payment for the remaining amount of the  
11 fine due five years after the Court enters a final judgment.

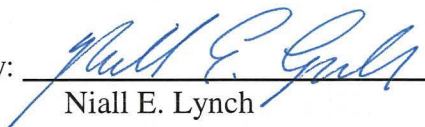
12 **III. CONCLUSION**

13 StarKist has demonstrated by a preponderance of the evidence that it cannot pay a fine of  
14 over \$50 million. None of the new arguments DOJ raised at the June 12 hearing change that  
15 conclusion. Thus, the Court should align with its original inclination to grant StarKist's  
16 evidentiary-hearing request and assess the substantial amount of other evidence proffered by  
17 StarKist and the Government related to each party's inability-to-pay arguments.

18  
19  
20 Dated: July 3, 2019

Respectfully submitted,

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

21  
22  
23  
24 By:   
Niall E. Lynch

25  
26 *Counsel for Defendant StarKist Co.*

27  
28 <sup>13</sup> StarKist's cash balance changes daily. StarKist will therefore provide the Court with its  
current cash-balance figures at the next hearing, or at any other time upon the Court's request.