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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. CHRISTOPHER LISCHEWSKI, Defendant.	No. 18-cr-00203-EMC **UNITED STATES' SENTENCING MEMORANDUM** Date: June 3, 2020 Time: 2:30 p.m. Judge: Hon. Edward M. Chen Courtroom: 5, 17th Floor

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INTRODUCTION

For over three years, defendant and his coconspirators conspired to increase the price of canned tuna, a staple consumer good found in kitchen cupboards across this country. Using his position of authority—both as a leader in the packaged-seafood industry and of Bumble Bee Foods, LLC—defendant orchestrated the formation of the conspiracy, directed his employees to implement the conspiracy, reached his own agreements with competitors, and fought to keep the conspiracy in effect through personnel changes at competitor companies. Defendant's conspiracy impacted billions of dollars in goods purchased by American households. Under his leadership, Bumble Bee alone sold over $1 billion in price-fixed canned tuna between November 2010 and December.

Defendant committed this crime while he was the President and Chief Executive Officer of a major American company and a prominent member of his community. These facts do not make him a sympathetic figure or warrant a reduced sentence. Instead, they underscore the willfulness of defendant's crime, the extent to which defendant misused his position to cheat American consumers out of competitive prices, and the absence of mitigating factors in this case. For these reasons, the United States recommends that the Court sentence defendant to a guidelines sentence at offense level 30 with a prison term between 97 and 120 months, a $1 million fine, and a mandatory special assessment.

BACKGROUND

I. Juror Findings of Guilt and Scope of the Conspiracy

On December 3, 2019, a jury found defendant guilty of knowingly participating in a conspiracy to fix prices of canned tuna from at least as early as November 2010 and continuing through at least as late as December 2013. The jury's special verdict form found that both StarKist and Chicken of the Sea participated in the conspiracy with defendant. (Verdict Form, Dkt. No. 640.) During trial, the government offered testimony from four coconspirators, a victim witness from Safeway, three non-coconspirator members of the packaged-seafood industry, and two witnesses from the Federal Bureau of Investigation, and introduced 233 exhibits.

II. Defendant Was the Most Culpable Member of the Conspiracy

A. Defendant Oversaw All of Bumble Bee's Pricing

Defendant was the senior-most executive at Bumble Bee: President and CEO. As the CEO, defendant approved all list-price increases and changes to pricing guidance issued during the conspiracy. (Trial Tr. at 1509:21-24; 1513:23-1514:1; Presentence Investigation Report, Dkt. No. 658 ("PSR") at ¶ 12.) He directly supervised Scott Cameron, Senior Vice President of Sales, and Kenneth Worsham, Senior Vice President of Trade Marketing in their employment and in their participation in the price-fixing conspiracy.

By defendant's own admission he was a hands-on manager. (Trial Tr. at 2922:14-15; 2924:9-2927:1.) This was consistent with Worsham's and Cameron's testimony that defendant was a detail-oriented, hands-on, and "very aggressive manager," who expected his subordinates to have a plan for dealing with changing market conditions and to bring him competitive information. (Trial Tr. at 482:5-21; 490:4-13; 1523:13-1524:18; 1531:4-16.) Defendant checked in with both Cameron and Worsham frequently by phone and in person, created and maintained detailed task lists for and received a daily report card about the company's performance, and set the annual budget for each department. (Trial Tr. at 1502:10-1504:23; 1933:16-1934:6; Trial Exhibit ("Trial Ex.") 2106.) As part of his supervision of the budgeting process, defendant was responsible for setting the goals and dictated that the company increase its profitability each year. (Trial Tr. at 1502:10-1504:23.)

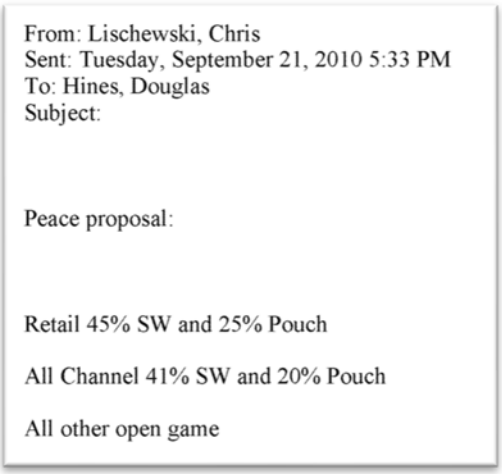
B. Defendant Started and Directed the Conspiracy

It was defendant's own financial goals for Bumble Bee that led to the formation of the conspiracy. In connection with Bumble Bee's late 2010 acquisition by private equity firm Lion Capital, defendant forecasted that Bumble Bee would grow its profitability at 8.5% year over year. (Trial Tr. at 1546:14-15-47:22; Trial Ex. 124.) Worsham described this as a "very aggressive" and "extremely difficult" goal. (Trial Tr. at 1547:23-5; 1549:7-19.)

Defendant's desire for continued growth at Bumble Bee was financially motivated. Defendant stood to receive $43 million if Bumble Bee met the growth projections defendant himself set on the Lion Capital's timeline for projected sale of Bumble Bee to a new owner.

(Trial Tr. at 393:21-396:14; Trial Ex. 324; PSR ¶ 11; *see also* Trial Ex. 755 ("Chris would like to see someone buying BBEE (he would make a lot of money on a personal basis)[.]").) He was the largest individual shareholder of Bumble Bee—both as to the Class B units invested by management and the Class C management incentive units, owning 25% of the latter. (Trial Tr. at 378:10-17; Trial Ex. 325). The value of both classes of units grew as Bumble Bee increased the value of the company, generally measured through profitability and earnings. This growth was particularly important for the value of the Class C units, which only returned a profit to management if Bumble Bee grew at least 8% year over year at the time of Lion Capital's exit. (Trial Tr. at 393:21-394:22.)

Immediately after the Lion Capital acquisition, industry circumstances threatened defendant's chance at a $43 million payday. Rising fish costs and continued "price wars" between Bumble Bee and StarKist jeopardized the company's ability to meet defendant's aggressive forecasts, and with it, his payout. (PSR ¶ 11; Trial Tr. at 386:2-387:25; 510:14-25; 575:5-23; 1287:15-1288:7; 1536:1-1537:1.) So, in an effort to preserve his payout, defendant used his leadership position to begin forming the conspiracy. In September 2010, he wrote an email to his Chief Operating Officer, Doug Hines, captioned "peace proposal," proposing a 45% market share for solid white and 25% market share for pouch:



From: Lischewski, Chris
Sent: Tuesday, September 21, 2010 5:33 PM
To: Hines, Douglas
Subject:

Peace proposal:

Retail 45% SW and 25% Pouch

All Channel 41% SW and 20% Pouch

All other open game

(Trial Ex. 131.) Bumble Bee's proposed 25% market share for pouch mirrors what defendant told his friend and CEO of Tri Marine International, Renato Curto, just three months earlier: that "[defendant] wants to get to 25% market share in pouch[.]" (Trial Ex. 755.)

At the same time defendant sent the peace proposal to Hines,[1] he ordered his senior vice presidents to reach out to their counterparts at StarKist to "make contact," "wave the white flag," and "signal a truce." (Trial Tr. at 529:6-531:22; PSR ¶ 11.) The employees followed defendant's orders: the evidence introduced at trial showed there were 443 phone activations between Bumble Bee and StarKist employees during the course of the conspiracy.[2] Cameron testified that he followed defendant's directive by calling his friend Chuck Handford, Vice President of Trade Marketing at StarKist. Over the course of several conversations in late 2010, Cameron and Handford agreed to a truce ending the price wars: that Bumble Bee would stop attacking StarKist's key products (light meat and pouch) and StarKist would stop attacking Bumble Bee's key product (albacore). (Trial Tr. at 535:6-17; Trial Ex. 414.) Cameron reported back to defendant that his conversation with Handford was successful. (Trial Tr. at 537:3-539:3.)

But as fish costs continued to rise, the truce was not enough to meet defendant's aggressive growth targets. So, defendant instructed Cameron and Worsham to reach an agreement with their counterparts at StarKist to implement a list-price increase (PSR ¶ 12). Defendant first directed Cameron to reach out to Handford and find out "[w]hat [StarKist is] planning to do???" (Trial Ex. 147.) After discussing the situation with Handford, Cameron reported back to defendant that StarKist was "panicking" about the rising fish costs but that StarKist did not, at that time, have plans to announce a list price increase. (*Id.*) Following this initial conversation, Cameron and Worsham had frequent conversations with Handford between late February and early March 2011, during which they ultimately agreed that both companies would issue a list price increase, and aligned on timing and amounts. (Trial Tr. at 582:12-584:11; 1576:3-1579:2.) They reported back to defendant that Handford had agreed that StarKist

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[1] As discussed below, Defendant denied knowing what Hines did with the email (Trial Tr. at 3013:9-10), but the document itself shows that Hines forwarded it to W.H. Lee (a fish supplier) and said, "See, would this work for Don?" (Trial Ex. 131 (unredacted).) Don Binotto was the CEO of StarKist at the time.

[2] As Anna Frenzilli, Staff Operations Specialist, testified at trial, a phone activation is "a form of phone activity [such as] a phone call or text message or voice mail." (Trial Tr. at 967:4-6.) The figure identified above includes phone activations between Bumble Bee's Cameron and Worsham, on the one hand, and StarKist's Handford and Hodge, on the other hand.

would issue a list-price increase that was coordinated with Bumble Bee's increase. (Trial Tr. at 586:6-587:10; 1593:22-1597:5.) Defendant approved Bumble Bee's list-price increase based on this knowledge. (PSR ¶ 12; Trial Tr. at 588:3-590:22; 596:25-598:24; 1598:1-9.)

C. Defendant Directed Cameron and Worsham to Maintain the Conspiracy Despite Personnel Changes

For the next several months, Cameron and Worsham continued reaching agreements with Handford on quarterly pricing guidance, setting the below-list discounts to retailers. (Trial Tr. at 606:7-608:20; 1581:6-1585:24.) The most important of these agreements for Bumble Bee was the agreement to discontinue promotions of 10 cans of 5-ounce solid white tuna for $10 (10/$10 promotions). (Trial Tr. at 606:7-608:20; 1581:6-1584:14.) Cameron and Worsham testified that they told defendant about their conversations and agreements with Handford, and that defendant approved Bumble Bee's decision to stop offering 10/$10 promotions knowing that StarKist had agreed to do the same. (PSR ¶ 12; Trial Tr. at 609:4-610:10; 1604:12-21.)

In the fall of 2011, Handford left StarKist, which threatened the existence of the conspiracy. After Worsham shared this information with defendant, defendant directed Worsham to find a new contact at StarKist with whom he could coordinate prices. (PSR ¶ 13; Trial Tr. at 1635:3-1636:11.) As Worsham testified, defendant "challenged [him] to come up with a contact at StarKist that [Worsham] could obtain continued competitive information and pricing information from and with." (Trial Tr. at 1636:3-5.) When Stephen Hodge, SVP of Marketing and Sales at StarKist, reached out to Worsham in November 2011 and reaffirmed StarKist's commitment to the conspiracy, Worsham reported the good news to defendant. (Trial Tr. at 1642:20-1643:24.) Based on Hodge's reaffirmation of the conspiracy, defendant instructed Cameron and Worsham not to "send the wrong signals" and instructed them to develop a plan for 2012 that kept the conspiracy in place. (PSR ¶ 13; Trial Ex. 228.) Defendant recognized that "[i]f we take action in Q1 that SK feels they need to react to, we could be responsible for plunging the year back into the abyss." (*Id.*) Cameron and Worsham testified that they understood this to be a directive "not to price aggressively" or to send "any signals in the marketplace that prices were softening" because that could plunge the industry back into the

price wars, cutting off the profits generated by the conspiracy. (Trial Tr. at 639:2-4; 647:7-648:20; 1647:16-1648:3.)

Following defendant's instructions, Worsham kept the conspiracy in place for another two years, until Hodge's termination in December 2013. This included efforts to bring Chicken of the Sea—the remaining brand—into the conspiracy. In November 2011, Worsham coordinated a list-price increase with Hodge and Michael White, VP of Marketing at Chicken of the Sea. (PSR ¶ 14; Trial Tr. at 1679:4-22.) In the spring of 2012 Worsham coordinated another series of staggered list-price increases with Hodge. (PSR ¶ 14; Trial Tr. at 1686:17-1693:8.) And every quarter until Hodge was fired, Worsham and Hodge agreed upon quarterly guidance. (Trial Tr. at 2122:1-2123:9.) The final guidance agreement that Worsham and Hodge reached was for the first quarter of 2014, which was finalized before Hodge was terminated. (Trial Tr. at 2122:22-2123:2.) Each step of the way, Worsham informed defendant of the agreements he reached with Hodge and White. (PSR ¶ 14; Trial Tr. at 2121:3-2123:9.) For example, on May 3, 2012, Worsham printed out StarKist's most recent pricing information to show defendant. (Trial Tr. at 1698:8-1702:12.) Worsham had received the documents the previous night on a thumb drive from Hodge when the two met for dinner at Fleming's restaurant. (Trial Tr. at 1694:17-1698:7.) And, each step of the way, defendant approved the collusive list-price increases and quarterly guidance, knowing that they resulted from the agreements Worsham reached with his competitors. (Trial Tr. at 1513:23-1514:1.)

D. Defendant Oversaw Chicken of the Sea's Involvement and Attempted to Recruit New Accomplices

Defendant's participation in the conspiracy was not limited to directing and supervising Cameron's and Worsham's agreements with competitors. At this point, StarKist's participation in the conspiracy was cemented, and defendant's focus shifted to keeping Chicken of the Sea's pricing-maverick tendencies from disrupting the profits from the conspiracy. He had his own collusive communications with the CEO of Chicken of the Sea, Shue Wing Chan, beginning in November 2011. At the same time Worsham was reaching an agreement with White regarding a January 2012 list price increase, defendant began sending emails to Chan complaining about

Chicken of the Sea's low-priced advertisements for canned tuna, often with just a single word like "wow" or "crazy." (*See e.g.*, PSR ¶ 16; Trial Exs. 627, 632.) From November 2011 to June 2013, defendant sent Chan nine such emails. (Trial Exs. 627, 632, 650, 651, 657, 661, 662, 667, 668.)

Defendant also escalated his communications with Chan beyond emails. In addition to a number of phone calls with Chan, several of which coincided with defendant's email complaints about pricing, Chan and defendant met one-on-one for breakfast at Milton's restaurant in Del Mar, California in March 2012. Over breakfast, Chan assured defendant that it was not Chicken of the Sea's strategy to offer low promotions. (PSR ¶ 16; Trial Tr. at 2236:8-2237:25.) After the breakfast, Chan understood that he and defendant were "on the same page . . . that [they] understand not to promote aggressively." (Trial Tr. at 2240:13-18.)[3] And in June 2013, after defendant had commented to Chan about recent statements by Chicken of the Sea indicating a more aggressive competitive posture, defendant and Chan had a side conversation at an industry meeting. (Trial Tr. at 2255.) Chan responded by reassuring defendant that Chicken of the Sea was upholding its side of the agreement. (Trial Tr. at 2255:25-2256:17.) Defendant was reassured by this conversation and told Cameron that Chan was "getting religion in Q3." (Trial Tr. at 663:8-14; Trial Ex. 304.) By "jabbing" Chan in person and through email, defendant maintained Chicken of the Sea's continued participation in the conspiracy in the same way his subordinates did with their competitive contacts.

Defendant also attempted to recruit David Roszmann, then-Chief Operating Officer of Chicken of the Sea, to join the conspiracy and keep it in place after Chan moved away from day-to-day management of the company. Defendant jabbed Roszmann about Chicken of the Sea's prices at Kroger in much the same way he had previously jabbed Chan about prices. (PSR ¶ 17; *Compare* Trial Tr. at 2383:13-2386:2; Trial Ex. 676 *with* Trial Tr. at 2196:6-2198:10; Trial Ex.

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[3] In its order denying defendant's renewed motion for acquittal under Rule 29, the Court held that "a guilty verdict for conspiring to price-fix can rest on an agreement formed by implied mutual assent." (Order Denying Defendant's Rule 29 Motion for Acquittal ("Rule 29 Order"), Dkt. No. 657 at 7.) From there the Court listed evidence admitted at trial from which the jury reasonably could have found an agreement between defendant and Chan. *Id.*

627.) Using a breakfast meeting as a pretext, defendant attempted to bring up pricing when the two had otherwise planned to discuss several operational and sourcing issues. (Trial Ex. 678.) Recognizing the impropriety of rival executives discussing pricing, Roszmann held up his hand to shut down the conversation. Defendant then left, abruptly ending the meeting without touching upon the planned agenda items or even eating breakfast. (PSR ¶ 17; Trial Tr. at 2390:17-2391:14.)

E. Defendant Took Steps to Conceal the Conspiracy

Defendant kept others at Bumble Bee and Lion Capital from learning about the conspiracy. When he met with either Cameron or Worsham to discuss their agreements with competitors, they spoke directly and clearly about the communications. (Trial Tr. at 538.) But when others were present, such as at Executive Committee meetings, the three spoke in coded language. (PSR ¶ 18; Trial Tr. at 531:2-19.) Defendant also omitted references to the agreements with competitors in his communications with Lion Capital. (PSR ¶ 18; Trial Ex. 298.) For example, defendant edited an email with Bumble Bee's fish supplier W.H. Lee before forwarding it to individuals at Lion Capital. His changes, which he testified were purportedly made only to fix the grammar of the email, actually remove all references to defendant's communications with Chan. (*Compare* Trial Ex. 298 *with* Trial Exs. 298A (not admitted); 299.) For example, defendant changed a sentence from "He [Chan] told you guys he will be aggressive" to the more innocent "He will continue to be aggressive"—while leaving an ungrammatical portion of the sentence intact. (Trial Tr. at 3002:7-3003:16.) As discussed further below, defendant's own testimony at trial contradicted his attempted explanation for this change.

F. Defendant Attempted to Dissuade Cameron from Cooperating with the Government

Defendant took actions to obstruct the government's investigation in December 2015. In a private conversation, Cameron informed defendant that the government's investigation weighed heavily on him. At the time of the conversation, Cameron was cooperating with Bumble Bee's internal investigation, but neither he nor his attorneys had yet spoken to the

government. Cameron expressed concern to defendant about how the investigation would affect the company, particularly attempts to sell the company to a new owner. Cameron testified that defendant told him in response "that Bumble Bee's counsel was playing to lose and that [defendant] didn't think about [the government investigation] at all, and [defendant] was going to defend himself at all costs." (PSR ¶ 23; Trial Tr. at 671:5-673:10.) As the conversation continued, defendant "put his hand on [Cameron's] shoulder and [defendant] said, 'the company has got your back to a point, as long as you and Kenny don't fuck it up.'" (*Id.*) Cameron interpreted this as a threat and understood that the company would support him only so long as he did not cooperate. (*Id.*)

G. Defendant Falsely Testified at Trial

Defendant took the stand and testified in his own defense. During that testimony, he denied any knowledge of Cameron's and Worsham's relationships with their coconspirators at StarKist and Chicken of the Sea, and denied any knowledge of the agreements they reached. (PSR ¶ 18.) Defendant started with the broad denial that "to tell you the truth, I didn't even know [Worsham] had any competitive contacts." (Trial Tr. at 2905:23-2906:8.) Defendant's denials were even more specific with regards to Worsham's relationship with Hodge at StarKist. He testified that he had very little awareness that Worsham even knew Hodge, much less that they were reaching pricing agreements, saying that "at some point I knew somebody—it may have been Mr. Worsham had told me that [Worsham and Hodge] knew each other from 20 years previously. I think they were both young sales people at StarKist early after in their career, but that's all I knew." (Trial Tr. at 2667:3-13.) This is despite an email indicating that within minutes of learning of Hodge's termination from StarKist, defendant considered hiring Hodge himself. (PSR ¶ 18; Trial Ex. 312.) According to defendant, his only knowledge of his employees' sharing or obtaining pricing information was that at most this information may have been exchanged "from time to time. Maybe they ran into each other at the lobby. You know, the industry people know each other so it's possible." (PSR ¶ 18; Trial Tr. at 2663:25-2664:4.)

Defendant also denied the plain meaning of the very words he used in the "peace proposal" email he sent to Hines. (*See* Trial Ex. 131.) Defendant's explanation for sending the

proposed market shares to Hines was that it was a "suggestion I was making on how we might respond to potential buyers of Bumble Bee who were questioning the competitive nature of the tuna industry." (Trial Tr. at 3010:1-4.) He insisted that the peace proposal was an internal communication between himself and Hines. (Trial Tr. at 2755:1-19; 3008:4-20.) Contrary to defendant's testimony, the full text of the email shows nothing related to a potential sale of the company. Instead, Hines forwarded the email to W.H. Lee asking whether the peace proposal would work for the then-CEO of StarKist, Don Binotto. (Trial Ex. 131 (unredacted).) When confronted with the commonly understood meaning of "proposal" and asked whether one could really propose something to oneself, defendant insisted that the word "has multiple definitions" and that "[h]ow I worded it happens to be how I worded it." (Trial Tr. at 3010:9-20.)

Defendant even contradicted his own testimony when presented with Exhibit 298A, the exhibit showing the changes defendant made to an email from FCF's W.H. Lee before forwarding to the Lion Capital board. Defendant first claimed to have edited only the grammar before forwarding it to members of Lion Capital. (Trial Tr. at 2899:1-2, 3001:22-3002:3 ("I edited the English a bit to make it more legible."); *see also* Trial Exs. 298; 298A (not admitted); 299.) The actual edits showed that defendant actually removed all references to his communications with Chan, and defendant later admitted that the portion of the sentence that referenced his communications with Chan was "perfectly grammatical" before he edited it. (*Id.*) Defendant also denied that the plain meaning of the phrase "He told you guys" references a communication he had with Chan. (Trial Tr. at 3004:1-11.)

Defendant also mispresented previous trial testimony and documents he was asked to review and describe. First, defendant denied that Chan testified to having an understanding with defendant, even after he was given an opportunity to review Chan's testimony that he and defendant "understand not to promote aggressively." (PSR ¶ 20; Trial Tr. at 2915:3-2917:1, 2240:13-25.) Second, defendant denied that a whistleblower letter he received in February 2012, during the middle of the conspiracy, was a "notice of price fixing." (PSR ¶ 21; Trial Tr. at 2936:9-13; 2938:6-9.) He testified under oath that "[t]here was nothing specific in [the letter] that would give [him] an indication that it was telling [him] of a violation of the Sherman Act,"

even though the letter—on the stand in front of defendant during his testimony—expressly raised concerns about "[p]otential anticompetitive activity: emails, meetings, phone calls to competitors suggesting to raise prices" at Bumble Bee and provided "Sherman Act: Any person who shall attempt or combine or conspire with others [sic] person, or persons shall be deemed guilty of a felony." (PSR ¶ 21; Trial Tr. at 2936:22-2937:1; Trial Ex. 262 (not admitted).) Although the misimpression left by this testimony was never corrected at trial because the jury was not permitted to see the contents of the letter, the Court may still consider defendant's false testimony about the letter.

III. The Conspiracy's Significant Impact on U.S. Commerce

During the conspiracy, the canned tuna industry was valued at over $1.5 billion a year. (PSR ¶ 8; Trial Ex. 124.) Of the three American brands, Bumble Bee is the second-largest supplier of canned tuna in the United States. It leads the market in solid-white canned tuna produced from the albacore species of fish. (PSR ¶ 8; Trial Tr. at 1525:7-10.) During the conspiracy, Bumble Bee sold approximately 500 to 600 million cans of tuna each year. (PSR ¶ 8; Trial Tr. at 496:2-10.) Those hundreds of millions of cans were sold to retailers in all fifty states including grocery stores, drug stores, and club stores where they were eventually placed on the shelf and sold to American consumers. Between November 2010 and December 2013, Bumble Bee sold $1.002 billion of canned chunk-light and solid-white tuna in retail sizes.[4] (Declaration of Leslie A. Wulff in support of United States' Sentencing Memorandum ("Wulff Decl.") ¶ 6.)

The conspiracy impacted Bumble Bee's prices for canned tuna as soon as it started. Cameron testified that the truce was "in play" as soon as he and Handford agreed to stop trying to take market share from each other on their key products. (Trial Tr. at 545:8-24.) The effects of the truce can be seen in Bumble Bee's decline and StarKist's corresponding increase in

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[4] The government has excluded all food-service-sized products (64-ounce cans) from its analysis as evidence regarding the food-service industry was not introduced at trial. The government will use the term "retail-sized cans" to refer to all of Bumble Bee's canned-tuna sizes with the exclusion of the 64-ounce cans.

market share in canned light meat as early as January 2011. (Trial Ex. 156; Trial Tr. at 544:3-545:22.)

The impact of the conspiracy grew from there. The collusive list-price increase Bumble Bee and StarKist announced in March 2011 went into effect on June 1. Bumble Bee, StarKist, and Chicken of the Sea announced another collusive list-price increase in January 2012 effective in April 2012. (Trial Exs. 249, 278, 639.) Bumble Bee and StarKist orchestrated yet another carefully choreographed list-price increase staggered from March through May 2012. Each of these list-price increases was the result of an anticompetitive agreement with at least one competitor. (PSR ¶ 14; Trial Tr at 1293:14-1295:3; 1686:17-1693:8.)

Contrary to defendant's and his expert's testimony, these list-price agreements had a significant impact of the prices paid by retailers. Safeway's category manager with responsibility for tuna, Michael Baribeau, testified that the list price is the starting point in the customer's negotiation process with Bumble Bee. (Trial Tr. at 1026:2-1028:10.) When Bumble Bee increased its list prices as a result of its collusive agreements with competitors, that caused the retailers to renegotiate their contracts with Bumble Bee. (Trial Tr. at 1017:5-11.) Baribeau testified that, as Bumble Bee's list prices increased, Safeway's net price—the discounted amount that Safeway paid for canned tuna—increased by the same percentage (or more) of the list price increase. (Trial Tr. at 1038:10-1042:12; Trial Ex. 705.) In turn, the increased prices that Safeway paid were led to higher on-shelf pricing that was ultimately paid by consumers.

But the impact of the conspiracy was not limited to list prices. The companies also agreed to pricing guidance and promotional price points. As described above, Cameron and Worsham testified that they agreed with Handford on pricing guidance from January 2011 until his departure in September 2011, and Worsham testified that he and Hodge agreed on every quarterly guidance from the third quarter of 2011 until Hodge's departure in 2013. Worsham and Hodge even agreed to the guidance that would be in effect for the first quarter of 2014 before Hodge was terminated. (Trial Tr. at 2122:22-2123:2.) As the witnesses explained, the agreements about quarterly guidance established "guardrails" and the "rules of the road," and that as long as the conspirators stayed within those guardrails, "in line with guidance," they were

free to negotiate with customers. (Trial Tr. at 505:13-22; 1178:16-20; 1323:9-18; 2107:7-19; Ex. 484.) They expected the companies to price within these parameters, but did not expect all prices to be the identical. (Trial Tr. at 2107:7-19.)

The collusive agreements on guidance also affected the promotional or sale prices for canned tuna. Promotions are very important in the tuna industry, because they drive significant sales volume for the promoted brand. (Trial Tr. at 1033:9-18; 1583.) In particular, 10/$10 promotions were highly sought after by retailers. (Trial Tr. at 1022:14-24.) Baribeau explained that canned tuna sales, especially 10/$10 sales, drive customers to the store, and are "basket builders" driving sales of higher-margin products like bread and mayonnaise. (Trial Tr. at 1019:13-1020:8.) During the summer of 2011, Cameron, Handford, and Worsham agreed that Bumble Bee and StarKist would stop offering 10/$10 promotions. (PSR ¶ 12; Trial Tr. at 606:7-608:20; 1581:6-1584:14.) Because of this agreement, the number of 10/$10 promotions offered by both companies fell precipitously between the first quarter and third quarter of 2011. (*See, e.g.*, Trial Tr. at 635:6-19; Trial Ex. 2186.) Bumble Bee ran 135 10/$10 promotions in the first quarter of 2011 but only 28 in the third quarter. (Trial Ex. 2186.) The first thing that Hodge did when he joined the conspiracy was reconfirm StarKist's adherence to the agreement not to allow 10/$10 promotions. (Trial Tr. at 1195:18-1196:8.)

The testimony of the coconspirators was consistent with Baribeau's testimony about pricing trends during the conspiracy:

Q. What was the general trend in [the] cost [Safeway paid] for canned tuna from 2010 to 2013?[5]

A. Costs went up.

Q. How did that affect Safeway's on-shelf pricing during that period?

A. Pricing went up as well.

Q. What was the resulting trend in Safeway's promotional offers for canned tuna?

A. The promotional price points went up, and our volume sold went down.

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[5] Baribeau earlier clarified that when he used the term "cost" he was referring to the price Safeway paid for the products its purchased. (Trial Tr. at 1011:24-1012:2.)

Q. In the period from 2010 to 2013, was Safeway able to offer 10-for-10s?

A. No.

(Trial Tr. at 1044:7-19.) These trends are corroborated by contemporaneous Bumble Bee documents circulated by defendant. (*See* Trial Ex. 290 at 12 (showing upward price trend for solid-white tuna, Bumble Bee's key product, and describing "promotional price points [as] having moved out of the '10 for $10' range, past the '4 for $5' point and into the '2 for $3' range").) In sum, by agreeing to increase list prices, pricing guidance, and promotional prices, the conspirators succeeded in increasing the prices of more than a billion dollars' worth of canned tuna sold throughout the United States during the conspiracy.

LEGAL STANDARD

A district court judge should begin all sentencing proceedings by correctly calculating the applicable range under the Sentencing Guidelines along with the other factors listed in 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 49-50 (2007); *United States v. Booker*, 543 U.S. 220, 256-60 (2005). The guidelines range "should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. When seeking to apply a particular adjustment from the Sentencing Guidelines, the party seeking to adjust the offense level bears the burden of proving the facts necessary to apply the adjustment. *United States v. Allen*, 434 F.3d 1166, 1173 (9th Cir. 2006). At sentencing, the court may consider "relevant information without regarding to its admissibility under the rules of evidence applicable at trial[.]" U.S.S.G. §6A1.3 (2018). *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence.").

ARGUMENT

I. Defendant's Total Offense Level Is 30

The government concurs with the guidelines calculation contained in the presentence report ("PSR"). (¶ 34.) Defendant's role in the conspiracy, conduct during the government's investigation, and testimony at trial, coupled with the size and scope of the conspiracy, result in an offense level 30, in Zone D of the sentencing table. Defendant continues—even after the jury

verdict—to deny his participation in the conspiracy and to re-litigate findings made by the jury; therefore, no downward adjustment for acceptance of responsibility is warranted. Defendant's guidelines range is calculated as follows:

Base Offense Level (§2R1.1(a))	12
Volume of Affected Commerce (§2R1.1(b)(2)(F))	+12
Total Adjusted Offense Level	24
Role in the Offense Adjustment (§3B1.1.(b))	+4
Obstructing or Impeding the Administration of Justice (§3C1.1)	+2
Acceptance of Responsibility (§3E1.1)	0
Total Offense Level	**30**

(PSR ¶¶ 26-34.) With a Criminal History Category I, defendant has a guidelines term of custody of 97-120 months.[6] Because defendant's offense level falls within Zone D of the Sentencing Table, defendant is ineligible for probation under the Guidelines. U.S.S.G. §5B1.1 cmt. n.2. The PSR also correctly calculates that defendant's guidelines fine is $1 million as capped by the statutory maximum for individuals in 15 U.S.C. § 1. (PSR ¶ 75.)

A. Defendant's Volume of Commerce Is Well Above $600 Million

Section 2R1.1 of the Sentencing Guidelines governs the base offense level for antitrust crimes and enhancements based on special characteristics of the offense. The parties and probation agree that the base offense level for antitrust crimes is 12. U.S.S.G. §2R1.1(a). From there, defendant merits a 12-level increase because the conspiracy affected more than $600 million but less than $1.2 billion in commerce. *Id.* §2R1.1(b)(2)(F). (PSR ¶ 27.) In fact, as discussed further below, the volume of commerce attributable to defendant is over $1 billion, falling at the high end of the range for this enhancement. Defendant's total adjusted offense level before any enhancements is, therefore, 24.

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[6] The Guidelines imprisonment range is 97 to 121 months; however, the statutory maximum of 10 years set forth in 15 U.S.C. § 1 caps the guideline range at 120 months.

1. Volume of Affected Commerce Is Broadly Defined

The Sentencing Guidelines specify that the base offense level for defendants convicted of antitrust crimes is to be enhanced where "the volume of commerce attributable to the defendant was more than $1,000,000[.]" U.S.S.G. §2R1.1(b)(2). For an individual defendant that means the "volume of commerce done by him or his principal in goods or services that were affected by the violation." *Id.* In defendant's case, this corresponds to Bumble Bee's volume of commerce. The Sentencing Guidelines use the volume of commerce as the relevant measure because the offense level must be tied to "the scale or scope of the offense . . . in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun." U.S.S.G. §2R1.1, background at ¶ 4. Because "[antitrust] damages are difficult and time consuming to establish . . . the guidelines calculate harm based on volume of commerce, rather than more direct measures." *United States v. Giraudo*, No. 14-CR-534, 2018 WL 2197703, at *4 (N.D. Cal. May 14, 2018) (citation omitted); *see also* U.S.S.G. §2R1.1, background at ¶ 4.

The applicable standard for determining volume of commerce is whether a sale is "affected" by the conspiracy. Importantly, determining the volume of affected commerce "does not require a sale-by-sale accounting, or an econometric analysis, or expert testimony." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999). While the Ninth Circuit has not interpreted what it means for a sale to be affected under §2R1.1, other courts have interpreted the term broadly.[7] The Seventh Circuit held that commerce affected by the violation "includes all sales made within the scope of the conspiracy." *United States v. Andreas*, 216 F.3d 645, 676 (7th Cir. 2000). The Sixth Circuit found "affected" commerce to be "very broad and would include all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy." *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995). According to the Second Circuit, "[s]ales can be 'affected' when the conspiracy merely acts upon or influences negotiations, sales prices, the volume of goods sold, or other transactional terms." *SKW Metals*,

[7] Although the circuits that have addressed this issue have articulated slightly different standards, even under the strictest interpretation the government has met its burden to prove that all sales of branded retail-sized canned tuna were affected by the conspiracy.

195 F.3d at 90. And "[w]hile a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy," *id.* (emphasis in original), "without regard to whether individual sales were made at the target price." *Hayter Oil*, 51 F.3d at 1273*; see also United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001); *Andreas*, 216 F.3d at 678. Accordingly, the presumption is to include all of a company's sales during the conspiracy period as affected commerce, because "the Sentencing Commission intended that the government have the benefit of a per se rule both at trial and at sentencing to avoid the protracted inquiry into the day-to-day success of the conspiracy." *Hayter Oil*, 51 F.3d at 1274.

A sale may be excluded from the volume of commerce only if it is "completely unaffected" by the conspiracy. Defendant bears the burden of proving the "rare" or "odd" case of a sale that is "completely unaffected." *Andreas*, 216 F.3d at 678-79; *see also United States v. Peake*, 804 F.3d 81, 100 (1st Cir. 2015) (finding that where defendant failed to demonstrate that certain "transactions were 'completely unaffected' by the conspiracy," those transactions were properly included in the affected commerce calculation). For example, "a defendant's brother-in-law might call one day and ask for a product at a bargain price in order to make a quick and urgently needed resale" and the seller might then "agree[] to the bargain price motivated solely by concern to help his relative, with no thought whatever about the fixed price against which he quotes to all other customers." *SKW Metals*, 195 F.3d at 93 (Newman, J., concurring). Such a rare circumstance involving "extreme facts" may satisfy a defendant's burden to show a "demonstrably uninfluenced" sale that should be excluded from the volume of commerce. *Id.* at 95. Those circumstances do not apply here.

2. The Conspiracy Affected All Sales of Branded Retail-Sized Canned Tuna During the Conspiracy Period

Cameron, Worsham, and Hodge testified that they conspired to increase the prices of canned tuna, that they implemented the agreement, and that prices in fact increased. The Court has already found that the evidence at trial regarding the conspiracy between Bumble Bee and both its competitors was "legion." (Rule 29 Order, at 3.) Considering this evidence, the Court

should find that the conspiracy affected the prices of all sales of branded retail-sized canned tuna made during the conspiracy period.[8]

Defendant's argument to the Probation Office that the volume of affected commerce is $0 ignores four weeks of trial testimony, and fundamentally misapplies the relevant legal standard. The conspirators agreed on list-price increases announced in March 2011, January 2012, March 2012, April 2012, and May 2012. (PSR ¶¶ 12 & 14.) As Safeway's Baribeau explained, retail contracts were negotiated as a percentage of the ***fixed*** list price, so the increase in list prices increased the net prices paid by retailers. (Trial Tr. at 1026:2-1028:10; 1017:5-11.) So, as Bumble Bee's list prices increased, Safeway's net price increased by that same amount or more. (Trial Tr. at 1038-1042 & Trial Ex. 705.) The conspiracy, therefore, had an effect on all branded retail-sized cans of tuna sold by Bumble Bee pursuant to the agreed-upon list prices.

But the conspiracy, and its impact, did not end there. The coconspirators testified that the conspiracy encompassed all levels of pricing, including list prices, quarterly pricing guidance, and promotional price points for specific retailers and products. Cameron and Worsham testified that they agreed to promotional guidance with Handford in 2011. (PSR ¶ 14; Trial Tr. at 606:7-608:20; 1581:6-1585:24.) And Worsham and Hodge testified that once they started communicating, they agreed with each other on every quarterly pricing guidance announced until Hodge was fired in December 2013. (PSR ¶ 14; Trial Tr. at 1322-1323; 2122:1-2123:9.)

The witnesses also explained the effect the conspiracy had on promotional prices of canned tuna. They testified that they agreed with their coconspirators to raise prices for retailers like Safeway in order to terminate or limit certain retailer promotions—notably $10/10s—and that as a result of that agreement, there was a "significant reduction" in $10/10 promotional activity. (*See, e.g.*, PSR ¶ 12; Trial Tr. at 635 & Ex. 2186.) Baribeau testified about the effect this conspiratorial agreement had on Safeway and its customers: that, during the conspiracy period, Safeway was first no longer able to offer 10/$10 promotions, and that ultimately, it was

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[8] As discussed further below, this is nevertheless a conservative measure of the conspiracy's impact because it excludes sales of pouch tuna, food-service-sized cans, and private-label canned tuna.

no longer able to offer 4/$5 promotions and could only offer 2/$3 promotions. (Trial Tr. at 1044.)

Because the conspirators agreed on all levels of pricing—list prices, pricing guidance, and promotional prices—the evidence introduced at trial irrefutably demonstrates that sales of all Bumble Bee's branded retail-sized canned tuna sold during the conspiracy period were affected and influenced by the price-fixing conspiracy. Agreements as to any one of these forms of pricing would be sufficient to show that the canned tuna sold by Bumble Bee during the conspiracy was affected. *See SKW Metals*, 195 F.3d at 90 ("Sales can be 'affected' when the conspiracy merely acts upon or influences negotiations, sales prices, the volume of goods sold, or other transactional terms."). The government's evidence went well beyond that: it showed a broad, continuing, pervasive, top-down conspiracy involving repeated and frequent competitor pricing communications by the Chief Executive Officer and his highest-level sales employees with their competitors. Accordingly, all of Bumble Bee's sales of retail-sized branded canned tuna during the conspiracy are appropriately included in the volume of commerce.

3. Defendant's Conservatively Calculated Volume of Commerce Is $1.002 Billion

To calculate defendant's volume of commerce, government statisticians reviewed sales-data files Bumble Bee produced to the United States and filtered those files for sales of branded retail-sized canned solid-white and chunk-light tuna from November 2010 through December 2013, duration of the conspiracy. (Wulff Decl. ¶¶ 3 & 5.) Out of an abundance of caution, the government excluded Bumble Bee's sales of pouch tuna from its volume-of-commerce calculations despite testimony at trial that the conspiracy did have some effect on the price of pouch-tuna products.[9] Similarly, the government excluded from its volume-of-commerce calculation all large-format cans sold as part of Bumble Bee's food-service business and all sales

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[9] For example, Cameron testified that the conspiracy began when Bumble Bee "struck a truce with StarKist to a cease-fire, if you will, on chunk light and pouch if they wouldn't attack us on solid white." (Trial Tr. at 529:11-13.) Members of the conspiracy also monitored the prices of pouch because aggressive promotions on those products could signal the beginning of aggressive prices on canned-tuna products, and the need to enforce the conspiracy. (Trial Tr. at 1317:11-1318:11.)

of private-label canned tuna.[10] Using these conservative parameters to calculate Bumble Bee's sales, defendant's volume of affected commerce is **$1.002 billion**. (Wulff Dec. ¶ 6.) Defendant has not disputed Bumble Bee's sales data—indeed, he cannot, as his expert relied on the same data in compiling his 91 summary charts.

Based on the evidence at trial, and as the Probation Office found, $1.002 billion is the correct measure of the volume of commerce affected by defendant's criminal conduct. (Addendum to the Presentence Report ("PSR Addendum"), Dkt. No. 658 ¶ 11). However, to demonstrate the reasonableness of its commerce enhancement, the government also ran a more limited calculation for sales of 5-ounce cans (the most frequently purchased size) of solid white and chunk light tuna sold between June 1, 2011 (the effective date of the first collusive list price increase) and December 31, 2013 (the end of the conspiracy). (Wulff Dec. ¶ 7.) Even under these significantly more conservative parameters, the volume of affected commerce is **$638.941 million** (*id*. ¶8.); still resulting in the same 12-level adjustment. U.S.S.G. §2R1.1. Under the applicable case law and the facts of this case, there is no calculation through which defendant's volume of commerce could be reduced below $600 million so as to result in less than a 12-level adjustment.

Contrary to the unsupported allegations in defendant's objections to the draft PSR, the government's volume-of-commerce figures for Bumble Bee, Cameron, and Worsham are consistent with the approach taken here. All three pleading defendants received a reduction in their volume of commerce under U.S.S.G. §1B1.8 for providing self-incriminating information previously unknown to the government. As a result of the application of §1B1.8, Bumble Bee's volume of commerce was reduced to $567.7 million. Plea Agreement ¶ 4(a), *United States v. Bumble Bee*, 17-CR-249, Dkt. No. 32. The information provided by Bumble Bee was based on the prompt cooperation of its then-employees, Cameron and Worsham; thus, they received the same §1B1.8 exclusions as the company.[11] Defendant, who continues to maintain he did not

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[10] The government excluded private-label products from its volume-of-commerce calculations despite evidence that private-label prices often increase with branded prices as costs increase and that private-label prices went up during the conspiracy. (Trial Tr. at 1068:11-21.)

[11] Although defendant insists that Cameron and Worsham's volume of commerce is only $300 million, both plea agreements make clear that the individual's volume of commerce is *at*

participate in any conspiracy, is not entitled to the benefits of §1B1.8 resulting from the immediate and substantial cooperation of others.

4. Defendant's Hired Expert Did Not Refute the Evidence

Nothing in defense expert Dr. Levinsohn's testimony changes the conclusion that the appropriate measure of affected commerce is all sales of retail-sized branded canned tuna during the conspiracy period. Dr. Levinsohn made the uncontested point that the conspiring companies did not sell their products at a uniform price across all customers, times, and places; that retailers charge different prices for similar products and offer staggered promotions; and that retail customers are price-sensitive shoppers. *Cf. SKW Metals*, 195 F.3d at 91 (calculating the volume of affected commerce "does not require a sale-by-sale accounting, or an econometric analysis, or expert testimony.") But the government's own witnesses already made this point repeatedly.

As the coconspirators explained, the conspiracy only required that the conspirators operated within the agreed-upon guardrails. (Trial Tr. at 1178:6-10; 1323:9-18; 2107:7-19.) As a result, one would expect to see pricing variation at different customers. While the prices of *individual* transactions varied based on retail customer, input costs, and even the day of a given transaction, they were nonetheless based on both agreed-upon list prices and pricing guidance. Indeed, none of the defense summary charts introduced through Dr. Levinsohn refute the conspiracy's effect on sales of all retail-sized branded canned tuna. To the contrary, they are perfectly consistent with it. (*See, e.g.*, Trial Ex. 16.B (showing prices charged by StarKist for chunk light halves to top retail customers clustered around the "blended net" price point in StarKist's guidance for the corresponding quarter).)

B. Defendant Was a Leader or Organizer of the Conspiracy

The Probation Office correctly determined that defendant was the leader or organizer of the conspiracy and increased defendant's offense level by four levels. (PSR ¶ 28.) The evidence at trial proved a conspiracy with at least five participants, and Defendant was far and away the most culpable member of the conspiracy. As Bumble Bee's CEO, he oversaw and directed

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least $300 million, the low end of the 10-level offense level adjustment range. U.S.S.G. §2R1.1(b)(2)(E); Plea Agreement ¶ 4(a), *United States v. Cameron*, 16-CR-501, Dkt. No. 18; Plea Agreement ¶ 4(a), *United States v. Worsham*, 16-CR-535, Dkt. No. 14.

Cameron's and Worsham's participation in the conspiracy. Beyond that, he exerted his influence over the entire industry, including by making sure that Chicken of the Sea stopped its discount pricing and did not disrupt the pricing equilibrium achieved between StarKist and Bumble Bee. Defendant easily meets the requirements of §3B1.1(a) by being "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive[.]"[12] U.S.S.G. §3B1.1(a).

1. The Conspiracy Had At Least Five Participants

Defendant's conspiracy involved at least five participants. Including defendant, five coconspirators testified at trial: defendant, Cameron, Worsham, Hodge, and Chan. But the conspiracy was not limited to these five participants. (PSR Addendum ¶ 13). The members of the conspiracy testified that Handford and White, among others, were also involved in the conspiracy.[13]

Cameron, Worsham, and Hodge all testified that Handford reached agreements to increase prices while at StarKist. (PSR ¶ 12; Trial Tr. at 606:7-608:20; 1364:7-24; 1368:10-22; 1581:6-1585:24.) Additionally, Worsham testified that he both agreed with White in November and December 2011 to increase prices in January 2012. (Trial Tr. at 1679:4-22; 1608:2-11.)

The jury's findings in the special verdict form demonstrate that there were at least five participants in the conspiracy. The jury agreed that individuals from both Chicken of the Sea and StarKist participated in the conspiracy with defendant. (Verdict Form, Dkt. 640.) Therefore, *at a minimum*, either Chan (who testified to his participation) or White from Chicken of the Sea participated in the conspiracy and, *at a minimum*, either Hodge (who pled guilty and testified to his participation) or Handford from StarKist participated in the conspiracy.[14] The involvement of a single Chicken of the Sea or StarKist coconspirator, plus both Cameron and

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[12] Given the scope of the conspiracy as discussed in subsection d, *infra*, the Court may find that the conspiracy was "otherwise extensive" as an alternative basis for this enhancement.

[13] Indeed, in its previous rulings, the Court found fourteen individuals (not including defendant) to be members of the conspiracy for purposes of admissibility of their statements under Federal Rule of Evidence 801(d)(2)(E). (Order on Admissibility of Co-Conspirator Statements, Dkt. No. 202 § D.)

[14] Hodge and Handford had sequential agreements with Bumble Bee and StarKist because Hodge only started reaching agreements with competitors after Handford left StarKist.

Worsham, who have pled guilty, and defendant, who was found guilty, equals at least five participants.

2. Defendant Supervised Cameron and Worsham

Defendant was the CEO of Bumble Bee and during trial he admitted the obvious point that he was Cameron and Worsham's supervisor. (Trial Tr. at 2643:8-2650:13; Ex. 2655.) Although §3B1.1(a) requires that the conspiracy itself have five or more participants, defendant need only have personally exercised control over at least one other participant. *United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993). Therefore, defendant's supervisory role over Cameron and Worsham exceeds "some degree of organizational authority" and is enough to satisfy this requirement. *See United States v. Koenig*, 952 F.2d 267, 274 (9th Cir. 1991) (citation omitted).

3. Defendant Acted as a Leader and Organizer of the Criminal Activity

As the CEO of Bumble Bee and a self-acknowledged industry leader (Trial Tr. at 2928:10-13), defendant led and organized the conspiracy. Moreover, the evidence introduced at trial made clear that his conduct went beyond merely being a "manager or supervisor" under the Sentencing Guidelines. The commentary to §3B1.1 provides the elements to consider when determining that defendant's conduct was beyond being merely a manager or supervisor: (1) the exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others. U.S.S.G. §3B1.1 App. Note 4. Although the government is not required to prove every element listed, in this case defendant satisfies every element. He planned the conspiracy and orchestrated the truce with StarKist; he oversaw and directed Cameron and Worsham's participation in the conspiracy; he ensured continuity by directing them to recruit more members, and attempted to recruit new members himself; he approved all prices at Bumble Bee; he had the largest individual financial stake in the success of the conspiracy; he leveraged his position as a leader in

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the packaged-seafood industry to effectuate the conspiracy; and he used his industry position to keep Chicken of the Sea's pricing and participation in line with the conspiracy.

a. Defendant Recruited Accomplices

Defendant took the very first steps to bring the conspiracy into existence and recruited coconspirators to join his efforts. In September 2010, in the middle of the tuna wars, defendant sent an email to Bumble Bee's COO with the phrase "peace proposal" and specifying a market-share division of Bumble Bee's and StarKist's key products. (PSR ¶ 11; Trial Ex. 131.) The email was sent shortly after defendant made aggressive promises to Lion Capital about Bumble Bee's future growth. Defendant also recruited Cameron and Worsham, and directed them to reach out to StarKist to end the price war, which they did. (PSR ¶ 12; Trial Ex. 414; Trial Tr. at 582:12-584:11; 1576:3-1579:2.)

In addition, defendant directed Worsham to find additional accomplices at StarKist when Handford left, so that he could continue to get information about StarKist's pricing. (Trial Tr. at 1636:3-5.) When Worsham made contact with Hodge and they agreed to continue the pricing agreements already in place, Worsham reported back to defendant that he had recruited Hodge into the conspiracy. Defendant responded to the news that Hodge was reaffirming the conspiracy by instructing Cameron and Worsham to make sure that Bumble Bee's pricing plans for 2012 were consistent with the conspiracy and did "not send the wrong signals for the balance of year." (Trial Ex. 228.)

Finally, in a desperate attempt to keep the conspiracy in place after Hodge's termination from StarKist and Chan's shift away from day-to-day operation of Chicken of the Sea, defendant attempted to recruit Chicken of the Sea's COO Roszmann. He jabbed Roszmann about Chicken of the Sea's low prices and later attempted to recruit Roszmann by bringing up pricing at a breakfast meeting. (Trial Ex. 678.) When Roszmann refused defendant's invitation and shut down the conversation on pricing, defendant ended the breakfast meeting—without touching upon the planned conversation topics or even eating breakfast. (Trial Tr. at 2390:17-2391:13.)

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b. Defendant Exercised Decision Making Authority, Had a Significant Role in Planning or Organizing the Offense, and Exercised Control and Authority Over Others

As Bumble Bee's President and CEO, defendant "reported to no higher authority" and he oversaw "just about everything that transpired. *See United States v. Ingham*, 486 F.3d 1068, 1073-1077 (9th Cir. 2007) (describing the conspiracy as the defendant's "brainchild"). His range of decision-making authority and oversight was broad, and his stamp of approval was a pervasive feature of the conspiracy. For example, defendant oversaw the company's budget process, choosing the company's annual financial targets, which as discussed above, was the catalyst for the conspiracy. (Trial Tr. at 1502:10-1504:23.)

Defendant had final authority to approve all pricing decisions. (Trial Tr. at 1508:25-15:09:24; 1513:4-1514:1.) During the conspiracy, Bumble Bee did not issue a single list price increase or pricing guidance without defendant's approval. (Trial Tr. at 1509:21-24; 1513:23-1514:1.) Defendant was the final decision maker on pricing; the board was not involved. (Trial Tr. at 1508:25-15:09:24; 1513:4-1514:1.) In doing so, defendant regularly received regular reports of his employees' collusive activities and approved pricing plans that he knew had been illegally fixed.

Defendant kept close tabs on his subordinates and their activities. As part of his admitted "hands on leadership style," defendant maintained task lists for each of his direct reports and held them accountable to meeting those tasks, including by reviewing a daily report card of the company's performance. (Trial Tr. at 2922:14-15;2924:9-2927:1; Trial Ex. 2106.) Cameron and Worsham agreed with defendant's assessment of his management style. (Trial Tr. at 482:5-21; 490:4-13; 1523:13-1524:18; 1531:4-16.) At defendant's direction and supervision, Cameron and Worsham implemented the conspiracy by reaching price-fixing agreements with their competitors. The fact that defendant did not have all of those conversations himself, and instead relied on others to do so, confirms his leadership role. *See United States v. Narte*, 197 F.3d 959, 966 (9th Cir. 1999) (applying a leader/organizer adjustment despite the fact that the defendant was not involved in pricing the illegal shellfish himself because he kept the conspiracy going).

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Defendant also had a leadership role in the entire packaged-seafood industry, which he used to recruit Chan into the conspiracy and persuade him to keep Chicken of the Sea's prices elevated. Curto described defendant's long tenure in the industry and his leadership role on numerous industry organizations, leading him to characterize defendant as "one of the most important person [sic] in the industry," and that "he has made a reputation for himself to be a good leader." (Trial Tr. at 1098:25-1099:1; 1100:4-18.) Defendant agreed with Curto's description of him as a "leader in the industry." (Trial Tr. at 2922:10-13.) Similarly, Roszmann described how defendant has a reputation in the packaged-seafood industry and led several industry organizations. (Trial Tr. at 2382:15-2383:10.) In his response to the draft PSR, Defendant reiterates his description of himself as an industry leader and uses the loss of his industry standing as an argument for a more lenient sentence. But defendant's abuse of his leadership role to lead his subordinates and others into illegal conduct is an aggravating factor, rather than a mitigating factor.

c. Defendant Stood to Gain the Most from the Success of the Conspiracy

Defendant had the most to gain financially from the conspiracy. Defendant's annual bonus eligibility was more than double that of either of his subordinates. (Trial Tr. at 475:1-16 (describing defendant's bonus eligibility as 100% of his $721,321.88 base salary); 1505:5-8 (describing Worsham's bonus eligibility as 45% of his $325,000 salary).) Defendant also had the largest individual ownership stake in Bumble Bee and the highest individual ownership in the management-profits-interest shares (Class-C units). The government's criminal investigation— which began during sale of Bumble Bee— was the only reason that defendant was unable to reap the financial rewards of his conspiracy.

d. The Nature of Defendant's Participation and the Scope of the Illegal Activity

Defendant was the most significant participant in the conspiracy with his hands in nearly every single aspect of the criminal enterprise. He directed Cameron and Worsham to agree on prices with the competition and recruit new members to the conspiracy and approving the prices they had agreed upon with competitors. Defendant also conspired directly with Chan, his peer,

to ensure that Chicken of the Sea curbed the aggressive promotions that could disrupt the conspiracy, and attempted to recruit Roszmann to join the conspiracy.

Defendant's conspiracy was also pervasive. Because the competitors fixed list prices, pricing guidance, and promotional price points, they ensured that every aspect of pricing had been agreed-upon in advance. And they did so for all branded retail-sized solid-white and chunk-light tuna Bumble Bee sold from November 2010 to December 2013. The result of defendant's conduct increased prices paid by millions of American consumers in all fifty states for a common household good.

In sum, defendant had the largest role of any other participant in the conspiracy and the facts support application of the leader/organizer enhancement under U.S.S.G. §3B1.1(a). *See United States v. Yi*, 704 F.3d 800, 807-08 (9th Cir. 2013) (applying a leader/organizer adjustment where the defendant gave final approval on all decisions and was the "final arbiter"); *United States v. Berry*, 258 F.3d 971, 977-78 (9th Cir. 2001) (applying a leader/organizer adjustment where the defendant told his coconspirators where to deposit stolen checks and instructed them how to further the scheme). The culpability of the other participants pales in comparison with that of defendant himself. No other individual was as committed to the formation of the conspiracy, its continued existence, or lamented its demise as much as defendant. An enhancement for defendant's role in the offense is warranted.

C. Defendant's Conduct Merits an Enhancement for Obstruction of Justice

The Sentencing Guidelines provide for a 2-level enhancement where a defendant willfully obstructs justice. U.S.S.G. §3C1.1. Defendant did so in two ways: he provided false testimony at trial and he obstructed the government's investigation. Either would be enough to merit the two-level enhancement. The Court should follow the PSR's recommendation to apply a two-level obstruction enhancement. (PSR ¶ 23.)

1. The Obstruction Enhancement Should be Applied for False Testimony

Defendant had no obligation to testify in his defense, but he chose to do so and he should be held accountable for his own false testimony. He gave self-serving, implausible, and self-contradictory testimony regarding key facts and documents. In doing so, defendant went well

beyond merely denying his guilt or exercising his right to testify in his own defense. Rather, he gave demonstrably false testimony regarding his knowledge and actions that "ha[d] the potential for obstructing" the prosecution of the case. *United States v. Sullivan*, 797 F.3d 623, 642 (9th Cir. 2015) (quoting *United States v. Draper*, 996 F.2d 982, 986 (9th Cir.1993)). The Supreme Court has made clear that "a defendant's right to testify does not include a right to commit perjury." *United States v. Dunnigan*, 507 U.S. 87, 96 (1993).

Under U.S.S.G. §3C1.1, a defendant's offense level shall be increased by two levels if he commits perjury at trial. U.S.S.G. §3C1.1 cmt. n. 4(b). In order to adjust a defendant's offense level based on perjured testimony, the Court must find that: (1) defendant gave false testimony; (2) the testimony was on a material matter; and (3) defendant had a willful intent to provide false testimony. *United States v. Jiminez-Ortega*, 472 F.3d 1102, 1103 (9th Cir. 2007) (citing *Dunnigan*, 507 U.S. at 94). Though the court must review the record and make a finding with respect to each of these elements, it need not provide "elaborate enumerations" or "specific findings as to those portions of a defendant's testimony it believes to have been falsified." *United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. 1990) (citing *United States v. Sanchez-Lopez*, 879 F.2d 541, 557 (9th Cir. 1989)). Defendant's testimony satisfies all three elements of perjury and merits an adjustment under §3C1.1.

a. Defendant Gave False Testimony

Defendant took the stand and falsely denied all knowledge of the conspiracy and every single aspect of his own conspiratorial conduct. This testimony was contradicted by defendant's other testimony, defendant's own documented statements during the conspiracy, testimony of other witnesses, and statements of other witnesses during the conspiracy.

Defendant categorically denied any knowledge of the relationships between Cameron and Worsham and their coconspirators at StarKist and Chicken of the Sea, let alone any knowledge of agreements between the coconspirators. This denial was contradicted by statements defendant made during the conspiracy and the testimony of other witnesses. On direct examination defendant testified that he had very little awareness that Worsham even knew Hodge. He testified that "at some point I knew somebody—it may have been Mr. Worsham had told me that

they knew each other from 20 years previously. I think they were both young sales people at StarKist early in their career, but that's all I knew." (Trial Tr. at 2667:3-13.) He also categorically denied knowing that Worsham had any contacts at competitors. (Trial Tr. at 2906 "[T]o tell you the truth, I didn't even know [Worsham] had any competitive contacts.") This testimony is, of course, contradicted by Worsham's testimony regarding his frequent reports to defendant about his pricing conversations and agreements with Hodge. It is also contradicted by defendant's own contemporaneous email to Cameron and Worsham proposing that Bumble Bee find a position for Hodge a mere 34 minutes after learning of Hodge's termination from StarKist. (Trial Ex. 312.) (PSR ¶ 18) Defendant's testimony is further contradicted in a follow-up email to members of Lion Capital in which defendant credited Hodge with the "rationality" that StarKist had exhibited during Hodge's participation in the conspiracy:

> Remember on Monday when I indicated that StarKist was having a great year and exceeding their financial projections? I also mentioned how rationale [*sic*] they were in the marketplace? Most of this was due to the individual that was running sales for them. Obviously profit must not be their primary metric as they just fired him.

(Trial Ex. 311.)

Defendant's testimony that he had no knowledge of Cameron's and Worsham's communications with competitors led to absurd explanations of his own contemporaneous statements made during the conspiracy. For example, defendant's professed ignorance on the witness stand of the anticompetitive contacts between his subordinates and their coconspirators at StarKist was belied by Renato Curto's August 2012 email recounting a meeting with defendant. Curto wrote, "His people and SK people are talking constantly and have a good communication about how to go to market intelligently (hello! Can I talk ro [*sic*] someone in the DOJ?...)." (Trial Ex. 757 (unredacted).) Apparently unable to explain these damning words, defendant simply denied their truth on direct examination and relied on the entirely circular reasoning that he could not have said these things to Curto "[b]ecause I didn't know that my people were talking to StarKist people all the time; so I wouldn't have said it." (Trial Tr. at 2862:4-5.)

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Defendant's tortured attempts to square the voluminous documentary evidence with his blanket denials reached their apex with the "peace proposal" email that defendant sent to Hines in September 2010, just weeks before the truce between Bumble Bee and StarKist that initiated the conspiracy. (Trial Exs. 131; 414.) Defendant was evasive during cross examination, insisting numerous times without any further elaboration that the email was a "suggestion [he] was making on how we might respond to potential buyers of Bumble Bee who were questioning the competitive nature of the tuna industry." (Trial Tr. at 3010:1-4.) This explanation was false and is contradicted by the full unredacted version of the email showing Hines forwarding the peace proposal to W.H. Lee and asking: "See, would this work for Don [Binotto, then-CEO of StarKist]?" (Trial Ex. 131 (unredacted).) Even ignoring the rest of the email, defendant's explanation makes no sense on its own terms. When asked about the logical consistency of a proposal regarding competitive "peace" that was supposedly intended only for an internal Bumble Bee audience, defendant simply repeated his incredible claim that it was a way of responding to potential buyers and that it was not illogical to make a proposal to oneself because "[a] proposal has multiple definitions." (Trial Tr. at 3010:9-13.) Unable to square his testimony with the document, defendant's ultimate conclusion was that "[h]ow I worded it happens to be how I worded it." (Trial Tr. at 3010:16-20.) Defendant's bald explanation of his own peace *proposal* strains his own definition, credulity, and the English language. Indeed, the Court found that "in light of [defendant's] testimony," "even if it was just given to Mr. Hines for the purpose he stated, . . . it's a fair inference—a fair argument that the Government can make that explanation was not credible." (Trial Tr. at 3153.)

Defendant's false denials also forced him to contradict his own testimony. For example, on direct examination defendant testified that he edited an email before forwarding it to members of Lion Capital merely to make it easier to understand. (Trial Tr. at 2899:1-2, 3001:22-3002:3; *see also* Trial Exs. 298 ("I edited the English a bit to make it more legible."); 298A (not admitted); 299.) But on cross examination, defendant admitted that he deleted a "perfectly grammatical" portion of a key sentence—changing it from "He [Chan] told you guys he will be aggressive" to the more innocent "He will continue to be aggressive"—while leaving an

ungrammatical portion of the sentence intact. (Trial Tr. at 3002:7-3003:16.) Moreover, when asked about the deletion of a second sentence starting with "He told you guys," defendant denied the plain meaning of those words and bafflingly claimed that they did not suggest a conversation with Chan. When asked directly whether they made clear that defendant had had a conversation with Chan, defendant responded "no." (Trial Tr. at 3004:4-7.) Defendant continued to insist that he omitted a perfectly grammatical portion of the sentence because he could not understand it. (Trial Tr. at 3004:4-11 ("I couldn't comprehend this sentence which is why I deleted it.").) Defendant simply was unable to square his testimony with the face of the document because his testimony was false.

As another example, defendant testified that information he sent to members of Bumble Bee's board of directors regarding a series of future list price increases by StarKist and Bumble Bee was based on information received from customers, not on the conspiratorial agreements between SVPs at the two companies. (Trial Ex. 276; Tr. 3018:1-3020:12.) Defendant's explanation was inconsistent with the testimony of Cameron and Worsham, as well as his own prior testimony on direct examination that information from competitors and customers was unreliable: "I don't think you can ever believe any information you get from a customer or competitor. So you know, in many ways their incentive is to lie to you to either get a lower price or, you know, to mislead you." (PSR ¶ 19; Trial Tr. at 2664:13-16.) It defies both common sense and defendant's own testimony that StarKist's customers would tell Bumble Bee that StarKist was preparing to raise its prices, thereby giving those companies a reason to raise their prices too. As noted by defendant himself, customers' incentives are to *not* reveal such plans, in the hopes of keeping their costs low for as long as possible. Defendant's tortured explanation requires the Court to believe not only that defendant sent information he found unreliable to his board of directors, but also that he did so without caveat or explanation.

Defendant was similarly self-contradictory when he testified on direct examination about "aggressive" pricing in 2011. When asked by his counsel, "In 2011 did you encourage—did you give advice about whether or not people at Bumble Bee were supposed to be competing aggressively with your competitors?" defendant replied categorically: "We always competed

aggressively." (Trial Tr. at 2782:13-16.) This is belied by a number of defendant's own statements in emails written during the conspiracy. (*See* Trial Ex. 228 ("What we won't accept is a show of aggressiveness that potentially plunges us back into the depths of 2011."); Trial Ex. 179 ("Please tell me we are NOT being aggressive on the Kroger bid."); Trial Ex. 450 ("According to C L. If BB went back to Kruger [*sic*] someone 'is going to be fired.'").) It is also contradicted by defendant's own testimony—for example, his explanation of "peace" in which all competitors are pricing in line with their costs and maintaining margins, as well as his frustration with Chicken of the Sea's aggression and his motivation for sending repeated jabs to Chan. On direct examination defendant testified that a "peaceful" market was better for profitability, explaining that "peace is an environment where competitors are pricing in line with their costs . . . If StarKist and Chicken of the Sea were acting rationally, you could have a market where there was peace." (Trial Tr. at 3010:25-3011:7.)

Defendant's false testimony was so egregious that on several occasions he explicitly misrepresented documents presented to him on the stand. Defendant lied about the allegations contained in a whistleblower letter he received before the government's investigation. In February 2012, in the middle of the charged conspiracy, defendant was forwarded a whistleblower letter which accused members of Bumble Bee's management team of "potential anticompetitive activity: emails, meetings, phone calls to competitors suggesting to raise prices." (Trial Ex. 262 (not admitted).) It also expressly referenced the Sherman Act by name and identified individuals by title whom the whistleblower believed were participating in the price-fixing conduct, including Cameron and Worsham. (*Id.*) During his testimony, moments after reviewing the contents of the letter to refresh his recollection, defendant denied the contents of the letter and claimed "I didn't see this as a notification. There was nothing specific in here that would give me an indication that it was telling me of a violation of the Sherman Act." (Trial Tr. at 2936:22-2937:1.) Knowing that the document had not been admitted for the jury to see, defendant chose to misrepresent the plain words in the document.

Defendant similarly misrepresented Chan's testimony, denying that Chan had testified to an understanding between the CEOs. Defendant made this denial even after he was asked to

review the transcript of Chan's testimony that Chan and defendant "understand not to promote aggressively" following their breakfast meeting at Milton's. (Trial Tr. at 2240:13-25.) Despite this unambiguous statement, defendant falsely testified, "I don't read that Mr. Chan said he felt there was an understanding." (Trial Tr. at 2916:22-2917:2.)

In sum, defendant repeatedly testified falsely throughout his direct and cross examination. Defendant's lies were contradicted by specific testimony of his coconspirators, his own prior statements, and his own testimony.

b. Defendant's False Testimony Was Material

Defendant's false testimony was clearly material because it went to the very issue at the heart of trial: whether defendant knowingly participated in the price-fixing conspiracy. Material testimony is testimony that "if believed, would tend to influence or affect the issue under determination." U.S.S.G. §3C1.1 cmt. n.6. Had the jury believed defendant's false testimony, it would have been much less likely to find him guilty.

c. Defendant's False Testimony was Deliberate and Willful

Given the breadth and volume of defendant's lies as well as the evidence that contradicted them, defendant's false testimony should be found to be deliberate and willful. In determining the willfulness of false or inaccurate testimony, courts are instructed to consider "that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory." U.S.S.G. §3C1.1 cmt. n.2. Not every instance of inaccurate testimony, in other words, will amount to a willful attempt to obstruct justice. "Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it." *Bronston v. United States*, 409 U.S. 352, 358 (1973).

The Ninth Circuit and other circuits have regularly upheld findings of willfulness where defendants provided testimony or representations that were deemed implausible or untrue in light of all relevant evidence and circumstances. *See United States v. Taylor*, 749 F.3d 842, 848 (9th Cir. 2014) (upholding willfulness finding where the district court found that defendant "clearly

and unambiguously and under oath, told a story that was simply not true, based on the totality of the evidence" (internal quotations omitted)); *United States v. Hernandez-Ramirez*, 254 F.3d 841, 843 (9th Cir. 2001) (upholding finding that defendant's financial affidavit willfully misrepresented his assets based on inferences from the facts of the case and defendant's professional background); *United States v. Magana-Guerrero*, 80 F.3d 398, 400 (9th Cir. 1996) (upholding finding of willfulness based on inferences drawn from probation officer's testimony that defendant's denials were "conscious misrepresentations"). *See also United States v. Thompson*, 962 F.2d 1069, 1071 (D.C. Cir. 1992) ("To limit enhancements only to cases of internally contradictory testimony or flagrant lying—or to permit enhancements only when no reasonable trier of fact could have found other than that the defendant lied—would be merely to reward the polished prevaricator while punishing those less practiced in the art of deception. We do not think that the Guidelines contemplate this distinction between different degrees of willful lying.").

Throughout his time on the stand, defendant proved himself to be just such a "polished prevaricator," engaging in a consistent pattern of self-serving minimization, evasion, implausible explanations and denials, contradictory statements, and outright lies. His false and misleading testimony was contradicted by nearly every percipient witness—both participants and non-participants in the conspiracy—a host of contemporaneous documents, and the defendant's own words. The willfulness of defendant's false testimony is all the more apparent given the scope and volume of defendant's false testimony.[15] Considered as a whole, defendant's statements are simply incredible and constitute willfully false testimony about his knowledge of and involvement in the price-fixing conspiracy.

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[15] For example, defendant's false denial regarding the unambiguous presence of an "understand[ing] not to promote aggressively" in the transcript of Chan's testimony (Trial Tr. at 2240:13-25), taken in isolation, could be viewed as a simple mistake, rather than a willful attempt to deceive. However, the government is not seeking—and the PSR does not recommend—a two-level adjustment based on a one-off instance of confused or mistaken testimony. Defendant's misrepresentation of Chan's testimony was but one part of a much larger pattern of misleading and false testimony.

2. Defendant Obstructed the Government's Investigation

In addition to his false and misleading testimony at trial, defendant also took actions to obstruct the government's investigation once it was underway—which independently merits a two-level enhancement. *See* U.S.S.G. §3C1.1 cmt. n.4(a). Cameron testified about a private conversation with defendant in 2015, and described how defendant "put his hand on [Cameron's] shoulder and said, 'the company has got your back to a point, as long as you and Kenny don't fuck it up[,]'" a statement Cameron interpreted as a threat regarding his future cooperation. (PSR ¶ 23; Trial Tr. at 671:19-672:13.) Defendant's actions are the very definition of the obstructive behavior identified in the guidelines, and merits an obstruction enhancement on its own. *See* U.S.S.G. §3C1.1 cmt. n.4(a) (providing as an example of obstruction "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so").

Defendant compounded the obstruction by lying about this conversation during his direct examination and denying that he ever told Cameron not to "fuck up" the investigation. (PSR ¶ 23; Trial Tr. at 2904:2-5.) Instead, he gave the implausible explanation that the conversation was an attempt to tell Cameron that the company would protect him so long as he had done nothing wrong. (Trial Tr. at 2904:14-19.) Having had the opportunity to sit through trial and evaluate the evidence and the credibility of witnesses in this case, the Court has a sufficient basis for weighing the conflicting testimony between Cameron and defendant. *See United States v. Karterman*, 60 F.3d 576, 584 (9th Cir. 1995) (upholding obstruction enhancement based on the testimony of a witness whose "reliability is questionable" where the district court was able to evaluate the witnesses and weigh the credibility of conflicting testimony). In light of defendant's repeatedly misleading testimony, the government respectfully submits that it is not Mr. Cameron's testimony that lacks credibility, but rather defendant's.

D. The Court Should Impose a Guidelines Fine of $1 Million

Defendant should be sentenced to pay the statutory maximum $1 million fine. 15 U.S.C. § 1. The guidelines fine for an individual is between one and five percent of the volume of commerce, but not less than $20,000. U.S.S.G. §2R1.1(c)(1); *see also* §5E1.2(b) (stating that an

offense-specific fine calculation in Chapter 2 takes precedence over the general individual fine table).[16] With a volume of commerce of $1.002 billion, even the bottom of the range, one percent of the volume of commerce (approximately $10 million), would exceed the statutory maximum fine.[17] Therefore, the statutory maximum fine controls and defendant's guidelines fine is $1 million. U.S.S.G. §8C3.1(b).[18] A $1 million fine meets the policy goals identified in the Sentencing Guidelines. U.S.S.G. §2R1.1 cmt. n.2.

First, the PSR reflects a conservative view of defendant's assets and still defendant has ample assets from which to pay a $1 million fine. The PSR correctly determines that defendant has a significant net worth and assets. (PSR ¶ 67.) Indeed, during the home inspection, the probation officer observed that defendant's recently-sold home was in a very upper-class area and that the home was filled with brand-name clothing, shoes, and bags. (PSR ¶ 50.) Moreover, the PSR counts a loan from defendant's wife against his assets, but this likely is not a true liability considering that defendant and his wife are still married and defendant has not indicated that the loan was from his wife's separate property. (PSR ¶ 65.) Defendant's assets are further increased after accounting for defendant's $1 million cash bond posted with the Clerk of Court. (Dkt. 112.) The cash bond demonstrates that Defendant can easily afford a $1 million fine and, as discussed in further detail below, a significant fine amount is necessary in order for the criminal fine to serve its stated purpose of punishment and deterrence.

Second, a $1 million fine also promotes general deterrence and furthers the policy goals set out in the Sentencing Guidelines. The Guidelines state that "[s]ubstantial fines are an essential part of the sentence." U.S.S.G. §2R1.1 cmt. background. Unlike crimes of violence,

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[16] The PSR correctly calculates the guidelines fine range in the body of the report only to state it incorrectly in the table describing its sentencing recommendation. The government respectfully notes that in this case, defendant's guidelines fine range before application of the statutory maximum is $10,020,000 to $50,100,000. (PSR ¶ 77.)

[17] Even using the lower volume of commerce figure for sales of only branded five-ounce cans from June 1, 2011 to December 31, 2013, one percent of the volume of commerce still exceeds $1 million.

[18] The PSR correctly identifies 18 U.S.C. § 3571(b) as a basis for finding that the statutory maximum fine applies, the government respectfully adds that U.S.S.G. §8C3.1(b) is an alternate basis.

economic crimes are motivated by a desire for a financial payout; significant criminal fines therefore provide necessary general deterrence, as is set forth in detail, *infra*, in the government's discussion of the 18 U.S.C. § 3553(a) factors.

Finally, defendant has not been fined for this or a similar offense, and the government is not seeking restitution. *See infra*. Defendant committed a serious financial crime with far-reaching impact. The fact that defendant got caught and did not ultimately benefit from the $43 million payout he was expecting does not mitigate his conduct or justify a reduced fine. A guidelines maximum fine is warranted.

E. Restitution

The government is not seeking restitution against defendant. The Mandatory Victim Restitution Act of 1996 does not require restitution for Sherman Act offenses. Further, the Clayton Act, 15 U.S.C. §§ 15, *et seq.* authorizes victims of antitrust offenses to seek treble damages through civil suits. The victims of this particular conspiracy are seeking damages pursuant to the Clayton Act through lawsuits against Bumble Bee, and defendant has been named as a defendant in a suit by a single retailer, Associated Wholesale Grocers, Inc. These cases have been consolidated in a multidistrict litigation pending in the Southern District of California, *In re Packaged Seafood Products Antitrust Litigation*, 15-md-02670-JLS-MDD.

F. Supervised Release

The government agrees with the PSR's recommendation for a three-year term of supervised release. Given that the government is not seeking restitution, the Court may wish to consider conditions of supervised release that would ensure that defendant could pay a civil judgment if so ordered.

II. A Guidelines Sentence Is Appropriate in Light of 18 U.S.C. § 3553(a)

The "nature and circumstances of the offense and the history and characteristics of the defendant" support the guidelines prison term and fine. 18 U.S.C. § 3553(a)(1). No departure or variance below the guidelines sentence is warranted for either the term of imprisonment or the fine for any reason, including the 18 U.S.C. § 3553(a) factors.

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A. The Nature and Circumstance of the Offense and the History and Characteristics of Defendant Support a Guidelines Sentence

An antitrust conspiracy is, by its nature, a serious crime. "Criminal antitrust violations, crimes such as price fixing and bid rigging, committed by business executives in a boardroom are serious offenses that steal from American consumers just as surely as does a street criminal with a gun." 150 Cong. Rec. S3610-02, S3615 (daily ed. Apr. 2, 2004) (statement of Sen. Kohl). Price fixing is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Such conspiracies "have manifestly anticompetitive effects and lack . . . any redeeming virtue." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotations and citations omitted). Recognizing the "profoundly harmful impact that antitrust violations have on consumers and the economy," the Sentencing Commission increased the offense levels for antitrust violations in 2004 "to make them more comparable to the offense levels for fraud with similar amounts of loss." 150 Cong. Rec. S3610-02, S3614 (daily ed. Apr. 2, 2004) (statement of Sen. Hatch); U.S.S.G. app. C, amend. 377. Imposing a guidelines custodial sentence of 97 to 120 months and $1 million fine will promote respect for the law, reflect the seriousness of the offense, provide just punishment, and afford adequate deterrence. 18 U.S.C. § 3553(a)(2)(A)-(B).

A white-collar price fixer—unlike many typical criminal offenders—is motivated by greed, not by desperate circumstance. As one court explained, price fixing is "[a] crime of fraud by one who already has more than enough—and who cannot argue that he suffered a deprived or abusive childhood or the compulsion of an expensive addiction—[it] is simply a crime of greed." *United States v. VandeBrake*, 771 F. Supp. 2d 961, 1006 (N.D. Iowa 2011) (quoting *United States v. Miell*, 744 F. Supp. 2d 904, 955 (N.D. Iowa, Sept. 27, 2010)), *aff'd*, 679 F.3d 1030 (8th Cir. 2012). When defendant decided to engage in this crime, he already was a wealthy man and CEO of a major company. By his own admission and that of every other witness during trial, defendant was one of the most, if not *the* most, prominent figures in the packaged-seafood industry. And he led a multi-year conspiracy to raise the price of canned tuna—all to satisfy his

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own greed. A guidelines prison sentence and fine is the only way to hold defendant accountable for his criminal conduct and disregard for the rule of law.

A guidelines prison sentence also is the only way to deter other executives driven by greed who may be tempted to cheat others and follow in defendant's footsteps. Deterrence "is particularly important in the area of white collar crime." S. Rep. No. 98-225, at 76 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259. Because defendants in white-collar cases "often calculate the financial gain and risk of loss," such crimes "therefore can be affected with serious punishment." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006); *see also United States v. Stein*, No. 09-CR-377, 2010 WL 678122, at *3 (E.D.N.Y. Feb. 25, 2010) ("Persons who commit white collar crimes like defendant's are capable of calculating the costs and benefits of their illegal activities relative to the severity of the punishments that may be imposed.").[19] Even if the Probation Office does not believe that defendant is a likely recidivist, it is important that the Court sentence him in a way that sends an appropriate message to other potential offenders. Accordingly, "[a] serious sentence is required to discourage such crimes." *Stein*, 2010 WL 678122, at *3.

For the same reason, the Court should impose the statutory maximum fine of $1 million. Given defendant's wealth, a significant fine is necessary to be sufficiently punitive. The Probation Office's recommended $100,000 fine, a ninety-percent variance from the guidelines fine, fails to accomplish these goals. When compared to defendant's and his wife's purchases on a single American Express card in a single year during the conspiracy (2012), the insufficiency of Probation's recommended fine is apparent. (Trial Ex. 2184 (not admitted).) That fine is only (1) one-fifth of what defendant charged to the credit card in a single year, (2) slightly more than double defendant's wine-club purchases, and (3) less than half of his wife's annual purchases. (*Id.* at pp. 2, 19-20.) Further, the Probation Office's recommended fine is only a tenth of the amount of defendant's cash bond. That defendant was able to secure his appearance with a $1

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[19] The legislative history of the Sentencing Reform Act notes that for white-collar crimes, "the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance." S. Rep. No. 98-225, at 91-92 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3274-75.

million cash bond only underscores the reasonableness of a $1 million criminal fine. The court in *VandeBrake* departed upward to impose a fine in excess of $800,000 for a millionaire executive (not CEO) of an Iowan concrete company, concluding that "only by imposing a fine of such a large amount does the fine become sufficiently proportionate to [defendant's] wealth to properly reflect the gravity of his offenses." 771 F. Supp. 2d at 1012. The same is true here, and a statutory maximum fine is necessary.

Similarly, only a significant financial penalty will serve as adequate deterrence for other wealthy executives. Imposing the Probation Office's recommended fine, which amounts to a mere fraction of an average executive salary—and less one-seventh of defendant's annual salary for the time period of the conspiracy—sends a message to those in the position to price fix that, if they are caught, the financial cost will be significantly less than they stand to gain by their crime. Here, defendant stood to make ***$43 million*** if he could meet the aggressive profitability projections he made to Lion Capital in connection with a sale of the company. A criminal fine amounting to ***.23%*** of what defendant stood to gain by his criminal conduct is no deterrent at all.

B. A Guidelines Sentence Does Not Result in Unwarranted Sentencing Disparities

A guidelines sentence of 97 to 120 months and a $1 million fine does not create unwarranted sentencing disparities either within this particular conspiracy or as compared to others who have committed similar crimes. *See* 18 U.S.C. § 3553(a)(6). To the contrary, a sentence within the guidelines range promotes fairness and ensures parity. The other individual defendants in the packaged-seafood conspiracy are not similarly situated, so differences are not "unwarranted." Accordingly, their anticipated sentences are not appropriate benchmarks both because they accepted responsibility and cooperated early in the investigation, and because defendant was the ringleader and more culpable than any other defendant. A guidelines sentence would be consistent with sentences imposed on Sherman Act defendants convicted after trial in other cases involving significant volumes of commerce. *See United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007) ("Congress's primary goal in enacting § 3553(a)(6) was to promote national uniformity in sentencing rather than uniformity among co-defendants in the same

case.") (internal quotations omitted). Finally, a guidelines sentence would be consistent with lengthy sentences imposed against similarly-situated high-level executives convicted of white-collar crimes.

As an initial matter, by linking sentences to the volume of commerce affected by the crime, the Guidelines capture the scope and magnitude of the crime and provide a built-in mechanism to ensure basic parity across defendants. As the Ninth Circuit stated in a case in which a defendant challenged his guidelines sentence, "avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *United States v. Treadwell*, 593 F.3d 990, 1011 (9th Cir. 2010) (internal quotations omitted), *overruled on other grounds by United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020); *see also United States v. Becerril-Lopez*, 541 F.3d 881, 895 (9th Cir. 2008) ("[W]e have trouble imagining why a sentence within the Guideline range would create a disparity[.]"). Accordingly, "when a district court imposes a within-Guidelines sentence, the explanation of its decision-making process may be brief." *United States v. Carter*, 560 F.3d 1107, 1117 (9th Cir. 2009).

In addition, Cameron, Worsham, and Hodge are not similarly situated to defendant. Cameron, Worsham, and Hodge accepted responsibility for their crimes and provided prompt and substantial cooperation with the government's investigation. That cooperation is reflected in their plea agreements through application of §1B1.8, in the case of Cameron and Worsham, and §5K1.1, in the case of all three. In all three instances, that cooperation affected the government's recommendation regarding offense level and fine. Rather than cooperating, defendant instead sought to obstruct the investigation and those benefits are not available to him.

Defendant is not entitled to benefit from the cooperation and acceptance of responsibility demonstrated by his coconspirators. "Failure to afford leniency to those who have not demonstrated those attributes on which leniency is based is unequivocally . . . prop[er]." *Id.* at 1121 (quoting *United States v. Narramore*, 36 F.3d 845, 847 (9th Cir. 1994)). That is why "defendants who cooperate with the government and enter a written plea agreement are not

similarly situated to a defendant who provides no assistance to the government and proceeds to trial." *United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009); *see also United States v. Susi*, 674 F.3d 278, 288 (4th Cir. 2012) ("[I]ndividuals who go to trial and those who plead guilty … are not similarly situated for sentencing purposes."). For that reason, there is no unwarranted disparity even when a cooperating defendant receives a substantially shorter sentence than a defendant who goes to trial, because "comparing the sentences of defendants who helped the Government to those of [a] defendant[] who did not . . . is comparing apples and oranges." *United States v. Perez-Pena*, 453 F.3d 236, 243 (4th Cir. 2006). Indeed, "[a] concomitant of [the § 3553(a)(6)] principle is the need to *avoid* unwarranted similarities among defendants who are not similarly situated." *VandeBrake*, 771 F. Supp. 2d at 1009.

The justifiable disparity with defendant's pleading coconspirators also applies to their fine. The Probation Office's recommended $100,000 fine appears to be based on his coconspirators' agreement to pay a $25,000 fine. (PSR, Sentencing Recommendation at 2.) But the fines for defendant's coconspirators are not an appropriate basis for determining his fine. The government agreed to reduce the fine for each individual below the guidelines fine range based on their substantial assistance and cooperation under §5K1.1. The defendant provided neither, and is not entitled to a fine reduction on that basis.

Second, defendant was the ringleader of the conspiracy. *See supra*. Where the defendant is "the ringleader and driving force" behind the conspiracy, courts impose a higher sentence. *United States v. Green*, 592 F.3d 1057, 1071-72 (9th Cir. 2010); *see also United States v. Hairston*, 627 F. App'x 857, 861 (11th Cir. 2015). By his own admission and the testimony of others, defendant was the CEO and an industry leader on a variety of issues. It was defendant's greed that led to the formation of the conspiracy. It was defendant who stood to gain over $40 million if his conspiracy was successful.[20] It was defendant who used his position of leadership

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[20] While Cameron and Worsham certainly stood to profit from the conspiracy as well—indeed, most individuals do not commit white-collar crimes without the potential of some personal gain—they stood to benefit significantly less from the anticipated future sale of Bumble Bee than defendant did. Under the same financial projections defendant created, Worsham would gain $3.414 million and Cameron would gain $2.384 million—less than 10% of the defendant's $43 million projected windfall. (*See* Trial Ex. 324.)

to ensure the continued existence of the conspiracy when cracks appeared: when he ordered Worsham to find a contact at StarKist to replace Handford; when he communicated directly with Chan to ensure that Chicken of the Sea did not disrupt the conspiracy; and, finally, when he tried unsuccessfully to recruit Roszmann into the conspiracy. (PSR ¶¶ 13, 16.) For these reasons, it is appropriate for defendant to receive the most serious sentence.

Third, defendant's guidelines sentence is consistent with other similarly-situated defendants convicted of price-fixing and bid-rigging schemes. In *Green*, the defendant was sentenced to 90 months for her role as ringleader in a bid-rigging scheme with a $60 million impact on the federal government. *Green*, 592 F.3d at 1060, 1063. In *United States v. Peake*, 804 F.3d 81(1st Cir. 2015), the defendant was sentenced to a 60-month guideline sentence for his role in orchestrating a scheme to fix the prices of freight shipments to Puerto Rico, where the judge found the scheme affected $500 million in commerce. In *United States v. McDonald*, the defendant was sentenced to 5 years after his conviction on Sherman Act violations for his role in a scheme to rig bids, pay kickbacks, and defraud the government in connection with cleanup efforts at the Federal Creosote Superfund site in New Jersey. 654 F. App'x 118 (3d Cir. 2016) (sentencing defendant to 14 years in prison on the related kickback, money laundering and tax fraud charges). In *Vandebrake*, a defendant who pleaded guilty received a 48-month sentence for his role in orchestrating price-fixing conspiracies affecting only $5 million in commerce. A guidelines sentence resulting from defendant's leadership role in a nation-wide conspiracy affecting over $1 billion in sales of a pantry staple for Americans meets the fairness goals of § 3553(a)(6).

Fourth, defendant's guideline sentence is also consistent with corporate-executive defendants with similar records—no prior history of crime, leadership in the community, privileged background and lifestyle—who were convicted of similar white-collar crimes. (*See* Appendix A.) Because of their privileged role in society, CEOs and other high-level executives convicted of white-collar crimes, including insider trading and securities fraud, are routinely

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sentenced to lengthy jail sentences.[21] But antitrust crimes have the same impact—if not even greater when the crime affects a staple product like canned tuna. In this particular instance, defendant's conspiracy affected the price of an important, low-cost food source for many Americans. And while the conspiracy may have stolen their hard-earned dollars only a few nickels and dimes at a time, when multiplied over the billions of cans of tuna sold during the conspiracy, the total harm to those consumers is staggering.

C. No Downward Departure or Variance is Warranted

No departure or variance from the guidelines sentence is warranted either as to defendant's fine or to his term of imprisonment. The Probation Office identified no basis for a departure, but recommends a significant variance because, due to defendant's age, he is unlikely to be a recidivist. (PSR, Sentencing Recommendation at 2.) But no variance is appropriate based on age, which is just one of the § 3553(a) factors and is substantially outweighed by the need for deterrence and sufficient punishment.

"When the Commission promulgated §2R1.1 it stated that ***deterrence***"—not an individual's likelihood of recidivism—"was the primary goal in sentencing antitrust offenses." United States Sentencing Commission, Antitrust Primer, February 2019 at 1 (emphasis added).[22] Further, age alone is a permissible basis for departure only in the rarest of circumstances. *See* U.S.S.G. §5H1.1. The Sentencing Guidelines Policy Statement on Age states that age "*may* be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an *unusual degree* and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm[.]" *Id.* (emphases added). No such conditions are present here. The PSR describes defendant's health as good, and identifies no health concerns that would arise from serving a guidelines sentence,

[21] Although the Sentencing Commission increased the offense levels for antitrust violations "to make them more comparable to the offense levels for fraud with similar amounts of loss," U.S.S.G. app. C, amend. 377, application of the Sentencing Guidelines still frequently "results in the disproportionately more lenient treatment of antitrust offenses than fraud crimes, or other types of offenses." *Vandebrake*, 771 F. Supp. 2d at 1002.

[22] https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Antitrust.pdf

and there is no other indication that his age is an extraordinary circumstance or otherwise presents considerations "to an unusual degree." (PSR ¶¶ 52, 53.) To the contrary, defendant presents as a stereotypical antitrust offender: a wealthy, middle-aged, senior executive in good health living a lifestyle commensurate with the very status that allowed him to perpetrate the crime.

Defendants are routinely sentenced to incarceration at the age of 59 and older, for all sorts of crimes. (*See, e.g.*, Appendix A.) The most successful white-collar crimes are those effectuated and policed at the highest executive levels of a company; positions of power and trust that can only be attained by years of experience. Indeed, being in a senior position is ordinarily a prerequisite to having the authority to fix prices for an entire company. This further underscores that defendant's age should not be treated as a mitigating circumstance warranting a downward departure, since it is his experience and seniority that put him in the position to successfully orchestrate this conspiracy.

In addition, the Court should not consider departing or varying downward based on the erroneous claim that the volume of commerce enhancement overstates the harm resulting from the conspiracy. (PSR ¶ 88.) To the contrary, the Sentencing Commission has determined that "the scale or scope of the offense as measured by the volume of commerce is an acceptable proxy for the harm caused by the defendant's conduct," and that "tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive." U.S.S.C., Antitrust Primer at 5. Here, the volume of commerce accurately reflects the scale and scope of defendant's conduct in orchestrating a pervasive conspiracy affecting billions of dollars in sales of a core food product. That defendant's conduct affected billions of dollars of commerce does not absolve him of culpability, it only emphasizes the need for accountability.

Penalties for Sherman Act violations often are disproportionately lower than those for similar crimes like mail and wire fraud. And obscure crimes with far less significant impact on American society carry far more significant penalties than price-fixing. As Judge Bennett noted in *Vandebrake*, "the possible maximum penalty for smuggling tarantulas into the United States is twice the penalty provided for under the Sherman Act." 771 F. Supp. 2d at 1001, n.37. A mid-

level drug conspirator could easily face a mandatory minimum sentence longer than the Sherman Act's maximum. Given the important purpose served by the Sherman Act, and the comparatively low maximum sentence under the Sherman Act, the Court should not depart or vary downward from a guidelines sentence that accurately reflects the harm defendant's crime caused to the U.S. economy.

Defendant's rationalization for a noncustodial sentence—in other words, a downward departure or variance of at least 97 months—is meritless. Defendant argued to the Probation Office that this was an "atypical" antitrust conspiracy, because any collusive price increases were "inevitable." But the Sherman Act does not distinguish between typical and atypical ways to cheat consumers. Here, faced with declining profits and the potential loss of a multi-million dollar windfall, defendant directed his executives to reach out to their competitors to fix the prices of canned tuna. The witnesses testified that they fixed all aspects of tuna prices: list prices, quarterly guidance, and promotional prices. And they testified that defendant orchestrated the conspiracy, coordinated the conduct, and approved every collusive pricing decision made during the course of the conspiracy. If there is anything atypical in this case, it is defendant's level of individual culpability. Few antitrust defendants have had such a prominent role in leading their industries into crime.

Defendant's conduct is particularly egregious because canned tuna is a staple household product. For many Americans, canned tuna is one of the only affordable sources of protein. The surging demand for canned tuna during the coronavirus pandemic demonstrates the importance of affordable protein for Americans during economic downturns.[23] Defendant's price fixing not only deprived American consumers of the benefit of competition, it also deprived shoppers of the option and ability to spend lost money on other products. As a result of the fixed prices—when

[23] *Tuna Surge Propels Thai Union Sales*, Financial Times, May 5, 2020, https://www.ft.com/content/2d0a5ab9-78f0-4fd2-b8ee-f98001474e98 ("Thai Union said its sales volume jumped almost 25 per cent to 99,599 tons 'as consumers around the world stocked up on shelf-stable products in response to Covid-19'"); *A Quarantine Surprise: Americans Are Cooking More Seafood*, New York Times, May 5, 2020, https://www.nytimes.com/2020/05/05/dining/seafood-fish-coronavirus.html ("Year-over-year sales of both canned and frozen seafood were around 37 percent higher for the four weeks that ended April 19, according to data from IRI, a Chicago-based market research firm.").

cans of tuna jumped from $1 to $1.50 a can—a shopper buying a few cans of tuna might be unable to also buy a loaf of bread.

Like the defendant in *Vandebrake*, defendant "was already wealthy when he embarked on and engaged in the charged conspirac[y,]" making his conduct "simply a crime of greed." 771 F. Supp. 2d at 1006. Despite his privileged position, defendant did not care about the many shoppers attempting to feed her families while balancing their budgets—he was only concerned about the millions of additional dollars he stood to gain. And, like in *Vandebrake*, defendant continues to justify, rationalize, and excuse his greed-driven criminal conduct as "inevitable" or "necessary" due to industry conditions. These "self-serving rationalizations reflect a total lack of remorse for his criminal conduct in his case." *Id*. at 1008.

Finally, as defendant testified at trial and argued to the Probation Office, he may be a good father and husband, and he may contribute generously to his community. But those factors do not warrant a departure nor a variance from the guidelines sentence. U.S.S.G. §5H1.11 ("Civic, charitable, or public service; employment related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted."). It is also true that, like the vast majority of price fixers and other white-collar criminals, defendant has no prior criminal record. This also does not provide a reason to depart downward from the guidelines sentence because the antitrust guidelines account for such a typical offender. *See Carter*, 560 F.3d at 1121-22 (observing that a defendant's prior history and circumstances must be so "atypical as to put [the defendant] outside the 'minerun of roughly similar' cases considered by the Sentencing Commission in formulating the Guidelines") (quoting *United States v. Stoterau*, 524 F.3d 988, 1002 (9th Cir. 2008).

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CONCLUSION

The government agrees with the Probation Office's calculation that defendant's guidelines sentence is 97-120 months in custody and a $1 million fine. The guidelines reflect an appropriate sentence for defendant in light of his role in the conspiracy, the conspiracy's widespread impact on American consumers, and the need for the sentence to deter others from engaging in similar conduct. The government urges the Court to impose a guidelines term of imprisonment and a $1 million fine.

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Respectfully submitted,

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