UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION	Case No. 3:15-md-2670-JLS-MDD MDL No. 2670 **JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE ON CFPS' MOTION TO COMPEL PRODUCTION OF ATTORNEY-CLIENT COMMUNICATIONS AND ATTORNEY WORK PRODUCT, AND DPPS', DAPS', AND EPPS' MOTION TO COMPEL TESTIMONY** Judge: Hon. Mitchell D. Dembin
This Document Relates to: ALL ACTIONS	

I. INTRODUCTION

Commercial Food Preparer Plaintiffs ("CFPs"), Direct Purchaser Plaintiffs ("DPPs"), End Payer Plaintiffs ("EPPs"), Direct Action Plaintiffs ("DAPs"), and Defendant StarKist Co. ("StarKist") respectfully file this Joint Motion regarding the testimony by StarKist General Counsel Robert Meece during a Federal Rule of Civil Procedure 30(b)(6) deposition on behalf of StarKist. CFPs seek to compel the production of attorney-client communications and attorney work product they contend were waived during the deposition. The other Plaintiff groups (the DPPs, EPPs, and DAPs) seek relief in the form of an additional deposition of a StarKist

30(b)(6) witness, as described below. StarKist opposes all of Plaintiffs' arguments.

The parties have met and conferred on these issues, and reached no agreement.

II. THE DISCOVERY IN DISPUTE

StarKist Third Supplemental Objections & Responses to Plaintiffs' Second Set of Interrogatories, Interrogatory No. 1 ("Rog Response"):

> **INTERROGATORY NO. 1**
>
> Identify and describe the nature of all joint ventures, alliances, agreements, initiatives, or business relationships between or among You and any other Defendant or Defendants or any other manufacturer of PSPs, identify persons with knowledge with respect to each, and the time period during which each existed.
>
> **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1**
>
> StarKist incorporates the General and Specific Objections to Interrogatory No. 1 as set forth above and in its Objections and Responses to Plaintiffs' First Set of Interrogatories During the Limited Discovery Stay Period, dated August 22, 2016; all General Objections and Specific Objections contained in StarKist's Supplemental Objections and Responses to Plaintiffs' Interrogatory Nos. 1, 2, 4-7, and 9-12, dated June 23, 2017; and all General Objections and Specific Objections contained in StarKist's Second Supplemental Objections and Responses to Plaintiffs' Interrogatory Nos. 1-3, dated September 29, 2017.
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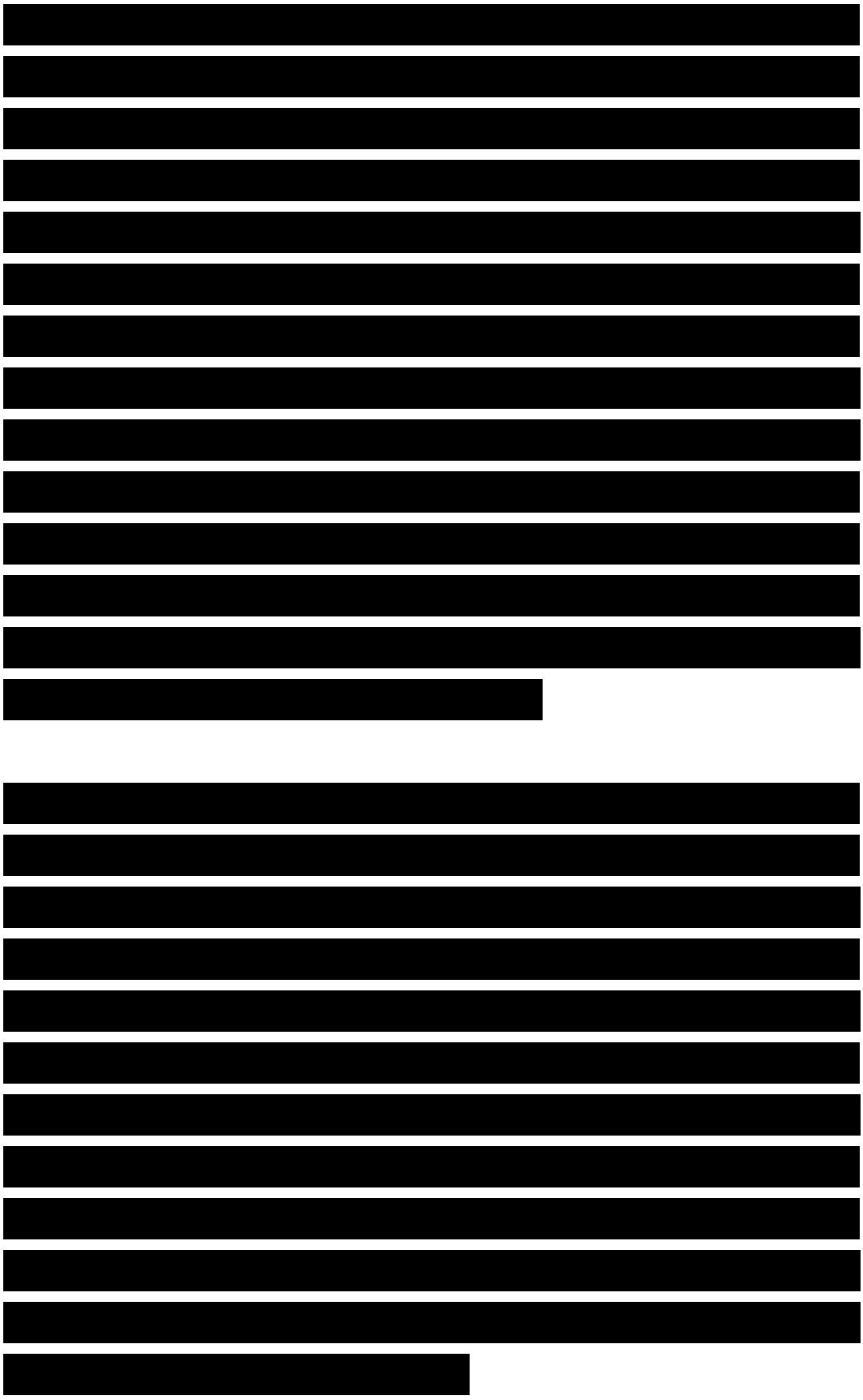
> Subject to and without waiving the foregoing and incorporated General and Specific Objections, StarKist responds as follows: [redacted]



[redacted].

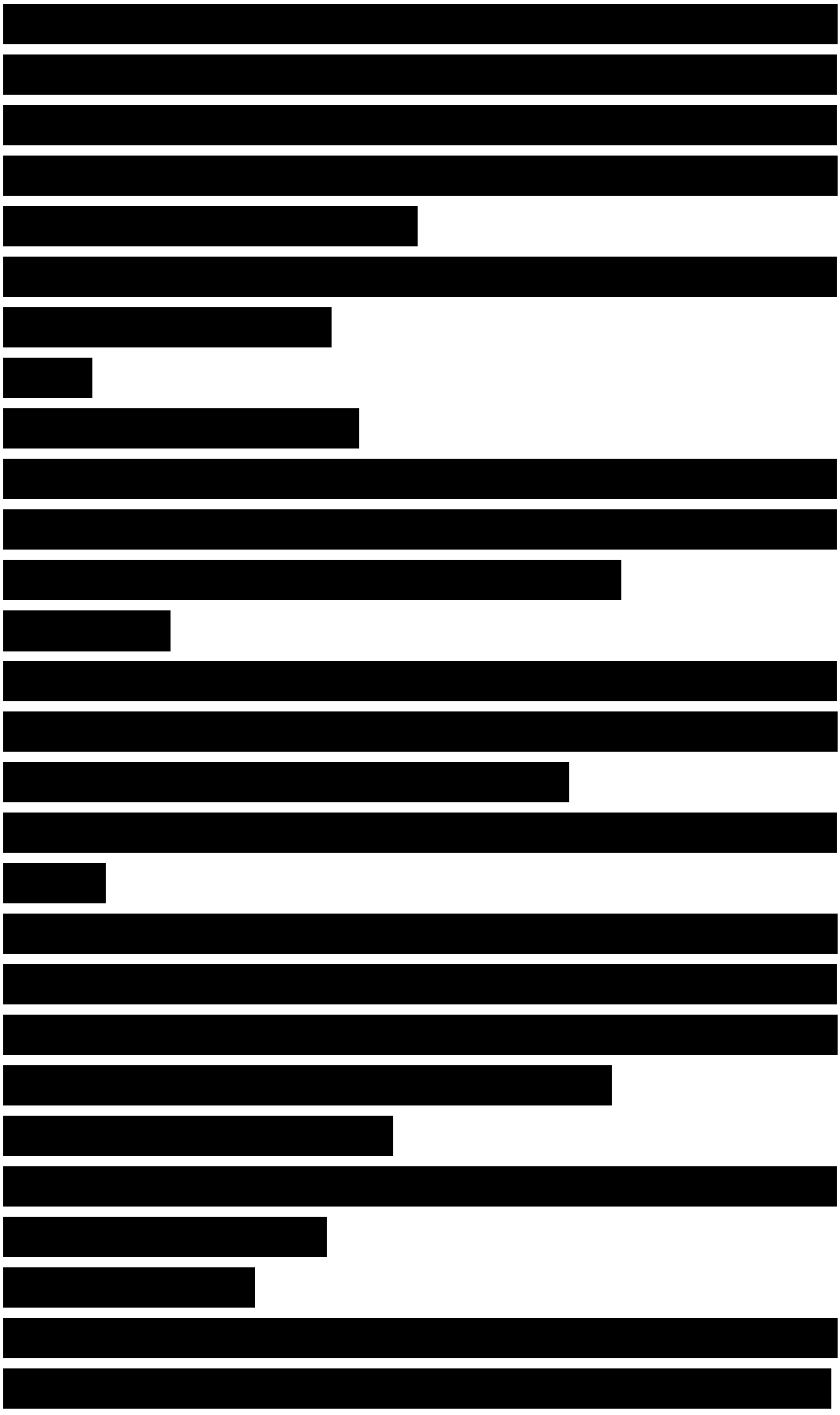
Rule 30(b)(6) Deposition Topics

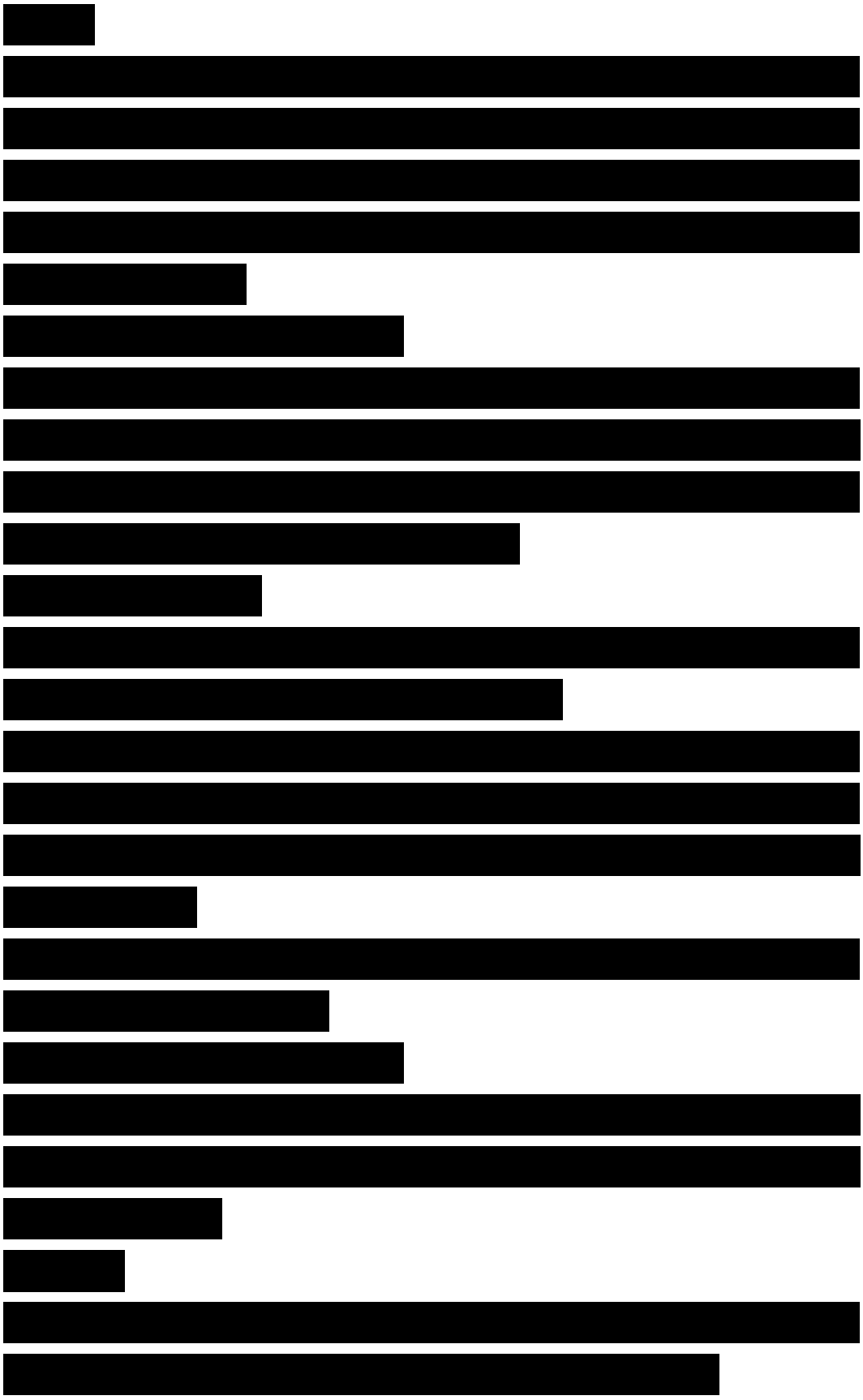
TOPIC 1: [StarKist's] knowledge of All facts relating to communications among StarKist, Bumble Bee and Chicken of the Sea regarding the Pricing and Sale of Packaged Tuna engaged in by Steve Hodge, Joe Tuza, Bruce Bollmer, Charles Handford, or Hubert Tucker (during the time period during which Mr. Tucker worked at StarKist), or in any way related to StarKist's guilty plea.

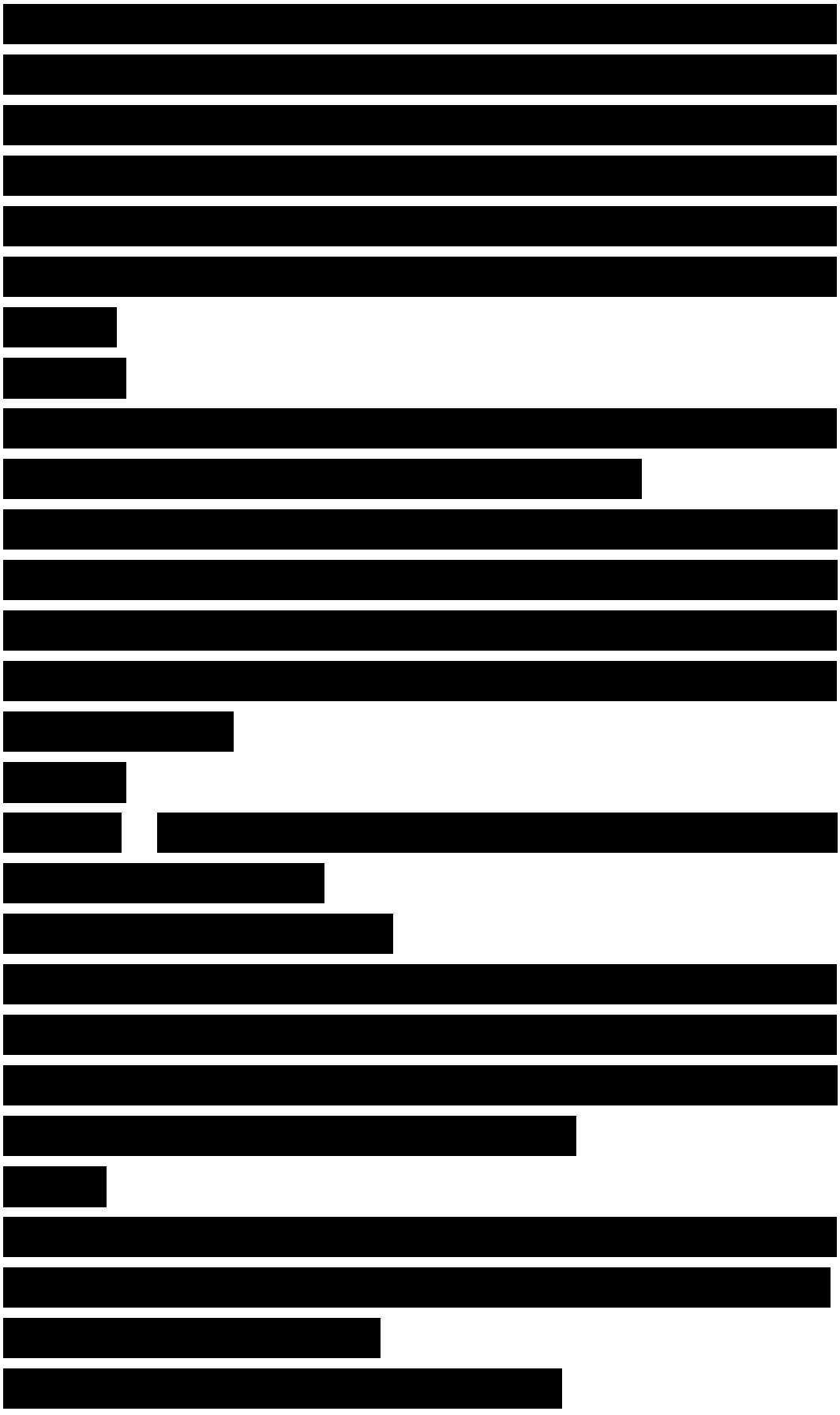
TOPIC 3: [StarKist's] knowledge of All facts relating to participation in any agreement or understanding among StarKist, Bumble Bee and Chicken of the Sea engaged in by Steve Hodge, Joe Tuza, Bruce Bollmer, Charles Handford, or Hubert Tucker (during the time period during which Mr. Tucker worked at StarKist), or in any way related to StarKist's guilty plea.

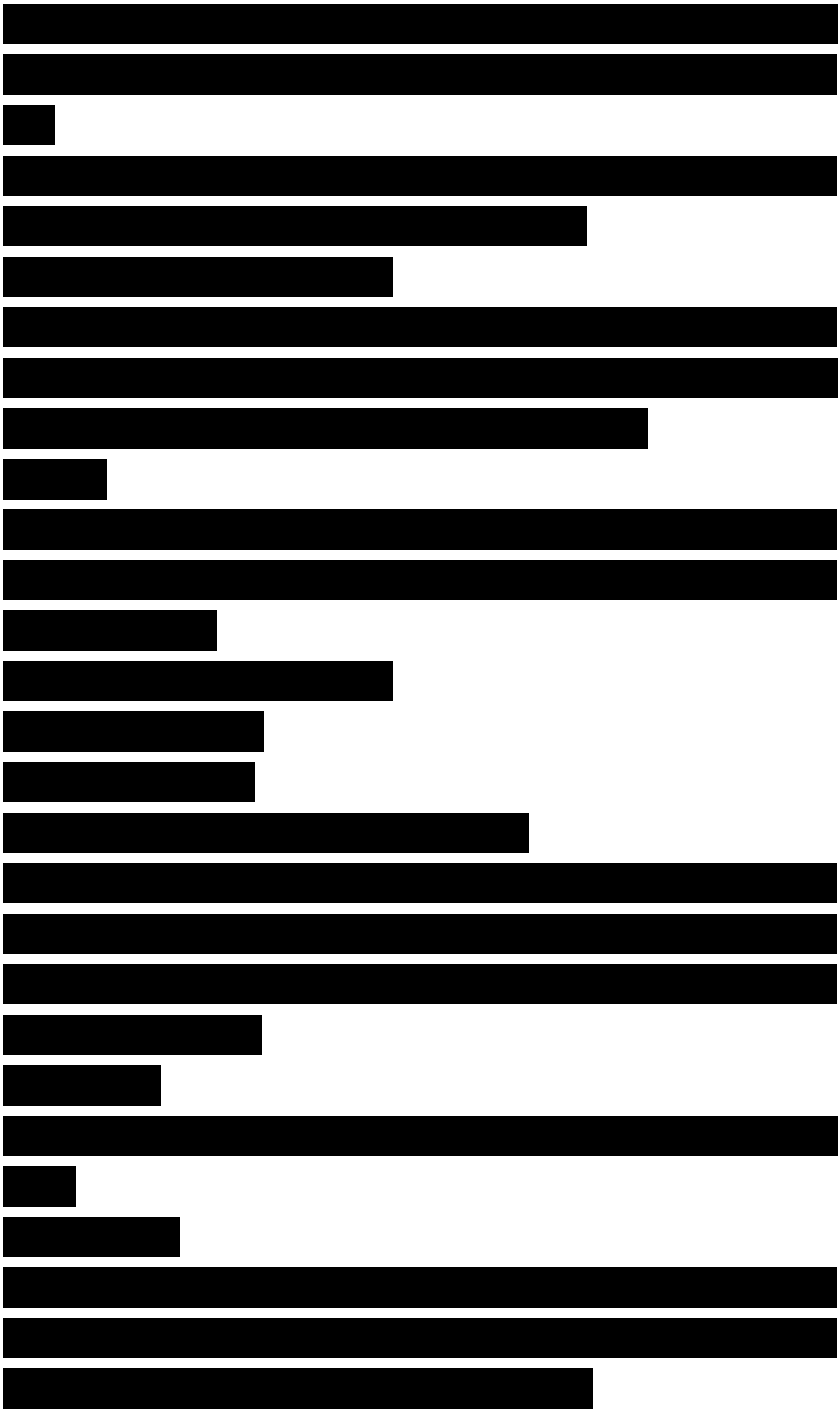
Deposition Transcript of Robert Meece, February 12, 2019

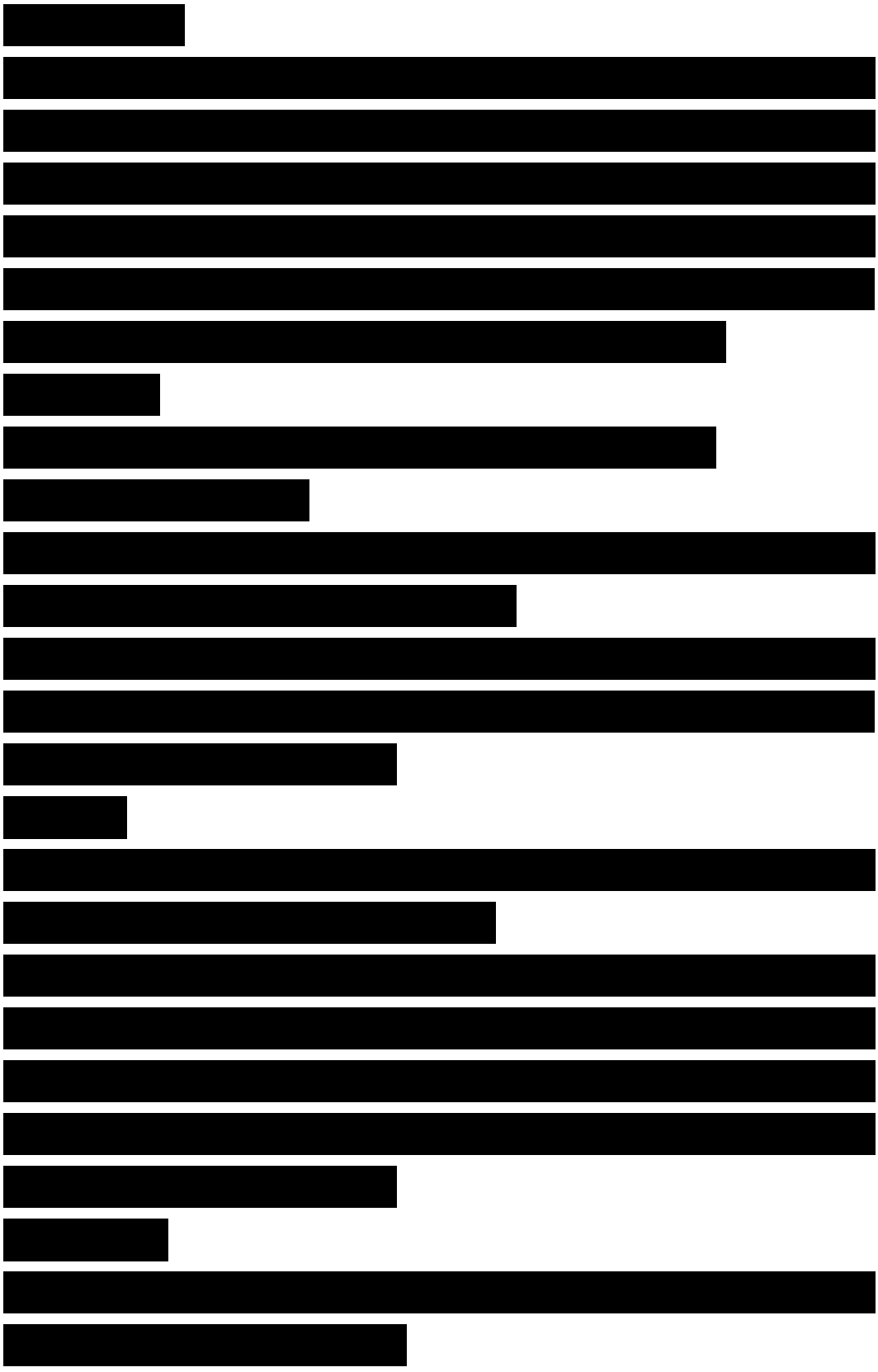
[redacted]

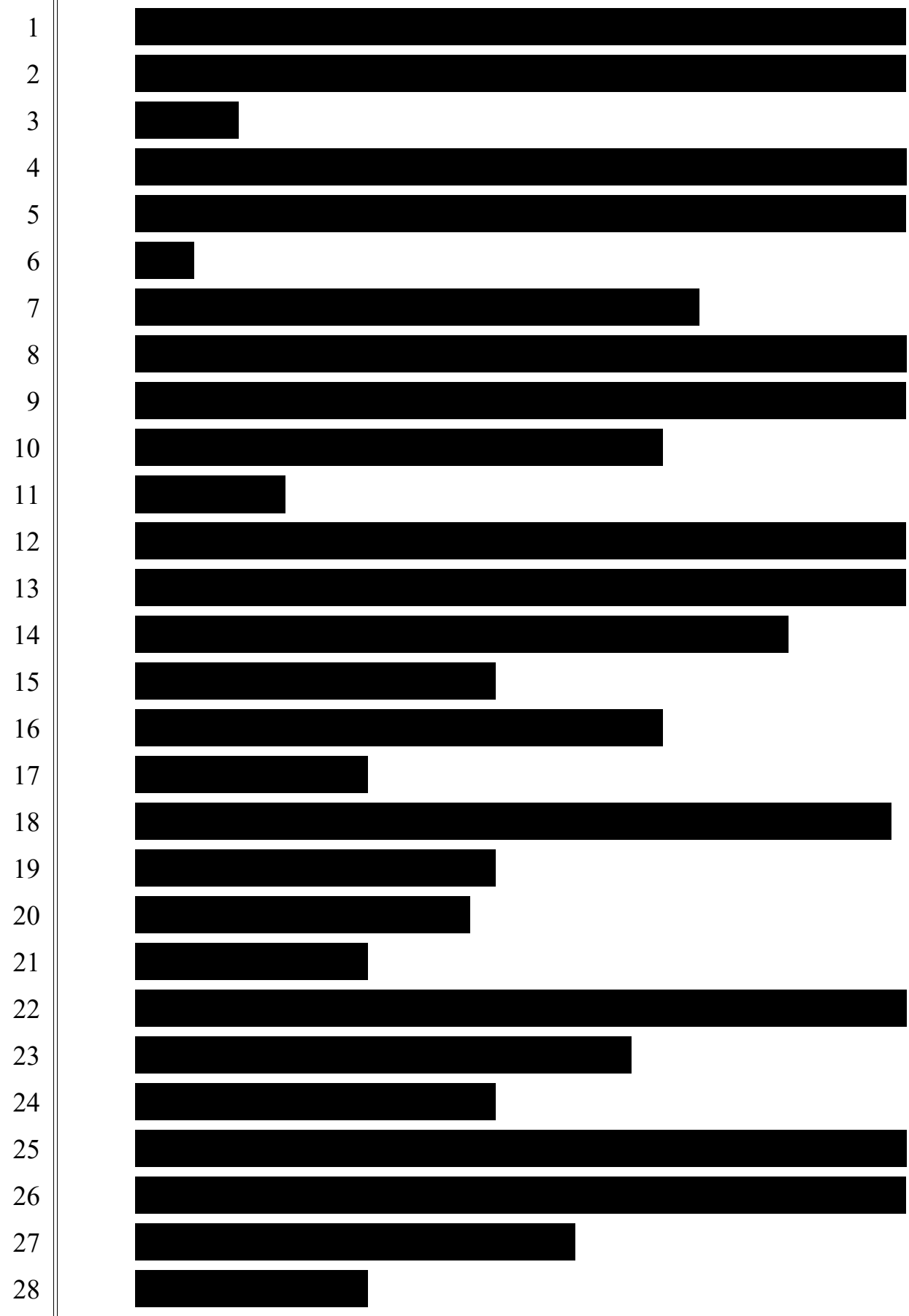


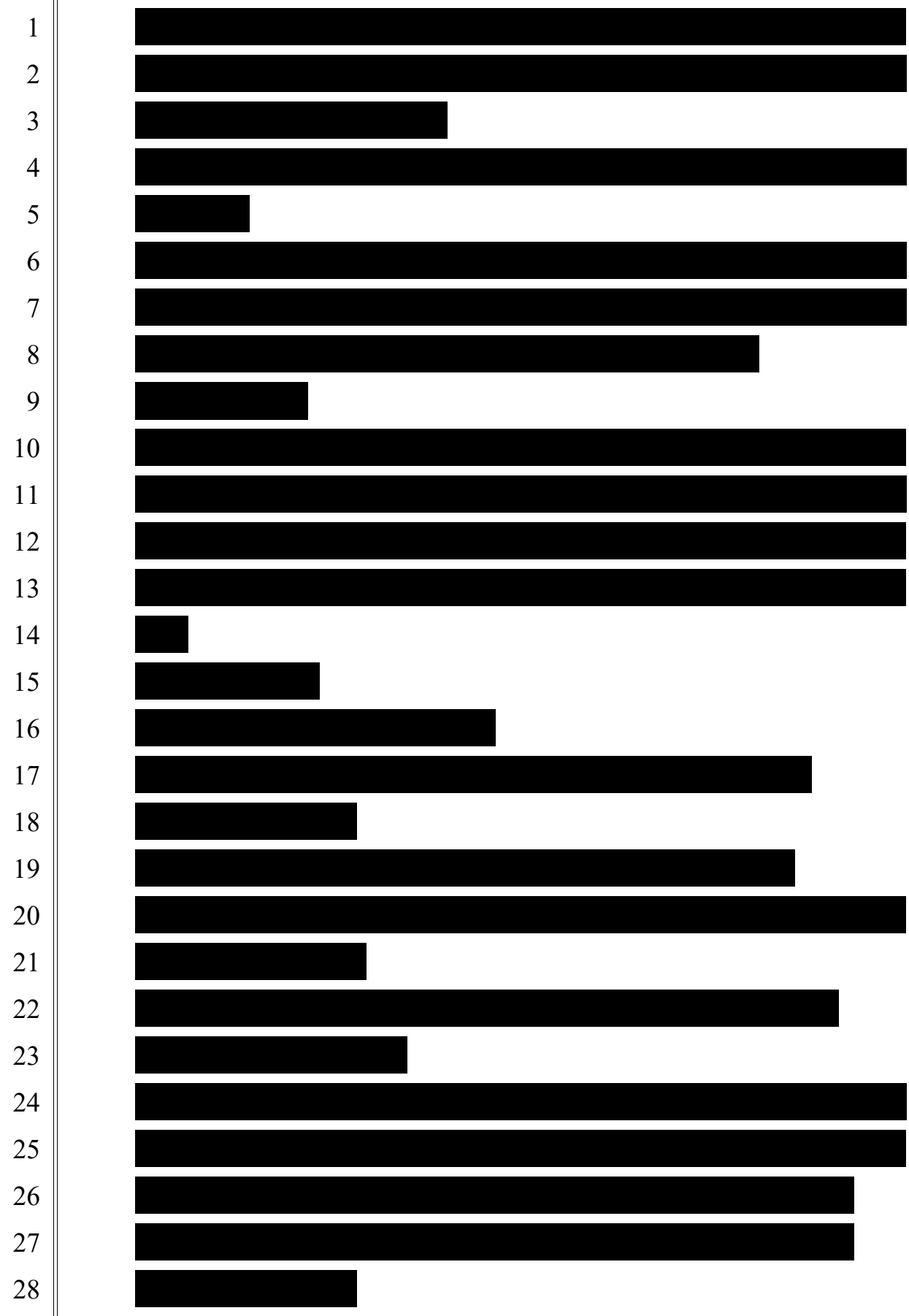












[redacted].

CFPs' Statement: StarKist waived any applicable attorney-client privilege and work product protection when it testified during its General Counsel's Fed. R. Civ. P. 30(b)(6) deposition [redacted] It is hornbook law that a party waives its attorney-client privilege and work product protections when it reveals that privileged material to opposing counsel. StarKist knows that it waived privilege when General Counsel Robert Meece claimed his only knowledge of why there was no collusion on non-5-ounce cans came from outside counsel's analysis. Rather than admitting waiver, StarKist claims that CFPs are on a fishing expedition for material that it is not entitled to. This is not so: the scope of StarKist's illegal activity lies at the heart of CFPs' case, and CFPs are entitled to all discovery necessary to understand StarKist's assertions and defenses. StarKist cannot hide behind its attorneys' analysis to prevent CFPs from discovering why exactly StarKist claims it did not illegally collude on non-5-ounce products, especially when it makes such a claim in order to revise previous testimony and its own guilty plea to the United States Department of Justice. This Court should compel StarKist to produce the communications and materials it has waived privilege over, specifically, the documents from its counsel that relate to its determination that it only colluded on 5-ounce cans and not on cans of any other size. At the very least, the court should

compel StarKist to produce the analysis. If no such analysis exists in written form, the Court should order a deposition of StarKist's counsel to testify to its determination.

DPPs, DAPs, and EPPs Statement: These Plaintiff Groups take no position as to whether StarKist's general counsel waived privilege as the CFPs submit, but rather contend that, at minimum, StarKist's deponent's [redacted], reflects that he was not prepared to provide the facts known to StarKist regarding its involvement in the conspiracy. Mr. Meece—who was serving as the 30(b)(6) representative for StarKist concerning "[StarKist's] knowledge of All facts . . . in any way related to StarKist's guilty plea"—had an obligation to come to the deposition prepared to testify about the fact underlying his novel view that the guilty plea was more circumscribed than it plainly reads. Because he could not provide Plaintiffs with any of the facts underlying the contention that StarKist did not collude on anything other than 5-ounce products, they believe that StarKist should provide another witness to be able to testify as to the factual basis for this contention. Significantly, StarKist has offered to do so through an 18-minute telephonic deposition on the specific topic of "How did StarKist come to the conclusion that the agreements that it admits to in response to Rog 1 of the second set relates only to the 5-ounce cans?" Plaintiffs submit that, at minimum, StarKist should be compelled to provide actual factual testimony on this issue—not merely rely on testimony broadly referencing its counsel's investigation—and thus, the Court should grant Plaintiffs the opportunity to take this limited deposition.

StarKist's Statement: Plaintiffs' motion is untimely and meritless. It comes 49 days after Mr. Meece's deposition, well after the close of fact discovery, and, most importantly, 15 days after the 30-day deadline to file a joint discovery motion.[1]

[1] Mr. Meece was StarKist's final witness for StarKist's *second* 30(b)(6) deposition. Declaration of Christopher Bower ("Bower Decl.") ¶¶ 3–4. Plaintiffs left themselves with only *one* hour, but StarKist agreed to let them depose Mr. Meece for *three* hours,

Plaintiffs claim the deadline to file *ought* to be 30 days after StarKist confirmed it would not alter the relevant testimony. But courts in the Southern District of California uniformly hold that the transcript is complete and the 30-day rule is triggered the day the court reporter issues the final deposition transcript. And even if their motion was timely (it is not), Plaintiffs' requests should be denied because Mr. Meece waived nothing, and his testimony was based on extensive preparation and is complete. Plaintiffs are upset because StarKist did not admit to unsubstantiated allegations of a vast conspiracy encompassing *all* packaged tuna products. But Mr. Meece repeatedly testified that the discovery in this case does not support their claims. For example, when pressed on why StarKist would not admit to conspiring on products other than five-ounce cans, such as pouches, Mr. Meece was clear: [redacted] Bower Decl. ¶ 26, Ex. 1 ("Meece Dep.") 61:12–15 (emphasis added).[2] Plaintiffs urge the Court to look only at a particular exchange where Mr. Meece explained, [redacted] Meece Dep. 72:12–18 (emphasis added). CFPs claim this answer included certain magic words triggering broad subject-matter waiver of *all* attorney-client communications and ***opinion*** work-product relating to the scope of the alleged conspiracy. Under CFPs' worldview, any time counsel is involved in educating a 30(b)(6) witness and the witness testifies to that fact, there would be waiver of work product and attorney communications related to the noticed topic. That defies logic and is inconsistent with standard litigation practice. DPPs, DAPs, and EPPs (whose claims, contrary to CFPs' suggestion, also include products in addition to five-ounce cans) notably do not join CFPs' waiver motion, likely because Mr. Meece's testimony amounts to little

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for a total of *16 hours* of StarKist 30(b)(6) testimony. *Id.* ¶¶ 4, 7. Whatever the merits of their arguments (there are none), Plaintiffs exhausted all 16 hours.

[2] [redacted] *See* Meece Dep. 57:2–10; 69:19–70:22; 72:12–18; 85:14–86:20.

more than an unremarkable statement about litigation—that parties' views are informed by their counsel's analysis of the discovery record. DPPs, DAPs, and EPPs instead assert Mr. Meece was unprepared to testify. They too urge the Court to focus only on Mr. Meece's answer to a single question, even though that is not how courts evaluate preparedness. They make vague references to additional "facts" to which they claim they are entitled and demand StarKist provide yet another 30(b)(6) deposition in the middle of expert discovery.[3] But StarKist cannot point Plaintiffs to an *absence* of "facts" to support Plaintiffs' broad allegations; it cannot prove a negative.

[3] DPPs, DAPs, and EPPs insinuate StarKist should submit to an additional deposition because it previously offered to extend its deposition by eighteen minutes. But StarKist ***expressly*** made that offer so the parties could put this issue to bed and avoid wasting the parties' and the Court's time and resources through motion practice. *See* Bower Decl. ¶¶ 21–22. DPPs, DAPs, and EPPs mischaracterize the parties' meet and confers and attempt to exploit StarKist's good-faith effort to negotiate a resolution.

III. PLAINTIFFS' POINTS AND AUTHORITIES

On January 30, 2019, StarKist served its Rog Response (above), which closely mirrored language in StarKist's guilty plea agreement, [redacted] The word "certain" was not included in StarKist's plea deal. On February 12, 2019, Plaintiffs questioned StarKist on this discrepancy during a Rule 30(b)(6) deposition, the topic of which was: "[StarKist's] knowledge of All facts relating to participation in any agreement or understanding among StarKist, Bumble Bee and Chicken of the Sea engaged in by [certain StarKist employees] or in any way related to StarKist's guilty plea." StarKist chose its General Counsel Robert Meece to testify on this topic.

Mr. Meece was asked what StarKist meant in using the phrase [redacted] When asked how StarKist concluded that the collusion was only on 5-ounce cans, Mr. Meece said [redacted] Tr. 72:12-18. Mr. Meece continually could not provide any specific bases for StarKist's belief that it only colluded on 5-ounce cans, even when told that his testimony was a potential privilege waiver. *See* Tr. 72:19-73:02; 128:24-132:12; 133:04-16.

Following the deposition, Plaintiffs and StarKist met and conferred. On February 15, 2019, the court reporter notified all counsel that the deposition transcript was available for review pursuant to Rule 30(e). Mr. Meece had 30 days to make changes and sign the transcript, with a two-week extension agreed to by the parties. On March 19, 2019, StarKist told Plaintiffs it had no edits to the relevant deposition excerpts, making this issue timely for the Court's review because Mr. Meece could

no longer change his testimony, thereby "completing it." *See* Local Rule IV(C)(2).[4]

A. CFPs' Position – StarKist's General Counsel Waived Privilege

By testifying about a "thorough analysis" upon which StarKist is relying in order to narrow its Rog Response, Mr. Meece made that analysis and any materials related to the subject matter of the analysis discoverable. Federal Rule of Civil Procedure 37 permits broad discovery. *See, e.g., In re Morning Song Bird Food Litig.*, No. 12-cv-1592, 2015 WL 12791470, at *3 (S.D. Cal. Jul. 17, 2015). Otherwise privileged materials are discoverable under Rule 26(b)(4) if "(i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id*. at *4.

CFPs have "substantial need for the materials" at issue, specifically, StarKist's outside counsel's "analysis," which appears to include details that led to a conclusion that cannot be squared with the evidence. [redacted] Tr. 71:05-14; 72:12-18. But the April 26 price list increased the price of 66.5-ounce cans of tuna *the same percentage* as its 5-ounce cans. StarKist's counsel likely provided Mr. Meece an analysis explaining the discrepancy, and that

[4] StarKist's assertions of untimeliness are meritless; they cannot point to a single case refuting Plaintiffs' position using rules identical to this Court's. In *Mir v. Kirchmeyer*, No. 12-cv-2340, 2016 WL 3501623 (S.D. Cal. June 27, 2016), the deposition transcript (dkt. 157-3) contained no indication that the deponent made edits, as opposed to Mr. Meece, whoaltered his transcript 46 days after receipt. Hudson Decl. Ex. 1. In *Jensen v. BMW N. Am., LLC*, No. 18-cv-103, 2018 WL 5389628, at *2 (S.D. Cal. Oct. 29, 2018), Judge Stormes' rules explicitly defined the "event giving rise to the dispute" to be "receipt of the transcript from the court reporter." StarKist refused Plaintiffs' request to jointly move the court for an extension. Hudson Decl. ¶ 7. Rather than filing *ex parte* motions, Plaintiffs believed a more efficient use of the Court's time was to file this joint motion.

analysis is necessary to understand StarKist's shifting testimony on this key issue.

There is no "substantial equivalent" to this analysis available to the CFPs, as StarKist claims that it "cannot prove a negative" in delineating how its collusion affected 5-ounce cans but not 66.5-ounce cans. A 30(b)(6) deposition is also not equivalent because StarKist has given no assurance it will not continue to assert privilege claims, nor does it provide CFPs the ability to question the individuals best positioned to explain StarKist's testimonial discrepancy. StarKist's cynical attempt to divide the Plaintiffs via its offer of a deposition with no further motion practice by CFPs should not be countenanced. CFPs' case is concerned entirely with large size products, unlike the other Plaintiffs; thus, StarKist's waiver uniquely impacts CFPs.

With its testimony, StarKist waived any privileges protecting the topic it covered. It is "widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject[,]" *Weil v. Inv./Indicators, Res. & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) and that "voluntarily testifying regarding protected information waives any claim to work product protection." *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 214-CV-00772, 2016 WL 3654285, at *3 (D. Nev. July 5, 2016) (citing *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010)). "The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *U.S. v. Nobles*, 422 U.S. 225, 239 (1975). Such waiver includes "attempts to use the work product as testimony or evidence, or reveal[ing] it to an adversary to gain an advantage in litigation." *See U.S. v. Reyes*, 239 F.R.D. 591, 598 (N.D. Cal. 2006). Mr. Meece proffered [redacted] using that analysis to gain an advantage in this litigation.

StarKist's testimony also impermissibly uses its outside counsel's work as both "a sword and a shield." *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV-04-9049, 2010 WL 3705902, at *5 (C.D. Cal. Sept. 22, 2010); *see also Bittaker v. Woodford*, 331 F.3d

715, 718-19 (9th Cir. 2003). In *Mattel*, "when challenged about his due diligence in confirming the accuracy of [representations made], [the waiving party] testified: 'If my attorney and his attorney … came back in writing and said that they had investigated—his attorney has investigated and his story is true, I believe that.'" *Mattel*, 2010 WL 3705902, at *5. The Court noted this as an example of testimony sufficient to cause waiver. *Id*. Similarly, StarKist cannot wield its testimony that it price fixed only 5-ounce cans as a sword while shielding that testimony's basis with claims of privilege. By putting "protected information in issue through some affirmative act for its own benefit," StarKist waived its privilege. *See In re Broadcom Corp. Sec. Litig.*, 2005 WL 1403516, at *1 (C.D. Cal. Feb. 10, 2005); *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 400 (D. Or. 2017) (finding documents shown to educate a witness on a deposition topic are intended to influence their testimony, creating a presumption of waiver on those documents, and distinguishing *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015.))

CFPs respectfully request that the Court compel StarKist to produce the materials it has waived privilege over, specifically, its counsel's analysis and/or documents relating to their determination that it only colluded on 5-ounce cans and not any other size cans. If no such analysis exists in writing, the Court could order a deposition of StarKist's counsel regarding their determination. *See, e.g., DiLorenzo v. Costco Wholesale Corp.*, 243 F.R.D. 413, 415 (W.D. Wash. 2007).

B. DPPs, EPPs, and DAPs' Positions

Like the CFPs, these Plaintiff groups believe that Mr. Meece's reference to StarKist's outside counsel's investigation was not an appropriate response to a question about facts related to StarKist's involvement in the conspiracy. The 30(b)(6) topics were designed to learn about the "facts" related to StarKist's collusive conduct, but when asked [redacted]

[redacted] Tr. 72:12-18. He testified that this analysis was [redacted] *Id.*, 130:08-15; 132:02-04. His testimony reflects that, at minimum, he was not prepared to testify as to the facts of StarKist's involvement and was merely relying on the undisclosed results of counsel's investigation. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL 13631248, at *5 (N.D. Cal. Oct. 5, 2015) ("[A] company cannot shield from discovery facts learned by its attorney's investigation because the attorney-client privilege does not protect underlying facts"); *see also F.C.C. v. Mizuho Medy Co.*, 257 F.R.D. 679, 681 (S.D. Cal. 2009) (Rule 30(b)(6) obligates a party to "designate a knowledgeable person to fully prepare and 'unevasively answer questions about the designated subject matter.'" (quotation omitted)); *LF Centennial Ltd. v. Z-Line Designs, Inc.*, No. 16CV929 JM (NLS), 2017 WL 2414791, at *3 (S.D. Cal. May 31, 2017) ("The corporation has a duty to educate its witnesses so they are prepared to fully answer the questions posed at the deposition." (quotation omitted)).

StarKist was willing to put forth another 30(b)(6) witness to testify about this issue in an 18-minute telephonic deposition on the topic of "How did StarKist come to the conclusion that the agreements that it admits to in response to Rog 1 of the second set relates only to the 5-ounce cans?" However, StarKist's offer was conditioned on Plaintiffs' stipulating that the deposition would end discovery on the issue with no further claims of waiver, nor any motion by CFPs on waiver. A universal compromise was not achieved and the further deposition has not occurred as a result.

DPPs, EPPs, and DAPs continue to seek this limited deposition to be able to collect the discovery they were entitled to as part of their joint Rule 30(b)(6) notice. The deposition will be of low burden to StarKist, but ensures that Plaintiffs have testimony they can use to address the scope of the conspiracy. Even if the Court grants CFPs' motion, these Plaintiff groups respectfully submit that an 18-minute telephonic deposition is equally important because it ensures that Plaintiffs have StarKist's testimony on this critical issue. They request oral argument on this motion.

IV. STARKIST'S POINTS AND AUTHORITIES

A. Plaintiffs' Motion Is Untimely

Plaintiffs' motion violates Chambers Rules because Plaintiffs failed to move within 30 days "after the date upon which the event giving rise to the dispute occurred." *See* Hon. Mitchell D. Dembin Chambers Rules § IV.C. For depositions, the "event giving rise to the dispute is the completion of the transcript." *Id.* Courts in this district are clear that the date the parties receive the transcript "from the court reporter" is the operative date. *Jensen v. BMW of N. Am., LLC*, No. 18-CV-103-WQH (NLS), 2018 WL 5389628, at *2 (S.D. Cal. Oct. 29, 2018).[5]

Plaintiffs admit Mr. Meece's final deposition transcript was available on February 15. The deadline to move was therefore March 18. Plaintiffs' delay is particularly puzzling given that *they* raised timing concerns on March 7, and StarKist's counsel *agreed with Plaintiffs* that time was indeed running out. *See* Bower Decl. ¶ 14. After waiting two weeks to even raise these issues, Plaintiffs proposed to delay joint motion practice. *See id.* Not only was there no good cause for such an extension, Plaintiffs' proposal was prejudicial to StarKist's expert discovery efforts. *See id.* Plaintiffs replied they were "happy to move" for an extension of time "unilaterally" because they believed whether Mr. Meece's transcript was complete remained an "open question." *See id.* Plaintiffs even called the Court *ex parte* seeking clarification on that issue, and chambers suggested Plaintiffs "tee up" their question

[5] *See Mir v. Kirchmeyer*, No. 12-CV-2340-GPC (DHB), 2016 WL 3501623, at *2 (S.D. Cal. June 27, 2016); *see also* Hon. Barbara Lynn Major Chambers Rules § V.E. ("[T]he event giving rise to the dispute is the receipt of the transcript from the Court reporter."); Hon. Andrew G. Schopler Chambers Rules § C.2 (explaining that a discovery dispute arises on the date the court reporter "(1) completes the affected portion of the transcript (*before revisions*), or (2) certifies that transcript portion," whichever comes earlier (emphasis added)). CFPs' point that these rules are not "identical to this Court's" is trifling. The particular Southern District of California courts may have been different, but they were clear that "the completion of the transcript" is the day the parties receive the transcript. *Jensen* and *Mir* also debunk (1) Plaintiffs' excuse that Rule 30(e) prevented them from filing sooner and (2) Plaintiffs' bare assertion that "StarKist t[elling] Plaintiffs it had no edits" "thereby complet[ed]" the transcript for the purpose of a discovery dispute.

in a motion. *Id.* ¶ 15. They never did. Plaintiffs instead waited weeks to file this motion, which they now assert is timely based on nothing more than misguided intuition.

Plaintiffs should have filed their motion on time or at least moved for an extension. After all, "even prisoners . . . have known to file motions to extend the 30-day rule." *Maiorano v. Home Depot USA, Inc.*, No. 16CV2862-BEN-MDD, 2017 WL 4792380, at *2 (S.D. Cal. Oct. 24, 2017) (Dembin, J.)). Instead, Plaintiffs waited until Defendants were in the midst of expert discovery. Their needless and seemingly calculated delay should be rejected, and their latest excuse—that a motion to extend time would have been an "[in]efficient use of the Court's time"—is hardly credible.

B. Neither StarKist's Plea Agreement Nor Its Interrogatory Response Encompass All Packaged Tuna or Even All Canned Tuna

The notion that StarKist is attempting to "revise previous testimony and its own guilty plea" is fiction; it is Plaintiffs who are trying to recast these documents. Plaintiffs' motion is premised on the idea that Mr. Meece's testimony regarding five-ounce cans is somehow inconsistent with StarKist's plea agreement (which refers to "canned tuna" in general) and its interrogatory response (which refers to "certain canned tuna products") and that StarKist should be compelled to explain those "discrepancies." But Plaintiffs' supposed inconsistency arises only because they have *chosen* (inexplicably) to interpret references to "canned tuna" and "certain canned products" as including *all* packaged tuna products. Plaintiffs' decision to read those documents to expand the conspiracy beyond what the evidence supports does not entitle them to privileged communications, work product, or more deposition time.[6]

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[6]CFPs speculate that "StarKist's counsel likely provided an analysis to Mr. Meece." CFPs' reasoning is strained, and their conclusion is wrong. Declaration of Robert Scott Meece ("Meece Decl.") ¶ 8 (stating he does not recall reviewing attorney work product). For the same reason, CFPs' citation to *Adidas America, Inc. v. TRB Acquisitions LLC* is inapposite. 324 F.R.D. 389, 400 (D. Or. 2017) (waiver where reviewed in preparation for deposition).

C. CFPs' Waiver Arguments Make No Sense[7]

CFPs' argument that they have a "substantial need" for StarKist's attorney communications and StarKist's counsel's "analysis" of the discovery record is not a waiver argument at all. It is also wrong. "[A] substantial need does not . . . provide a legal basis for piercing the attorney-client privilege." *Siddall v. Allstate Ins. Co.*, 15 F. App'x 522, 523 (9th Cir. 2001). Nor is it enough to justify turning over ***opinion*** work product.[8] *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (requiring "a showing beyond . . . substantial need"). The vagaries of CFPs' arguments and requests for relief reveal this motion for what it is: a fishing expedition to obtain protected material CFPs are not even sure exists and an effort to disrupt StarKist's expert-discovery efforts. They should be rejected.

StarKist's counsel's analysis is also not at issue. Mr. Meece's testimony at most implies StarKist's attorneys talked to StarKist about the discovery in this case. *See also* Meece Decl. ¶ 9–12. If that was enough, an attorney's analysis would be at issue in every case—particularly where, as here, Plaintiffs' counsel insists on discovery, as part of a 30(b)(6), of all facts, including those developed by counsel.

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[7] Their waiver argument is also moot. A privilege holder may "preserve" privileged information by "abandon[ing] the claim that gives rise to the waiver condition." *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003). StarKist has set the record straight: it does not hide behind its counsel's analysis to show that Plaintiffs' claims are overbroad. It relies on the lack of evidence. *See* Meece Decl. ¶¶ 11–12. And it bears emphasis that Plaintiffs never confronted Mr. Meece with the supposed evidence that cannot be "squared" with his testimony.

[8] The "attorney analysis" CFPs pursue, whether written or via a deposition of StarKist's outside counsel, is by definition opinion work product. Critically, "***opinion work product is essentially inviolate and protected from discovery***." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:07-CV-05944SC, 2015 WL 13631248, at *4 (N.D. Cal. Oct. 5, 2015) (emphasis added); *see In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 390 (E.D. Pa. 2006). CFPs' citation to *DiLorenzo v. Costco Wholesale Corporation*, 243 F.R.D. 413, 415 (W.D. Wash. 2007), moreover, fails because StarKist is basing its position on "all the discovery in this case," not evidence to which Plaintiffs do not otherwise have access. Further, compelling testimony regarding "attorney analysis" would be *expressly* about the "mental processes of counsel" which cannot be said to be "crucial" to CFPs. *Cf. id.* CFPs should build their own case using the same discovery instead of trying to obtain opponents' work product.

Bower Decl. ¶ 25. In fact, protected information is not placed at issue unless the privilege holder "attempts to prove [a] claim or defense by disclosing or describing" that information. *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994). A party cannot, therefore, obtain privileged materials by relying on deposition testimony because a "deposition transcript is simply a record of what was said." *See In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 146 (D.C. Cir. 2015).

CFPs apparently think waiver is some sort of "gotcha" game triggered by magic words. *See F.D.I.C. v. Fid. & Deposit Co. of Maryland*, 196 F.R.D. 375, 380 (S.D. Cal. 2000). But waiver is an "exceedingly severe" sanction, *United States v. Al-Shawaf*, No. 16-CV-1539-ODW-SP, 2017 WL 5997440, at *4 (C.D. Cal. Sept. 5, 2017), "rooted in notions of fundamental fairness." *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996). "Its principal purpose is to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications." *Id.* at 340–41. Simply put, without prejudice there can be no waiver. *Akamai Techs., Inc. v. Digital Island, Inc.*, No. C-00-3508 CW(JCS), 2002 WL 1285126, at *8 (N.D. Cal. May 30, 2002).

Mr. Meece's testimony did not prejudice Plaintiffs. StarKist has not—and will not—use its counsel's analysis as a "sword and a shield" by deferring to attorney communications to support its position that Plaintiffs' allegations are unfounded. StarKist points to the "[redacted]" (Meece Dep. 130:10–15)—specifically, the lack of evidence to support Plaintiffs' claims of a vast conspiracy. *See also* Meece Decl. ¶¶ 10, 12. The simple fact that StarKist's attorneys reviewed the evidentiary record and talked to StarKist is not noteworthy. And Mr. Meece's passing reference to this unremarkable fact did not reveal the substance of any communications or cause any unfairness.[9] Indeed, what is unfair is that Plaintiffs in the lead up to Mr. Meece's

[9] CFPs also argue Mr. Meece waived privilege by "testifying about a 'thorough analysis.'" But Mr. Meece simply noted that such an analysis took place. This is not nearly enough to constitute waiver. *See Guidiville Rancheria of Cal. v. United States*,

deposition repeatedly demanded "any and all facts known" by outside counsel and then claimed waiver as soon as counsel was mentioned. *See* Bower. Decl. ¶ 25.

D. Mr. Meece Was Adequately Prepared

DPPs, DAPs, and EPPs claim Mr. Meece's answer to one question proves he was unprepared. Mr. Meece's preparation was extensive,[10] and his response was more than adequate. As Mr. Meece explained, [redacted] *See* Meece Dep. 57:8–19; 61:2–15; 72:15–18; 86:6–20; Meece Decl. ¶¶ 10, 12. Plaintiffs bear the burden of pointing to evidence that supports their case, and Mr. Meece testified that StarKist believes no such evidence exists. Rule 30(b)(6) did not, as Plaintiffs suggest, require Mr. Meece to recount every stone StarKist unturned to come to this conclusion. Even if it did, a single answer during a deposition is not enough. *Shapiro v. Am.'s Credit Union*, No. C12-5237-RBL, 2013 WL 12310679, at *2 (W.D. Wash. May 31, 2013) (a corporate designee's inability to "answer every question posed . . . does not mean that the corporation failed to . . . prepare the witness.").[11]

Because Plaintiffs' motion is untimely, StarKist has not waived privilege or work product, and Mr. Meece was adequately prepared, the motion should be denied.

No. 12-CV-1326 YGR, 2013 WL 6571945, at *6 (N.D. Cal. Dec. 13, 2013); *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (Ginsburg, J.); *U.S. Ethernet Innovations LLC v. Acer Inc*, No. C 10-03724 CW (LB), 2014 WL 3570749, at *2–3 (N.D. Cal. July 17, 2014); *Aronson v. McKesson HBOC, Inc.*, No. 99-CV-20743, 2005 WL 934331, at *10 (N.D. Cal. Mar. 31, 2005).

[10] [redacted] *Id.* at 18:5–17; 27:10–29:10; Bower Decl. ¶¶ 5–6.

[11] *See Greer v. Elec. Arts, Inc.*, No. C10-3601 RS JSC, 2012 WL 6131031, at *2 (N.D. Cal. Dec. 10, 2012); *Casas v. Midland Credit Mgmt., Inc.*, No. 07CV1124 LAB (NLS), 2009 WL 249992, at *5 (S.D. Cal. Jan. 30, 2009); *Chick-fil-A v. ExxonMobil Corp.*, No. 08-61422-CIV, 2009 WL 3763032, at *12 (S.D. Fla. Nov. 10, 2009).

Dated: April 3, 2019

Respectfully submitted,

CUNEO GILBERT & LADUCA LLP

By: *s/ Christian Hudson*

Jonathan W. Cuneo
Joel Davidow
Blaine Finley
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
Telephone: 202-789-3960
jonc@cuneolaw.com
joel@cuneolaw.com
bfinley@cuneolaw.com
Christian Hudson
16 Court Street, Suite 1012
Brooklyn, NY 11241
Telephone: 929-258-7815
christian@cuneolaw.com

Lead Counsel for the Commercial Food Preparer Class

HAUSFELD LLP

By: *s/ Samantha J. Stein*

Michael P. Lehmann
Bonny E. Sweeney
Christopher L. Lebsock
Samantha J. Stein
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Tel: (415) 633-1908
Fax: (415) 358-4980
mlehmann@hausfeld.com
bsweeney@hausfeld.com
clebsock@hausfeld.com
sstein@hausfeld.com

Michael D. Hausfeld
James J. Pizzirusso
1700 K Street NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
mhausfeld@hausfeld.com
jpizzirusso@hausfeld.com

Interim Lead Counsel for the Direct Purchaser Class

KAPLAN FOX & KILSHEIMER LLP

By: *s/ Laurence D. King*

Laurence D. King (SBN 206423)
Mario M. Choi (SBN 243409)
350 Sansome Street, Suite 400
San Francisco, CA 94104
Telephone: 415-772-4700
Facsimile: 415-772-4707
lking@kaplanfox.com
mchoi@kaplanfox.com

Robert N. Kaplan
Gregory K. Arenson
Elana Katcher
Matthew P. McCahill
850 Third Avenue, 14th Floor
New York, NY 10022
Telephone: (212) 687-1980
Facsimile: (212) 687-7714
rkaplan@kaplanfox.com
garenson@kaplanfox.com
ekatcher@kaplanfox.com
mmccahill@kaplanfox.com

Liaison Counsel for Direct Action Plaintiffs

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

By: *s/ Thomas H. Burt*

Betsy C. Manifold
Rachele R. Rickert
Marisa C. Livesay
Brittany N. Dejong
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599
manifold@whafh.com

Fred Taylor Isquith
Thomas H. Burt
270 Madison Avenue
New York, New York 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653
Email: isquith@whafh.com
Email: burt@whafh.com

Theodore B. Bell
Carl Malmstrom
70 West Madison Street, Suite 1400
Telephone: 312/984-0000
Facsimile: 312/212-4401
tbell@qhafh.com
malmstrom@whafh.com

Interim Lead Counsel for the End Payer Plaintiffs

LATHAM & WATKINS LLP

By: s/ Christopher S. Yates

Alfred C. Pfeiffer (CA 120965)
Christopher S. Yates (CA 161273)
Belinda S Lee (CA 199635)
Niall E. Lynch (CA 157959)
Ashley M. Bauer (CA 231626)
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
Al.Pfeiffer@lw.com
Chris.Yates@lw.com
Belinda.Lee@lw.com
Niall.Lynch@lw.com
Ashley.Bauer@lw.com

Counsel for Defendant StarKist Co.

ECF CERTIFICATION

Under Section 2.f.4 of the Court's CM/ECF Administrative Policies, I hereby certify that authorization for filing this document has been obtained from each of the other signatories shown above and that all signatories have authorized placement of their electronic signature on this document.

Dated: April 3, 2019 By: /s/ Christian Hudson

DECLARATION OF COMPLIANCE WITH MEET AND CONFER REQUIREMENT

Pursuant to §IV(A) and §IV(C)(4)(e) of Magistrate Judge Dembin's Chambers Rules, counsel for Plaintiffs and StarKist Co. participated in telephonic meet and confers on March 7, 2019 and March 15, 2019. Counsel who participated on behalf of Plaintiffs for the first March 7, 2019 call were: Christian Hudson and Blaine Finley (Commercial Food Preparer Plaintiffs), Samantha Stein (Direct Purchaser Plaintiffs), Elana Katcher (Direct Action Plaintiffs Liaison), and Thomas Burt (End Payer Plaintiffs). Christian Hudson and Sam Stein participated in the second March 7, 2019 call. All but Thomas Burt participated for the March 15, 2019 call. Counsel who participated on behalf of StarKist for the first March 7, 2019 call were: Christopher Bower and Gaby Kapp. Christopher Bower and Gaby Kapp participated in the second March 7, 2019 call. Christopher Bower and Alex Epstein participated in the March 15, 2019 call.

By: /s/ Christian Hudson

By: /s/ Christopher Bower