UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 06-CV-688 (DMC) (MF)

DEBORAH FELLNER, Individually and on Behalf of Those Similarly Situated,	)
Plaintiffs,	)
v.	)
TRI-UNION SEAFOODS, L.L.C., d/b/a CHICKEN OF THE SEA,	)
Defendant.	)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO FED. R. CIV. P. 12(b)(6)

Kenneth A. Schoen KS-7180
BONNER KIERNAN TREBACH
& CROCIATA, LLP
299 Cherry Hill Road, Suite 300
Parsippany, NJ 07054
(973)335-8480
Attorneys for Defendant

On the Brief: John A. Kiernan, Esq.
Kenneth A. Schoen, Esq.
Scott H. Goldstein, Esq.

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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

INTRODUCTION AND PROCEDURAL HISTORY

The Plaintiff, Deborah Fellner ("Plaintiff"), filed this Complaint ("Complaint") against Defendant, Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea ("Defendant" or "Tri-Union"), a manufacturer and distributor of canned tuna, alleging violations of the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1, et seq., (Counts I and II), and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq., (Count III) and common law fraud (Count IV) for canning and distributing tuna which purportedly contained methylmercury and failing to disclose to the public that consumption of tuna containing methylmercury could result in mercury poisoning by using a warning label.

In March, 2006, defendant moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), on the grounds that it failed to allege facts sufficient to state a cause of action against the Defendant. This Court granted Tri-Union's motion to dismiss holding that the state law failure to warn claims were pre-empted by the FDA's regulatory approach for dealing with the existence of mercury within canned tuna which rejected the use of warning labels on tuna cans.[1] Because the Court dismissed on jurisdictional grounds, it did not rule upon the remaining grounds for dismissal raised by Tri-Union in the motion. After plaintiff's Complaint was dismissed, she successfully appealed to the United States Court of Appeals for the Third Circuit, reversing this Court's dismissal of this case and remanding the matter back to this Court. Tri-Union thereafter petitioned for a rehearing en banc which was denied. Lastly, Tri-Union petitioned for certiorari to the United States Supreme Court, which denied the petition via an April 20, 2009 Order.

Now, Tri-Union submits this motion renewing the remaining grounds for dismissal of plaintiff's Complaint set forth in the original motion. In short, the claims set forth in the Complaint are deficient in several respects and should be dismissed, with prejudice and in their entirety, for the following reasons: (1) Defendant is not liable under New Jersey law for injuries incurred by Plaintiff for abnormal consumption of its product (tuna); (2) the strict liability and breach of warranty claims in Counts I and II must be dismissed as the alleged "harmful compound," methylmercury, occurs naturally in tuna and does not result from an additive or from an error in the manufacturing process; (3) all remaining counts should be dismissed as there is no duty to warn of a commonly known danger and (4) compelling public policy considerations necessitate the dismissal of plaintiffs' Complaint.

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[1] The Court also dismissed Court IV of the plaintiff's Complaint. That dismissal was not appealed and Count IV remains dismissed from the case.

Here, Plaintiff alleges in her Complaint that she "almost exclusively" consumed canned tuna for a five year period (1999-2004). These allegations are tantamount to admissions about the plaintiff's excessive consumption of canned tuna during that period of time. Case law and common sense dictate that there is no duty to warn a consumer of the dangers of over-consumption. By way of comparison, the United States Supreme Court has taken notice that a person could be harmed by ingesting too much of a traditionally harmless product or substance like table salt, or even water. *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 163 , 79 S. Ct. 160 (1958). Accordingly, the Defendant owed no duty to warn against the dangers of over-consumption and cannot be liable to Plaintiff for injuries that she incurred by abnormally consuming canned tuna "almost exclusively" for five years and therefore, Plaintiff's individual claims in the Complaint should be dismissed.

In addition, the Complaint's strict liability and breach of warranty claims must be dismissed as the alleged "harmful compound," methylmercury occurs naturally in tuna and does not result from an additive or from an error in the manufacturing process as held most recently by the Court of Appeal of the State of California, First Appellate District in *The People ex rel. Edmund G. Brown, Jr. as Attorney General, etc., et al. v. Tri-Union Seafoods, LLC, et al.*, 171 Cal.App.4th 1549, 90 Cal.Rptr.3d 644, (Cal.App. 1 Dist., 2009). Lastly, public policy considerations warrant dismissal of the Complaint, including (1) limiting the endless litigation against food producers that would result from stretching the duty to warn of over-consumption of food products beyond the boundaries of common sense; and (2) (2) preventing a decrease in fish consumption by the general population at risk for cardiovascular disease who would otherwise benefit from the positive effects of omega-3 fatty acids contained in fish.

In sum, because (1) Defendant is not liable under New Jersey law for injuries incurred by Plaintiff for abnormal consumption of its product (tuna); (2) the strict liability and breach of warranty claims in Counts I and II must be dismissed as the alleged "harmful compound," methylmercury, occurs naturally in tuna and does not result from an additive or from an error in the manufacturing process; (3) all remaining counts should be dismissed as there is no duty to warn of a commonly known danger and (4) compelling public policy considerations necessitate the dismissal of plaintiffs' Complaint. As such, this Court should grant Defendant's motion to dismiss Plaintiff's Complaint pursuant to Fed R. Civ. P 12(b)(6).

STATEMENT OF FACTS

I. THE COMPLAINT

On January 16, 2006 (Summons erroneously dated January 19, 2004), Plaintiff filed a Class Action Complaint and individual claims alleging violations of the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1, et seq., and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq., and common law fraud for canning and distributing tuna which allegedly contained methylmercury and failing to disclose that consumption of tuna containing methylmercury could allegedly result in mercury poisoning. *See* [Schoen Cert., Exhibit "A" (Complaint, ¶ 1)].[2] Plaintiff states that her diet consisted "almost exclusively" of canned tuna for five years between 1999 and 2004. *Id.* at ¶ 7.

II. BACKGROUND OF METHYLMERCURY IN FISH

The nature of this action necessitates consideration of the universally understood and well-documented facts regarding (1) mercury in the environment, (2) methylmercury in fish, (3) the United States Food and Drug Administration's ("FDA") approach to the issue of methylmercury in fish, and (4) the indeterminable number of variables relevant to evaluating whether any given person will experience, or has experienced, adverse health effects due to ingesting methylmercury through consumption of fish products, as well as (5) the extent to which such symptoms are due to factors other than ingestion of fish or methylmercury.

It is well-known that mercury is present in nearly all fish.[3] Mercury is a naturally occurring element in the environment and is also released into the air through industrial

[2] The Class Action claims were voluntarily dismissed with prejudice by Stipulation dated April 27, 2006 and filed with the Court on May 12, 2006

[3] *See* "What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services and the United States Environmental Protection Agency ("What You Need to Know"), attached the June 5, 2009 Certification of Kenneth A. Schoen ("Schoen Cert.") as Exhibit "B."

pollution. Mercury that falls from the air often accumulates in streams and oceans. Bacteria in the water causes chemical changes that transform mercury into methylmercury. Fish absorb the methylmercury as they feed in these waters. Mercury becomes part of the fish meat and cannot be removed. The levels of methylmercury build up in some types of fish and shellfish more than others, depending on what the fish eat. As a result, the levels vary among different fish and even within the same fish.[4]

Whether any given individual will experience adverse health effects as a result of ingestion of methylmercury is dependent on an indeterminable number of factors. Further, mercury poisoning is a diagnosis of exclusion, in that diagnosis is only made after ruling out numerous other potential causes of symptoms which are sometimes associated with mercury poisoning, sometimes associated with alternative causes, and oftentimes are of unknown etiology.

The United States Food and Drug Administration ("FDA"), has established tolerance levels for methylmercury in fish through nutritional guidelines. Further, pursuant to the Federal Food, Drug and Cosmetic Act, the FDA is provided broad authority to control the nature and extent of warnings with respect to methylmercury in fish. The FDA has noted that "[r]esearch shows that most people's fish consumption does not cause a health concern." Further, the FDA has recommended "that consumers eat a balanced diet, choosing a variety of foods including fruits and vegetables, foods that are low in *trans* fat and saturated fat, as well as foods rich in high fiber grains and nutrients. The FDA has also noted that "[f]ish and shellfish can be an

[4] *See* "Backgrounder for the 2004 FDA/EPA Consumer Advisory: What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services and the United States Environmental Protection Agency, at 2 (hereinafter "Backgrounder"), and attached to the Schoen Cert. as Exhibit "C."

important part of this diet." *See* Backgrounder, at 2. With this backdrop in mind, the FDA has instructed against providing warnings regarding methylmercury in fish.

LEGAL ARGUMENT

I. LEGAL STANDARDS FOR GRANTING A MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. *Warth v. Seldin,* 422 U.S. 490, 501 (1975); *Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc.,* 140 F.3d 478, 483 (3d Cir. 1998). However, legal conclusions offered in the guise of factual allegations are given no presumption of truthfulness. *Chugh v. Western Inventory Services, Inc.,* 333 F. Supp. 2d 285, 289 (D.N.J. 2004) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). While a court will accept well-pled allegations as true for the purposes of the motion, it will not accept bald assertions, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

II. ACCEPTING PLAINTIFF'S ALLEGATIONS AS TRUE, PLAINTIFF HAS ENGAGED IN ABNORMAL OVER-CONSUMPTION OF TUNA BY ALMOST EXCLUSIVELY CONSUMING ONLY TUNA FOR A PERIOD OF FIVE YEARS. AND THE COMPLAINT SHOULD BE DISMISSED AS DEFENDANT IS NOT LIABLE FOR ANY INJURY ARISING FROM PLAINTIFF'S ABNORMAL TUNA CONSUMPTION.

Plaintiff's Complaint should be dismissed because, as a matter of law, Defendant is not liable for any alleged injury that was caused by the Plaintiff's abnormal over-consumption of tuna.

The Plaintiff alleges that she consumed tuna to such an excessive degree that her diet was comprised "almost exclusively" of tuna for a period of five years. *See* [Schoen Cert., Exhibit "A" (Complaint, ¶ 7)].

The elements for proving a product defect are essentially the same for both a design defect and a failure-to-warn claim. *Jurado v. W. Gear Works,* 131 *N.J.* 375, 385, 619 A.2d 1312 (1993). A plaintiff must prove: (1) the product was defective; (2) the defect existed when the product left the defendant's control; and (3) the defect caused injury to a reasonably foreseeable user. *Coffman v. Keene Corp.,* 133 *N.J.* 581, 593, 628 A.2d 710 (1993). "A failure to warn, or a failure to warn adequately, may constitute a defect in a product sufficient to support a cause of action in strict liability." *Zaza v. Marquess & Nell, Inc.,* 144 *N.J.* 34, 57, 675 A.2d 620 (1996). In a failure-to- warn case, "the duty to warn is premised on the notion that a product is defective absent an adequate warning for foreseeable users that 'the product can potentially cause injury.' " *Clark v. Safety-Kleen Corp.,* 179 *N.J.* 318, 336, 845 A.2d 587 (2004) (quoting *Coffman, supra,* 133 *N.J.* at 593-94, 628 A.2d 710). The failure to provide necessary warnings constitutes a breach of duty. *Coffman, supra,* 133 *N.J.* at 598, 628 A.2d 710. Initially, the plaintiff must establish that the defendant had a duty to warn. *James v. Bessemer Processing Co.,* 155 *N.J.* 279, 297-98, 714 A.2d 898 (1998). The manufacturer of a product has a duty to warn about any risk relating to the product that it knows or ought to know, *Feldman v. Lederle Labs.,* 97 *N.J.* 429, 434, 479 A.2d 374 (1984), unless the risk and the way to avoid it are obvious. *Mathews v. Univ. Loft Co.* 387 N.J.Super. 349, 358, 903 A.2d 1120 (App.Div.), certif. denied, 188 *N.J.* 577, 911 A.2d 69 (2006).

Based on the above law, Defendant has no duty to warn about the obvious danger of using over-consuming a product. Likewise, the principles set forth in the Restatement (Second)

of Torts § 402A regarding the question of a seller's liability for injuries incurred by a plaintiff as a result of their over-consumption of a product are still instructive today even though it has since been superseded by the Restatement (Third) of Torts. Indeed, New Jersey courts still refer to and cite the Restatement Second and its comments. See *Sharpe v. Bestop, Inc.* 314 N.J.Super. 54, 64 713 A.2d 1079, (App. Div. 1998), *Jurado v. Western Gear Works*, 131 N.J. 375, 387 619 A.2d 1312 (1993).

The Restatement (Second) of Torts § 402A states in Comment (h) that: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from ... abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable."

Comment (i) further addresses the lack of liability for abnormal consumption noting that,

> Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption.... Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks.

Applying the Restatement (Second) of Torts § 402A, courts should not punish a food manufacturer for over-consumption. Just as a food manufacturer would not be liable under the Restatement (Second) of Torts § 402A to: (a) a consumer who consumes a diet of "almost exclusively" candy bars if it results in type 2 diabetes; or (b) a consumer who consumes a diet of "almost exclusively" butter if it results in elevated cholesterol or a heart attacks, a food manufacturer is not liable for the over-consumption of tuna.

Similarly, restaurants that serve fried foods have no duty to warn customers that foods, like hamburgers, and french fries, if consumed over a prolonged period of time can lead to

weight gain and obesity. *Pelman v. McDonald's Corp.*, 237 F. Supp.2d 512, 531-534, 540-543 (S.D.N.Y. 2003). No duty exists to warn consumers that over-consumption of fried foods or consumption of fried foods over a prolonged period of time may lead to obesity. *Id.*

The United States Supreme Court has even taken notice that a person could be harmed by ingesting a certain level of essentially harmless products like table salt, or even water. *Flemming v. Florida Citrus Exchange*, 358 U.S. at 163.

Just as there is no duty to warn consumers that over-consumption of fried foods may lead to coronary heart disease, over-consumption of foods high in salt may lead to high blood pressure, and over-consumption of foods high in sugar may lead to obesity or diabetes, similarly, no duty exists to warn consumers that over-consumption of tuna – at an absurd rate of eating "almost exclusively" canned tuna for five years, may lead to mercury poisoning. A multitude of foods can be dangerous if consumed in rampant excess over a prolonged period. If a plaintiff consumed "almost exclusively" fried onion rings for a period of five years, the manufacturer of fried onion rings would not be liable for a plaintiff's excess weight gain and heart attack as there is no duty to warn of a danger that exists only through over-consumption.

As shown through the examples set forth in the restatement, the above case law, and applying the elements for establishing a failure to warn claim under New Jersey law, Tri-Union has no duty to warn plaintiff about the obvious dangers of over-consuming a product in a manner that does not fall within its "intended use." The consumption of canned tuna as part of a well-balanced diet falls within the products "intended use." However, consumption "almost exclusively" of tuna daily for five years is undisputedly outside the "intended use" of the product.

Distorting the law to create a duty to warn consumers of all potential harms resulting from unforeseeable over-consumption would require a complete disregard of common sense and personal responsibility for personal choices. Accordingly, the Plaintiff's cause of action should be dismissed as the defendant owes no duty to the plaintiff for her extreme over-consumption of canned tuna "almost exclusively" for five years.

III. ALL REMAINING COUNTS SHOULD BE DISMISSED AS THERE IS NO DUTY TO WARN OF A COMMONLY KNOWN DANGER.

The elements set forth above in Point II for proving a failure-to-warn claim under New Jersey law are equally applicable to the question of whether Tri-Union has a duty to warn of a commonly known or obvious danger. As discussed above, the manufacturer of a product has a duty to warn about any risk relating to the product that it knows or ought to know, *Feldman v. Lederle Labs.*, 97 *N.J.* 429, 434, 479 A.2d 374 (1984), unless the risk and the way to avoid it are obvious. *Mathews v. Univ. Loft Co.* 387 N.J.Super. 349, 358, 903 A.2d 1120 (App.Div.), certif. denied, 188 *N.J.* 577, 911 A.2d 69 (2006).

Here, it is common knowledge that methylmercury is present in tuna and that excessive consumption of canned tuna containing trace amounts of methylmercury may lead to elevated mercury accumulation. Therefore, Tri-Union has no duty to warn about its existence in canned tuna. For example, restaurants that serve fried foods have no duty to warn customers that foods, like hamburgers, and French fries, if consumed over a prolonged period of time can lead to weight gain and obesity. *Pelman v. McDonald's Corp.*, 237 F. Supp.2d at 531-534, 540-543. No duty exists to warn consumers that prolonged consumption of fried foods may lead to obesity because this is common knowledge. *Id.*

Just as there is no duty to warn consumers that prolonged consumption of fried foods may lead to coronary heart disease, prolonged consumption of alcohol may lead to cirrhosis of the liver, consumption of unpasteurized cheese during pregnancy may lead to miscarriage or stillbirth, similarly, no duty exists to warn consumers of the "common knowledge" that over-consumption of fish containing low levels of methylmercury may lead to elevated mercury accumulation. The FDA has made public advisories regarding the consumption of fish and methylmercury exposure since the mid 1990s – years prior to the Plaintiff's alleged five year exposure period when she over-consumed canned tuna between 1999-2000. In addition, the FDA has researched methylmercury and fish consumption for decades and established limits on the amount of permissible mercury in fish over twenty-five years ago. See generally Schoen Cert, Exhibits C and D. Hundreds of published studies and news articles have been printed on the issue of methylmercury and fish consumption in the past thirty-five years.

Prior to and during the Plaintiff's alleged exposure period, the FDA had issued repeated public advisories and thousands of published studies and news articles were in print. As it was common knowledge that fish, including tuna, contained mercury and over-consumption of fish could lead to elevated mercury accumulation, the plaintiff's claims should be dismissed.

IV. PLAINTIFF CANNOT STATE A CAUSE OF ACTION FOR BREACH OF WARRANTY AND STRICT LIABILITY AS THE ALLEGED "HARMFUL COMPOUNDS" ARE NATURALLY OCCURRING.

As methylmercury is naturally-occurring in fish, including tuna, Plaintiff should be barred from asserting claims for strict liability and breach of warranty against the Defendant. Counts I and II allege violations of the New Jersey Products Liability Act, including claims of strict liability and breach of warranty. However, the strict liability and breach of warranty claims in Counts I and II must be dismissed as the alleged "harmful compound," methylmercury, occurs

naturally in tuna and does not result from an additive or from an error in the manufacturing process.

New Jersey courts have yet to consider the issue of whether a restaurant or other entity should be held liable for producing or serving food that contains naturally-occurring substances which could have deleterious effects. Given the lack of New Jersey case law confronting the issue of particular substances in foods, New Jersey courts have often looked to other jurisdictions when ruling upon similar cases. *Id.* (citing to *Mexicali Rose v. Superior Court,* 822 P.2d 1292 (Cal. 1992)).

California courts have directly confronted the issue of liability of an entity for producing or serving food that contains naturally-occurring substances that could have deleterious effects and have held that in such a situation liability should not be imposed. "If the injury-producing substance is natural to the preparation of food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or deceptive. A plaintiff in such a case has no cause of action in strict liability or implied warranty." *Mexicali*, 822 P.2d at 1303.

Rather, in order for a plaintiff to have a cause of action, there must be a foreign object in the food which the plaintiff would not reasonably expect to be there. "If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability." *Id.*

Recently, in *People ex rel. Brown v. Tri-Union Seafoods, LLC, et al,* 171 Cal.App.4th 1549, 90 Cal.Rptr.3d 644, (Cal.App. 1 Dist., 2009), the First Appellate District affirmed the trial court's ruling that methylmercury is naturally occurring in tuna fish. In that case it was the Tuna Companies' burden to show, by a preponderance of the evidence that methylmercury in tuna is

naturally occurring. The trial court sided with the Tuna Companies' experts, found them more credible and afforded their testimony greater weight. On the basis of this testimony, The Court of Appeals affirmed the trial court's finding that methylmercury in tuna is naturally occurring which exempted Tri-Union from California state warning requirements (Proposition 65).

Adherence to this proposition by New Jersey courts was made evident in *Sofman v. Denham Food Services, Inc.*, 37 N.J. 304 (1962). In *Sofman*, the New Jersey Supreme Court held that the defendant restaurant owner was liable for breach of warranty for injuries suffered by the plaintiff as a result of biting into a frankfurter that contained a piece of bone or gristle. *Sofman*, 37 N.J. at 306. Given the fact that frankfurters consist of highly processed meat, an average consumer would not expect a "piece of bone or gristle" to be present in the processed meat. The "amount of processing the food product has undergone" is a factor that contributes to the determination of whether a customer should reasonably anticipate the presence of a specific substance in the food. *Clime v. Dewey Beach Enterprises, Inc.*, 831 F.Supp. 341, 349 (D. Del. 1993). When the "food has undergone no processing," the food that the plaintiff ingests is "exactly the way that it occurs 'in the wild.'" *Id.* Thus, "a consumer should expect substances that are indigenous to the organism in its natural state to be present when he or she receives it." *Id.*

When the food at issue is served in its natural state (and therefore not highly processed), courts have held that consumers should reasonably expect the presence of substances that are natural to the food. *Clime*, 831 F.Supp. at 349 (customer could not maintain a claim for breach of the implied warranty of merchantability for injuries sustained after consuming clams containing naturally occurring bacteria); *Simeon v. Doe*, 618 So.2d 848, 851 (La. 1993) (no finding of strict liability against either restaurant or supplier for sale of raw oysters which contained a naturally-

occurring bacteria); *Ruvolo v. Homovich*, 778 N.E.2d 661, 662-63 (Ohio.App.3d 2002) (trial court properly held that customer should have reasonably anticipated that his chicken sandwich may contain a chicken bone); *Matthews v. Maysville Seafoods, Inc.*, 602 N.E.2d 764, 764-66 (Ohio.App.3d 1991) (trial court properly held that customer should have reasonably anticipated and guarded against possibility of bone in fish fillet); *Koperwas v. Publix Supermarkets, Inc.*, 534 So.2d 872, 873 (Fla. Dist. Ct. App. 1988) (maker of clam chowder was not liable for customer's injuries from biting into clam given that "an occasional piece of clam shell in a bowl of clam chowder is so well known to a consumer of such product" that a consumer can reasonably anticipate it and guard against it).

Moreover, a manufacturer cannot be expected to remove all naturally-occurring substances from a food product that have a remote possibility of creating a deleterious effect. *See Porteous v. St. Ann's Café & Deli,* 713 So.2d 454, 458 (La. 1998) ("there was nothing more the defendant restaurant could reasonably have done to eliminate the small possibility that a customer might find a pearl in an oyster and be injured thereby.") In many instances, there simply is no process by which such an entity could attempt to remove all naturally-occurring substances that could be harmful. *See Hollinger v. Shopper Paradise of New Jersey, Inc.*, 134 N.J. Super 328, 342-343 (Law Div. 1975) (seller of diseased pork was not liable in strict liability because the character of the product made it "impossible for the seller to detect the presence of the latent defect"). Similarly, here, it would be impossible for Tri-Union to remove the naturally occurring methylmercury from the canned tuna.

In addition, given the recent California Appellate Court decision in *People ex rel. Brown v. Tri-Union Seafoods, LLC, et al,* 171 Cal.App.4th 1549, 90 Cal.Rptr.3d 644, (Cal.App. 1 Dist., 2009) specifically finding that methylmercury is naturally occurring in tuna fish, and the fact that

the naturally occurring methylmercury cannot be removed from the tuna, Tri-Union should be exempted from any state-law warning requirements. Therefore, the Plaintiff will not be able to sustain her claims for breach of warranty and strict liability. Consequently, Counts I and II must be dismissed.

V. COMPELLING PUBLIC POLICY CONSIDERATIONS NECESSITATE THE DISMISSAL OF PLAINTIFFS' COMPLAINT.

Two compelling public policies will be advanced by dismissal of Plaintiff's Complaint. First, fish are an excellent source of omega-3 fatty acids which may protect against cardiovascular disease – the major killer of Americans over the last century. The American Heart Association reports that, "except during the 1918 flu pandemic, cardiovascular disease has been the No. 1 killer in the United States every year for more than a century" and continues to claim more lives than the rest of all major causes of death combined. Coronary heart disease alone is the single largest killer of Americans and is responsible for one in five women's deaths in the United States.

The FDA advances the public health by recognizing the exhaustive number of studies concluding that fish are an excellent source of omega-3 fatty acids, which may protect against coronary heart disease and stroke. *See* Exhibit D to Schoen Certification Accordingly, the FDA, after decades of reviewing numerous studies, has prudently constructed a regulatory approach to encourage consumption of fish in the general population while advising a target population of pregnant woman, woman who may become pregnant, nursing mothers and young children to limit, *not avoid,* consumption of tuna. *Id.* The FDA sought to avoid the deleterious effects of a warning to the general population and expressly rejected such a proposal. *Id.*

Undue notoriety of this sensationalist suit may result in a decrease in fish consumption, which can have a negative health impact on the multitudes of Americans at risk for

cardiovascular disease. This action and the allegations that one woman's over-consumption, wherein her diet "almost exclusively" consisted of canned tuna for five years, may result in a devastating decrease in fish consumption by the general American population, which will have a negative health impact on the millions of Americans at risk for cardiovascular disease.

Further, it would be poor public policy to distort and extend the duty of a food manufacturer to warn of all potential dangers that could possibly result from over-consumption where such potential dangers would be remote or non-existent under conditions of normal or average use. Recognizing such a duty, would arguably require warning of the effects of over-consumption of nitrates on hot dogs at Yankee Stadium, a disclaimer concerning prostate and ovarian cancer on a carton of milk, necessitate a warning concerning type 2 diabetes on Halloween candy, and warnings about coronary heart disease on pats of butter. Beyond distorting common sense and absolving individuals of any personal responsibility for their food choices, such a policy would spawn an abyss of litigation against endless other food providers.

"We recognize that some cases will present circumstances that defy the categorization here devised to circumscribe a defendant's orbit of duty, limit otherwise boundless liability and define an identifiable class of plaintiffs that may recover. In these cases, the courts will be required to draw upon notions of fairness, common sense and morality to fix the line limiting liability as a matter of public policy, rather than an uncritical application of the principle of particular foreseeability." *People Exp. Airlines, Inc. v. Consolidated Rail Corp.*, 100 N.J. 246, 264 (1985). "Liability depends not only on the breach of a standard of care but also on a proximate causal relationship between the breach of the duty of care and resultant losses. Proximate or legal causation is that combination of " 'logic, common sense, justice, policy and precedent' " that fixes a point in a chain of events, some foreseeable and some unforeseeable,

beyond which the law will bar recovery." *Id.* (citing *Caputzal v. Lindsay Co.*, 48 N.J. 69, 77-78, 222 A.2d 513 (1966) (quoting *Powers v. Standard Oil Co.*, 98 N.J.L. 730, 734, 119 A. 273 (Sup. Ct. 1923), *aff'd o.b.*, 98 N.J.L. 893, 121 A. 926 (E. & A. 1923)); *see also Palsgraf v. Long Island R.R., supra*, 248 N.Y. at 350, 162 N.E. at 103 (Andrews, J., dissenting)). Indeed, Plaintiff seeks to recover under the New Jersey Products Liability Act, which the New Jersey legislature has amended to "limit the expansion of products-liability law." Zaza *v. Marquess and Nell, Inc.*, 144 N.J. 34, 47 (1996). "The Legislature intended for the Act to limit the liability of manufacturers so as to balance the interests of the public and the individual with a view towards economic reality." *Id.* at 627.

Compelling public policy considerations necessitate the dismissal of Plaintiff's Complaint, including but not limited to: (1) limiting the endless litigation against food producers that would result from stretching they duty to warn of over-consumption of food products beyond the boundaries of common sense; and (2) preventing a decrease in fish consumption by the general population at risk for cardiovascular disease who would otherwise benefit from the positive effects of omega-3 fatty acids contained in fish.

CONCLUSION

Based on all of the foregoing reasons set forth above namely that 1) Defendant is not liable under New Jersey law for injuries incurred by Plaintiff for abnormal consumption of its product (tuna); (2) the strict liability and breach of warranty claims in Counts I and II must be dismissed as the alleged "harmful compound," methylmercury, occurs naturally in tuna and does not result from an additive or from an error in the manufacturing process; (3) all remaining counts should be dismissed as there is no duty to warn of a commonly known danger and (4) compelling public policy considerations necessitate the dismissal of plaintiffs' Complaint. For

these reasons, it is clear that dismissal of plaintiff's individual claims under New Jersey state law, with prejudice is appropriate.

Respectfully submitted,
TRI-UNION SEAFOODS, L.L.C,
d/b/a CHICKEN OF THE SEA
By its attorney,

Kenneth A. Schoen (#KS-7180)
Bonner Kiernan Trebach & Crociata, LLP
140 Littleton Road – Suite 201
Parsippany, NJ 07054
(973) 335-8480

DATED: June 5, 2009

CERTIFICATE OF SERVICE

I, Kenneth A. Schoen, hereby certify that a true copy of the within document was served upon Barry R. Eichen, Esq., Eichen, Levinson, and Crutchlow, LLP, 40 Ethel Road, Edison, New Jersey 08817, via first class mail on June 5, 2009

Kenneth A. Schoen