UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DEBORAH FELLNER,	:	CIVIL ACTION NO. 2:06-CV-688 (DMC)-MF
	:	
Plaintiff,	:	
v.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	
d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	AUGUST 31, 2009

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)

FELLNER v. TRI-UNION SEAFOODS, L.L.C. Doc. 35 Att. 1

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DEBORAH FELLNER,	:	CIVIL ACTION NO. 2:06-CV-688 (DMC)-MF
	:	
Plaintiff,	:	
v.	:	
	:	
TRI-UNION SEAFOODS, L.L.C., d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	AUGUST 31, 2009

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

I. INTRODUCTION

On July 7, 2009, Plaintiff filed the Amended Complaint against Defendant Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea ("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. (Count I) and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. (Count II) for canning and distributing albacore tuna that purportedly contained methlymercury, and for failing to disclose to the public, through a warning label, that consumption of tuna containing methylmercury could result in mercury poisoning. Additionally, Plaintiff alleges what appears to be a common law claim for punitive damages (Count III). For the reasons set forth herein, Defendant Tri-Union now moves to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. PROCEDURAL HISTORY AND STATEMENT OF MATERIAL FACTS

A. The Original Complaint

On January 16, 2006,[1] 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. (the "PLA"), the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. (the "CFA"), and common law fraud for canning and distributing tuna that allegedly contained methylmercury and for failing to disclose that consumption of tuna containing methylmercury could allegedly result in mercury poisoning. (Schoen Cert., Ex. "A" (Complaint, ¶ 1).) The Complaint alleged, inter alia, that, from "1999 through 2004, Plaintiff's diet consisted almost exclusively of Tuna Products canned and distributed by the Defendant." (Id. at ¶ 7.) The Complaint contained two individual claims (under the PLA and for common law fraud), and three class claims (under the PLA, the CFA, and common law fraud).

In March of 2006, Tri-Union moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that it failed to allege facts sufficient to state a cause of action against Tri-Union. This Court granted Tri-Union's motion to dismiss, holding that the United States Food and Drug Association's (the "FDA") regulatory approach for dealing with the existence of mercury within canned tuna, which rejected the use of warning labels on tuna cans, preempted Plaintiff's state law failure to warn claims. Fellner v. Tri-Union Foods, L.L.C., No. 06-CV-0688 (DMC), 2007 WL 87633 (D.N.J. Jan. 9, 2007) (Cavanaugh, J.).[2] In addition, this Court dismissed Plaintiff's claim of common law fraud after determining that such a cause of action was subsumed by the PLA. Id. at *7-8 ("Put another way, plaintiffs

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[1] The Summons was erroneously dated January 19, 2004.

[2] Copies of all unpublished decisions are attached to Schoen Certification as Exhibit "B."

cannot recast a product liability claim as a fraud claim."). This Court did not rule upon the remaining grounds for dismissal, which Tri-Union had raised in its motion to dismiss.

Plaintiff then successfully appealed to the United States Court of Appeals for the Third Circuit, which reversed this Court's dismissal on the preemption issue and remanded the matter back to this Court. Fellner v. Tri-Union Foods, L.L.C., 539 F.3d 237 (3d Cir. 2008). Tri-Union thereafter petitioned for a rehearing en banc, which was denied. Lastly, Tri-Union petitioned for certiorari to the Supreme Court of the United States. The Court denied the petition via an Order entered on April 20, 2009.

Once the case was returned to this Court, on or about June 5, 2009, Tri-Union resubmitted the remaining arguments set forth in the initial motion to dismiss in a second motion to dismiss the Complaint.[3]

B. The Amended Complaint

After Tri-Union re-filed its motion to dismiss, Plaintiff filed an Amended Complaint on July 7, 2009, alleging violations of the PLA and the CFA for canning and distributing tuna that allegedly contained methylmercury and for failing to disclose that consumption of tuna containing methylmercury could result in mercury poisoning. (Schoen Cert., Ex. "C" (Amended Complaint at ¶¶ 5-6, 10-11).)[4] Count III of the Amended Complaint appears to allege a common law claim for punitive damages. The Amended Complaint alleges, inter alia, that, from "1993 through 2004, Plaintiff consumed approximately one can per day of Defendant's Chicken of the Sea albacore tuna products." (Id. at ¶ 3.)

[3] At the direction of this Court, Tri-Union subsequently withdrew the motion to dismiss without prejudice, and incorporated the arguments from the original Complaint into the instant motion to dismiss Plaintiff's Amended Complaint.

[4] The Amended Complaint also removed any reference to the Class Action Complaint originally filed by Plaintiff, which has been dismissed with prejudice by Stipulation filed with the Court on May 12, 2006.

C. 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 FDA's approach to the issue of methylmercury in fish; (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; and (5) the extent to which such symptoms are due to factors other than ingestion of fish or methylmercury.

This Court has previously taken judicial notice of certain publications pertaining to the methylmercury content of fish. Fellner, 2007 WL 87633, at *1-2.[5]

It is well-known that mercury is present in nearly all fish. Mercury is a naturally occurring element in the environment and is also released into the air through industrial pollution. Mercury that falls from the air often accumulates in streams, oceans and other bodies of water. Fish absorb the mercury as they feed in these waters. As a result, mercury becomes part of the fish meat and cannot be removed. (See *What You Need To Know*.) Bacteria in the water cause chemical changes that transform mercury into methylmercury. Fish absorb the methylmercury as they feed in these waters. The levels of mercury build up in some types of

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[5] This Court took judicial notice of the following publications: "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*") (Schoen Cert., Ex. "D."); "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 ("*Backgrounder*") (Schoen Cert., Ex. "E."); Letter from Lester M. Crawford, D.V.M., Ph.D., United States Commissioner of Food and Drugs, to Bill Lockyer, Attorney General of the State of California, dated August 12, 2005, re: a suit filed on June 21, 2004 in San Francisco Superior Court ("*FDA Letter*") (Schoen Cert., Ex. "F."); and Section 540.600 of the FDA's Compliance Policy Guide allowance of up to one part of methyl mercury per million non-mercury parts of the edible portion of seafood ("*Section 540.600*") (Schoen Cert., Ex. "G.").

fish and shellfish more than others, depending on their diet. As a result, the levels vary among different fish, and even within the same types of fish. (See *Backgrounder*.)

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

The FDA has established tolerance levels for methylmercury in fish through nutritional guidelines. (See *Section 540.600*.) The FDA also has broad authority under the Federal Food, Drug, and Cosmetic Act to control the nature and extent of warnings with respect to methylmercury in fish. (*FDA Letter* at 2.) According to the FDA, research shows that most people's fish consumption does not cause a health concern. (*Backgrounder* at 2.) Further, the FDA recommends "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." (*Backgrounder* at 2.) The FDA has likewise noted that "[f]ish and shellfish can be an important part of this diet." (*Backgrounder* at 2-3.) With this backdrop in mind, the FDA has instructed against providing warnings regarding methylmercury in fish. (See *FDA Letter*.)

III. ARGUMENT

A. The Allegations Contained In The Amended Complaint Are Insufficient To State A Claim To Relief.

1. The Standard

When deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. See 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). In evaluating a motion to dismiss under Rule 12(b)(6), a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents, if the plaintiff's claims are based upon those documents. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993).

While under the liberal notice pleading standard, a party is not required to plead facts sufficient to prove its case, there must still be an underlying claim for relief before the court. Lum v. Bank of Am., 361 F.3d 217, 223 (3d Cir. 2004). Moreover, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." RLR Invs., LLC v. Town of Kearny, No. 07-cv-3648 (DMC), 2009 WL 1873587, at *2 (D.N.J. June 29, 2009) (Cavanaugh, J.) (quoting Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)). A pleading that offers labels and conclusions or a "formulaic recitation of elements of a cause of action will not do." Id. at *2 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

In Twombly, the Supreme Court established new language for interpreting the pleading standard when it held that a plaintiff was required to plead "enough facts to state a claim to relief that is plausible on its face." RLR Invs., 2009 WL 1873587, at *2 (quoting Twombly, 550 U.S.

at 570). The "[f]actual allegations [of the complaint] must be enough to raise a right to relief above the speculative level." Id. at *2 (quoting Twombly, 550 U.S. at 555). Nonetheless, the Supreme Court specified that there is no heightened standard of fact pleading or requirement to plead specifics. Id. at *2 (citing Twombly, 550 U.S. at 570). The Supreme Court explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief."

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556, 557, 570). Here, Plaintiff has failed to comply with the pleading requirements[6] set forth in Tombly and expanded on in Iqbal.

2. The Amended Complaint fails to state a claim to relief that is plausible on its face.

Plaintiff has failed to allege facts sufficient to state a claim upon which relief may be granted. As the Supreme Court has recently reiterated, Rule 8(a)(2)[7] of the Federal Rules of Civil Procedure requires a "'showing,' rather than a blanket assertion of entitlement to relief." Twombly, 550 U.S. at 555 n.3. Indeed, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing Wright & Miller,

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[6] The Supreme Court has explained that it does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Nonetheless, plaintiffs must "nudge their claims across the line from conceivable to plausible[.]" Id.

[7] According to Rule 8(a)(2): "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]"

Federal Practice and Procedure § 1202, at 94, 95 (3d ed. 2004)). Moreover, Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader's bare averment that he wants relief and is entitled to it[.]" Id. The "plain statement" condition of Rule 8(a)(2) means a requirement that the factual allegations "possess enough heft" to show that the pleader is entitled to relief. Twombly, 550 U.S. at 557.

While Rule 8 does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555). A complaint containing only "naked assertions" without any "further factual enhancement" is not legally sufficient. Id. at 1949 (quoting Twombly, 550 U.S. at 557). Rather, to survive a motion to dismiss for failure to state a claim upon which relief may be granted, a complaint must contain "sufficient factual matter . . . to state a claim to relief that is plausible on its face." Id. at 1949 (quoting Twombly, 550 U.S. at 570). A claim is facially plausible when a plaintiff pleads facts sufficient enough to allow the court to infer that the defendant is liable for the misconduct alleged. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. at 1949 (quoting Twombly, 550 U.S. at 556, 557). The Supreme Court in Iqbal then addressed what it termed the "working principles" of Twombly. First, a court's required acceptance of a complaint's allegations as true does not apply to legal conclusions. Iqbal, 129 S. Ct. at 1249. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Id. (citing Twombly, 550 U.S. at 555). Thus, while Rule 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a

plaintiff armed with nothing more than conclusions." Id. at 1950. Second, only a pleading that sets forth a plausible claim for relief will survive a motion to dismiss. Id. (noting that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief'") (quoting Fed. R. Civ. P. 8(a)(2)).

The court in Iqbal set forth a three-part process through which courts should evaluate motions to dismiss for failure to state a claim. First, the court should identify the pleadings that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950-51. The court should next determine whether sufficient factual allegations support any legal conclusions present in the complaint. Id. at 1951. Finally, if "there are well-pleaded factual allegations, a court should assume their veracity and determine whether they plausibly give rise to an entitlement of relief." Id. at 1950, 1951.

In short, Plaintiff's Amended Complaint does not satisfy the standards set forth in Twombly and Iqbal. First, virtually all of the allegations in the Amended Complaint are mere legal conclusions that are not entitled to an assumption of truth. (See Ex. C at ¶¶ 4-13, 15-19.) As this Court has observed, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." RLR Invs., 2009 WL 1873587, at *2 (quoting Morse, 132 F.3d at 906). Indeed, the Amended Complaint is rife with such bald assertions and legal conclusions and offers mere "formulaic recitation[s]" of the elements of the PLA and CFA in support of her claims. Twombly, 550 U.S. at 555.

Second, the Amended Complaint does not contain sufficient factual allegations to support any legal conclusions contained within it. Such supporting factual allegations are notably sparse, and are often co-mingled with legal conclusions. (See, e.g., Ex. C at ¶ 7 ("Due to the negligence

and statutory violations of the Defendant, Plaintiff Deborah Fellner contracted severe mercury poisoning and suffered extreme physical and emotional injuries.").) There are only four paragraphs in the Amended Complaint that are factually-based. Of those, two merely identify the parties. (See Ex. C at ¶¶ 1-2.) Of the remaining two allegations, one solely pertains to the fact that Plaintiff incurred medical expenses. (See Ex. C at ¶ 14.) This leaves only one other sentence in the entire Amended Complaint that arguably provides a relevant factual allegation. (See Ex. C at ¶ 3 ("During the period 1993 through 2004, Plaintiff consumed approximately one can per day of Defendant's Chicken of the Sea albacore tuna products.").) Thus, this Court has before it two factual allegations that are debatably entitled to be taken as true and only one of which provides factual support for its claims.[8]

Third, the Amended Complaint contains no well-leaded factual allegations that plausibly give rise to an entitlement of relief. Rather, Plaintiff pleads facts that are "merely consistent with" Tri-Union's alleged liability. Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557). Indeed, the Amended Complaint "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). Essentially, Plaintiff asks this Court to infer that she consumed 4,000 cans of tuna fish[9] over an eleven-year period, and suffered mercury poisoning as a result. Further, Plaintiff now seeks compensation from Tri-Union for her alleged harm. Indeed, such allegations amount to nothing "more than . . . unadorned, the-defendant-unlawfully-harmed-me accusation[s]." Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555). Therefore, Plaintiff has not asserted factual allegations that plausibly entitle her to relief.

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[8] But see infra Part II.D (maintaining that Plaintiff's revised allegations concerning the nature of her tuna consumption violate the equitable principle of judicial estoppel).

[9] See infra Part II.F.

Plaintiff's claims are not plausible on their face. Therefore, this Court cannot draw the reasonable inference that Tri-Union is liable for the misconduct alleged in the Amended Complaint. Accordingly, Tri-Union respectfully requests this Court to dismiss the Amended Complaint in its entirety.

B. The PLA Subsumes Plaintiff's Claims Under The CFA As Plaintiff Alleges Personal Injury, And Not Economic Loss, As The Result Of Ingesting Tuna Manufactured And Sold By Tri-Union.

The New Jersey Legislature enacted the PLA to "limit the expansion of product liability law, [thus making it] 'the sole method to prosecute a product liability action.'" Nafar v. Hollywood Tanning Sys., Inc., No. 06-CV-3826 (DMC), 2007 WL 1101440, at *3 (D.N.J. Apr. 10, 2007) (Cavanaugh, J.) (citing Tirrell v. Navistar Int'l, Inc., 248 N.J. Super. 390, 398-99 (App. Div. 1991), cert. denied, 126 N.J. 390 (1991)). In Repola v. Morbark Industries, 934 F.2d 483 (3d Cir. 1991), the Court of Appeals for the Third Circuit reversed the district court's denial of defendant manufacturer's motion to dismiss a common law failure to warn claim because the PLA subsumed such a claim. Also, the court in Brown v. Phillip Morris, Inc., 228 F. Supp. 2d 506 (D.N.J. 2002), dismissed the plaintiff's intentional fraud claims because they were subsumed by the PLA.

"The PLA provides the sole method of prosecuting a New Jersey consumer fraud claim when the claim is based on harm caused by a product." Delaney v. Stryker Orthopaedics, No. 08-03210 (DMC), 2009 WL 564243, at *7 (D.N.J. Mar. 5, 2009) (Cavanaugh, J.) (citing Tirrell, 248 N.J. Super. at 398-99); see Fellner, 2007 WL 87633, at *7-8 (dismissing common law fraud claim where Plaintiff "merely recast[ed] her product liability claims as fraud claims") (internal quotation marks & citation omitted). "Pursuant to the PLA, any claim that falls within its scope, as consumer fraud does, is subsumed by it, and a strict liability claim is the only surviving cause of action." Id. (citing Tirrell, 248 N.J. Super. at 399 n.5). Indeed, the Supreme Court of New

Jersey has explained that "'the language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products." Id. (quoting Sinclair v. Merck & Co., Inc., 195 N.J. 51, 65 (2008)); see Lopienski v. Centocor, Inc., No. 07-4519 (FLW), 2008 WL 2565065, at *1-2 & n.2 (D.N.J. June 25, 2008) (Wolfson, J.) (dismissing claim under CFA where plaintiff claimed injuries from prescription medication & observing that "New Jersey Legislature expressly intended to consolidate all product liability claims into one single statutory cause of action") (citing Herman v. Sunshine Chem. Specialties, Inc., 133 N.J. 329 (1993)); McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 98 (App. Div. 2008) (reversing grant of attorney's fees under CFA after "find[ing] no basis, in legislative history, statutory language or Court decisions to conclude that plaintiffs can maintain separate causes of action under the PLA and the CFA" where plaintiffs alleged injuries arising out of prescription drug rofecoxib).

Here, Plaintiff's CFA claim arises out of Tri-Union's alleged failure to disclose to Plaintiff that its Tuna Products contained methylmercury or other harmful compounds that could result in mercury poisoning. (See Ex. C at ¶ 11.) Cf. Nafar, 2007 WL 1101440, at *4 (denying motion to dismiss claim under CFA where plaintiff did "not claim[] harm for any physical injuries[,]" but sought only "to recover for economic harm suffered from purchasing Defendant's services"). The facts underlying Plaintiff's CFA claim are the same facts that Plaintiff contends are violative of the PLA. Under these circumstances, as New Jersey case law makes clear, Plaintiff's sole remedy for such a claim is through the PLA Accordingly, the Court should dismiss Count II for failure to state a claim upon which relief may be granted.

C. Count III Of The Amended Complaint Must Be Dismissed As It Is A Prayer For Relief Improperly Stated As A Cause Of Action.

Plaintiff improperly couches a common law claim for punitive damages, which is a prayer for relief, as a cause of action in Count III. Pursuant to well-settled New Jersey case law, a claim for punitive damages is legally insufficient and cannot form the basis of an independent cause of action. See, e.g., Gautam v. DeLuca, 215 N.J. Super. 388, 395-96 (App. Div. 1987) (clarifying that claim for punitive damages is not independent cause of action); Barber v. Hohl, 40 N.J. Super. 526, 534 (App. Div. 1956) ("It is true, as defendants argue, that the great weight of authority is to the effect that punitive or exemplary damages will not be awarded unless there is an independent cause of action . . . ."). Accordingly, Tri-Union respectfully requests that this Court dismiss Count III for failure to state a claim upon which relief may be granted.

D. The Equitable Doctrine Of Judicial Estoppel Precludes Plaintiff From Asserting Claims In The Amended Complaint That Are Directly Contrary To Those Claims Plaintiff Asserted In Her Original Complaint.

In the Amended Complaint, Plaintiff makes wholesale changes to the underlying facts upon which she has based her claims against Tri-Union for three and-a-half-years. For three and-a-half-years, Plaintiff was content with the recitation of facts as set forth in the original Complaint, i.e., that her diet consisted "almost exclusively" of tuna between 1999 and 2004. (Ex. A at ¶ 7.) Indeed, Plaintiff never before hinted that the allegations contained in the original Complaint were erroneous in any way, even in opposition to Tri-Union's first motion to dismiss the Complaint, which explicitly sought dismissal on overconsumption grounds. Suddenly, in response to the most recent motion practice, and despite Plaintiff's prior reliance on the facts of the original Complaint via written submissions to, and oral arguments before, both this Court and the Third Circuit confirming the aforementioned five years of eating almost nothing but canned

tuna, Plaintiff now reverses course in an effort to circumvent Tri-Union's over-consumption argument and drastically expand the timeframe of alleged tuna consumption.

Plaintiff's Amended Complaint drastically alters the facts that were alleged in the original Complaint. Now (and for the first time since commencement of this suit), Plaintiff alleges that she ate approximately *one can* of tuna per day for *eleven* years. This Court should not condone Plaintiff's disingenuous revision of factual allegations in her blatant attempt to alter the very core of her claim in order to circumvent Tri-Union's overconsumption argument and should dismiss the Amended Complaint as violative of the equitable principles of judicial estoppel.

"New Jersey judicial estoppel law is consistent with the federal law." Palcsesz v. Midland Mut. Life Ins. Co., 87 F. Supp. 2d 409, 411 (D.N.J. 2000) (citing Nat'l Utility Serv., Inc. v. Chesapeake Corp., 45 F. Supp. 2d 438, 445 (D.N.J. 1999)). The Supreme Court of the United States has long held that:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000). "Because the rule is intended to prevent 'improper use of judicial machinery,' judicial estoppel 'is an equitable doctrine invoked by a court at its discretion[.]'" New Hampshire v. Maine, 532 U.S. 742, 750 (2000) (quoting Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990); Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980)); see Marino v. Adamar of Jersey, Inc., No. 05-4528, 2009 WL 260799, at *3 (D.N.J. Feb. 4, 2009) (Bumb, J.) (describing judicial

estoppel as "judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that he or she has previously asserted in the same or previous proceeding)

The Third Circuit has adopted a modified three-part test for applying the doctrine of judicial estoppel:

> First, the party to be estopped must have taken two positions that are *irreconcilably inconsistent*. Second, judicial estoppel is unwarranted unless the party *changed his or her position* "*in bad faith* – i.e., with intent to play fast and loose with the court." Finally, a district court may not employ judicial estoppel unless it is "tailored to address the harm identified" and *no lesser sanction would adequately remedy the damage* done by the litigant's misconduct.

Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319-20 (3d Cir. 2003) (quoting Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 779-80 (3d Cir. 2001)) (emphasis in original). Additionally, the Third Circuit considers two additional, non-dispositive factors in such an analysis, i.e., whether the litigant (1) succeeded in convincing a tribunal to accept its initial assertion; and (2) would derive an unfair advantage in the absence of estoppel. Visual Interactive Phone Concepts v. Virgin Mobile USA, No. 05-2661 (MLC), 2008 WL 4192065, at *4 (D.N.J. Sept. 8, 2008) (Cooper, J.) (citing Chao v. Roy's Constr., Inc., 517 F.3d 180, 186 n.5 (3d Cir. 2008)).

Here, each of the factors needed to enforce the doctrine of judicial estoppel are satisfied. First, Plaintiff's current allegations about her consumption of Tri-Union tuna products (one can of tuna per day for eleven years) are drastically different than those contained in the original Complaint and are irreconcilably inconsistent with the position Plaintiff steadfastly maintained for the first three and-a-half-years of this litigation (diet consisting "almost exclusively" of tuna for five years).

Second, Plaintiff changed her position with the obvious intention of circumventing an argument that was likely to result in dismissal of her case. The differences between the

allegations contained in the original Complaint and Amended Complaint are much too substantive to be the product of mere inadvertence or mistake.[10] Nor are the allegations so vague as to be susceptible to more than one interpretation.[11] Finally, the allegations are entirely fact-based.[12] Plaintiff now alleges an exposure period that goes back in time six years prior to the time she claimed for the first three and-a-half-years of litigation and has reduced by approximately two-thirds the daily amount of tuna she is alleged to have consumed. Indeed, Plaintiff cannot claim that she "lacked sufficient knowledge" of her initial claims regarding the time period and extent of her tuna consumption.[13]

Third, no lesser sanction than mooting the Amended Complaint in its entirety and Ordering Plaintiff to proceed under the allegations of the original Complaint will remedy the damage done by Plaintiff's misconduct. Applying a lesser sanction here would reward Plaintiff

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[10] See, e.g., In re Chambers Dev. Co., 148 F.3d 214, 229 (3d Cir. 1998) (stating that judicial estoppel will not apply where inconsistent positions are asserted in good faith or through inadvertence); Naporano Assocs. v. B & P Builders, 309 N.J. Super. 166, 174-75 (App. Div. 1998) (holding that defendant who had previously argued that plaintiff should be limited to actual damages instead of liquidated damages was not judicially estopped from arguing for liquidated damages when further investigation revealed that liquidated damages were reasonable); C.R. v. J.G., 306 N.J. Super. 214, 238-39 (Chancery Div. 1997) (holding that judicial estoppel requires knowledge of the facts and would not apply where a party's statement in the prior litigation was based on an ignorance of the facts and not an attempt at deception); see also John S. Clark Co. v. Faggert & Frieden, 65 F.3d 26, 29 (4th Cir. 1995) (deeming application of judicial estoppel inappropriate "where a party's prior position was based on inadvertence or mistake").

[11] See, e.g., Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973) (refusing to interpret "general language" claiming that entire balance was due on installment contract as equivalent to admission that work had been completed, remarking that judicial estoppel "does not allow for the resolution of ambiguities in favor of estoppel") (citation omitted); Scott v. Land Span Motor, Inc., 781 F. Supp. 1115, 1120 (D.S.C. 1991) (plaintiff not precluded from seeking damages for loss of earnings despite earlier statements in administrative employment proceeding that she was "able to do the job" where such a phrase contained a "possible ambiguity").

[12] See, e.g., Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802 (1999) (acknowledging that statement of total disability when applying for Social Security benefits does not "involve directly conflicting statements about purely factual matters, such as 'The light was red/green,' or 'I cannot raise my arm above my head.'"); Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996) (stating that "the position sought to be estopped must be one of fact rather than law or legal theory").

[13] See Palcsesz, 87 F. Supp. at 414.

for what appears to be duplicitous conduct engaged in over the course of this litigation. Moreover, if the Amended Complaint is not dismissed, Plaintiff would be allowed to pursue this lawsuit on factual bases never before alleged and the integrity of the judicial process would suffer.

Fourth, both this Court and the Third Circuit have considered and accepted Plaintiff's original assertions detailing the extent of her consumption of tuna products from 1999-2004 as both courts specifically referenced these allegations in their decisions.[14] Moreover, Plaintiff succeeded in persuading the Third Circuit to reverse this Court's entry of dismissal. Indeed, while Tri-Union acknowledges that the Third Circuit's decision did not turn on the extent of Plaintiff's alleged exposure to mercury, Plaintiff must acknowledge that for the first three and-a-half-years of this litigation, including written submissions and oral arguments made both to this Court and to the Third Circuit,[15] she steadfastly adhered to the facts contained in the initial Complaint regarding her consumption of canned tuna. This Court cannot condone her sudden about-face regarding such a central foundation to her claims against Tri-Union.

This is not a peripheral issue; rather, this goes to the heart of Plaintiff's claims. The Third Circuit has found that "the application of judicial estoppel does not turn on whether the estopped party actually benefited from its attempt to play fast and loose with the court." Krystal Cadillac-Oldsmobile GMC Truck, Inc., 337 F.3d at 324; Visual Interactive Phone Concepts, Inc., 2008 WL 4192065, at *4 n.4 (explaining that "whether a litigant has successfully asserted a legal

[14] See Fellner, 539 F.3d at 241; Fellner, 2007 WL 87633, at *1, *7.

[15] See Damiano v. Sony Music Entertain., No. CIV. A. 95-4795, 2000 WL 1689081, at *7 (D.N.J. Nov. 13, 2000) (Simandle, J.) (holding that "a plaintiff, such as Mr. Damiano, who twice adopts one position that is relied upon by a court in his favor, . . . is judicially estopped from contradicting that position in a bad faith attempt to repeatedly reargue meritless positions while contemning the prior judgments of the court").

position is merely a factor in the Court's judicial estoppel determination") (citing Chao, 517 F.3d at 186 n.5). Indeed, "the presence or absence of any such benefit is merely a factor in determining whether the evidence would support a conclusion of bad faith." Krystal Cadillac-Oldsmobile GMC Truck, Inc., 337 F.3d at 324; see also AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219, 225 (D.N.J. 1992) (noting that "integrity of the judicial process can be sorely compromised short of inconsistent results . . . [i]ndeed, if what is at issue is the integrity of the court, whether a court is asked to rely or has in fact relied on a prior inconsistent position should be a difference without a distinction"[16]).

Accordingly, Tri-Union respectfully submits that this Court should invoke the equitable doctrine of judicial estoppel to preserve the integrity of the judicial system and prevent Plaintiff from working an injustice against the Court. See, e.g., Delgrosso v. Spang & Co., 903 F.2d 234, 241 (3d Cir. 1990) ("Unlike the concept of equitable estoppel, which focuses on the relationships between the parties, judicial estoppel focuses on relationship between litigant and the judicial system, and seeks to preserve integrity of the system.") (citation omitted); DePuy, Inc. v. Biomedical Eng'g Trust, 216 F. Supp. 2d 358, 376 (D.N.J. 2001) (noting that judicial estoppel "is solely concerned with the relationship between the litigants and the court").

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[16] See supra note 14 and accompanying text.

E. Tri-Union Has No Duty To Warn Of An Obvious Or Commonly-Known Danger, Such As the Presence Of Methylmercury In Tuna.

1. The existence of methylmercury in canned tuna is commonly known, which abrogates any alleged duty to warn Tri-Union might otherwise have.

A product manufacturer 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 (1984). There is no such duty to warn, however, when the risk and the way to avoid it are obvious. Mathews v. Univ. Loft Co., 387 N.J. Super. 349, 358 (App. Div. 2006), cert. denied, 188 N.J. 577 (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. (See generally *What You Need To Know*; *Backgrounder*; *FDA Letter*.) Therefore, Tri-Union has no duty to warn about the existence of methylmercury in canned tuna. For example, restaurants that serve fried foods have no duty to warn customers that such food, such as hamburgers and French fries, if consumed over a long period of time, can cause weight gain and obesity. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 531-34, 540-43 (S.D.N.Y. 2003). No duty exists to warn customers that prolonged consumption of fried foods may lead to coronary disease and weight gain because this is common knowledge. Id.

Furthermore, in analogous situations, there is no duty to warn consumers that prolonged or excessive consumption of alcohol may lead to cirrhosis of the liver or death; Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991) (noting that "the danger of developing the disease of alcoholism from prolonged and excessive consumption of alcoholic beverages is within the ordinary knowledge common to the community"); or that consumption of

unpasteurized cheese during pregnancy may lead to miscarriage or stillbirth.[17] Similarly, Tri-Union has no duty to warn consumers of the common knowledge that fish contain trace amounts of methylmercury. The FDA has made public advisories regarding the consumption of fish and methylmercury exposure since the mid-1990's; (*FDA Letter* at 2; see also *Backgrounder* at 3 (citing "Mercury in Fish: FDA Monitoring Program (1990-2003)".); which pre-date most, if not all, of Plaintiff's alleged exposure period wherein she allegedly consumed one can of tuna per day between 1993 and 2004. Hundreds of published studies and news articles have been printed on the issue of methylmercury and fish consumption in the past thirty-five years.

As it was common knowledge that (1) fish, including tuna, contain trace amounts of mercury and methylmercury; and (2) over-consumption of such fish could lead to elevated mercury accumulation, Tri-Union has no duty to warn of such commonly known facts and therefore, this Court should dismiss Plaintiff's claims.

[17] See also Garrison v. Heublein, 673 F.2d 189, 192 (7th Cir. 1982) ("the dangers of the use of alcohol are common knowledge to such an extent that the product cannot objectively be considered to be unreasonably dangerous"); Pemberton v. Am. Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984) (no duty to warn of commonly-known danger of death from rapid over-consumption of grain alcohol in single sitting); Menard v. Newhall, 373 A.2d 505 (Vt. 1977) (finding no duty to warn of hazards associated with BB gun because these hazards are "generally known and recognized"); Morris v. Adolph Coors Co., 735 S.W.2d 578 (Tex. Ct. App. 1987) (no duty to warn of risks of driving while intoxicated because there is a "general awareness" of these risks); Friedman v. Houston Sports Ass'n, 731 S.W.2d 572, 575 (Tex. Ct. App. 1987) ("the general dangers inherent in baseball are part of the 'universal common knowledge'"); Brown v. Sears Roebuck & Co., 667 P.2d 750, 756 (Ariz. Ct. App. 1983) (holding no duty to warn of risks of a product that are within "the ordinary knowledge common to the community"; "[s]urely every adult knows that if an electrical extension cord is cut or frayed[,] a danger of electrical shock is created").

2. As this Court took judicial notice over publications detailing the presence of methylmercury in canned tuna,[18] Plaintiff had imputed knowledge of the same, and cannot now claim failure to warn.

Plaintiff did not appeal this Court's taking judicial notice of *What You Need To Know*, *Backgrounder*, *FDA Letter*, and *Section 540.600.* See Fellner, 539 F.3d at 242 (noting grant of judicial notice with regard to aforementioned publications and stating that "[t]he sole question presented in this appeal is whether Fellner's state claim for damages is preempted by federal law"). Thus, Plaintiff may not now contest the propriety of that decision.

As this Court has previously acknowledged, courts may take judicial notice of public records on motions to dismiss. Fellner, 2007 WL 87633, at *2 (citing Benak v. Alliance Capital Mgmt. L.P., 349 F. Supp. 2d 882, 889 n.8 (D.N.J. 2004)). This Court made clear that, on a motion to dismiss, the "court may take judicial notice of publicly available documents and 'plaintiffs may therefore be charged with knowledge of relevant public information.'" Id. (quoting Benak, 349 F. Supp. 2d at 889 n.8). Furthermore, this Court deemed the aforementioned publications to be "public records and available." Id.

Since the information contained in the publications consists of commonly known facts, Plaintiff was aware (or should have been) that, inter alia, as of the mid-1990's, the FDA "issued its first methylmercury in fish advisory[.]" (*FDA Letter* at 2; *Backgrounder* at 3 (citing "Mercury in Fish: FDA Monitoring Program (1990-2003)".) Plaintiff may not now maintain that Tri-Union failed to warn of the presence of methylmercury in its canned tuna when such information was commonly known and disclosed as part of "relevant public information." Accordingly, Plaintiff fails to state a claim for failure to warn because the existence of trace amounts of methylmercury in tuna is commonly known.

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[18] See supra note 5.

F. Accepting As True Plaintiff's Recent Amendments Regarding Her Rate Of Tuna Consumption, Plaintiff Nonetheless Engaged In Abnormal Over-Consumption Of Tuna By Consuming More Than 4,000 Cans Of Tuna Over An Eleven-Year Period.

Plaintiff's Amended Complaint alleges that, from "1993 through 2004, Plaintiff consumed approximately one can per day of Defendant's Chicken of the Sea albacore tuna products." (Ex. C at ¶ 3.) That amounts to more than 4,000 cans of tuna over an eleven-year period. While this is less tuna consumed than what Plaintiff alleged in her original Complaint, it is, nonetheless, over-consumption.[19]

In New Jersey, the elements for proving a product defect are essentially the same for both a design defect and a claim for failure to warn. Jurado v. W. Gear Works, 131 N.J. 375, 385 (1993). To establish liability under the PLA for failure to warn, 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 (1993). "A failure to warn, or a failure to warn adequately, may constitute a defect to support a cause of action in strict liability." Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 57 (1996). Where a plaintiff alleges failure to warn, "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 (2004) (quoting Coffman, 133 N.J. at 593-94). The failure to provide necessary warnings constitutes a breach of duty. Coffman, 133 N.J. at 598. Initially, the plaintiff must establish that the defendant had a duty to warn. James v. Bessemer Processing Co., 155 N.J. 279, 297-98 (1998). A product manufacturer has a duty to warn about any risk relating to the product that it either knows or

[19] Compare *What You Need To Know*; *Backgrounder*; *FDA Letter* (all recommending six ounces, or one average meal, of canned albacore tuna per week, which amounts to a recommended maximum of less than 600 meals of canned albacore tuna over an eleven-year period).)

ought to know; Feldman, 97 N.J. at 434; unless the risk and the way to avoid it are obvious. Mathews, 387 N.J. Super. at 358.

Tri-Union has no duty to warn about the obvious danger of over-using, or over-consuming, a product. Similarly, the principles set forth in Section 402A of the Restatement (Second) of Torts regarding the question of a seller's liability for injuries incurred by a plaintiff as a result of over-consumption remain instructive.

Comment (h) to Section 402A provides 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 in the context of over-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 Section 402A, courts should not punish a food manufacturer for over-consumption by a consumer. Just as a food manufacturer would not be liable under Section 402A to: (a) a consumer who consumers a diet of a candy-bar-a-day if it results in type-2 diabetes; or (b) a consumer who consumes excessive amounts of butter if it results in elevated cholesterol or a heart attack, a food manufacturer is not liable for the alleged effects arising out of the over-consumption of tuna. New Jersey courts still refer to and cite Section 402A and its comments, and they are applicable to this case. See Jurado, 131 N.J. at 387 (citing Comment h); Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 96-99 (1990) (citing Comment i); Johnson v. Navistar

Int'l Transp. Corp., 2008 WL 2885190, at *7 (N.J. Super. Ct. App. Div. July 29, 2008) (per curiam) (citing § 402A).

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, 237 F. Supp. 2d at 531-34, 540-43. 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 Supreme Court of the United States has even taken notice that a person could be harmed by ingesting certain levels of essentially harmless products like table salt, or even water. Flemming v. Florida Citrus Exch., 358 U.S. 153, 163 (1959).

Just as there is no duty to warn consumers that over-consumption of fried foods may lead to coronary heart disease and weight gain, 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 a rate of more than 4,000 cans over eleven years – may lead to elevated mercury levels in the blood. A multitude of foods can be dangerous if consumed in rampant excess over a prolonged period. If a consumer ate an order of onion rings every day for eleven years, the manufacturer of the onion rings would not be liable for the consumer's excess weight gain and heart disease, as there is no duty to warn of a danger that exists only through over-consumption.

As the Restatement, case law, and New Jersey law for failure to warn demonstrate, Tri-Union has no duty to warn Plaintiff about the obvious dangers of over-consuming canned tuna 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 product's "intended use." However, a diet consisting of

more than 4,000 cans of tuna over eleven 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 one's own choices. According, the Court should dismiss the Amended Complaint as Tri-Union owes no duty to Plaintiff for her extreme over-consumption of canned tuna for eleven years.

G. Plaintiff Fails To State A Cause Of Action For Breach Of Warranty And Strict Liability Because The Alleged "Harmful Compounds" Occur Naturally.

1. It is undisputed that methylmercury occurs naturally in tuna.

As methylmercury is naturally-occurring in fish, including tuna; (See generally *What You Need To Know*; *Backgrounder*; *FDA Letter*.); Plaintiff should be barred from asserting claims for strict liability and breach of warranty against Tri-Union. Count I alleges violations of the PLA, including claims of strict liability and breach of warranty. Such claims must be dismissed, however, because the alleged "harmful compound," (Ex. C at ¶¶ 4-6.), methylmercury, occurs naturally in tuna and does not result from an additive or 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 that could have deleterious effects. Given the lack of New Jersey case law confronting the issue of particular substances in foods, New Jersey courts have looked to other jurisdictions when ruling upon similar cases. See Koster v. Scotch Assocs., 273 N.J. Super. 102, 109 (App. Div. 1993) (citing Mexicali Rose v. Superior Court, 822 P.2d 1292 (Cal. 1992)).

2. Where methylmercury is natural to the preparation of canned albacore tuna, it can be said that it was reasonably expected to be present by its very nature.

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 liability should not be imposed in such situations. "If the injury-producing substance is natural to the preparation of the 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 Rose, 822 P.2d at 1303. Rather, for a plaintiff to state a claim upon which relief may be granted, the food must contain a foreign object that 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, a California appellate court affirmed a trial court's ruling that methylmercury occurs naturally in tuna fish. People ex rel. Brown v. Tri-Union Seafoods, LLC, 171 Cal. App. 4th 1549 (1st Dist. 2009). Based on the lower court's assessment of the expert testimony presented at trial, the appellate court affirmed the finding that methylmercury is naturally-occurring in tuna fish. New Jersey courts have traditionally adhered to the proposition that there no liability arises out of an injury resulting from a naturally-occurring substance found in food that an average consumer would expect to find there.

In Sofman v. Denham Foods Services, 37 N.J. 304 (1962), the Supreme Court of New Jersey 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. Id. at 306. Given that frankfurters consist of highly-processed meat, an average consumer would not expect a "piece of bone or gristle" to be present in the final product. 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 Enters., Inc., 831 F. Supp. 341, 349 (D. Del. 1993). When the "food has undergone no processing," the food that a consumer 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. See, e.g., Clime, 831 F. Supp. at 349 (holding that customer cannot maintain claim for breach of implied warranty of merchantability for injuries sustained after consuming clams containing naturally-occurring bacteria); Porteous v. St. Ann's Café & Deli, 713 So. 2d 454, 458 (La. 1998) (no liability where plaintiff was injured upon biting into pearl while eating oyster po-boy as "[t]here 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"); Ex parte Morrison's Cafeteria of Montgomery, Inc. v. Haddox, 431 So. 2d 975, 979 (Ala. 1983) (agreeing with underlying trial court that "as a matter of law that a one-centimeter bone found in a fish fillet 'makes that fish neither unfit for human consumption nor unreasonably dangerous'") (citation omitted); Parianos v. Bruegger's Bagel Bakery, No. 84664, 2005 WL 78114 (Ohio Ct. App. Jan. 13, 2005) (Cooney, J.) (upholding grant of summary judgment where plaintiff should reasonably have anticipated and guarded against presence of pig's bone in sausage, egg, and cheese bagel sandwich); Ruvulo v. Homovich, 778 N.E.2d 661, 662-63 (Ohio Ct. App. 2002) (affirming trial court's finding that customer should have reasonably anticipated

chicken sandwich might contain chicken bone); Soles v. Cheryl & Co. Gourmet Foods & Gifts, No. 14-99-36, 1999 WL 1054786, at *3 (Ohio Ct. App. 1999) (Hadley, J.) (affirming summary judgment where "common sense dictates that the presence of a pecan shell in a pecan cookie is a natural occurrence that the appellant reasonably should have anticipated and guarded against"); Matthews v. Maysville Seafoods, Inc., 602 N.E.2d 764, 764-66 (Ohio Ct. App. 1991) (trial court properly held that customer reasonably should have 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 not liable for customer's injuries sustained after biting into claim 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 from a food product all naturally-occurring substances that have a remote possibility of creating a deleterious effect. Porteous, 713 So. 2d at 458. In many instances, there simply is no process by which an entity could attempt to remove all naturally-occurring substances that might be harmful. See id.; Hollinger v. Shopper Paradise of New Jersey, Inc., 134 N.J. Super. 328, 342-43 (Law Div. 1975) (seller of diseased pork not held strictly liable because 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, 171 Cal. App. 4th 1449, 1557-58, 1562, which specifically found that methylmercury is naturally-occurring in tuna; id. at 1557-58, 1562; tuna manufacturers do not add methylmercury to canned tuna; id. at 1562; and that such methylmercury cannot be removed from the tuna; id. at

1562; Tri-Union should be exempted from any state-law warning requirements. Therefore, Plaintiff cannot sustain her claims for breach of warranty and strict liability. Consequently, Tri-Union respectfully requests that this Court dismiss Count I of the Amended Complaint.

H. Public Policy Considerations Require Dismissal Of The Amended Complaint.

The Court will advance two compelling public policies by dismissing Plaintiff's Amended Complaint.

1. Fish is an excellent source of omega-3 fatty acids.

First, fish are an excellent source of omega-3 fatty acids, which protect against coronary heart disease. (*FDA Letter* at 4 & n. 6.) The American Heart Association reports that: "Coronary heart disease, stroke, high blood pressure, heart failure and all other heart- and blood vessel-related problems have been the major cause of death in the United States every year since 1900 except during the 1918 flu pandemic."[20] See Daniel Shelton, *Review of Selected 2008 California Legislation: Health and Safety: Chapter 207: California's Fight Against Trans Fats*, 40 McGeorge L. Rev. 426, 426 & n.1 (2009) ("*Chapter 207*") (citing American Heart Association, Cardiovascular Disease Statistics). Cardiovascular disease is responsible for more than one-third of the deaths in America each year, which is more than cancer, HIV, and accidents combined. *Chapter 207* at 426 (citing American Heart Association, Cardiovascular Disease Statistics). Cardiovascular disease "is the largest single cause of mortality among women, accounting for 38 percent of all deaths among females."[21]

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[20] American Heart Association, A Report from the American Heart Association Statistics Committee and Stroke Statistics Subcommittee, http://www.americanheart.org/presenter.jhtml?identifier=3054076 (last visited Aug. 28, 2009).

[21] American Heart Association, Feb. 19, 2007 Journal Report, http://www.americanheart.org/presenter.jhtml?identifier=3045524 (last visited Aug. 28, 2009).

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. (*FDA Letter* at 4 & n.6.) 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 women, women who may become pregnant, nursing mothers, and young children, to limit – *not avoid* – consumption of tuna. (See generally *What You Need To Know*; *Backgrounder*; *FDA Letter*.) The FDA sought to avoid the deleterious effects of a warning to the general population, and expressly rejected such a proposal. (See generally *FDA Letter*.)

If the Court denies Tri-Union's Motion To Dismiss, the resulting undue notoriety from this sensationalist suit may result in a decrease in fish consumption, which could have a negative health impact on the multitudes of Americans at risk for cardiovascular disease. This lawsuit, and the allegations that one woman's over-consumption, wherein her diet consisted of more than 4,000 cans of tuna in an eleven-year period, may result in a devastating decrease in fish consumption by the American public, which would result in a negative impact on the millions of Americans at risk for cardiovascular disease.

2. It would be inappropriate to expand the duty of a product manufacturer it to warn of all potential dangers that might possibly result from over-consumption of its product.

Second, 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 of a product where such potential dangers would be remote or non-existent under conditions of normal or average use. Recognizing such a duty would arguably require (1) the vendors at Yankee Stadium to warn of the effects of over-consumption of nitrates in hot dogs; (2) a warning concerning type-2 diabetes on Halloween candy; and (3) warnings about coronary heart disease

on packages 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.

As the Supreme Court of New Jersey has recognized:

> [S]ome 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 Express Airlines, Inc. v. Consol. Rail Corp., 100 N.J. 246, 264 (1985) (citations omitted). Moreover, a finding of 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. (citations omitted); see also Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). Indeed, Plaintiff seeks recovery, in part, under the PLA, which the New Jersey Legislature has amended to "limit the expansion of products-liability law." Zaza, 144 N.J. at 47. "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 47-48 (citations & internal quotation marks omitted)

Thus, the aforementioned compelling public policy considerations necessitate the dismissal of Plaintiff's Amended Complaint.

IV. CONCLUSION

The Amended Complaint fails to state a claim upon which relief may be granted insofar as: (1) the PLA subsumes actions under the CFA where, as here, Plaintiff seeks damages for physical injuries arising out of a product; (2) Plaintiff improperly couches a prayer for relief as a cause of action; (3) the equitable doctrine of judicial estoppel prevents Plaintiff from asserting claims in the Amended Complaint that are directly contrary to those she asserted in the original Complaint, and upon which this Court and the Third Circuit previously relied in assessing the viability of this lawsuit; (4) Tri-Union has no duty to warn Plaintiff of a commonly-known danger, such as the presence of methylmercury in tuna; (5) Plaintiff consumed an abnormal amount of canned tuna, e.g., more than 4,000 cans, over an eleven-year period; (6) Plaintiff fails to state claims for breach of warranty and strict liability because the alleged harmful compounds in Tri-Union's canned tuna occur naturally; and (7) public policy considerations require dismissal.

For the foregoing reasons, Tri-Union respectfully requests that this Court dismiss the Amended Complaint in its entirety.

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CERTIFICATION

I hereby certify that on this date a copy of foregoing **Memorandum of Law in Support of Defendant's Motion to Dismiss** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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