

EICHEN LEVINSON & CRUTCHLOW

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

Barry R. Eichen §
Certified by the Supreme Court
as a Civil Trial Attorney

William O. Crutchlow
Certified by the Supreme Court
as a Civil Trial Attorney

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Of Counsel

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October 9, 2009

Hon. Dennis M. Cavanaugh, U.S.D.J.
United States District Court
U.S. P.O. & Courthouse Building
Federal Square
Newark, NJ 07101

**Re: Deborah Fellner v. Tri-Union Seafoods, L.L.C. d/b/a Chicken of the Sea
Civil Action No. 06-CV-688 (DMC)**

Dear Judge Cavanaugh:

Enclosed please find a courtesy copy of the **Plaintiff's Opposition and Cross Motion to Defendant's Motion for Judicial Notice returnable on October 19, 2009.**

Should you have any questions or comments, please feel free to contact my office at your earliest convenience. Thank you for your anticipated cooperation.

Respectfully submitted,

/s/ Barry R. Eichen
BARRY R. EICHEN

BRE/jg

Enclosure

Cc: Kenneth A. Schoen, Esq. via First Class Mail

www.eichenlevinson.com

Also Admitted To Practice Law In: ‡New York, §Pennsylvania, ΔDistrict of Columbia

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(NEWARK VICINAGE)**

EICHEN LEVINSON & CRUTCHLOW, LLP
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff Deborah Fellner

DEBORAH FELLNER,	:	
	:	
Plaintiff	:	Civil Action 2:06-cv-00688-DMC-MF
	:	
vs.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	NOTICE OF CROSS MOTION
d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	

TO: Kenneth A. Schoen
Bonner Kiernan Trebach
& Crociata, LLP
209 Cherry Hill Road, Suite 300
Parsippany, New Jersey 07054
Attorneys for Defendant

PLEASE TAKE NOTICE that on Monday, October 19, 2009 at 9:00 a.m. or as soon thereafter as counsel may be heard, the undersigned, attorneys for Plaintiff Deborah Fellner, will apply to the United States District Court, District of New Jersey, Newark Vicinage, by way of Cross Motion seeking that the Court strike Defendant's Motion Requesting Judicial Notice for failure to comply with Rule 7.1 of the Local Civil Rules of the United States District Court for the District of New Jersey as well as Rule 7 of the Federal Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE that Plaintiff will rely upon the Brief in support of this cross-motion and in opposition to Defendant's Motion for Judicial Notice as well as Certification of Counsel annexed hereto.

PLEASE TAKE FURTHER NOTICE that an oral argument is requested.

A proposed form of Order is annexed.

Respectfully submitted,

EICHEN LEVINSON & CRUTCHLOW
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff

DATED: October 9, 2009

By: 
BARRY R. EICHEN

CERTIFICATE OF SERVICE

I, Barry R. Eichen, hereby certify that a true copy of the written document was served upon Kenneth A. Schoen, Esq., Bonner Kiernan Trebach & Crociata, LLP at 209 Cherry Hill Road, Suite 300, Parsippany, New Jersey 07054 via First Class Mail.

DATED: October 9, 2009

By: 
BARRY R. EICHEN

**FOR THE DISTRICT OF NEW JERSEY
(NEWARK VICINAGE)**

EICHEN LEVINSON & CRUTCHLOW, LLP
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff Deborah Fellner

DEBORAH FELLNER,	:	
	:	
Plaintiff	:	Civil Action 2:06-cv-00688-DMC-MF
	:	
vs.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	
d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	

**BRIEF IN SUPPORT OF PLAINTIFF’S CROSS MOTION AND IN OPPOSITION TO
DEFENDANT’S MOTION FOR JUDICIAL NOTICE**

Pursuant to L. Civ. R. 7.1 (d)(7), and for all the reasons stated below, Defendant’s Motion requesting Judicial Notice should be stricken by this Court since Defendant’s moving papers were not filed or served on all parties 24 days prior to the noticed motion date. Defendant’s blatant disregard of applicable motion procedures is unacceptable and cannot go unnoticed by this Court. In the alternative, if the Court is inclined to hear Defendant’s Motion at this time, Plaintiff respectfully submits this Brief in opposition to Defendant’s Motion for Judicial Notice.

I. NATURE OF THE CASE

Plaintiff Deborah Fellner brought suit against the Defendant, alleging violations of the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1 *et seq.*, the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*, and common law fraud, for caning and distributing tuna containing harmful mercury compounds, yet failing to warn and disclose the harms associated with mercury in its tuna products. See Plaintiff's Amended Complaint

II. OPPOSITION AND CROSS MOTION TO DEFENDANT'S MOTION FOR JUDICIAL NOTICE

A. Plaintiff's Statement of Material Facts

1. Defendant's Motion to Dismiss Plaintiff's complaint was properly filed before this Court and made returnable on October 5, 2009.
2. On September 21, 2009 Plaintiff timely filed her opposition papers.
3. Even though Defendant was obligated to serve a reply by September 28, 2009, Plaintiff had graciously agreed to extend the date to October 1, 2009.
4. On October 1, 2009 Defendant proceeded to file their Reply papers as well as a Motion Requesting Judicial Notice of several documents annexed to their papers in violation of the timing requirements governing motion practice proscribed in L.Civ.R.7.1 (c)(1); (d)(1).
5. Other than a Notice of Motion Requesting Judicial Notice and Certification of Counsel, Defendant did not file any other paper in support of its Motion.
6. Defendant's Motion Requesting Judicial Notice did not state any grounds or offer any reasons as to why this Court should take Judicial Notice, in violation of Fed.R.Civ.P. 7(b)(1)(B).

B. Argument

Defendant's Motion for Judicial Notice must be stricken for failure to comply with appropriate Local Rules of the District Court of New Jersey as well as the Federal Rules of Civil Procedure.

Pursuant to L.Civ.R. 7.1 (c)(1) "All applications . . . shall be made returnable before Judge or Magistrate Judge to whom the case has been assigned on the first regular motion day which is at least 24 days after the date of filing." L.Civ.R. 7.1 (d)(1) states that "No application will be heard unless the moving papers, and brief . . . and proof of acknowledgment of service on all parties, are filed with the Clerk at least 24 days prior to the noticed motion day." Defendant's Motion was filed four days prior to the motion date noticed in their papers, and thus Plaintiff respectfully requests this Court to strike their papers.¹

Defendant's Motion also fails to state adequate grounds for Judicial Notice. Specifically, Fed.R.Civ.P. 7(1)(B) states that motions **must** "state with particularity the grounds for seeking the order" (emphasis added). In their certification in support of motion, Defendant only states that "applicable case law permitting judicial notice are listed in the footnotes to the motion submitted." Def's Certif. ¶ 3. However, in their attempt to blind side the Plaintiff, Defendant failed to provide any document containing the aforementioned footnotes and case law.

Thus Defendant's statement that the documents of which they seek judicial notice of are "publicly available" is the only contention they offer in support of the requested Judicial Notice. Def's Certif. ¶ 3. However, Rule 201 of the Federal Rules of Evidence allows the Court to only take judicial notice of **adjudicative facts**. Defendant makes no argument and offers no case law to support a conclusion that the documents and/or statements contained within them are the kinds

¹ L.Civ.R. 7.1(d)(7) states that "The Court may reject any brief or other paper not filed within the time specified."

of facts that are capable of being judicially noticed pursuant to Fed.R.Evid. 201 Moreover, it is entirely unclear whether Defendant seeks judicial notice of the statements contained in the attached documents or of the documents themselves.

Accordingly, for the reasons stated above, it is respectfully submitted that Defendant's Motion requesting judicial notice is stricken or in the alternative denied.

Respectfully submitted,

EICHEN LEVINSON & CRUTCHLOW
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff

DATED: October 9, 2009

By: 
BARRY R. EICHEN

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(NEWARK VICINAGE)**

EICHEN LEVINSON & CRUTCHLOW, LLP
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff Deborah Fellner

DEBORAH FELLNER,	:	
	:	
Plaintiff	:	Civil Action 2:06-cv-00688-DMC-MF
	:	
vs.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	CERTIFICATION OF BARRY R. EICHEN IN
d/b/a CHICKEN OF THE SEA,	:	SUPPORT OF PLAINTIFF'S CROSS MOTION
	:	
Defendant.	:	

I, Barry R. Eichen by way of Certification, state:

1. I am an attorney-at-law and partner with the firm of Eichen Levinson & Crutchlow, attorneys for Plaintiff and I am the attorney entrusted with the handling of this matter.
2. I make this Certification in support of Plaintiff's cross-motion to strike Defendant's Motion Requesting Judicial Notice for failure to comply with Rules 7.1(c)(1) and 7.1(d)(1) of the Local Civil Rules of the United States District Court for the District of New Jersey as well as Rule 7 of the Federal Rules of Civil Procedure.
3. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

EICHEN LEVINSON & CRUTCHLOW
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff

DATED: October 9, 2009

By: 

BARRY R. EICHEN

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(NEWARK VICINAGE)**

EICHEN LEVINSON & CRUTCHLOW, LLP
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff, Deborah Fellner

_____	:	
DEBORAH FELLNER,	:	
	:	
Plaintiff	:	Civil Action 2:06-cv-00688-DMC-MF
	:	
vs.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	ORDER
d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	
_____	:	

This matter being brought before the Court on Notice of Motion filed by Bonner Kiernan Trebach & Crociata, LLP, attorneys for the Defendant Tri-Union Seafoods, LLC, and upon cross-motion of Eichen Levinson & Crutchlow, LLP, attorneys for the Plaintiff, and the Court having considered the pleadings filed herein, and good cause having been shown;

IT IS on this _____ day of _____, 2009;

ORDERED that the Defendant's motion seeking Judicial Notice of all documents referenced in their application is:

_____ **STRICKEN**

_____ **DENIED**

and it is further,

ORDERED that Plaintiff's motion seeking to strike Defendant's Motion for Judicial Notice for failure to comply with Rules 7.1(c)(1) and 7.1(d)(1) of the Local Civil Rules of the United States District Court for the District of New Jersey, is **GRANTED**; and it is further,

ORDERED that a copy of this Order shall be served upon all counsel within ____ days of the date hereof.

Hon.
United States District Court