

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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

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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.

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DEFENDANT TRI-UNION SEAFOODS, LLC d/b/a CHICKEN OF THE SEA'S  
MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR PROTECTIVE ORDER

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

DEBORAH FELLNER,	:	CIVIL ACTION NO. 2:06-CV-688-DMC-JAD
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	
d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	DECEMBER 15, 2010

**DEFENDANT TRI-UNION SEAFOODS, L.L.C.'S  
MOTION FOR PROTECTIVE ORDER**

**I. INTRODUCTION**

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the Defendant Tri-Union Seafoods, L.L.C. moves this Court for an order to protect it from the oppression, undue burden, and expense of responding to interrogatories and requests for production concerning nearly 10,000,000 pages of hard copy documents, nearly 6,400,000 e-mails, and more than 93 gigabytes<sup>1</sup> of electronically-stored files. The resulting machine hours alone involved in producing such documents would be enormous. Further, such time does not include any time for the physical handling of such documents or the review of such documents for relevance, attorney-client privilege, work product, and confidential or proprietary information.

Tri-Union asks that the Court exercise its discretion to bar such discovery, or at least substantially limit the scope of such discovery to certain matters as described in more detail herein. Specifically, Tri-Union requests that this Court: (1) preclude the Plaintiff from

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<sup>1</sup> To put the amount of gigabytes in context, such data would fill more than 66,200 3.5" diskettes. See *infra* notes 9 & 12. Further, if all such electronic documents were in Word format, they would result in more than 22,000,000 full-text pages. See *infra* Section III.C.

conducting discovery regarding any document, e-mail, or information that was possessed, known by, or attributable to Tri-Union after 2004; (2) limit any pre-2005 discovery by the Plaintiff to that which is reasonably proportional to the allegations of the Amended Complaint; and (3) limit the scope of permissible discovery by the Plaintiff to inquiries relevant to the allegations of the Amended Complaint. Tri-Union further requests that the Court shift the costs of compliance to the requesting party, *i.e.*, the Plaintiff, in light of counsel's overreaching efforts to build support for a future potential class action lawsuit replacing the one that has been dismissed with prejudice. As grounds there for, Tri-Union states the following:

## **II. BACKGROUND**

### **A. Original Complaint**

On January 16, 2006,<sup>2</sup> the Plaintiff filed a Complaint alleging class action and individual claims, contending that Tri-Union violated the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1, *et seq.* (the "PLA"), and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* (the "CFA"). The Plaintiff also alleged that Tri-Union engaged in common law fraud by 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, the 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).

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<sup>2</sup> The Summons was erroneously dated January 19, 2004.

The Plaintiff dismissed her class action allegations with prejudice by Stipulation filed with the Court on May 12, 2006. The Plaintiff subsequently filed an Amended Complaint, which eliminated any reference to the originally-filed Class Action Complaint.

**B. Amended Complaint**

On July 7, 2009, the Plaintiff filed an Amended Complaint, 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. “B” (Amended Complaint at ¶¶ 5-6, 10-11).) Count III of the Amended Complaint alleged a common law claim for punitive damages. The Amended Complaint alleged, *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.)

**C. Motion To Dismiss Amended Complaint**

On August 31, 2009, Tri-Union filed its Motion To Dismiss all counts of the Amended Complaint. The Court (Cavanaugh, J.) subsequently granted the Motion with regard to the counts alleging violations of the CFA and a common law claim for punitive damages. Thus, the Plaintiff’s only remaining claim is that Tri-Union violated the PLA by canning and distributing tuna that allegedly contained methylmercury, and failing to disclose or warn that consumption of tuna containing methylmercury could result in mercury poisoning.

**D. November 12, 2010 Telephone Conference With The Court (Dickson, J.)**

On November 12, 2010, after being unable to resolve discovery-related disagreements, the parties participated in a telephone conference with Magistrate Dickson to resolve these discovery disputes. During the conference, one of the issues was the appropriate scope of discovery, specifically the relevant time period. The Defendant argued that because there was no

allegation by the Plaintiff concerning a defect in the tuna, the only claim concerned the Defendant's alleged failure to warn about the extent to which methylmercury is present in tuna sold by the Defendant. Because the Amended Complaint alleges consumption only through 2004, the Defendant maintained that its post-2004 knowledge regarding the presence and amount of methylmercury in its tuna is irrelevant to a claim of failure to warn.

In response, the Plaintiff stated that there were two possible theories of liability in the Amended Complaint: failure to warn and a speculative product defect claim. The Plaintiff seeks test results from 1993 through 2004 concerning the presence of methylmercury in the Defendant's tuna. The Plaintiff, though, seeks studies and other information concerning the Defendant's knowledge about the presence and potential harm arising from methylmercury in its tuna from 2004 through the present. While the Court noted that post-2004 information concerning a purported product defect might be relevant in the instant action (assuming such allegations were properly pled), the Court appeared to concur with the Defendant's position that post-2004 information concerning a failure to warn would be irrelevant. The Defendant further contended that the Amended Complaint simply did not specifically allege product defect. If the Plaintiff is now advancing a theory of product defect, a Motion To Dismiss would be appropriate as neither side addressed product defect in prosecuting and defending against the previously-discussed Motion To Dismiss The Amended Complaint because such a claim did not appear to have been alleged.

Indeed, the Amended Complaint contains absolutely no information to satisfy the requirements of Atlantic Corporation v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), regarding the Plaintiff's purported product defect pleading. To wit, the Amended Complaint makes only conclusory allegations regarding tuna sold by the Defendant

being “defective.” There is not one single fact-based allegation in the Amended Complaint to support an allegation of product defect, as the single theory upon which the Plaintiff is relying, as set forth in her pleading, is non-compliance with the PLA, as it relates to appropriate warnings.

Plaintiff asserts all claims and causes of action against the Defendant, including but not limited to negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness, strict liability, failure to warn and/or inadequate warning on theories of both negligence and strict liability, all claims and causes of action pertaining to the design, manufacture, sale and distribution of the defective tuna products which were not reasonably fit, suitable, or safe for their intended purposes as they were defectively designed, manufactured and/or failed to contain adequate warnings and/or instructions.

(Amended Compl. at ¶ 8.) It is significant that, during oral argument before the Court of Appeals for the Third Circuit, as well as during the above-mentioned telephone conference with the Court, the Plaintiff was unable to articulate how, exactly, the Defendant “defectively” manufactured its tuna insofar as it is undisputed that the Defendant does not insert the methylmercury into the tuna; rather, the tuna already contains trace amounts of methylmercury when the Defendant catches and processes it. In fact, the Third Circuit provided the Plaintiff an opportunity to articulate her theory of product defect, but she declined to do so when she filed her Amended Complaint. Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237, 241 n.1 (3d Cir. 2009). Thus, the only arguably cognizable claim that the Plaintiff alleges under the PLA is a failure to warn. It is simply unfair for the Plaintiff to engage in a wait-and-see approach to pleading. Such tactics undermine the requirements of the Federal Rules of Civil Procedure as courts interpret and apply them.

With respect to the Plaintiff’s newly-asserted theory, mentioned for the first time in her position paper submitted to the Court (Dickson, J.), the Court observed in its conference call with the parties that it was important to determine what, exactly, the Plaintiff is alleging against the Defendant. If the Plaintiff is claiming a product defect, then the Defendant’s post-2004



knowledge regarding methylmercury might be relevant.<sup>3</sup> If, however, the Plaintiff is claiming a failure to warn, then the Defendant respectfully submits that any post-2004 knowledge that the Defendant possesses is irrelevant to the determination of whether then-existing warnings were appropriate during the relevant time period. As a result of this unresolved issue, the Court suggested that the Defendant file the instant Motion for Protective Order, and the Plaintiff subsequently file an Opposition thereto.

### III. ARGUMENT

#### A. **This Court Has The Authority To Enter An Order Protecting The Defendant From Unduly Burdensome And Otherwise Inappropriate Discovery Requests From The Plaintiff.**

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, this Court has the authority to enter a Protective Order in favor of the Defendant with regard to the discovery requests propounded by the Plaintiff. As an initial matter, the Defendant certifies that it has conferred in good faith several times with counsel for the Plaintiff in an effort to resolve the dispute without court intervention. Fed. R. Civ. P. 26(c)(1); see supra Part II.D. Rule 26(c)(1) provides that:

[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; [and] (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters[.]

For the reasons set forth herein, the Defendant respectfully requests that the Court enter a Protective Order in favor of the Defendant with regard to the Interrogatories and Requests for Production served by the Plaintiff.

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<sup>3</sup> The Defendant emphasizes that if this is a theory on which the Plaintiff intends to rely, it will renew and supplement its Motion To Dismiss. See infra Section III.B.

**B. The Allegations Contained In The Amended Complaint Regarding A Product Defect In The Defendant's Tuna Are Insufficient To State A Claim To Relief, And, Therefore, The Plaintiff Is Not Entitled To Any Post-2004 Discovery.**

As described herein, the Defendant previously moved to dismiss the Amended Complaint. With regard to the Plaintiff's claim under the PLA, the Defendant focused its argument on the failure to warn theory that the Plaintiff has advanced since the inception of this case. Likewise, the Plaintiff focused her Opposition on the failure to warn theory. Now, the Plaintiff is hinting that she might be proceeding under both a failure to warn theory and a claim of product defect, as such allegations support her attempts to seek discovery of post-2004 documents and information. Unfortunately for the Plaintiff, the allegations of the Amended Complaint with regard to a product defect claim fall woefully short of the standard required by law. It is not up to the Defendant to speculate as to what the Plaintiff's theory of liability is.

The point is that the court can well understand, at this stage of the case, why [the defendant] would want to try to pin plaintiff down to specifics, so he can learn what he must defend against in court. The court believes each defendant is entitled to that information before trial and that it is not unduly burdensome, oppressive or inappropriate to require plaintiff to finally be brought to quarter and state its position, as to each count, with specific particularity, and disclose the evidence upon which it is going to rely at trial rather than referring to a mass of deposition transcripts, records and documents from which a defendant is supposed to winnow and glean, if he can, the relevant from the non-relevant, the wheat from the chaff, the jewels from the junk, as it were.

Plaintiff's argument that defendant can discern, from the general mass, exactly what plaintiff claims defendant did or did not do, or both, as well as plaintiff can, is almost absurd. Only plaintiff and its lawyers know what evidence, as opposed to all the information it has discovered, it intends to offer at trial and the relationship of that evidence to its theories of recovery and claims against [the defendant].

Nat'l Bank & Trust Co. of Chicago v. Caton, 136 F.R.D. 682, 690 (D. Kan. 1991).

## 1. Pleading Standard

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). 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.” 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). The Supreme Court explained that, to state a claim, an allegation must be plausible on its face. Such a 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.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557). Here, the Plaintiff has failed to comply with the pleading requirements set forth in Twombly and expanded in Iqbal.

## 2. The Amended Complaint fails to state a claim for product defect that is plausible on its face.

The Plaintiff has failed, in the Amended Complaint, to allege facts sufficient to state a claim upon which relief may be granted. As the Supreme Court recently reiterated, Rule 8(a)(2)<sup>4</sup> of the Federal Rules of Civil Procedure requires a “‘showing,’ rather than a blanket assertion of

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<sup>4</sup> 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[.]”

entitlement to relief.” Twombly, 550 U.S. at 555 n.3. Certainly, “[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, 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) is 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). 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. A court’s required acceptance of a complaint’s allegations as true does not apply to legal conclusions. Iqbal, 129 S. Ct. at 1949. “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 (emphasis added).

The Amended Complaint does not satisfy the standards set forth in *Twombly* and *Iqbal*. With regard to her newly-announced theory of product defect, Paragraph 8 (the only portion of the remaining Amended Complaint<sup>5</sup> to mention a form of the word “defect”) contains absolutely no facts to support such a claim. Instead, the Plaintiff provides only a “formulaic recitation” regarding the elements of the PLA. *Twombly*, 550 U.S. at 555. As *Twombly* and *Iqbal* make clear, the Plaintiff bears the burden to clarify on what theories she is relying. Other courts have condemned the wait-and-see approach to pleading the Plaintiff is taking. See *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 629-30 (8<sup>th</sup> Cir. 1998), *reh’g denied*, 1999 U.S. App. LEXIS 14198; *In re Capstead Mort. Corp. Secs. Litig.*, 258 F. Supp. 2d 533, 566-67 (N.D. Tex. 2003). Therefore, the Defendant respectfully suggests that the sole remaining count in the Amended Complaint makes an allegation concerning only the Defendant’s failure to warn. The Defendant submits that to condone discovery efforts of the Plaintiff regarding post-2004 information and documents would be to contradict the admonition expressed in *Iqbal* that Rule 8 “**does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.**” 129 S. Ct. at 1950 (emphasis added). Accordingly, under that theory, any documents created, or knowledge obtained, after 2004 are not relevant to discovery, and the Defendant respectfully requests that the Court enter an Order protecting such documents from disclosure.

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<sup>5</sup> Nor did any of the allegations contained in the predecessor Complaints contain any factual support for such a theory of liability.

**C. The Proposed Discovery Is Unduly Burdensome And Violates The Rule Of Proportionality.**

As argued in Section III.B, the Defendant respectfully suggests that any post-2004 discovery is irrelevant to the instant action, and should be disallowed. In any event, the discovery (both pre- and post-2004) proposed by the Plaintiff seeks information that violates the rule of proportionality set forth in Rule 26(b)(2)(C)(iii) of the Federal Rule of Civil Procedure. When the burden of a discovery request is likely to outweigh the benefit, Rule 26 vests the District Court with the authority to limit a party's pursuit of otherwise discoverable information. DesMarteau v. CIT Group, No. 09-5361 (SRC)(MAS), 2010 U.S. Dist. LEXIS 97582, at \*3-4 (D.N.J. Sept. 17, 2010) (Shipp, J.)<sup>6</sup>; Emerson Elec. Co. v. Le Carbone, S.A., No. 05-6042 (JBS), 2009 U.S. Dist. LEXIS 13113, at \*5 (D.N.J. Feb. 18, 2009) (Simandle, J.) (noting that Rule 26(b)(2)(C) "incorporates the rule of proportionality"). The Third Circuit has recognized that the right to discovery, although broad, "is not unlimited and may be circumscribed." Bayer AG v. Betachem, Inc., 173 F.3d 188, 191 (3d Cir. 1999) (citations omitted). "Accordingly, a discovery request may be denied if, after assessing 'the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues,' the District Court finds that there exists a likelihood that the resulting benefits would be outweighed by the burden or expense imposed as a consequence of the proposed discovery." DesMarteau, 2010 U.S. Dist. LEXIS 97582, at \*4 (quoting Rule 26(b)(2)(C)(iii)).

"This rule of proportionality is intended 'to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.'" Bowers v. NCAA, No. 97-2600, 2008

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<sup>6</sup> (Schoen Cert., Ex. "E" (unpublished decisions).)

U.S. Dist. LEXIS 14944, at \*15 (D.N.J. Feb. 27, 2008) (Simandle, J.) (quoting Leksi, Inc. v. Fed. Ins. Co., 129 F.R.D. 99, 105 (D.N.J. 1989)); see also Pub. Serv. Enter. Group, Inc. v. Philadelphia Elec. Co., 130 F.R.D. 543, 551 (D.N.J. 1990) (relying on rule of proportionality to exclude “marginally relevant evidence” from scope of discovery); G-69 v. Degnan, 130 F.R.D. 339, 347 (D.N.J. 1990) (finding discovery request unduly burdensome in violation of rule of proportionality where request had only “limited relevance”).

As this Court is aware, the Plaintiff originally commenced this litigation as a class action suit, eventually withdrawing the class action claim with prejudice. Despite this, the current discovery requests are so expansive that they suggest that counsel for the Plaintiff is gathering information far exceeding the scope of the Plaintiff’s claims to position themselves to commence a separate future class action lawsuit concerning methylmercury in tuna. (Schoen Cert., Exs. “C” and “D” (Plaintiff’s Interrogatories and Requests for Production, respectively).) Such requests include, generally without geographic or temporal<sup>7</sup> limits, inquiries regarding the Defendant’s corporate structure and history, its professional affiliations, testing procedures, consumer complaints, labeling, marketing and sales information, scientific research, investigations, lobbying, and legal actions that occurred long after the Plaintiff’s last alleged date of exposure in 2004. The Defendant cites the following Interrogatories and Requests for Production as a non-exhaustive list of disproportionate discovery requests.<sup>8</sup>

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<sup>7</sup> The Defendant acknowledges that the Plaintiff sometimes limits her Interrogatories to certain time periods, though such periods often extend to before and after the period of the Plaintiff’s alleged exposure in this case of 1993 through 2004. All of the Plaintiff’s Requests for Production, though, are open-ended and contain no date parameters whatsoever.

<sup>8</sup> In citing only select examples of discovery requests received to date from the Plaintiff, the Defendant is not waiving its right to assert objections to any requests that are not included herein. Nor does the Defendant claim that disproportionality is its sole objection to the examples provided herein.

**INTERROGATORY NO. 3:** Identify any organizations that Tri-Union has ever been associated with or supported directly or indirectly, that support tuna consumption.

**INTERROGATORY NO. 8:** Identify all Joint Ventures and/or agreements, whether for the purposes of marketing or sales or scientific research or testing entered into between Tri-Union and any other organization/association/laboratory/company, and identify any and all documents reflecting the same.

**INTERROGATORY NO. 13:** Identify any and all departments, employees, agents, and/or any other persons or entities acting on your behalf that are knowledgeable of the documents that reflect your annual expenditures, throughout the relevant period, for the following activities: (1) any financial expenditures, investments and/or contributions for any and all political lobbying or other political activity; (2) financial investments/contributions made to any other organization with the purpose promoting [sic] the safety of tuna consumption; and (3) financial expenditures for promotion and/or marketing and/or sales of your tuna products.

**REQUEST NO. 1:** All documents concerning mercury in tuna fish.

**REQUEST NO. 3:** All documents relating to investigations concerning mercury in tuna fish.

**REQUEST NO. 7:** All documents that comprise, evidence, refer, or relate to any communications or meetings between Tri-Union and any competitor, the Food and Drug Administration (FDA), or anyone, including consumers, concerning mercury in tuna fish.

**REQUEST NO. 14:** All documents concerning mercury in tuna fish, including documents circulated: (a) Internally including with affiliates; (b) With outside organizations; (c) With Lobbyists; and (4) With other companies.

**REQUEST NO. 16:** All documents referring to, relating, or reflecting any lobbying activities, either directly or indirectly, concerning any legislative bill, regulation, policy or initiative of government concerning the presence of mercury in tuna fish.

**REQUEST NO. 18:** All documents concerning the adverse effects of mercury in people.

Not only are the aforementioned requests overbroad and disproportionate to the claims the Plaintiff is advancing, but they pose an extreme burden to Tri-Union. In conjunction with this litigation, Tri-Union has investigated the extent of its hard copy and electronic records. (Affidavit of John Barker at ¶ 9.) Tri-Union Seafood, LLC was formed on or about November 6, 1996. (*Id.* at ¶ 3.) There are approximately eighty desktop computers in the Defendant's corporate headquarters in San Diego, California. (*Id.* at ¶ 4.) There are also approximately forty



laptops, which are primarily utilized by the sales force. (Id. at ¶ 5.) Full e-mail system backup systems were installed in 2004, with monthly back-ups. (Id. at ¶ 6.)

### **1. Hard Copy Documents (1996-2004)**

The Defendant currently possesses approximately 3,000,000 pages of documents in hard copy format for the time period of 1996 through 2004. (Barker Aff. at ¶ 10.) On information and belief, of these 3,000,000 pages, an exceedingly high percentage of the documents are irrelevant to the allegations in this lawsuit and/or are protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 11.) It is estimated that it will take approximately two seconds per page to scan such documents into electronic form. At such a rate, it will take nearly 1,700 machine hours to convert the hard copy documents into electronic form. (Id. at ¶ 12.) The aforementioned 1,700 hours represent only the machine-scanning time for such documents, and not the man-hours necessary to perform the scanning. Adding time for the physical handling, including gathering, moving, and handling, of the documents, as well as examining them for relevance, privilege, work product, and confidential or proprietary information would increase the number of total hours exponentially. (Id. at ¶ 13.)

Further, the Defendant will need to purchase licenses for document management software to facilitate the analysis and production of such documents. Such licenses will cost approximately \$4,000.00. (Id. at ¶ 14.) The Defendant will also need to purchase a scanner to work with such software. The cost of such a scanner will be approximately \$500.00. (Id. at ¶ 15.) Finally, the Defendant will need to purchase three additional scanners for conversion of documents into optical character recognition (“OCR”) format. Such scanners will cost approximately \$5,000.00 each, for a total of \$15,000.00. (Id. at ¶ 16.)

It is estimated that it will then take between ten and fifteen seconds per page to convert such scanned documents into a format that is searchable through OCR programs. At such a rate, it will take more than 10,400 man hours to convert such documents into a searchable form. (Id. at ¶ 17.) The aforementioned 10,400 hours represent only the machine-converting time for such documents, and not the man-hours necessary to perform the converting. Adding time for the physical handling, including gathering, moving, and handling, of the documents would increase the number of total hours substantially. (Id. at ¶ 18.)

## **2. Hard Copy Documents (2005-present)**

It is estimated that, for the time period of 2005 through the present, the Defendant has approximately 6,900,000 pages of hard copy documents. (Barker Aff. at ¶ 19.) On information and belief, an exceedingly high number of these pages are irrelevant to the allegations in this lawsuit and/or are protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 20.) It is estimated that it will take approximately two seconds per page to scan such documents into electronic form. At such a rate, it will take more than 3,800 machine hours to convert the hard copy documents into electronic form. (Id. at ¶ 21.) The aforementioned 3,800 hours represent only the machine-scanning time for such documents, and not the man hours necessary to perform the scanning. Adding time for the physical handling, including gathering, moving, and handling, of the documents, as well as examining them for relevance, privilege, work product, and confidential or proprietary information would increase the number of total hours substantially. (Id. at ¶ 22.)

It is estimated that it will take between ten and fifteen seconds per page to convert such scanned documents into a format that is searchable through OCR programs. At such a rate, it will take nearly 24,000 machine hours to convert such documents into a searchable form. (Id. at

¶ 23.) The aforementioned 24,000 hours represent only the machine-converting time for such documents, and not the man hours necessary to perform the converting. Adding time for the physical handling, including gathering, moving, and handling, of the documents would increase the number of total hours substantially. (Id. at ¶ 24.)

### **3. E-mails and Electronically-Stored Files (1996-2004)**

#### **a. E-mails**

The Defendant has conducted a search of electronically-stored data as well. A search of e-mails dated between 1996 and 2004 revealed more than 96,000 e-mails, which number does not include files attached to such e-mails. (Barker Aff. at ¶ 25.) On information and belief, an exceedingly high number of these e-mails are irrelevant to the allegations in this lawsuit and/or are protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 26.) The time needed to examine such e-mails for relevance, attorney-client privilege, work product, and confidential or proprietary information would constitute an extraordinary burden upon the Defendant and inhibit its ability to function as a commercial enterprise or fulfill its corporate responsibilities. (Id. at ¶ 27.) There is no way to estimate the number of such e-mails that contain attachments. Nor is it possible to determine the approximate total size of all the attachments for this time period. (Id. at ¶ 28.)

#### **b. Files**

Using the category of files that were last modified between 1996 and 2004, a search of electronically-stored files on the Defendant's server revealed more than 24,000 files, consisting of approximately 6.34 gigabytes<sup>9</sup> of data saved in multiple formats, including Excel, Word,

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<sup>9</sup> It takes approximately 711 standard 3.5" diskettes to store one gigabyte of data. Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 553 n.2 (W.D. Tenn. 2003). Therefore, the

PowerPoint, .PDF, .HTML, Lotus 1,2,3, Word Perfect, and .RTF. (Id. at ¶ 29.) Assuming all such files were in Word format, the result would be approximately 1,500,000 full-text pages. (Id. at ¶ 30.) On information and belief, an exceedingly high number of these files are irrelevant to the allegations in this lawsuit and/or are protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 31.) The time needed to examine such files for relevance, attorney-client privilege, work product, and confidential or proprietary information would constitute an extraordinary burden upon the Defendant and inhibit its ability to function as a commercial enterprise or fulfill its corporate responsibilities. (Id. at ¶ 32.) The Defendant will need to purchase licenses for a software document viewer for opening the various formats of these files. Such a viewer will cost approximately \$3,000.00. (Id. at ¶ 33.)

#### **4. E-mails and Electronically-Stored Files (2005-present)**

##### **a. E-mails**

A search of e-mails on COSI's server dated after 2004 revealed 6,300,000 e-mails<sup>10</sup>, which number does not include files attached to such e-mails. (Barker Aff. at ¶ 34.) On information and belief, an exceedingly high number of these e-mails are irrelevant to the allegations in this lawsuit and/or are protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 36.) The time needed to examine such e-mails for relevance, attorney-client privilege, work product, and confidential or proprietary information would constitute an extraordinary burden upon the Defendant and inhibit its ability to function as a commercial enterprise or fulfill its corporate

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amount of electronic data (other than e-mails), last modified between 1996 and 2004, currently on the Defendant's server would fill more than 4,500 such diskettes.

<sup>10</sup> This data reflects e-mails as of December 14, 2010. (Barker Aff. at ¶ 35.)

responsibilities. (Id. at ¶ 37.) There is no way to estimate the number of such e-mails that contain attachments. Nor is it possible to determine the approximate total size of all the attachments for this time period. (Id. at ¶ 38.)

**b. Files**

Using the category of files, other than e-mails, that were last modified after 2005, a search of electronically-stored files on COSI's server revealed nearly 140,000 files<sup>11</sup>, consisting of approximately 86.80 gigabytes<sup>12</sup> of data saved in multiple formats, including Excel, Word, PowerPoint, .PDF, .HTML, Lotus 1,2,3, Word Perfect, and .RTF. (Barker Aff. at ¶ 39.) Assuming all such files were in Word format, the result would be more than 20,500,000 full-text pages. (Id. at ¶ 41.) On information and belief, an exceedingly high number of these files are irrelevant to the allegations in this lawsuit and/or are protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 42.) The time needed to examine such e-mails for relevance, attorney-client privilege, work product, and confidential or proprietary information would constitute an extraordinary burden upon the Defendant and inhibit its ability to function as a commercial enterprise or fulfill its corporate responsibilities. (Id. at ¶ 43.)

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<sup>11</sup> This data reflects electronically-stored files as of approximately December 10, 2010. (Barker Aff. at ¶ 40.)

<sup>12</sup> See supra note 9. The amount of electronic data (other than e-mails), last modified after 2004, currently on the Defendant's server would fill more than 61,700 3.5" diskettes. Medtronic Sofamor Danek, Inc., 229 F.R.D. at 553 n.2.

48. **The total amount of hard copy documents and electronically-stored files the Defendant would have to assemble, analyze, and produce to respond to the Plaintiff's discovery requests will result in a burden to the Defendant that is monumentally disproportionate to any benefit the Plaintiff might obtain as a result of the discovery responses.**

As described above, the Defendant has approximately 10,000,000 pages of hard copy documents from 1996 through the present. This includes nearly 7,000,000 post-2004 pages. (Barker Aff. at ¶ 44.) It will take approximately 40,000 machine hours to copy and scan such documents. (Id. at ¶ 45.) Those 40,000 hours do not include the man hours necessary to gather, move, and handle such documents; scan and convert such documents; and examine such documents for relevance, attorney-client privilege, work product, and confidential or proprietary information. (Id. at ¶ 46.)

Also, the Defendant has nearly 6,400,000 e-mails from 1996 through the present. This includes approximately 6,300,000 post-2004 e-mails. (Id. at ¶ 47.) The man hours necessary to examine such e-mails for relevance, attorney-client privilege, work product, and confidential or proprietary information would be an exceedingly high number that would inhibit the Defendant's ability to function as a commercial enterprise or fulfill its corporate responsibilities. (Id. at ¶ 48.)

Further, the Defendant has more than 164,000 electronically-stored files from 1996 through the present. This includes approximately 140,000 post-2004 files. (Id. at ¶ 49.) These files amount to more than 93 gigabytes of data, which, assuming all such files were in Word format, would result in more than 22,000,000 full-text pages. (Id. at ¶¶ 50, 51.) The 93 gigabytes of data would fill more than 66,200 3.5" diskettes. See supra notes 9 & 12. The man hours necessary to examine such files for relevance, attorney-client privilege, work product, and confidential or proprietary information would be an exceedingly high number that would inhibit the Defendant's ability to function as a commercial enterprise or fulfill its corporate responsibilities. (Barker Aff. at ¶ 52.) In addition, the associated vendor costs for the upload of

such electronically-stored data would be substantial.

Counsel for the Defendant has data from a June 2008 case in which it was involved that resulted in costs between \$800.00 and \$1,500.00 per gigabyte to upload electronically-stored information into a searchable program. Applied to the amount of electronically-stored data in this case, the resulting costs to the Defendant would range between more than \$74,500.00 and nearly \$140,000.00. The cost differential depends on the amount of de-duplication that may be necessary. Further to the above-mentioned time, labor, and expenses, the Defendant will need to make several purchases to comply with the Plaintiff's overbroad discovery requests, including: \$7,000.00 to purchase various software licenses; (Barker Aff. at ¶¶ 14, 33.); and \$15,500.00 to purchase necessary scanners. (Id. at ¶¶ 15-16.)

Accordingly, for the foregoing reasons, the Defendant respectfully requests that the Court enter an Order foreclosing or substantially curtailing the discovery requests of the Plaintiff insofar as they are quite disproportionate to the allegations of this one Plaintiff. Moreover, it is appropriate to limit the discovery period to 1996 through 2004 where: (1) the Defendant was not formed until 1996; (Barker Aff. at ¶ 3.); (2) the Amended Complaint purports to allege only failure to warn, and, therefore, the applicable warning period, with respect to the Plaintiff, ended in 2004; and (3) such an extraordinarily large amount of post-2004 information exists to render the analysis and production of such information immensely burdensome and expensive to the Defendant, the burden of which is grossly disproportionate to any benefit the Plaintiff might obtain from such information.

**D. The Proposed Discovery Of Electronically-Stored Information Is Not Reasonably Accessible To The Defendant Because Of Undue Burden And Cost.**

The electronically-stored information the Plaintiff seeks is not reasonably accessible to Tri-Union insofar as accessing, analyzing, and producing such files will result in undue burden and cost to Tri-Union.

**1. The electronically-stored information sought by the Plaintiff can be obtained only through substantial burden and unreasonable cost to Tri-Union.**

Pursuant to Rule 26(b)(2)(B), a party “need not provide discovery of electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost.” Rule 26(b)(2)(B) places the initial burden on the party resisting discovery, here Tri-Union, to make such a showing. If the Court finds that Tri-Union has met its burden, the burden then shifts to the Plaintiff to show “good cause, considering the limitations of Rule 26(b)(2)(C).”<sup>13</sup> “The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case.” Major Tours, Inc. v. Colorel, 2009 U.S. Dist. LEXIS 97554, at \*9 (D.N.J. Oct. 20, 2009) (Schneider, J.) (quoting Advisory Committee Notes to Fed. R. Civ. P. 26(b)(2)(B), 2006 Amendment). Courts examine the following factors when conducting this analysis:

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<sup>13</sup> According to Rule 26(b)(2)(C), the Court may limit the frequency or extent of discovery otherwise allowed if it determines that: (1) such discovery is unreasonably cumulative, duplicative, burdensome, or expensive; (2) the party seeking discovery has had ample opportunity to obtain the information via discovery; or (3) the burden or expense of the proposed discovery on is disproportionate to its likely benefit. See, e.g., Colony Ins. Co. v. Danly, Inc., Nos. 10-308-P-H, 09-108-P-H, 2010 U.S. Dist. LEXIS 107547, at \*14-15 (D. Me. Oct. 4, 2010) (Rich, J.) (finding burden of proposed discovery outweighed benefit under Rule 26(b)(2)(C) where party expended thirty hours searching for responsive documents).



(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Id. Courts interpret the above “good cause” factors not as a checklist, with the party having the most checks prevailing. Id. at \*14-15 (citing Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003)). Rather, the Court should weigh the factors by importance. Id. at \*15.

Here, the Plaintiff's discovery requests are overbroad. See supra Part III.C. & note 7. They are generally not limited in geographic or temporal scope, and address subject matter having nothing to do with the narrowly-pled allegations of the Amended Complaint. There is no evidence that the Defendant has failed to produce relevant information that existed, but is no longer available. Further, the only prediction to date regarding the importance and usefulness of the electronically-stored data is that nearly all of it is either not relevant to the Plaintiff's allegations or is protected from disclosure by the attorney-client privilege, work product doctrine, or as confidential or proprietary information.<sup>14</sup> (Barker Aff. at ¶¶ 26, 31, 36, 42.) As Judge Schneider observed in Major Tours, the notion that there is a possibility that some of the requested categories may contain “smoking gun”-type documents “is pure conjecture[,]” and does not weigh in favor of discovery. Major Tours, Inc., 2009 U.S. Dist. LEXIS 97554, at \*12.

Courts have deemed electronically-stored files “not readily accessible” under Rule 26(b)(2)(B) under circumstances far less onerous and severe than those presented in this case. For example, the Court in Colony Insurance Company found that such files were not reasonably accessible where a party had already spent thirty hours searching for responsive material. 2010

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<sup>14</sup> The reason for the extraordinary amount of material protected from discovery is due, in part, to the Proposition 65 litigation in California against Tri-Union.

U.S. Dist. LEXIS 107547, at \*14-15. Here, Tri-Union faces having to expend untold man hours analyzing nearly 6,400,000 e-mails, nearly all of which are likely to be irrelevant to the allegations of this lawsuit or otherwise protected from discovery. (Barker Aff. at ¶¶ 25, 26, 34, 36.) Such hours include the time necessary to examine such documents for relevance, attorney-client privilege, work product, and confidential or proprietary information. (*Id.* at ¶¶ 27, 32.) Further, Tri-Union faces having to additional untold man hours analyzing more than 93 gigabytes of electronically-stored information, nearly all of which are likely to be irrelevant to the allegations of this lawsuit or otherwise protected from discovery. (*Id.* at ¶¶ 29, 31, 39, 42.) Such hours include the time necessary to examine such files for relevance, attorney-client privilege, work product, and confidential or proprietary information. (*Id.* at ¶¶ 32, 43.)

**2. If the Court nonetheless allows the Plaintiff to seek discovery of such inaccessible information, it should shift the cost of producing such electronic discovery to the Plaintiff.**

In the event that the Court allows the Plaintiff to impose the burden on Tri-Union to conduct this time-consuming costly discovery of inaccessible information, the cost of conducting such discovery, should be either fully or substantially shifted to the Plaintiff. This Court has the discretion to shift all or part of the costs of producing electronic discovery to the requesting party, in this case the Plaintiff. Major Tours, Inc., 2009 U.S. Dist. LEXIS 97554, at \*16-17 (citing Peskoff v. Faber, 251 F.R.D. 59, 61 (D.D.C. 2008) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978))). Courts have held that, where electronic discovery imposes an undue burden or expense on the responding party, cost-shifting or sharing may be considered. Major Tours, Inc., 2009 U.S. Dist. LEXIS 97554, at \*17. The main issue in cost-shifting or sharing is “how important is the sought-after evidence in comparison to the cost of production.” *Id.* (citing Zubulake, 217 F.R.D. at 322-23). Many District Courts have utilized the seven factors set forth in Zubulake with regard to the appropriateness of cost-shifting or sharing, which

include the (1) extent to which the request is specifically tailored to discover relevant information; (2) availability of such information from other sources; (3) total cost of production, compared to amount in controversy; (4) total cost of production compared to resources available to each party; (5) relative ability of each party to control costs and its incentive to do so; (6) importance of the issues at stake in the litigation; and (7) relative benefits to the parties of obtaining the information. Major Tours, Inc., 2009 U.S. Dist. LEXIS 97554, at \*18 (citing Zubulake, 217 F.R.D. at 322).

Here, the Plaintiff's requests are not specifically tailored to discover relevant information. Indeed, many of the requests are overbroad, unduly burdensome, and entirely irrelevant to the allegations of the Amended Complaint. With regard to each party's ability to control costs, the Court should be "mindful that cost sharing incentivizes plaintiffs to conduct discovery proportionate to [their] likely benefit." Major Tours, 2009 U.S. Dist. LEXIS 97554, at \*19 n.6. Finally, the Defendant respectfully suggests that the relative benefits to the Plaintiff of obtaining the information is grossly disproportionate to the burden the Defendant will have to suffer to obtain, review, and produce such information, which directly violates the rule of proportionality as previously addressed. Other courts have ordered the requesting party to share in the cost of electronic discovery.<sup>15</sup> See, e.g., id. (ordering parties to share equally in estimated retrieval cost

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<sup>15</sup> Cf. Tierno v. Rite Aid Corp., No. C-05-02520 TEH, 2008 U.S. Dist. LEXIS 58748 (N.D. Cal. July 31, 2008) (Henderson, J.) (noting that Zubulake applies to cost-shifting in electronic discovery matters only). "The rule for paper documents, on the other hand, is that "[a] party producing documents will ordinarily not be put to the expense of making copies for the requesting party." Id. (quoting Moore's Federal Practice § 34.13[5] at 34-92 (2008) (additional citations omitted)). See also Clever View Investments, Ltd. v. Oshatz, 233 F.R.D. 393, 394 (S.D.N.Y. 2006) ("[A] party need only make requested documents available for inspection and copying; it need not pay copying costs.") (citations omitted); Fryer v. Brown, No. C04-5481 FDB, 2005 U.S. Dist. LEXIS 20830, at \*20 (W.D. Wash. July 15, 2005) (Burgess, J.) ("Ordinarily, the producing party bears the costs of reviewing and gathering documents while the requesting party pays for the costs of the copies only."). Thus, to the extent the Plaintiff is

of electronic discovery); Quinby v. WestLB AG, 245 F.R.D. 94 (S.D.N.Y. 2006) (shifting 30% of cost to requesting party); Medtronic Sofamor Danek, Inc., 229 F.R.D. 550 (shifting some costs to requesting party after finding discovery costs were undue even though they were less than 2% of the amount in controversy); Zubulake, 217 F.R.D. at 289 (shifting 25% of cost to requesting party); cf. Guy Chem. Co. v. Romaco, 243 F.R.D. 310 (N.D. Ind. 2007) (shifting entire cost of production to requesting party from responding non-party). Accordingly, the Defendant respectfully suggests that the Court shift at least all or substantially all of the costs of discovery to the Plaintiff.

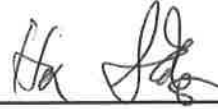
#### **IV. CONCLUSION**

For the foregoing reasons, the Defendant Tri-Union Seafoods, L.L.C. respectfully requests that the Court enter a Protective Order, limiting the scope of permissible discovery to those issues and time periods as described herein, including that: (1) the Plaintiff may not seek any information, documents, data, or knowledge possessed by the Defendant for any time after 2004; (2) any pre-2005 discovery by the Plaintiff be reasonably proportional to the allegations of the Amended Complaint; and (3) any inquiries be limited to the subject matter reasonably responsive to the failure to warn allegations of the Amended Complaint. The Defendant further requests that the Court shift the cost of discovery compliance to the Plaintiff, or, alternatively, order the Plaintiff to assume substantially all of such cost.

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permitted to inspect the hard copy documents in the possession, custody, or control of the Defendant, the Plaintiff must be required to pay for her copies of such documents.

DEFENDANT, TRI-UNION SEAFOODS,  
L.L.C., d/b/a CHICKEN OF THE SEA



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**CERTIFICATION**

I hereby certify that on this date a copy of the foregoing **Motion for Protective Order** was filed electronically and served by mail on any party 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 any party 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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