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 Attorneys for Plaintiff

	:	<b>UNITED STATES DISTRICT COURT</b>
DEBORAH FELLNER,	:	<b>DISTRICT OF NEW JERSEY</b>
	:	
Plaintiff	:	Civil Action 2:06-cv-00688-DMC-MF
	:	
vs.	:	
	:	
TRI-UNION SEAFOODS, L.L.C.,	:	<b>PLAINTIFF’S OPPOSITION TO</b>
d/b/a CHICKEN OF THE SEA,	:	<b>DEFENDANTS’ MOTION FOR</b>
	:	<b>PROTECTIVE ORDER</b>
Defendant.	:	
	:	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO  
 DEFENDANTS’ MOTION FOR PROTECTIVE ORDER**

## **I. INTRODUCTION**

Tri-Union's present application for a Protective Order can only be characterized as an attempt to further stall any meaningful discovery in this case. Plaintiff seeks information that is both relevant and important to her claims. Specifically, Plaintiff seeks information and documents concerning methylmercury and the presence of methylmercury in Tri-Union's tuna products. Mrs. Fellner became very ill with mercury poisoning as a result of ingesting Tri-Union's albacore tuna product over the course of many years. The lingering effects of mercury poisoning continue to be a serious problem for Mrs. Fellner. Because this case presents serious public health and safety issues with regards to potential dangers of eating Tri-Union's canned tuna products, Plaintiff is entitled to meaningful discovery in this case.

Tri-Union claims that Mrs. Fellner's requests that seek information and documents after 2004 (the year she stopped eating Defendant's tuna) are disproportionate to her claims and should be prevented altogether because it is only "marginally relevant." However, what Plaintiff is asking for, is information to help her prove causation in this case. For instance, even though Mrs. Fellner consumed Defendants' tuna fish from 1996 until 2004, if Tri-Union performed any scientific testing or studies with regards to harmful effects their consumers may suffer from ingesting its tuna products, Mrs. Fellner is entitled to know that information in order to prepare her case. Likewise, if other consumers have informed Tri-Union that they too have suffered mercury poisoning from eating its tuna, Plaintiff has the right to this information as well to further demonstrate causation. Discovery should not be limited to just the years Plaintiff consumed the Defendant's product.

Tri-Union also argues that Plaintiff's discovery requests (consisting of only 14 interrogatory questions and 20 document requests) are overbroad and unduly burdensome.

Tri-Union's argument that many of the requests are not limited to the specific years Plaintiff consumed its product, is without merit, since Plaintiff is entitled to know what Defendants knew about methylmercury in its tuna products at any given time. Once again, this information is sought because it is relevant and necessary to prove causation. Moreover, it is important to note that this is not the first time that Tri-Union is involved in litigation concerning the very same claims as are asserted in this suit. In fact, in 2004, State of California instituted an action against Tri-Union Seafoods under the Unfair Competition Law (UCL) and the Safe Drinking Water and Toxic Enforcement Act, for failure to label its tuna products with warnings for the presence of methylmercury. *People v. Tri-Union Seafoods LLC*, 171 Cal.App.4<sup>th</sup> 1549 (1<sup>st</sup> District Ca. Mar.11, 2009) (dismissed under Safe Drinking Water and Toxic Enforcement Act).

Unlike the present suit, the California action involved a Statute which New Jersey does not have and subsequently the proofs were entirely different in the California case. Despite this distinguishing characteristic, however, the California's Attorney General argued that the tuna companies should be required to place a label on their products warning consumers of possible mercury poisoning if consumed in certain dosages- one of the claims that Mrs. Fellner presents in the present action. This shows that Tri-Union has already been subjected to similar discovery requests despite its claims of undue burden and disproportionality. In fact, it is disingenuous for Defendants to say that they need to start from scratch regarding discovery production in the present law suit when the bulk of their work has already been done and produced in the California case. Plaintiff's discovery requests are narrowly tailored to the same issue – methylmercury.

Lastly, Defendants' argument to limit Plaintiff's inquiries to subject matter that is responsive only to the failure to warn allegations of the Amended Complaint is completely inappropriate and should be disregarded by the Court because such arguments should be advanced by way of Motion to Dismiss. Tri-Union attempts to bypass having to argue a Motion to Dismiss by advancing the claim that Plaintiff's Amended Complaint does not specifically include a product defect claim (though accepting as true the fact that liberal notice pleading standard applies in this case). With regards to Plaintiff's request for documents, Defendants' argument that they are required to search by hand 10 million pages is completely disingenuous. Moreover, defense requests to be exempt from answering Plaintiff's interrogatories, which have been diligently and narrowly tailored to avoid seeking irrelevant or broad information. This Motion is simply an attempt by defense to downplay the seriousness nature of Plaintiff's allegations and further stall the discovery process.

**II. DEFENDANTS' ATTEMPT TO CONVERT THE PRESENT APPLICATION FOR A PROTECTIVE ORDER INTO A MOTION TO DISMISS IS INAPPROPRIATE**

While Defendants claim that Plaintiff's theory of liability in this case is only limited to a failure to warn case because her product defect claim has not been specifically pled, it is important to keep in mind that the liberal notice pleading standard is applicable in this case. *Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004). Furthermore, as this is Defendants' motion for protective order and not a Motion to Dismiss, Plaintiff will decline to advance any arguments that would support her product liability claim and sufficiency of her pleading. However, Plaintiff will comment that her Amended Complaint contains sufficient facts to put Tri-Union on notice of her claims against it.

**III. THE PROPOSED DISCOVERY IS NOT UNDULY BURDENSOME AS IT HAS BEEN PRODUCED IN PRIOR LITIGATIONS AND PLAINTIFF IS ENTITLED TO ALL EVIDENCE THAT IS RELEVANT.**

The information sought in Plaintiff's discovery requests can be summed up as seeking any documents/information in Tri-Unions possession regarding the presence of methylmercury in its tuna products. In other words, Plaintiff is only asking for information that is necessary to prove her claims. Her discovery requests comply with Rules of Civil Procedure and are otherwise narrowly constructed to address only the issues in this case. Tri-Union's argument that they are so expansive and suggest that Plaintiff is looking to commence a separate class action lawsuit in the future is absolutely absurd. The class action claims were voluntarily dismissed in this case, and Plaintiff's counsel is not seeking discovery to commence a class action suit.

**A. Plaintiffs requests are relevant and proportionate to the claims advanced**

Defendants claim that all of Plaintiff's discovery requests are "marginally relevant" and should be excluded under the rule of proportionality. However, Tri-Union fails to explain how all of Plaintiff's requested discovery can be considered "marginally relevant." In fact, it is clear from the discovery questions that Deborah Fellner is merely trying to find out information relevant to her product defect and failure to warn claims. Specifically, she is entitled to know any and all of communications Tri-Union had with the FDA regarding methylmercury in tuna fish since Tri-Union claims that the agency communicated that no warning label on its tuna products was necessary. Plaintiff also seeks to find out exactly what Tri-Union knew about the presence of methylmercury and its risks to human health. In another request, Mrs. Fellner asks for any scientific studies and/or testing Tri-Union has done with regards to the effects of human consumption of Tri-Union's tuna products which

contain methylmercury. Plaintiff recognizes that the rules of discovery are not limitless, however, in this case the necessity of requested information to prove her claims outweighs any of the burdens that Tri-Union may have. If Tri-Union's request for protective order is granted, Plaintiff (despite the fact that she had mercury poisoning from ingesting Defendants' products) will most certainly be prevented from asserting her cause of action against Tri-Union.

The rule of proportionality has been addressed and “[c]ourts have construed this rule liberally, creating a broad vista for discovery.” *Tele-Radio Sys. Ltd. V. De Forest Elecs., Inc.*, 92 F.R.D. 371, 375 (D.N.J.1981) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). However, “[a]n effort to determine a discovery dispute must contain an assessment of the potential for developing relevant evidence in addition to an analysis of the relative burdens the discovery may entail.” *Leski, Inc. v. Federal Ins.Co.* 129 F.R.D. 99, 102 (D.N.J. 1989). The *Leski* court further elaborated on the issue explaining that “[i]n this district, the court may restrict discovery as **long as the restriction does not foreclose ‘discovery that is reasonably necessary** to afford a fair opportunity to develop and prepare the case.” *Id. at 106* (citing to *Robbins v. Camden Board of Education*, 105 F.R.D. 49, 61-63 (D.N.J.1985)) (emphasis added). If Tri-Union's request for a Protective Order in this case is granted it would deprive Plaintiff of a fair opportunity to develop and prepare her case. Moreover, Tri-Union is unable to articulate exactly which of the discovery requests are “marginally relevant” and which are too burdensome for them to produce (citing only a few examples of Plaintiff's request but without any explanation of their objection).

Rule 26 of the Federal Rules of Civil Procedure does not shelter Defendants from producing evidence that is clearly relevant and essential to Plaintiff's claims. Instead Rule (b)

provides that “[P]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” The Court in *Pu. Serv. Enter. Group, Inc. v. Philadelphia Elec. Co.*, 130 F.R.D. 543,551 (D.N.J. 1990) held that “The discovery of marginally relevant evidence may be circumscribed by the court if it determines, under Rule 26(b)(1), Fed.R.Civ.P., that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.”

In reviewing Plaintiff’s Interrogatories and Requests for Production, it is clear that such requests do not warrant a limitation. Applying the three elements of Rule 26 (b)(1) cited above, the Court should not limit Plaintiff’s discovery. First, the discovery requested is by no means cumulative or duplicative or is obtainable from any other source. Plaintiff submitted 14 specific interrogatory questions as well as 20 carefully drafted and narrowly tailored document demands. (Attached hereto as Exhibits “A” and “B”). None of the requests are duplicative or can be obtained from any other source. In light of the fact that Tri-Union has recently litigated the same issue in a case that proceeded to trial, it is almost certain that Tri-Union has already produced relevant documents and has documents responsive to Plaintiff’s requests, in hand.

Secondly, Plaintiff has had absolutely no opportunity to obtain discovery in this action. Even though Plaintiff has produced hundreds of pages of documents concerning her medical records, to date she has yet to receive a single document from the Defendants. Tri-Union continues to fight Plaintiff during every step of litigation in an effort to stall and/or altogether interfere with meaningful discovery in this case. Plaintiff's counsel was assured by Defendant's counsel during the last case management conference that she would be receiving documents that fell within the timeframe Plaintiff alleges she consumed the Defendant's product. However, to date nothing has been produced by Tri-Union.

Lastly, this case involves extremely important public policy matters that directly implicate serious public safety concerns – namely the health of the general population that remains unaware of the health risks associated with the daily consumption of Tri-Union's tuna products.

The third prong of Rule 26(b)(1) requires the court to balance the importance of the issues and other needs of the case with how burdensome or expensive discovery would be for the other party. In this case, the importance of the issues (namely those of public safety) dictates that Plaintiff should be entitled to the specific information she seeks.

From Tri-Union's moving papers it remains unclear whether Defendants object to all of the Plaintiff's interrogatories and document requests or to only some. Tri-Union's specific examples of Plaintiff's overbroad and disproportionate discovery requests only shows that these requests are indeed relevant and necessary to Plaintiff's case. Specifically Tri-Union takes issues with the following requests which are relevant and important for the following reasons:

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

This request simply asks Tri-Union to identify the organizations it supports or is associated with. It does not ask for documents related to those organizations. This request is not unduly burdensome and would take minimal effort to answer. This request is important because there are many organizations being supported by the tuna industry which are spreading disinformation concerning seafood related mercury poisoning, such as [mercuryfacts.org](http://mercuryfacts.org). Plaintiff has a right to know Defendant's affiliation with these organizations.

**Request No.1** *All documents concerning mercury in tuna fish.*

This request is narrowly tailored to the issue of mercury in tuna fish and simply asks Tri-Union to provide all documents related to that subject matter. Any documents Tri-Union possesses concerning mercury in tuna fish is relevant to the core issue in dispute in this litigation.

**Request No. 3** *All documents relating to investigations concerning mercury in tuna fish.*

This request is narrowly tailored to the issue of investigations regarding mercury in tuna fish and simply asks Tri-Union to provide all documents related to that subject matter.

The request is certainly relevant and important to the claims in dispute in this case.

**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.*

This request is narrowly tailored and seeks only documents related to communications Tri-Union had concerning mercury in tuna fish. The request is certainly relevant and important to the claims in dispute in this case.

**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*
- (d) *With other companies.*

This request is narrowly tailored and seeks only documents related to mercury in tuna fish. The request is certainly relevant and important to the claims in dispute in this case.

**Request No. 16:** *All documents referring to, relating to, 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.*

This request is highly relevant to rebut Tri-Union's claim that the FDA has issued warnings and informed the public regarding the presence of methylmercury in fish.

Defendant's counsel has made it clear that they intend to argue under N.J.S.A 2A:58C-4 that the FDA has approved "no warning" concerning methylmercury in tuna fish, and that they are entitled to a rebuttable presumption that no warning was adequate. Plaintiff is thus entitled to all communications between the FDA and Tri-Union concerning mercury in tuna fish and whether the information Tri-Union provided was accurate and/or used as the basis for agency action.

**Request No. 18:** *All documents concerning the adverse effects of mercury in people.*

This request seeks extremely relevant information that would support Plaintiff's causation claims. Plaintiff is entitled to know whether at any time (pre 1994 and post 2004)

Tri-Union has received documents such as complaints, studies or other lawsuits regarding persons experiencing adverse effects relating to mercury in Tri-Union's tuna products.

Plaintiff is in complete agreement with Defendants that were evidence has only "marginal" or "limited" relevance and production of such evidence will cause undue burden on Defendants, then it should be limited. In this case, and for the requests cited above, however, Plaintiff's requests seek not only relevant documents and information but all that is truly necessary to prove her claims.

**B. Plaintiff's discovery requests do not unduly burden Tri-Union because a large portion of that discovery has already been produced in prior litigation**

Plaintiff's discovery requests are narrowly tailored so as to make sure that no irrelevant information is sought. Defendants contend that they need to go through 10 million pages of documents, some by hand. All these arguments are hard to believe as any medium to large size corporation is equipped with computer systems that are able to search documents by a search terms. Defendants are not asked to look through every single electronically stored document. Rather, by using appropriate search terms, Tri-Union can determine relevant documents.

Tri-Union's argument is in essence that due to the fact that they have so many documents stored in all different ways, Plaintiff should be precluded from seeking relevant discovery. This reasoning is not only contra intuitive but would also imply that anytime an individual files a lawsuit against a medium to large size company, the individual is locked out of the discovery process because the company has too many documents to go through. In other words, the company is too big to sue.

Miraculously however, when Tri-Union was sued by California's Attorney General for substantially similar claims, and the case proceeded to trial, Tri-Union was able to search its 80 computers and millions of pages to comply with its discovery obligations.<sup>1</sup> In support of its Motion Tri-Union offers an Affidavit of John Barker who is "the Manager of Corporate Affairs of Chicken of the Sea International ("COSI"). In his affidavit, Mr. Barker attempts to show this Court the enormity of documents and data that Tri-Union has to deal with in order to comply with Plaintiff's discovery requests. However, one thing is clear from this affidavit and that is Defendants' attempt to circumvent any discovery obligations. For instance, without knowing Tri-Union's corporate structure and organizational history (*See Plaintiff's Interrogatories to Defendants #1*) Plaintiff has no way of understanding who Mr. Baker is and what "COSI" does in relation to Tri-Union.

In his affidavit Mr. Baker also states that Tri-Union has approximately 80 computers and 40 laptops utilized by sales force, however, common sense dictates that little of the information that Plaintiff is requesting will be located on the sales laptops that are used to sell Tri-Union's tuna products. Furthermore, it seems that Defendants are completely misrepresenting the amount of pages, the cost, and most importantly the retrieval process of gathering the requested documents. As previously mentioned, much of the information requested should have already been gathered and kept by Tri-Union from the California lawsuit. It is also interesting how Mr. Baker can know how many millions of pages are stored (hard copy and electronic) without having done the search before or in preparation for this suit. The same reasoning can be applied to Mr. Baker's calculation of how long it would take

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<sup>1</sup> *People v. Tri-Union Seafoods LLC*, 171 Cal.App.4<sup>th</sup> 1549 (1<sup>st</sup> District Ca. Mar.11, 2009) (The Judge found no violations of Safe Drinking Water and Toxic Enforcement Act).

for machines to scan and process the requested information. These statements only show that Mr. Baker has already searched Tri-Union's databases for the previous litigation. However, without any support of an expert and/or further explanation of Mr. Baker's duties in the company, discovery cannot be prevented just because Tri-Union claims through some affidavit that it would be burdensome. Most importantly however, the documents sought by Plaintiff prior and post the time frame during which Mrs. Fellner consumed Tri-Union's canned tuna, is necessary to prove the causation element of her claim.

**1. Pre-2004 Discovery requests are relevant and necessary to prove causation**

With respect to its hard copy documents retained from 1996 until 2004, Tri-Union claims that "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." (Def's Motion at 14). Once again Tri-Union attempts to lump a number of different issues in order to avoid discovery. For instance Plaintiff can hardly understand how documents relating to methylmercury presence in tuna and its effects on health can fall within the attorney-client privilege. Part of Plaintiff's claim requires her to prove that Tri-Union's tuna products cause mercury poisoning. Specifically, that methylmercury is present in Tri-Union's tuna products and that the consumption of tuna can lead to mercury poisoning -- which is what occurred to Mrs. Fellner. Therefore, Plaintiff seeks to obtain pre-2004 discovery as it is highly relevant to the element of causation (i.e. studies performed by or in possession of Defendants on the topic of methylmercury in tuna and safety of consumption; any prior consumer complaints received by Tri-Union where individuals suffered mercury poisoning, etc.). Tri-Union claims that the presence of

methylmercury in tuna fish has been publically known and governmental agencies such as the FDA have supported the consumption of its tuna. Plaintiff is entitled to know what specific agencies/corporations or entities have advised or informed Tri-Union on the topic of mercury poisoning from its tuna products, and what information Tri-Union has supplied in return.

## **2. Post-2004 Discovery is relevant and necessary to prove causation**

Next, Tri-Union complains that there are 6,900,000 pages of hard copy documents and 6,300,000 e-mails that are in Defendants' possession and that in Mr. Baker's opinion contain an "exceedingly high number" of irrelevant information. Despite the fact that Mr. Baker was able to estimate to a second how many additional machines and software will need to be purchased in order to review these documents, he never mentioned how these estimates were arrived at and more importantly how he knows that most of that information is irrelevant to Plaintiff's claims. Did he do a search using case specific search terms? (i.e. methylmercury in tuna; laboratory testing of tuna fish; etc.) Assuming the hard copy documents are indexed in some way, has Mr. Baker looked at the storage facility and check documents indexed under topics dealing with methylmercury in tuna? Tri-Union conveniently offers no explanation of how its documents are stored, catalogued, indexed or how Mr. Baker arrived at his conclusions.

Moreover, post-2004 discovery such as environmental studies about the presence of methylmercury in tuna fish are extremely relevant to Plaintiff's proof of causation (i.e. that eating tuna fish can cause mercury poisoning). In order for Plaintiff to prove causation she is entitled to know what information Tri-Union had in its possession regarding mercury poisoning caused by consumption of their products, even after Mrs. Fellner stopped eating

Defendants' tuna. Causation in essence is not time specific and that is the reason why Plaintiff seeks post 2004 documents and information.

**C. Shifting any part of the cost of discovery to the Plaintiff would be absurd**

All of the discovery requested from Defendant has been relevant and necessary to her claims. Most importantly, because Defendant fails to explain how and where their hard documents are stored or how Mr. Baker arrived at his estimates with regards to how long it would take to produce electronically stored information, shifting any costs of discovery to the Plaintiff would be simply incomprehensible.

*Zabulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 322 (S.D.N.Y.2003) is instructive in this matter as it has been cited by the District Courts in New Jersey and is consistent with Rule 26 of the Federal Rules of Civil Procedure. (*See e.g. Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 91 (D.N.J Dec. 6, 2006)). In *Zabulake*, the Court set forth a three step analysis to address disputes regarding costs and scope of electronic discovery. First, the Court reasoned that the parties must have a thorough understanding of the responding party's computer system, both with respect to active and stored data. *Id.* The court held that the responding party should pay for the costs of producing responsive information for data that is kept in **an accessible format and that a court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.** (emphasis added). Under this precedent and first step, no cost-shifting can be considered because Plaintiff was not provided with an adequate understanding of Tri-Union's storage systems and also because the information is accessible to Tri-Union.

The second step outlined in *Zabulake* is that because the cost-shifting analysis is so fact-intensive, the parties must determine what data may be found on the inaccessible media.

The court reasoned that a sensible approach in most cases is to require the responding party to restore and produce responsive documents from a small sample of the requested backup tapes. Once again, Tri-Union has not attempted to produce any of the requested discovery.

Lastly, Rule 26(b)(2), (c), and *Zabulake's* last step analysis make clear that a balancing test should be used by the Judge in making a determination whether an expense in responding to discovery request is "undue." The test includes consideration of: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with the production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 91 (D.N.J Dec. 6, 2006) (citing to *Zabulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 322 (S.D.N.Y.2003).

In this case, the likelihood of discovering critical information pertaining to Plaintiff's claims outweighs any potential burdens that Defendants may be exposed to. Tri-Union undoubtedly has more resources available to it than Plaintiff. Even though Tri-Union attempts to estimate the cost associated with the production of Plaintiff's discovery through Mr. Baker's Affidavit, Defendants fail to disclose the basis, reasoning and methodology used to arrive at that estimate. That is unacceptable. It is unclear what position Mr. Baker has with the company and whether he has the expertise to make such estimates in the first place. Therefore, Defendants' request to shift the cost of production of Plaintiff's requested information should be denied.

**D. Tri-Union's Motion should be denied because the issues raised in this case implicate matters of public health and safety**

Lastly, discovery should not be limited in this case because Defendants should not be protected from discovery as the dangerous levels of methylmercury in tuna and the hazardous effects it may have on one's health have been matters of growing public concern. For example, the State of California brought suit against Tri-Union claiming injunctive relief and damages under the Unfair Competition Law (UCL) and the Safe Drinking Water and Toxic Enforcement Act, for failure to label tuna with warnings of the presence of methylmercury. *People v. Tri-Union Seafoods*, 2006 WL 1544377 (Cal.Super.Ct. May 12, 2006).

The Court entered a verdict for the tuna companies after a finding that methylmercury is "naturally occurring" as defined by the Safe Drinking Water and Toxic Enforcement Act which barred any claims in that case.<sup>2</sup> As more studies and reports continue to be published addressing health concerns associated with consumption of tuna fish, it has become abundantly clear that the risks of serious injury as a result of mercury poisoning are high and consumers should be given warnings concerning the dangers and adverse health effects of eating seafood containing mercury, including tuna fish.

Just recently, an article appeared in the January 2011 issue of Consumer Reports magazine titled *New Tests reinforce a need for some people to limit consumption*. (Attached hereto as Exhibit "A"). The article scrutinized the FDA's testing of tuna products and found them to under report the actual levels of mercury present in tuna. The article also noted that despite a repeated plea with the FDA to warn consumers about the dangers and risks

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<sup>2</sup> It is important to once again point out that New Jersey has no similar Act and that the present case is brought under product defect and failure to warn theories of liability which do not provide a similar "naturally occurring" defense as the California Statute.

associated with tuna consumption (namely mercury poisoning) the FDA declines to do so until the present day.

Therefore, the potential benefits to society which remains mostly unaware that eating tuna products on a daily basis, such as Tri-Union's albacore tuna fish, can cause mercury poisoning, and outweighs any burdens to the Defendant. Tri-Union should not be allowed to shield itself from its discovery obligations because it possesses large numbers of documents, especially when Tri-Union performed substantially the same discovery for similar cases it was a defendant in, concerning mercury in tuna fish.

### **CONCLUSION**

For all the reasons set forth above, Plaintiff respectfully requests that this Court deny Defendants' Motion for Protective Order.

Respectfully Submitted,

**EICHEN CRUTCHLOW & MCELROY, LLP**

Dated: January 10, 2011

By: \_\_\_\_\_ /s/  
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# EXHIBIT

## A

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DEBORAH FELLNER,  
  
Plaintiff,

vs.

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

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

Civil Action 2:06-cv-00688-DMC-MF

**PLAINTIFF'S FIRST SET OF  
INTERROGATORIES TO  
DEFENDANT**

To: Kenneth A. Schoen  
Scott H. Goldstein, Esq.  
BONNER KIERNAN TREBACH & CROCIATA, LLP  
299 Cherry Hill Road, Suite 300  
Parsippany, NJ 07054

**PLEASE TAKE NOTICE** that Plaintiff, DEBORAH FELLNER, demands that Defendant give certified answers to the following interrogatories within 30 days after service in the manner prescribed by court rules, and further demands the supplement and amendment of said answers.

Dated: May 17, 2010

By:   
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*Attorneys for Plaintiff, Deborah Fellner*

## **I. DEFINITIONS**

1. "Tri-Union" or the "Company" means Defendant TRI-UNION SEAFOODS, L.L.C., d/b/a/ CHICKEN OF THE SEA and all of its predecessors, successors, parents, subsidiaries, divisions, affiliates, or anyone acting or purporting to act on its behalf, including any of its respective directors, officers, managing agents, agents, employees, attorneys, accountants, or other representatives.

2. "Advertisement" includes the attempt directly or indirectly by publication, dissemination, solicitation, indorsement, or circulation, or in any other way to attempt directly or indirectly to induce any person to enter or acquire any title or interest in any merchandise or service, or to increase the consumption thereof.

3. "Publication" includes but is not limited to all printings, billboards, banners, newspapers, newspaper inserts, chalk boards, radio, television, internet, all forms of electronic circulation, and email.

4. "Merchandise" includes any objects, wares, goods, commodities, services, or anything offered directly or indirectly to the public for sale.

5. "Document" means all written, printed, typed, recorded or graphic matter of every type and description, whether draft or final, however and by whomever prepared, produced, reproduced, disseminated or made, in any form, including, but not limited to, all writings, letters, minutes, correspondence, telegrams, bulletins, instructions, charts, literature, work assignments, reports, memoranda, notes of telephone or personal conversations or conferences, contracts, agreements, interoffice communications, notes, notebooks, drafts, microfilm, circulars, pamphlets, studies, notices, summaries, reports, books, graphs, photographs, data sheets, data compilations, computer data sheets, computer data compilations, work sheets, records, statistics, speeches, and other writings, tapes, sound recordings, tape recordings, videotapes, electronic mail, computer disks, data compilations from which information can be obtained or can be translated through detection devices into reasonably usable form, or any other tangible thing.

6. The term “document” shall also mean each copy which is not identical to the original or to any other identified copy and each draft of each document requested to be identified.

7. “Identify” and “identity,” when used with respect to a document shall mean to state its date, the type of document (e.g., letter, memorandum, telegram, chart, photograph, sound reproduction, etc.), the author, addressee, title, identity of its custodian and physical location of the document.

8. “Person” means all natural persons, corporations, companies, partnerships, and any other business associations and all other legal entities, without limitation.

9. “Identify,” when used with respect to a natural person, means to state the person's full name and present or last known home and business address, present or last known employer, and present or last known position held and, if such individual has ever been employed by Tri-Union or participated in any way in your company's business or the manufacture, sale or distribution of any of your company's products, so indicate and state the nature and time period of such employment or participation. When used with respect to a person other than a natural person, “identify” means to state such person's full name and the address of such person's principal place of business. Where a natural person or entity has been identified in full as required by these definitions in response to one interrogatory, it shall be sufficient in identifying such natural person or entity in response to subsequent interrogatories to state the full name of such natural person or entity.

10. As used herein, any term in the singular shall be deemed to include the plural where appropriate and vice versa.

11. All terms including “and” & “or” shall be construed either conjunctively or disjunctively as required by the context to include in the response any statement that might be deemed non-responsive by any other construction.

12. The term “mercury” includes methylmercury, elemental or metallic mercury, inorganic mercury compounds, and organic mercury compounds.

## II. INSTRUCTIONS

1. Pursuant to Local Rule 33.1(b), if the person who verifies the answers to interrogatories does not have personal knowledge of the information contained in the answers, that person shall, for each answer not verified by personal knowledge, identify the person or persons from whom the information was obtained or, if the source of the information is documentary, provide a full description including the location thereof.

2. If you claim the attorney-client privilege or any other privilege or work product protection with respect to any answer to an interrogatory, provide a detailed privilege log that contains at least the following information for each document that you have withheld:

- a. state the date of the document;
- b. identify each and every author of the document;
- c. identify each and every person who prepared or participated in the preparation of the document;
- d. identify each and every person who received the document;
- e. identify each and every person from whom the document was received;
- f. state the present location of the document and all copies thereof;
- g. identify each and every person having custody or control of the document and all copies thereof; and
- h. provide sufficient information concerning the document and the circumstances thereof to explain the claim of privilege or protection and to permit the adjudication of the propriety of such claim.

3. These interrogatories shall be deemed to be continuing in nature so that if you subsequently discover or obtain possession, custody or control of any document, information or knowledge previously requested or covered by these interrogatories, you shall promptly supplement your responses hereto.

### **III. INTERROGATORIES**

1. Detail Tri-Union's corporate history and organizational structure during the period of 1990 to the present, including, but not limited to, any current and/or former parent entities, any of predecessor entities, and any subsidiaries and/or divisions held or controlled by Tri-Union at any time.
2. Identify every person that answers any of these interrogatories or provides information used in answering these interrogatories.
3. Identify any organizations that Tri-Union has ever been associated with or supported directly or indirectly, that support tuna consumption.
4. Identify anyone having knowledge or information concerning the within matter, including but not limited to all present and former: employees, agents, and anyone acting or purporting to act on Tri-Union's behalf, and detail the information held by each.
5. Identify everyone involved in testing Tri-Union's tuna products for mercury.
6. Detail Tri-Union's policy and procedure for testing its tuna products for mercury, for each year beginning with 1990 and ending with 2004.
7. Identify each laboratory and/or departments and/or divisions held and controlled by Tri-Union involved in research and/or testing of its tuna products for harmful agents, including mercury.
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.
9. Identify everyone having authority to modify the label on any of Tri-Union's tuna products.
10. Identify all investigations, research, and testing concerning mercury in Tri-Union's tuna fish products, and the results and conclusions of each.
11. Identify all representations made by Tri-Union concerning mercury in its tuna fish products.

12. Identify and describe Tri-Union's policies concerning data/document retention and data/document destruction, including electronically stored information, paper documents, and physical evidence, including the people or entities responsible for implementing said policies.
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; and (2) financial investments/contributions made to any other organization with the purpose promoting the safety of tuna consumption; and (3) financial expenditures for promotion and/or marketing and/or sales of your tuna products.
14. Identify all legal actions currently pending or previously instituted against Tri-Union regarding mercury, safety, or labeling issues with its tuna products.

**EXHIBIT**

**B**

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

DEBORAH FELLNER,  
  
Plaintiff,

vs.

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

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

Civil Action 2:06-cv-00688-DMC-MF

**PLAINTIFF'S FIRST REQUEST FOR  
PRODUCTION OF DOCUMENTS ADDRESSED TO DEFENDANT**

Plaintiff, Deborah Fellner, hereby requests that the Defendant produce the documents hereinafter described for inspection and copying by Plaintiff's counsel within thirty (30) days after service of these requests at the offices of EICHEN CRUTCHLOW & MCELROY, LLP, 40 Ethel Road, Edison, NJ 08817, or at such other place and time upon which counsel may agree.

**I. DEFINITIONS**

1. "Tri-Union" or the "Company" means Defendant TRI-UNION SEAFOODS, L.L.C., d/b/a/ CHICKEN OF THE SEA and all of its predecessors, successors, parents, subsidiaries, divisions, affiliates, or anyone acting or purporting to act on its behalf, including any of its respective directors, officers, managing agents, agents, employees, attorneys, accountants, or other representatives.

2. The term “communications” refers to any exchange of information by any means of transmission, including, but not limited to, face-to-face conversations, mail, electronic mail, telegram, overnight delivery, telephone, facsimile or telex.

3. The term “documents” means documents whether fixed in tangible medium or electronically stored on disk or tape. The word “documents” shall include, by way of example and not by way of limitation, all of the following: papers, correspondence, trade letters, envelopes, memoranda, telegrams, cables, notes, messages, reports, studies, press releases, comparisons, books, accounts, checks, audit and video recordings, pleadings, testimony, articles, bulletins, pamphlets, brochures, questionnaires, surveys, charts, newspapers, calendars, desk calendars, pocket calendars, lists, logs, publications, notices, diagrams, instructions, diaries, minutes of meetings, corporate minutes, orders, resolutions, agendas, memorials or notes or oral communications, whether by telephone or face-to-face, contracts, agreements, drafts of or proposed contracts or agreements, memoranda of understanding, letters of intent, deal memoranda, transcriptions of audio or video recordings, computer tapes, computer diskettes or disks, or any other tangible things on which any handwriting, typing, printing, photo-static, electronic or other form of communication or information is recorded or reproduced, together with all notations on any of the foregoing, all originals, file copies or other unique copies of the foregoing and all versions or drafts thereof, whether used or not, and includes all attachments.

4. The following rules of construction shall apply to all discovery requests:

- (a) All/Each. The terms “all” and “each” shall be construed as “all and each”;

- (b) And/Or. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope; and
- (c) The use of the singular form of any word includes the plural and vice versa.

5. The term “person” means any individual, corporation, partnership, firm, association, government agency or other organization recognizable at law, and its agents and employees.

6. The term “concerning” means relating to, referring to, describing, evidencing, or constituting. Requests for documents “concerning” any subject matter include documents concerning communications regarding that subject matter.

7. The term “mercury” includes methylmercury, elemental or metallic mercury, inorganic mercury compounds, and organic mercury compounds.

## **II. INSTRUCTIONS**

1. You are requested to produce all documents described below that are in your possession, custody, or control or in the possession, custody or control of your predecessors, successors, parents, subsidiaries, divisions, or affiliates, directors, officers, managing agents, employees, attorneys, accountants or other representatives. The documents are to be produced in the form and in the same order within each file in which they were located prior to production. The file folders, boxes, binders, or other containers in which such documents are found are also requested to be produced intact,

including the title, labels, or other description of each such folder, box, binder, or container.

2. Defendant shall produce the original of each document described below or, if the original is not in its custody, then a copy thereof, and in any event, all non-identical copies which differ from the original or from the other copies produced for any reason, including, but not limited to, the making of notes thereon.

3. If production of a document is withheld pursuant to a claim of privilege, as to each such withheld document, state the following information:

- (a) Which privilege is claimed;
- (b) A precise statement of the facts upon which said claim of privilege is based; and
- (c) The following information describing each purportedly privileged document:
  - (i) its nature, *e.g.*, agreement, letter, memorandum, etc.;
  - (ii) the date it was prepared;
  - (iii) the date it bears;
  - (iv) the date it was sent;
  - (v) the date it was received;
  - (vi) the identity of the person preparing it;
  - (vii) the identity of the person sending it;
  - (viii) the identity of each person to whom it was sent or was to have been sent, including all addresses and all recipients of copies;

(ix) a statement as to whom each identified person represented or purported to represent at all relevant times; and

(x) a precise description of the place where each copy of that document is kept, including the title or description of the file in which said document may be found and the location of such file.

4. Whenever a document is not produced in full or is produced in redacted form, so indicate on the document and state with particularity the reason(s) it is not being produced in full and describe to the best of your knowledge, information and belief, and with as much particularity as possible, those portions of the document which are not being produced.

5. If a document responsive to these requests was at any time in any Defendant's possession, custody or control but now is no longer available for production, as to each such document state the following information:

- (a) whether the document is missing or lost;
- (b) whether it has been destroyed;
- (c) whether the document has been transferred or delivered to another person or entity and, if so, at whose request;
- (d) whether the document has been otherwise disposed of; and
- (e) a precise statement of the circumstances surrounding the disposition of the document and the date of the document's disposition.

### **III. DOCUMENTS TO BE PRODUCED BY DEFENDANT**

1. All documents concerning mercury in tuna fish.
2. All documents concerning mercury in Tri-Union's tuna fish products.
3. All documents relating to investigations concerning mercury in tuna fish.
4. All transcripts of testimony, including transcripts of hearings or depositions, given by Tri-Union in any other law suit concerning the presence of mercury in Tri-Union's tuna fish products, or other tuna fish.
5. All documents produced in all prior litigations concerning mercury in Tri-Union's tuna fish products.
6. All transcripts of testimony, including transcriptions of formal or informal hearings, interviews or depositions, written statements or testimony, affidavits, and summaries of any such testimony given by Tri-Union to any Government entity referring or relating to the presence of mercury in tuna fish.
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.
8. All documents that comprise, evidence, refer or relate to any representations, whether written or oral, through print or other media, to consumers of Tri-Union tuna fish products relating to the presence of mercury in the tuna fish.
9. All documents concerning testing for mercury in Tri-Union's tuna products.
10. All documents that analyze, evaluate, or summarize information referring or relating to the costs, development, production, manufacture, distribution, marketing, promotion or sale of Tri-Union tuna fish products containing a warning label advising of the presence of mercury in Tri-Union tuna fish products.
11. All documents referring, relating to, or reflecting any internal discussion, review, dissemination, analysis, or study at Tri-Union concerning the presence of mercury in tuna fish.

12. All documents referring, relating to, or reflecting any communications with anyone outside of Tri-Union concerning the presence of mercury in tuna fish, including but not limited to, other tuna fish manufacturers, trade associations, interest groups, affiliates, and anyone in government.
13. All documents (including any attachments thereto) referring, relating to, or reflecting any public comments made by Tri-Union or others on its behalf, including responses, hearing transcripts, testimony, and complaints regarding the presence of mercury in tuna fish.
14. All documents concerning mercury in tuna fish, including documents circulated:
  - (a) Internally including with affiliates;
  - (b) With outside organizations;
  - (c) With Lobbyists; and
  - (d) With other companies.
15. All information concerning the safe keeping and/or storage of Tri-Union documents, including but not limited Tri-Union's data/document retention policy and policies concerning data destruction.
16. All documents referring to, relating to, 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.
17. All Tri-Union tuna fish labels in existence from January 01, 1990 until present.
18. All documents concerning the adverse effects of mercury in people.
19. All documents concerning customer complaints about Tri-Union tuna products.
20. All documents referenced, reviewed, or referred to in answering any of PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT.

Dated: May 17, 2010

By:

  
Barry R. Eichen (BEichen@eichencrutchlow.com)  
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*Attorneys for Plaintiff, Deborah Fellner*

EXHIBIT

C

# Consumer Reports magazine: January 2011

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## In this report

Overview ▶

Fish Q & A

Lower-mercury choices

How much tuna is safe?

## 75 Years of CU



**Featured Report**  
 75 years bold

A retrospective of *Consumer Reports* and its place in the American consumer landscape.

## Mercury in canned tuna still a concern New tests reinforce a need for some people to limit consumption

Last reviewed: January 2011



This article appeared in January 2011 Consumer Reports Magazine.

Canned tuna, Americans' favorite fish, is the most common source of mercury in our diet. New tests of 42 samples from cans and pouches of tuna bought primarily in the New York metropolitan area and online confirm that white (albacore) tuna usually contains far more mercury than light tuna.

Children and women of childbearing age can easily consume more mercury than the Environmental Protection Agency considers advisable simply by eating one serving of canned white tuna or two servings of light tuna per week. A serving is about 2.5 ounces. Expect a 5-ounce can to contain about 4 ounces of tuna plus liquid.

The heavy metal accumulates in tuna and other fish in an especially toxic form, methylmercury, which comes from mercury released by coal-fired power plants and other industrial or natural sources, such as volcanoes.

Fortunately, it's easy to choose lowermercury fish that are also rich in healthful omega-3 fatty acids. That's especially important for women who are pregnant or might become pregnant, nursing mothers, and young children, because fetuses and youngsters seem to face the most risk from methylmercury's neurotoxic effects.

Results from our tuna tests, conducted at an outside lab, underscore the longheld concern for those people. We found:

- Every sample contained measurable levels of mercury, ranging from 0.018 to 0.774 parts per million. The Food and Drug Administration can take legal action to pull products containing 1 ppm or more from the market. (It never has, according to an FDA spokesman.) The EPA compiles fish advisories when state and local governments have found high contaminant levels in certain locally caught fish.
- Samples of white tuna had 0.217 to 0.774 ppm of mercury and averaged 0.427 ppm. By eating 2.5 ounces of any of the tested samples, a woman of childbearing age would exceed the daily mercury intake that the EPA considers safe.
- Samples of light tuna had 0.018 to 0.176 ppm and averaged 0.071 ppm. At that average, a woman of childbearing age eating 2.5 ounces would get less than the EPA's limit, but for about half the tested samples, eating 5 ounces would exceed the limit.

In 2006 we scrutinized the results of the FDA's tests in 2002 to 2004 of mercury levels in hundreds of samples of canned tuna. The agency's white-tuna samples averaged 0.353 ppm; light tuna, 0.118 ppm. But we found that as much as 6 percent of the FDA's light-tuna samples had at least as much mercury as the average in white tuna—in some cases more than twice as much.

Given the uncertainties about the impact of occasional fetal exposure to such high levels, we urged the FDA to warn consumers about occasional spikes in mercury levels in canned light tuna. More than four years later, the FDA still hasn't issued such a warning. When we asked why, an FDA spokesman indicated that the agency had already taken the spikes into account when formulating its mercury advice.

### Bottom line

Canned tuna, especially white, tends to be high in mercury, and younger women and children should limit how much they eat. As a precaution, pregnant women should avoid tuna entirely. Our answers to the questions in [Fish Q & A](#) can help you get the nutritional benefits of fish and minimize exposure to mercury.

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Illustration by Gary Neill

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