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

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

DEBORAH FELLNER, Individually and on Behalf of Those Similarly Situated,	
Plaintiffs,	
v.	**RETURN DATE: APRIL 10, 2006**
TRI-UNION SEAFOODS, L.L.C., d/b/a CHICKEN OF THE SEA,	
Defendant.	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S CLASS ACTION ALLEGATIONS

The Plaintiff, Deborah Fellner ("Plaintiff"), filed a Class Action Complaint ("Complaint") in the above-referenced matter on behalf of "similarly situated" individual consumers in New Jersey and throughout the United States, against the sole Defendant, Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea ("Defendant"), a manufacturer and distributor of canned tuna, for violation of the New Jersey Products Liability Act, violation of the New Jersey Consumer Fraud Act and common law fraud. The Plaintiff is the sole class representative. Pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, 12(f), the Defendant requests an Order dismissing or otherwise striking all class action allegations contained in the Complaint because the Complaint itself demonstrates that the requirements for maintaining a class action cannot be met. *See* Fed. R. Civ. P. 23. As additional grounds, the Defendant states that the class allegations must be dismissed because the Plaintiff – the sole named class

representative – has failed to state an individual claim upon which relief may be granted. *See* Motion to Dismiss Plaintiff's Complaint, incorporated herein by reference.

INTRODUCTION

This purported class action was commenced by the Plaintiff, Deborah Fellner ("Plaintiff") against the sole Defendant, Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea ("Defendant"), a manufacturer and distributor of canned tuna. The Plaintiff asserts several claims on her own behalf and as sole class representative alleging that the Defendant violated the New Jersey Products Liability Act and New Jersey Consumer Fraud Act, and committed common law fraud by (1) purportedly failing to disclose that its tuna contained methylmercury and other unspecified harmful compounds, (2) canning and distributing tuna products that were not reasonably safe, and (3) making material representations or omissions regarding its tuna products' safety.

The Plaintiff's Complaint fails to demonstrate that the requirements of Fed. R. Civ. P. 23 for certifying a class can be met, and the Plaintiff's class action allegations must, therefore, be dismissed and/or stricken.

As an initial matter, the Defendant has moved to dismiss the Plaintiff's individual claims (Counts I through IV) pursuant to Fed R. Civ. P. 12(b)(6) on the grounds that: (1) the United States Food and Drug Administration ("FDA") pre-empts state law in the areas of establishing the maximum allowable concentration of methylmercury in fish, and of advising/warning consumers about the presence of methylmercury in tuna and its potential effects upon consumption; (2) there is no liability on the part of a seller for abnormal consumption; (3) there is no duty to warn of a product which only may be dangerous if over-consumed; and (4) the

Plaintiff's claim for common-law fraud is subsumed by the New Jersey Products Liability Act, thereby rendering Count IV moot. That motion to dismiss is currently pending before this Court.

This brief is submitted in support of the Defendant's motion to dismiss and/or strike the Plaintiff's class claims. At the outset, the Defendant notes that if this Court were to grant its motion to dismiss Counts I through IV of the Complaint regarding the Plaintiff/Class Representative's individual claims, then that disposition would moot this motion to dismiss and/or strike the class action allegations and counts.

If this Court were to deny the Defendant's motion to dismiss the individual claims, then it is respectfully submitted that the Complaint fails to demonstrate that the requirements of Fed. R. Civ. P. 23 for certifying a class can be met. As fully set forth herein, the allegations contained in the Plaintiff's Complaint and the definition of the proposed class show that it would be impossible to satisfy any of the requirements for class certification.

The Plaintiff defines the proposed class as follows:

> . . . a class of all New Jersey individuals ("New Jersey Class"), and a class of all individuals in the United States ("Nationwide Class"), who purchased Tuna Products from the Defendant, and whom Defendant failed to apprise via adequate warnings of the methylmercury and other harmful compounds that could result in mercury poisoning, that Defendant knew and should have known were contained in its Tuna Products. Specifically excluded from the class are the Defendant, any entity in which the Defendant has a controlling interest, and the defendant's officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries and their assigns or any such entity, together with any immediate family members of any officer or employee of said companies.
>
> [Schoen Cert., Exhibit "A" (Complaint, ¶ 16)].

In sum, the proposed class consists of all of individuals in New Jersey and the United States who ". . .who purchased Tuna Products from the Defendant" and who could suffer "mercury poisoning" as a result of the Defendant's purported failure to provide warnings about methylmercury and/or other harmful compounds that may be found in tuna.

Indeed, the proposed class outlined by the Plaintiff in the Complaint will not satisfy the requirements set forth in Fed R. Civ. P. 23 for the certification of a class for several reasons, including, but not limited to: (1) as set forth in the Defendant's motion to dismiss, the Plaintiff has failed to state a valid cause of action upon which relief could be granted with respect to her individual claims; (2) numerous individual questions of fact and law regarding causation, the extent of damages, and exposure to methylmercury will predominate over the alleged common questions of law and fact, and class treatment is accordingly not the superior method of adjudication of the claims asserted; (3) the Complaint fails to set forth any legitimate common questions of law or fact; (4) the Plaintiff's claims are not typical of the claims of other class members and the Plaintiff is not an adequate representative of the class; (5) the numerosity requirement for class certification cannot be satisfied by the speculative allegations set forth in the Complaint; (6) the purported classes cannot be certified under Fed. R. Civ. P. 23(b)(1); and (7) alternatively, the Plaintiff's proposed class, as defined in the Complaint, cannot include all individuals throughout the United States because products sold in other states cannot be compelled to adhere to New Jersey state law.

First, and most importantly, if the Plaintiff's individual claims do not survive the Motion to Dismiss that is currently *sub judice*, the proposed class will likewise not be certified.

Second, there are no circumstances under which the Plaintiff could satisfy the stringent predominance requirements of Fed. R. Civ. P. 23(b)(3). Of critical significance, the nature of the Plaintiff's claims implicate numerous and specific individual issues of law and fact that are inappropriate for class treatment. Particularly, causation, damages and the extent of each putative class member's level of exposure to methylmercury must be determined on a plaintiff-by-plaintiff, rather than a class-wide, basis. Indeed, there are countless variables which may be

different for each member of the potential class outlined by the Plaintiff's Complaint regarding (1) the extent of their exposure to methylmercury, (2) other possible ways that the Plaintiff and/or other class members could have contracted mercury poisoning other than through Chicken of the Sea canned tuna (assuming *arguendo* that any class members contracted mercury poisoning from Chicken of the Sea canned tuna which defendant respectfully submits, they did not), and (3) the extent to which each plaintiff has been injured and suffered monetary damages. As a result, any possible common issue regarding liability would be substantially overshadowed and predominated by the numerous individual factors that would need to be resolved before reaching a determination about causation and/or damages.

Third, the questions proposed by the Plaintiff are not "common" as defined by Fed. R. Civ. P. 23(a)(2). The Plaintiff has alleged that the following questions of law and fact are common to all members of each class: (a) whether the actions or activities of Defendant violated the New Jersey Products Liability Act; (b) whether the actions or activities of Defendant violated the New Jersey Consumer Fraud Act; (c) whether the Defendant made material misrepresentations of fact or omitted to state material facts to Plaintiff and the class regarding the harmful mercury compounds contained in their tuna products which operated as a fraud or deceit on the class; and (d) whether the Plaintiff and members of the class sustained damage or loss. [Schoen Cert., Exhibit "A" (Complaint, ¶ 19)].

The first three "common" questions of law and/or fact simply reiterate the alleged bases for the Plaintiff's causes of action. *See id.* at ¶ 19. The fourth "common" question of law or fact regarding whether each class member sustained damages, will depend on facts particular to each individual member. *See id.* Indeed, the broad "common" questions of law or fact alleged by Plaintiff are not "common" as defined by Fed. R. Civ. P. 23 (a)(2). This is because to be

common, a question "must be susceptible to being answered after the presentation of common proof that will apply equally to every class member." *See Abbent v. Eastman Kodak, Co.*, No. 90-CV-3436, 1992 WL 1472751, *5 (D. N.J. Aug. 28, 1992). Here, despite the Plaintiff's broad allegations as to commonality, the fact and proofs necessary to answer the proposed questions will not apply equally to every class member and will vary greatly from plaintiff to plaintiff. Accordingly, the Plaintiff's Complaint will never be able to satisfy the commonality requirement for class certification.

Fourth, based on the allegations set forth in her Complaint, the Plaintiff will never be able to satisfy the typicality requirement of Fed. R. Civ. P. 23(a)(3), or adequately represent the class as a representative as required by Fed. R. Civ. P. 23(a)(4). The typicality/adequate representative requirements are designed to screen out factual positions of a class representative which are markedly different from other class members. The Plaintiff's allegations will never satisfy these requirements because of the unusual facts leading to her purported exposure to methylmercury. The Plaintiff contends that her diet for five years consisted "almost exclusively" of Chicken of the Sea canned tuna and, as a result, she "contracted severe mercury poisoning and suffered extreme physical and emotional injuries." *See* [Schoen Cert., Exhibit "A" (Complaint, ¶¶ 7 and 28)]. The Plaintiff's diet is highly uncharacteristic of the ordinary consumer. Moreover, beyond the Plaintiff's unique circumstances, the multitude of individual issues of law and fact that affect causation, exposure and damages for each respective class member, discussed at length in connection with the predominance and commonality arguments, *infra*, make it doubtful that any representative(s) could satisfy the typicality requirement. Similarly, neither the Plaintiff nor any other proposed representative could satisfy the adequacy of representation requirement of Fed. R. Civ. P. 23(a)(4).

Fifth, the Plaintiff will also never be able to satisfy the numerosity requirement for class certification because the Plaintiff's allegation that millions of people may be affected by methylmercury is purely speculative and conclusory. Indeed, mere conclusory or speculative allegations that joinder is impractical are not sufficient to satisfy the numerosity requirement. Also, for similar reasons as set forth, *infra*, in the predominance and commonality arguments, class treatment is not superior over other methods of adjudication particularly because of the individual considerations that need to be made for each putative class member with respect to the extent of their exposure to methylmercury, causation and injuries/damages they suffered.

Lastly, in the alternative, the Plaintiff's proposed class as defined in the Complaint should be limited to preclude the class of all individuals throughout the United States, because, as a matter of law, products sold in other states cannot be compelled to adhere to New Jersey state law. Application of New Jersey law to putative class members who are not citizens of New Jersey is contradictory to the Class Action Fairness Act of 2005 (109 P.L.2, 119 Stat. 4 (2005)), which was enacted, in part, because Congress wanted to curb nationwide application of one state's law. In other words, Congress was troubled by the notion that, for example, the rights of a Texas plaintiff may be determined under the laws of New Jersey.

In sum, and as more fully discussed below, there are no circumstances under which any conceivable class involving the issues of law and fact alleged in this Complaint, could be certified in light of its inability to satisfy the rigorous requirements of Fed. R. Civ. P. 23. Accordingly, the Plaintiff's class action claims should be dismissed and/or stricken.

BACKGROUND OF METHYLMERCURY IN FISH

The nature of this action necessitates consideration of the universally understood and well-documented facts, which warrant judicial notice, regarding (1) mercury in the environment,

(2) methylmercury in fish, (3) the United States Food and Drug Administration's ("FDA") approach to the issue of methylmercury in fish, and (4) the indeterminable number of variables relevant in evaluating whether any given person will experience, or has experienced, adverse health effects due to ingesting methylmercury through consumption of fish products, as well as (5) the extent to which such symptoms are due to factors other than ingestion of fish or methylmercury.[1] Such facts are relevant to analyzing the sufficiency of the class action allegations in light of the requirements of Fed. R. Civ. P. 23.

It is well-known that methylmercury is present in nearly all fish.[2] The level of methylmercury builds up in some types of fish and shellfish more than others, depending on what the fish eat. As a result, the levels vary among different fish and even within the same fish.[3] Whether any given individual will experience adverse health effects as a result of ingestion of methylmercury is dependent on an indeterminable number of factors. Further, mercury poisoning is a diagnosis of exclusion, in that diagnosis is only made after ruling out numerous other potential causes of symptoms which are sometimes associated with mercury poisoning, sometimes associated with alternative causes, and oftentimes are of unknown etiology.

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[1] *See* Defendant's Motion Requesting Judicial Notice in Support of Its Motion to Dismiss Plaintiff's Complaint and Motion to Dismiss Plaintiff's Class Action Allegations ("Motion for Judicial Notice"). *See also See Hollis-Arrington v. PHH Mortgage Corp.*, No. 05-2556FLW, 2005 WL 3077853, * (D. N.J. Nov. 15, 2005), *Benak v. Alliance Capital Mgmt. L.P.*, 349 F. Supp. 2d 882, 889 n. 8 (D. N.J. 2004), and *Sonntag v. Papparozzi*, 256 F. Supp. 2d 320, 324 (D. N.J. 2003) (finding it appropriate to take judicial notice of publicly available documents in deciding upon a motion to dismiss and/or documents or facts integral to resolving a motion to dismiss).

[2] *See* "What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services and the United States Environmental Protection Agency (hereinafter "What You Need to Know"), attached to Motion for Judicial Notice as Exhibit "A."

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

The United States Food and Drug Administration ("FDA"), has established tolerance levels for methylmercury in fish through nutritional guidelines.[4] Further, pursuant to the Federal Food, Drug and Cosmetic Act, the FDA is provided broad authority to control the nature and extent of warnings with respect to methylmercury in fish. The FDA has noted that "[r]esearch shows that most people's fish consumption does not cause a health concern." Backgrounder, at 2. Further, the FDA has recommended "that consumers eat a balanced diet, choosing a variety of foods including fruits and vegetables, foods that are low in *trans* fat and saturated fat, as well as foods rich in high fiber grains and nutrients. *Id.* The FDA has also noted that "[f]ish and shellfish can be an important part of this diet." *Id.* at 2-3. With this backdrop in mind, the FDA has specifically instructed against providing warnings regarding methylmercury in fish.

LEGAL ARGUMENT

AS A MATTER OF LAW, THE ALLEGATIONS CONTAINED IN THE PLAINTIFF'S COMPLAINT WILL NEVER BE SUFFICIENT TO SATISFY THE REQUIREMENTS FOR CERTIFICATION OF THE PLAINTIFF'S PROPOSED CLASS UNDER ANY CIRCUMSTANCES; THEREFORE THE PLAINTIFF'S CLASS CERTIFICATION COUNTS SHOULD BE DISMISSED AND/OR STRICKEN.

There is a significant trend among courts to deny Fed. R. Civ. P. 23 certification in products liability actions involving personal injuries, as opposed to property damage. For instance, the court in *In re Tetracycline Cases*, noted that:

> Whether class certification has been denied on the basis of lack of commonality, typicality, or predominance and superiority, most courts have exhibited great reluctance to certify a class in actions involving a number of defendants and exposure to the product in question over an extended period of time. Usually, these courts have concluded that the individualized nature of the proof as to liability, individual questions as to affirmative defenses, and the absence of a single event causing the injury result in such a multiplicity of issues as to make class action treatment inappropriate or unworkable.

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[4] *See* What You Need to Know; *see also* Section 540.600 of the Federal Food and Drug Administration's Compliance Policy Guide, allowing up to one part of methylmercury per million non-mercury parts of the edible portion of seafood, Agency (hereinafter "Section 540.600"), attached to Motion for Judicial Notice as Exhibit "D."

107 F.R.D. 719, 724 (W.D. Mo. 1985). Another court noted that "[a]lthough no per se prohibition exists with respect to class certification in products liability litigation, many courts have recognized the potential difficulties of commonality and management inherent in certifying products liability class actions." *See In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 208 F.R.D. 625, 630 (W.D. Wash. 2002) (citing various cases involving asbestos, pacemakers, prescription drugs, medical devices and tobacco in which courts have declined to certify putative products liability classes). In doing so, the court distinguished products liability actions in which individual issues often outnumber any arguably common issues, reasoning that:

> No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

See id. at 631 (citing *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 853 (9th Cir. 1982) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997)). The same considerations apply in this case, rendering it inappropriate for class treatment.

A. Applicable Legal Standards

This action is not maintainable as a class action simply by virtue of its designation as such in the Complaint. Rather, the Plaintiff may sue as the representative party for a class "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the [Plaintiff] are typical of the claims or defenses of the class, and (4) the [Plaintiff] will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Additionally, the action must fall within

one of the three categories of subsection (b). *See* Fed. R. Civ. P. 23(b). In this case, the class action allegations should be dismissed because, as a matter of law, the allegations contained in the Plaintiff's Complaint do not satisfy the requirements of Fed. R. Civ. P. 23.

Further, pursuant to Fed. R. Civ. P. 12(b)(6) and/or 12(f), class action allegations may be dismissed or otherwise stricken prior to a motion to certify the class where the complaint itself demonstrates that the requirements of Fed. R. Civ. P. 23 cannot be met. *See Andrews v. Home Depot U.S.A., Inc.*, No. 03-CV-5200, 2005 WL 1490474, *2 (D. N.J. June 23, 2005) and *Strzakowlski v. Gen. Motors Corp.*, No. 04-4740, 2005 WL 2001912, *8 (D. N.J. Aug. 16, 2005).[5] The analysis is similar to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Id.* In making a preliminary determination as to whether this action may be certified under any circumstances, the key inquiry is "whether the matters in controversy are primarily individual in character or are susceptible to proof in a class action." *See Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 56 (S.D. Fla. 1990). The merits of the Plaintiff's claims are not relevant with respect to the foregoing inquiry. *Id.* As more fully addressed below, there are no set of circumstances under which this personal injury action would satisfy the rigorous analysis under Fed. R. Civ. P. 23 for any proposed class. Thus, all allegations asserted on behalf of the purported classes should be dismissed as a matter of law.

B. Dismissal Of Plaintiff's Class Action Allegations Is Appropriate Because There Are No Circumstances Under Which Plaintiff's Complaint Can Satisfy The Commonality And Predominance Requirements For Class Certification.

1. The Plaintiff has failed to allege any common issues of fact or law as required by Fed. R. Civ. P. 23(a)(2).

[5] *See also Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205, 226 (D. N.J. 2003), *Bd. of Educ. of Tp. High Sch. v. Climatemp, Inc.*, Nos. 79-C-3144, 79-C-4898, 1981 WL 2033 (N.D. Ill. 1981) (rejecting plaintiff's argument that it would be procedurally improper to entertain defendant's motion to strike class action allegations in advance of motion by plaintiff to certify class), and *Miller v. Motorola, Inc.*, 76 F.R.D. 516 (N.D. Ill. 1977) (granting motion to strike class action allegations on the basis of the complaint).