

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

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.

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

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v.

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

Defendant.

: CIVIL ACTION NO. 2:06-CV-688-DMC-JAD

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: JANUARY 24, 2011

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

I. INTRODUCTION

The Defendant Tri-Union Seafoods, L.L.C. herein replies to the Opposition filed by the Plaintiff on January 11, 2011 in response to the Defendant's Motion for Protective Order, dated December 15, 2010. Whereas Tri-Union explained its arguments in favor of a protective order in great detail in its initial Motion submission, it will endeavor not to repeat such arguments unnecessarily herein. Rather, it focuses its Reply to address specific points of the Plaintiff's Opposition.

As an initial matter, contrary to representations by the Plaintiff, Tri-Union is not seeking to "stall any meaningful discovery in this case." (Pl. Opp. at 2.) Rather, Tri-Union necessarily seeks to clarify the scope of the Plaintiff's allegations, which will then allow the parties to streamline the discovery process to focus on those issues that are relevant to the Plaintiff's claim. This will eliminate time and resources that would otherwise be spent addressing immaterial

issues and poring over millions of pages of irrelevant documents that have no bearing on this case.

II. ARGUMENT

A. The Plaintiff Is Not Entitled To Any Post-2004 Discovery Because The Amended Complaint Does Not Allege Design Defect.¹

The Amended Complaint purports to state a claim only for failure to warn. It makes no allegations to support a claim for design defect. Accordingly, the Plaintiff is entitled only to discovery that is relevant to her failure to warn claim. To wit, the Plaintiff has alleged that she began eating Tri-Union's tuna in 1993. (Schoen Cert., Ex. "B" to Dec. 15, 2010 Mot. for Prot. Order (Amended Complaint at ¶ 3)). The Plaintiff has also alleged that she stopped eating Tri-Union's tuna in 2004. (*Id.*) As a result, Tri-Union no longer owed the Plaintiff a duty to warn regarding the presence of methylmercury in Tri-Union's tuna fish after 2004. Any information, documents, data, or knowledge that Tri-Union acquired after 2004 is therefore irrelevant to the Plaintiff's claim under the Amended Complaint and, accordingly, not subject to discovery.

Rather than address this consequence of inadequate pleading, the Plaintiff glosses over the issue and observes, correctly, that the motion before this Court is the Defendant's Motion for a Protective Order, and not a motion to dismiss. "Furthermore, as this is Defendants' [sic] motion for protective order and not a Motion To Dismiss, Plaintiff will decline to advance any

¹ As argued herein in Section II.A., Tri-Union submits that any post-2004 discovery is irrelevant to the instant action, a failure to warn case, and should not be allowed. Further, 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 Rules of Civil Procedure, and is inaccessible because of undue burden and cost pursuant to Rule 26(b)(2)(B). Thus, Tri-Union relies on several arguments to support its efforts to preclude discovery of any information, documents, data, or knowledge it possessed for any time after 2004. (See generally Mot. for Prot. Order at 11-15; see infra Sections II.B. and II.C.)

arguments that would support her product liability claim and sufficiency of her pleading.” (Pl. Opp. at 4.) Plaintiff’s position misses the point. Tri-Union recognizes the substance of its Motion. The pending Motion for Protective Order arose out of the November 12, 2010 telephone conference between the parties and the Court (Dickson, J.), as well as an in-Chambers meeting between the parties and the Court (Dickson, J.).²

It was then that the Plaintiff announced that the Amended Complaint alleged two possible theories of liability: failure to warn and product defect. During the telephone conference, the Court (Dickson, J.) suggested that the parties determine on what theory or theories the Plaintiff is proceeding before continuing with discovery. Tri-Union maintained during the November conference, as it reiterated again in its Motion for Protective Order; (Mot. at 4-6 & n.3.); that if the Plaintiff is now claiming that the Amended Complaint alleges product defect, then the Defendant will renew and supplement its Motion To Dismiss.³ Ultimately, the Court (Dickson,

² The Plaintiff first raised the issue of product defect in Chambers on or about October 5, 2010 during a conference with the Court (Dickson, J.) and the Defendant. During that in-Chambers conference, the Defendant raised its concerns that the Amended Complaint did not state allegations sufficient to support a claim for product defect. The parties subsequently exchanged position letters regarding discovery disputes, which led to the aforementioned telephone conference of November 12, 2010.

³ As Tri-Union explained in its Motion for Protective Order, it had based its previously-filed Motion To Dismiss, which the Court (Cavanaugh, J.) granted in part, on the premise that the Amended Complaint purported to allege only failure to warn under the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1 *et seq.* (the “PLA”). Tri-Union did not prosecute its Motion To Dismiss, nor did the Plaintiff defend against it, with regard to a claim of product defect. Moreover, in its decision, the Court (Cavanaugh, J.) stated that it was treating the Plaintiff’s claim under the PLA as a failure to warn claim. *See, e.g., Fellner v. Tri-Union Seafoods, L.L.C.*, No. 06-CV-0688 (DMC), 2010 U.S. Dist. LEXIS 36195, at *9 n.5 (Apr. 13, 2010) (Cavanaugh, J.) (“Although Plaintiff’s sparse Amended Complaint broadly asserts ‘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

J.) suggested that Tri-Union move for a protective order, and that the Plaintiff respond to such a motion. Tri-Union complied, and argued in its Motion that the Amended Complaint failed to comply with recent case law from the Supreme Court regarding pleading requirements, and was absolutely void of any allegation to support a claim for product defect. This correspondingly limits the extent to which the Plaintiff may seek discovery. (Mot. at 4-5, 8-10.)

Instead of trying to explain how the allegations of the Amended Complaint satisfy the pleading requirements announced in Atlantic Corporation v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) as to design defect, the Plaintiff chose to remain nearly silent on the issue. “However, Plaintiff will comment that her Amended Complaint contains sufficient facts to put Tri-Union on notice of her claims against it.” (Pl. Opp. at 4.) Such commentary, though, does not transform the Plaintiff’s factually-void Amended Complaint into one that states a claim for product defect. Liberal notice pleading standards notwithstanding; (Id.); the Amended Complaint “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) (internal quotation marks omitted). “Rule 8(a)(2) of the Federal Rules of Civil Procedure requires the pleader not only to provide a ‘short and plain statement,’ but also a statement ‘showing that the pleader is entitled to relief.’” Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 322 (3d Cir. 2008) (citation omitted).

Further, Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” Iqbal, 129 S. Ct. at 1950. “The complaint must state enough facts to

defectively designed, manufactured and/or failed to contain adequate warnings and/or instructions,’ the Court will treat her claim under the PLA as one for ‘failure to warn.’”).

raise a reasonable expectation that discovery will reveal evidence of the necessary element.” Wilkerson, 522 F.3d at 322 (citations omitted). In her Opposition, the Plaintiff claims that “what Plaintiff is asking for, [sic] is information to help her prove causation in this case.” (Pl. Opp. at 2.) Indeed, the Plaintiff admits in her Opposition that she seeks documents and information that are **not** relevant to her claim. “Plaintiff’s requests seek not only relevant documents and information[,] but all that is truly necessary to prove her claims.” (Pl. Opp. at 11.) Tri-Union submits that the only relevant discovery in this case concerns the Plaintiff’s claim of failure to warn. Moreover, it is black letter law that parties are entitled only to that discovery that is relevant to the claims or defenses involved in the litigation. See, e.g., Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense”); Ford Motor Co. v. Edgewood Props., 257 F.R.D. 418, 428 (D.N.J. 2009) (deeming joint defense agreement “not discoverable because it is not relevant to any claim or defense in this case”).

Rather than address the issue of the adequacy of the Amended Complaint head-on, and explain how it contains an appropriate allegation regarding a product defect, the Plaintiff makes subtle and conclusory attempts to circumvent the requirements of Twombly and Iqbal. For example, the Plaintiff states in a footnote 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.”⁴ (Pl. Opp. at 17 n.2.) Such a statement is not only baseless (as the Amended Complaint contains absolutely no factual support for a claim of product defect), but also misstates the applicable law on the defenses available to product defect claims under

⁴ See infra Section II.B.2 for a discussion of the California statute to which the Plaintiff alludes.

New Jersey law. The Plaintiff cites no authority, and the Defendant's research has revealed none, stating that a "naturally-occurring" defense is not available to product liability claims under New Jersey law.

Accordingly, whereas the Amended Complaint does not contain any factual allegations to support a claim of product defect, the Plaintiff is not entitled to expand the scope of permissible discovery to encompass the same. Thus, Tri-Union requests that the Court enter an Order, limiting the Plaintiff to discovery within only the time period relevant⁵ to her claim of failure to warn, *e.g.*, 1993 through 2004.⁶

B. The Plaintiff's Proposed Discovery Requests Are Grossly Disproportionate To The Sole Claim Of Failure To Warn In The Amended Complaint.

1. The Plaintiff seeks to violate the rule of proportionality through her overbroad and unduly burdensome discovery requests that are tailored for a class action, and not the individual claims of the Plaintiff.

Where, as here, the burden of proposed discovery requests outweigh their likely benefit, the Court has the authority to limit a party's access to otherwise discoverable information.

DesMarteau v. CIT Group, No. 09-5361 (SRC)(MAS), 2010 U.S. Dist. LEXIS 97582, at *3-4

⁵ Contrary to repeated references in the Plaintiff's Opposition, Tri-Union did not refer to the Plaintiff's proposed discovery requests as being "marginally relevant." (Pl. Opp. at 1, 5.) Nor has Tri-Union ever conceded that any of the Plaintiff's discovery requests are relevant – marginally or otherwise. Rather, the terms "marginally relevant" appear in Tri-Union's Motion for Protective Order only in the context of a parenthetical, quoting language from Public Service Entertainment Group, Inc. v. Philadelphia Electric Company, 130 F.R.D. 543, 551 (D.N.J. 1990), which precluded the discovery of "marginally relevant" evidence because the pursuit of such discovery would violate the rule of proportionality. (See Mot. at 12.)

⁶ This does not mean, however, that Tri-Union concedes that all requests pertaining to the time period between 1993 and 2004 are proper subjects of discovery. Tri-Union has previously addressed such concerns in its Motion for Protective Order, and will describe such concerns herein as well. See *infra* Sections II.B. and II.C.

(D.N.J. Sept. 17, 2010) (Shipp, J.).⁷ Tri-Union respectfully disagrees with the Plaintiff's assertion that her discovery requests "have been diligently and narrowly tailored to avoid seeking irrelevant or broad information." (Pl. Opp. at 4.) The examples of offending requests set forth in Tri-Union's Motion offer clear examples of the overreaching extent of the Plaintiff's discovery requests. (See Mot. at 12-13 (citing several Interrogatories and Requests for Production served by the Plaintiff on Tri-Union).) Moreover, Tri-Union reiterates its position that the discovery served to date demonstrates an intent to obtain discovery sufficient to support a class action lawsuit concerning methylmercury in tuna fish, and not merely discovery relevant to the claims of the Plaintiff. (Compare Pl. Opp. at 5.) To wit, none of the Plaintiff's Requests for Production are limited in time.⁸ In addition, many of the Interrogatories from the Plaintiff are similarly open-ended. For example, Interrogatory No. 3 asks Tri-Union to "[i]dentify any organizations that Tri-Union has ever been associated with or supported directly or indirectly, that support tuna consumption." (Schoen Cert. Ex. "C" to Dec. 15, 2010 Mot. for Prot. Order (Interrogatories from Plaintiff); quoted in Mot. at 13; quoted in Pl. Opp. at 9) (emphasis added).) Further, the Plaintiff seeks information from Tri-Union regarding products and investigations that are not its own. (See Schoen Cert. Ex. "D" to Dec. 15, 2010 Mot. for Prot. Order (Requests for Production from Plaintiff) at Nos. 1, 3, 14, 16, and 18.)

Tri-Union does not base its concern solely on the broadly-drafted discovery requests received from the Plaintiff. In addition, the arguments the Plaintiff advances in support of such

⁷ (Schoen Cert., Ex. "E" to Dec. 15, 2010 Mot. for Prot. Order (Unpublished Decisions).)

⁸ The time period issue is one of the key reasons that Tri-Union has not yet begun responding to the Plaintiff's Requests for Production. (See Pl. Opp. at 8 (comparing production of certain medical records by Plaintiff to lack of production by Tri-Union).)

requests reveal the motives behind the inappropriately expansive requests. (See, e.g., Pl. Opp. at 2 (“this case presents serious public health and safety issues”; 8 (“this case involves extremely important public policy matters that directly implicate serious public safety concerns – namely the health of the general population”; 17 (“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”; 18 (“the potential benefits to society . . . outweighs any burdens to the Defendant”) (emphasis added).) While public policy and/or health considerations are not to be ignored, this is not a class action suit and they bear no relevance as applied to the claims of the Plaintiff, an individual who claims harm as a result of eating tuna manufactured and distributed by Tri-Union. The Amended Complaint purports to state a discreet allegation that pertains to a single person. The Plaintiff’s discovery requests, though, pertain to society generally and a putative class instead of a single plaintiff. They are, simply put, a fishing expedition. The requests, then, are disproportionate insofar as the extensive burden and expense that Tri-Union will incur in responding to them greatly outweighs any possible benefit that the Plaintiff might gain from them.

In her Opposition, the Plaintiff cites the District Court’s decision in Public Service Entertainment Group, 130 F.R.D. 543, for its discussion of the applicability of the rule of proportionality. (See Pl. Opp. at 7.) As already discussed, the Court in that matter prevented the discovery of “marginally relevant” evidence and cited, in its analysis, the three factors set forth in Rule 26(b)(2)(C). The Court ruled that it had the authority to preclude discovery of otherwise relevant evidence where:

- 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 discovery has had ample opportunity by discovery 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.

Pub. Serv. Enter. Group, 130 F.R.D. at 551. The Court focused its analysis on the first and third factors. Here, too, the relevant factors are one and three.⁹ First, as the Plaintiff points out in her Opposition, there are publications concerning methylmercury in seafood generally, and tuna fish specifically, that are currently available to the public. (Pl. Opp. at 17-18.) Thus, such information is available equally to both the Plaintiff and Tri-Union. Furthermore, it would be an inappropriate burden for Tri-Union to have to assume the responsibility of searching for and gathering documents from the public domain for production to the Plaintiff when the Plaintiff can avail herself of the same public resources. Second, as articulated at length in the original Motion for Protective Order and supporting Affidavit, the open-ended and overbroad discovery requests proposed by the Plaintiff would impose a substantial burden and expense on Tri-Union.

2. The nature and extent of the discovery requested and produced in the Proposition 65¹⁰ litigation in California has no bearing on the appropriate nature and extent of the discovery in this matter.

⁹ The factors in Rule 26(b)(2)(C) are disjunctive. That is, the Rule does not require a party resisting discovery to satisfy all three factors to obtain an Order from the Court limiting the scope of discovery.

¹⁰ Proposition 65 is formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986. See Cal. Health & Saf. Code § 25249.5 et seq.

The Plaintiff makes much of the fact that Tri-Union was previously involved in the Proposition 65 litigation in California.¹¹ While that is true, the issues before the Court in that matter are vastly different from the Plaintiff's failure to warn claim here. Indeed, the Plaintiff acknowledges the differences between the two suits in her Opposition. "Unlike the present suit, the California action involved a statute which New Jersey does not have and subsequently [sic] the proofs were entirely different in the California case." (Pl. Opp. at 3 (emphasis added).) Moreover, in addition to the application and enforcement of a California statute, the Proposition 65 case concerned discovery requests and responses that were specific to California. Further, the State of California, through its Attorney General, and Public Media Center, a non-profit public interest corporation, were the Plaintiffs in the Proposition 65 case, making it much more like a class action lawsuit than the current suit, which involves only the Plaintiff. Furthermore, written discovery in the Proposition 65 case ended in 2005. (Supplemental Affidavit of John Barker at ¶ 12 (attached hereto).) As Tri-Union emphasized in its Motion for Protective Order, the vast majority of its e-mails, as well as its hard copy and electronically-stored files, were created after 2004. (Mot. at 1, 14-20 & nn. 1, 9-12.)

It is not tenable for the Plaintiff to suggest that Tri-Union faces no hardship in responding to the Plaintiff's discovery requests insofar as "the bulk of [Tri-Union's] work has already been done and produced in the California case." (Pl. Opp. at 3.) First, as already explained, more than five years have passed since written discovery concluded in the Proposition 65 case. Thus, Tri-Union now possesses many more millions of hard copy documents, e-mails, and

¹¹ Ex rel. Lockyer v. Tri-Union Seafoods, Consolidated Case Nos. CGC-01-402975 and CGC-04-432394.

electronically-stored files. Second, even if Tri-Union had performed manual and/or electronic searches¹² in response to requests in the Proposition 65 case, that would not obviate its need to search the same source materials with an eye toward the Plaintiff's requests in this action. Further, Tri-Union takes great exception to the Plaintiff's unfounded accusation that it is "completely misrepresenting the amount of pages, the cost, and most importantly the retrieval process of gathering the requested documents." (Pl. Opp. at 12.) Indeed, the Plaintiff's incredulity at representations contained in the Affidavit submitted in support of the Motion for Protective Order is irrelevant. (See Pl. Opp. at 11.) Tri-Union has provided sworn testimony in support of its position. The Plaintiff has done nothing to diminish the strength of Tri-Union's arguments, but has instead ignored key issues that Tri-Union submits should rightfully curtail the scope of discovery available to the Plaintiff in this case. Nonetheless, to clarify the issues raised by the Plaintiff with regard to the contents of the original Affidavit, and to assist the Court with its analysis of Tri-Union's Motion, Tri-Union attaches a Supplemental Affidavit in Support of its Motion for Protective Order.

The Proposition 65 litigation was first filed in 2001. (Supplemental Affidavit at ¶ 7.) On information and belief, some of the documents, e-mails, and electronically-stored files were created after 2001 in response to the Proposition 65 litigation. (Id. at ¶ 8.) On information and belief, such documents, e-mails, and electronically-stored files included communications between representatives of Tri-Union and its attorneys, and are protected by the attorney-client privilege. (Id. at ¶ 9.) On information and belief, such documents, e-mails, and electronically-stored files were created at the direction of counsel, and are protected as work product. (Id. at ¶

¹² See Supplemental Affidavit at ¶ 13.

10.) On information and belief, such documents, e-mails, and electronically-stored files contain the mental impressions of counsel, and are protected as work product. (Id. at ¶ 11.) On information and belief, written discovery in the Proposition 65 litigation ended in 2005. (Id. at ¶ 12.) On information and belief, no electronic searches were ever done on the Defendant's servers in conjunction with the Proposition 65 litigation. (Id. at ¶ 13.) On information and belief, the Defendant did not produce any electronic files or e-mails in conjunction with the Proposition 65 litigation. (Id. at ¶ 14.)

Employees from each department of the Defendant investigated the nature and extent of hard copy and electronic data currently in the possession, custody, or control of the Defendant, and provided such information for use in the original Affidavit in support of the Motion for Protective Order. (Id. at ¶ 15.) Members of the Information Technology Department of the Defendant provided assistance with regard to searches of e-mail and electronically-stored files. (Id. at ¶ 16.) Such members are experienced in the operation of computers and software that the Defendant utilizes. (Id. at ¶ 17.) Such members are similarly experienced in the operation of computers and software generally. (Id. at ¶ 18.) Such members possess the education, training, and experience necessary to estimate the time necessary to scan hard copy documents into electronic form. (Id. at ¶ 19.) Such members possess the knowledge, training, and experience necessary to estimate the number of licenses, and associated costs, necessary to facilitate the analysis and production of such hard copy documents. (Id. at ¶ 20.) Such members possess the knowledge, education, and experience necessary to estimate the number of scanners, and associated costs, necessary to convert such hard copy documents into optical character recognition ("OCR") format. (Id. at ¶ 21.) Such members possess the knowledge, education,

and experience necessary to convert such scanned documents into a format that is searchable through OCR programs. (Id. at ¶ 22.)

Such members possess the knowledge, education, and experience necessary to search the electronic archives of the Defendant to quantify, for a particular period of time, the number of e-mails that the Defendant's server contains. (Id. at ¶ 23.) Such members possess the knowledge, education, and experience necessary to determine that the number of files attached to such e-mails cannot be quantified through electronic searches. (Id. at ¶ 24.) Such members possess the knowledge, education, and experience necessary to search the electronic archives of the Defendant to quantify, for a particular period of time, the amount of data consisting of electronically-stored files that the Defendant's server contains. (Id. at ¶ 25.) Such members possess the knowledge, education, and experience necessary to estimate the number of licenses, and associated costs, necessary to open the various formats of such electronically-stored files. (Id. at ¶ 26.)

Based on the judgment of Mr. Barker, the Manager of Corporate Affairs for the Defendant, and the judgment of the Defendant's Director of Information Technologies, as well as on samples of data and collective knowledge and judgment, it was determined that most of the information contained in the e-mails and electronically-stored files is irrelevant to the allegations of this lawsuit and/or is protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (Id. at ¶ 27.)

Hard copy documents are currently stored in the Defendant's offices and in an off-site storage warehouse. (Id. at ¶ 28.) Hard copy documents in the Defendant's offices are stored in the various departments, and are not indexed. (Id. at ¶ 29.) Such departments include

Accounting, Consumer Affairs, Customer Service, Engineering, Executive, Finance, Human Resources, Information Technologies, Legal, Logistics, Marketing, Operations, Procurement, Production, Purchasing, and Sales. (Id. at ¶ 30.) Hard copy documents in the off-site storage warehouse are stored in boxes with labels describing the contents. (Id. at ¶ 31.) On information and belief, there is no overall set of categories for labeling such boxes; rather, the manner of labeling the boxes depends on the individual who packed each box. (Id. at ¶ 32.) On information and belief, the current storage bookkeeping has changed several times over the last ten years. The current system is filed by department. (Id. at ¶ 33.) Some examples of categories for documents stored in the off-site storage warehouse include Accounting – A/P Vouchers, Accounting – Payroll Input, Human Resources – Lump Sum Payments, Human Resources – Terminated Employees, Logistics – Bills of Lading, Logistics – Invoices, and Logistic – Receipts. (Id. at ¶ 34.) With regard to estimating the number of hard copy documents, employees from each department estimated how many documents would fit into a standard storage box. (Id. at ¶ 35.) With regard to hard copy documents stored onsite in the Defendant's offices, department heads estimated the equivalent number of boxes each department had stored in file cabinets, desks, binders, and bookshelves. (Id. at ¶ 36.) With regard to hard copy documents stored in the off-site storage warehouse, employees of the Defendant analyzed data from the off-site storage warehouse, which provided the number of boxes. The number of boxes was then converted to an approximate number of pages. (Id. at ¶ 37.)

Based on the judgment of Mr. Barker and the individual department heads and their staffs, it was determined that most of the information contained in the hard copy documents stored onsite is irrelevant to the allegations of this lawsuit and/or is protected from disclosure by

the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (*Id.* at ¶ 41.) Based on the fact that the storage boxes containing the hard copy documents stored in the off-site storage warehouse are labeled, and that very few of such labels indicate contents that pertain to the allegations of the Amended Complaint, it was determined that most of the information contained in such hard copy documents is irrelevant to the allegations of this lawsuit and/or is protected from disclosure by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information. (*Id.* at ¶ 42.)

C. The Discovery Of Electronically-Stored Information The Plaintiff Seeks Is Not Reasonably Accessible To Tri-Union

The Plaintiff does not address Tri-Union's arguments under Rule 26(b)(2)(B), which states that a party "need not provide discovery of electronically stored information that the party identifies as not readily accessible because of undue burden or cost." Instead, the Plaintiff makes baseless assertions questioning Tri-Union's representations concerning the nature and extent of efforts necessary to comply with the Plaintiff's current discovery requests. This does not comply with Rule 26, though. Pursuant to Rule 26(b)(2)(B), if Tri-Union meets its initial burden by demonstrating that electronically-stored information is not reasonably accessible because of undue burden or cost, the burden then shifts to the Plaintiff to show "good cause" under Rule 26(b)(2)(C). Tri-Union submits that it has satisfied its initial burden by articulating, in its Motion for Protective Order and supporting Affidavit, the thousands of hours and corresponding costs that would be necessary to comply with the Plaintiff's requests. Other courts have deemed electronically-stored files inaccessible in the face of much less burdensome circumstances. Compare 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 such files inaccessible under Rule

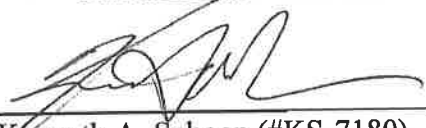
26(b)(2)(B) where party had already spent thirty hours searching for responsive material).¹³ In this case, on information and belief, employees of the Defendant have already spent an estimated 120 hours trying to determine the nature and extent of hard copy documents, e-mails, and electronically-stored files in the possession, custody, or control of the Defendant. (Supp. Aff. at ¶ 38.) Such hours include approximately 81 hours spent by members of the Information Technologies Department concerning e-mails and electronically-stored files, and 39 hours for other employees of the Defendant concerning hard copy documents stored both on-site and in the off-site storage warehouse. (*Id.* at ¶¶ 39-40.) Tri-Union submits that because the Plaintiff has not addressed Tri-Union's arguments under Rule 26(b)(2)(B), she has failed to establish the good cause necessary to entitle her to such discovery. Accordingly, Tri-Union asks this Court to enter an Order foreclosing the Plaintiff from seeking discovery of this inaccessible information.

III. CONCLUSION

For the foregoing reasons, the Defendant Tri-Union Seafoods, L.L.C. respectfully requests that the Court limit the scope of permissible discovery to those issues and time periods as described both herein and in Tri-Union's original Motion for Protective Order, 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.

¹³ See *supra* note 7.

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CERTIFICATION

I hereby certify that on this date a copy of the foregoing **Reply to Plaintiff's Opposition to 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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A handwritten signature in black ink, appearing to read 'KS', is written over a horizontal line.

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