

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Joseph A. Dickson
United States Magistrate Judge

Martin Luther King, Jr. Federal Bldg
& U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07102
(973-645-2580)

LETTER ORDER

March 11, 2011

All counsel of record

**Re: Deborah Fellner v. Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea
2:06-cv-688-DMC-MF**

Dear Counsel:

This letter order shall address defendants Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea (“Defendant”) motion for a protective order as to discovery requested by Plaintiff. Plaintiff opposes the motion. Upon careful consideration of the parties’ submissions, and for the reasons stated below, Defendant’s motion will be granted in part.

1. Background

On or about January 16, 2006, Deborah Fellner (“Plaintiff”) filed a Complaint in the Superior Court of New Jersey alleging a class action and individual claims, contending that Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea (“Defendant”) violated the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1, *et seq.* (the “PLA”), and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* (the “CFA”). Plaintiff also asserted a common law fraud claim seeking punitive damages. On February 15, 2006, the matter was removed to this Court.

On May 12, 2006, Plaintiff dismissed her class allegations and claims with prejudice by Stipulation, and, on July 8, 2009, Plaintiff filed an Amended Complaint.

In the Amended Complaint, Plaintiff asserted claims against Defendant under the PLA and CFA for canning and distributing albacore tuna that contained harmful mercury compounds and for failing to warn and disclose the harms associated with the mercury compounds contained in the albacore tuna products. The Amended Complaint also included a claim for common law punitive damages.

On August 31, 2009, Defendant filed a Motion to dismiss all counts in the Amended Complaint. The Court subsequently dismissed the CFA claim as subsumed under the PLA claim, but allowed Plaintiff's claim for failure to warn under the PLA to proceed.

On or about May 17, 2010, Plaintiff served Defendant with a First Set of Interrogatories and First Request for Production of Documents. (Pl. Opp. Br., Exs. A and B, ECF No. 59)

After being unable to reach an agreement with Plaintiff regarding the scope of discovery sought, Defendant filed this motion for a protective order. In its motion, Defendant states that several of Plaintiff's interrogatories and requests for production of documents are overbroad and irrelevant to Plaintiff's failure to warn claim. Furthermore, Defendant argues that the requests for documents from the relevant time period should be limited in scope because responding to these requests would cause undue burden on Defendant. Specifically, Defendant argues that production of hard copy documents from 1996 through 2004 would require Defendant to do the following:

- Scan approximately 3,000,000 pages of hard copy documents, which would require approximately 1,700 machine hours (and additional man hours to handle the documents).

- Review the approximately 3,000,000 pages of hard copy documents to determine whether they are irrelevant and/or are protected by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information.
- Purchase licenses for document management software required to facilitate the review and production of the documents, totaling \$4,000.
- Purchase four scanners to work with the document management software and to convert the documents into optical character recognition (“OCR”) format, totaling \$15,500.
- Convert the documents into searchable OCR form, which would require approximately 10,400 machine hours.

(Def. Br. 14-15, ECF No. 57-8) Moreover, Defendant asserts that production of emails and electronically-stored files from 1996 through 2004 would also result in an undue burden because it would require Defendant to do the following:

- Review more than 96,000 emails and over 24,000 electronically stored files consisting of approximately 6.34 gigabytes to determine whether they are irrelevant and/or are protected by the attorney-client privilege, work product doctrine, and/or as confidential or proprietary information.
- Purchase licenses for a software document viewer for opening the electronically stored files, totaling \$3,000.

Id. at 16-17.

Accordingly, Defendant seeks an order (1) precluding Plaintiff from requesting information, documents, data or knowledge possessed by Defendant after 2004; (2) limiting any

pre-2005 discovery by Plaintiff to that which is reasonably proportional to the allegations of the Amended Complaint; and (3) limiting the scope of permissible discovery by Plaintiff to inquiries relevant to the failure to warn claim.

2. Applicable Law

RULE 26 provides that a party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b). Furthermore, under RULE 26(b), the court may order discovery of any matter relevant to the subject matter of the action, provided the Court finds good cause. *Id.* In determining good cause, courts in this District interpret RULE 26(b) liberally, “creating broad vista for discovery to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be the case.” *Tele-Radio Sys. Ltd. v. De Forest Elecs., Inc.*, 92 F.R.D. 371, 375 (D.N.J. 1981) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The party seeking discovery bears the burden of “showing that the information sought is relevant to the subject matter of the action and may lead to admissible evidence.” *Carver v. City of Trenton*, 192 F.R.D. 154, 159 (D.N.J. 1990) (citing *Nestle Food Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 105 (D.N.J. 1990)).

Although RULE 26 has been interpreted broadly, pretrial discovery is not without limitation. *Hickman v. Taylor*, 329 U.S. 495 (1947). Discovery not reasonably calculated to lead to admissible evidence will not be permitted. *Oppenheimer Fund*, 437 U.S. at 352. Furthermore, as stated in the Advisory Committee Note to the 2000 Amendment to RULE 26(b)(1), “[t]he committee intends that the parties and the Court focus on the actual claims and defenses involved in the action . . . The rule change signals to the Court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the

parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.” FED. R. CIV. P. 26(b)(1) advisory committee’s note.

Moreover RULE 26(b)(2)(C) requires the Court to limit a party’s pursuit of otherwise discoverable information if the Court finds that (i) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving issues. FED. R. CIV. P. 26(b)(2)(C).

Pursuant to RULE 26(c), “[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending – or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken” FED. R. CIV. P. 26(c)(1). The Court may, upon a showing of good cause, enter a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including. . . forbidding the disclosure or discovery.” FED. R. CIV. P. 26(c)(1). A party has standing to move for a protective order to prevent a deposition of a nonparty if it has an interest in doing so, such as avoiding expense and delay of attending the deposition. *See, e.g., Regency Oldsmobile, Inc. v. General Motors Corp.*, No. 87-314, 1988 WL 133436, at *3 (D.N.J. Dec. 13, 1988) (Defendant had standing to move for protective order where it had an “interest in avoiding the expense and delay of attending the deposition [of a nonparty].”) The party seeking a protective order has the burden to demonstrate that good cause exists. *Robotic Parking Sys. v. City of Hoboken*, No. 06-3419, 2010 WL 1077286, at *2 (D.N.J. Mar. 23, 2010).

Courts have held that irrelevancy of the proposed discovery is sufficient to satisfy the “good cause” requirement for a protective order. *Smith v. Dowson*, 158 F.R.D. 138, 140 (D. Minn. 1994) (“showing of irrelevancy of proposed discovery can satisfy the ‘good cause’ requirement of Rule 26(c).”); *McCurdy v. Wedgewood Capital Mgmt. Co., Inc.*, No. 97-4304, 1998 WL 946185, at *9 (E.D. Pa. Nov. 16, 1998) (“A party seeking a protective order on the ground that the documents sought are irrelevant must demonstrate to the court that the requested documents either do not come within the broad scope of relevance defined pursuant to [Federal Rule of Civil Procedure] 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.”) (internal quotation omitted); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 454 (9th Cir. 1983) (not error for trial court to grant protective order barring discovery related to affirmative defenses because such discovery was “irrelevant and immaterial.”)

Finally, RULE 34(b)(2)(E) states that when producing electronically-stored documents, the following procedures apply: “(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and (iii) A party need not produce the same electronically stored information in more than one form.” Accordingly, the party producing discovery has to produce documents as they ordinarily maintain them, and does not have to format the documents. *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146, 149 (D. Mass. 2009). If the party requesting discovery wishes the format to be changed, that party must pay for any reformatting. *Id.*

3. Analysis

In the present case, Plaintiff is not generally entitled to post-2004 discovery because the Amended Complaint alleges events only occurring during the years 1993 through 2004. The conduct at issue is the failure to warn Plaintiff of the potential dangers of consuming tuna fish. Therefore, post-2004 discovery is outside the scope of the claims and defenses of the parties – and, in fact, also outside the scope of the subject matter of the case¹ - to the extent such information sought pertains to Defendant's knowledge or conduct after 2004. Discovery of post-2004 documents should be limited to only those documents that bear on Defendant's knowledge and conduct before 2004 about the issues of warning of methylmercury in its tuna.

In her opposition to Defendant's motion for a protective order, Plaintiff essentially seeks informally to amend her Amended Complaint to add a defective product claim, while declining to advance any reasons why the nature of the current claims, defense and/or subject matter of the Amended Complaint - which does not include a count for defective product – should allow Plaintiff under RULE 26 to obtain the discovery requested.

Plaintiff states that her “Amended Complaint contains sufficient facts to put [Defendant] on notice of her claims against it” (Pl. Opp. Br. 4, ECF No. 59), which she argues includes a claim for product defect -- even though it is not expressly pled. Plaintiff is incorrect. The days of bare bones notice pleading are quickly disappearing, if not altogether gone. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court examined RULE 8(a)(2), which provides that a complaint must contain “a short and plain statement of the claim showing that the pleader is

¹ Notwithstanding that Plaintiff fails to argue that good cause exists to obtain discovery relevant to the subject matter of the case, the Court finds that documents regarding the existence of mercury in tuna after 2004, or Defendant's knowledge thereof, is not relevant to the subject matter of Plaintiff's Amended Complaint.

entitled to relief.” FED. R. CIV. P. 8(a)(2).² The Court held that a valid complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*. --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). *Iqbal* clarified that the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), which required a heightened degree of fact pleading in an antitrust case, “expounded the pleading standard for ‘all civil actions.’ ” 129 S. Ct. at 1953. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’-‘that the pleader is entitled to relief.’ ” *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

More importantly, as the District Court stated in its decision in this matter granting in part and denying in part Defendant’s Motion to Dismiss “[a] claim under the [New Jersey Products Liability Act] may be brought alleging a manufacturing defect, a failure to warn of potential harm or a design defect. Here, Plaintiff’s claim is premised upon Defendant’s failure to warn” (4/13/10 Opinion 6, ECF No. 48) (emphasis added).³ In short, there is no manufacturing defect claim and no design defect claim in this case.⁴ Accordingly, discovery will be allowed to go forth solely with respect to the failure to warn claim.

² RULE 8(d)(1) provides that “[e]ach allegation must be simple, concise, and direct. No technical form is required.” FED. R. CIV. P. 8(d).

³ The District Court also held that the New Jersey Consumer Fraud Act claims contained in Count 2 of Plaintiff’s Complaint were subsumed under Count 1, which asserted a violation of the New Jersey Products Liability Act.

⁴ Furthermore, there seems to be no logical basis for alleging a manufacturing or design claim; the product canned and sold to the public is albacore tuna, which, as far as this Court is aware, was not designed or manufactured by Defendant.

As the District Court stated, “[t]o prevail on a failure to warn claim, a Plaintiff must demonstrate that the Defendant had (1) a duty to warn, (2) failed to do so adequately, and (3) the inadequate warning caused injury to the Plaintiff.” *Id.* (citations omitted). Furthermore, the District Court noted that to establish a duty to warn, “Plaintiff must demonstrate that Defendant (or those within the relevant industry) had ‘knowledge of the harmful effects of a product,’ and such knowledge may be ‘imputed to a manufacturer on a showing that knowledge of the defect existed within the relevant industry.’” *Id.* at 11 (citations omitted).

Turning to Plaintiff’s discovery demands, some of them are overbroad in both scope and time. Generally, the scope of discovery will be restricted to Defendant’s knowledge of the presence of methylmercury in tuna fish, Defendant’s understanding of the dangers, if any, presented by such presence, and the Defendant’s efforts and/or decision making process with regard to any warnings that may have, could have been or were placed on its labels. Moreover, the relevant time period for this discovery is 1993 through 2004. Requests numbers 1, 2, 3, 12, 13, 14, and 16 seek documents that overbroadly relate generally to mercury in tuna fish, and in some cases are merely redundant to other requests. These are overbroad and will be stricken.

Document requests 4, 5, 6, 7, 8, 9, 10, and 11 are relevant to Defendant’s knowledge of mercury and its awareness or non of the harmful effects of its tuna fish products. However, they should be limited in scope to the relevant time period, 1993 through 2004. Document request 11 should be limited to documents relating to internal discussion, review, dissemination, analysis or study by Defendant concerning the presence of mercury in Defendant’s tuna fish products from 1993-2004.

Document request 15 is overbroad, but Defendant should produce its document retention policies in effect from 1993 through 2004. With respect to document request 17, although it

requests information relevant to Defendant's alleged failure to warn of the presence of mercury in its tuna fish products, it is unclear why Plaintiff is asking for the labels from January 01, [sic] 1990 when her Amended Complaint states that she consumed one can of tuna fish per day from 1993 through 2004. Nevertheless, the Court will allow that document request. Document requests numbers 18 and 19 are also relevant, but should be limited to pre-2005 documents. Furthermore, document request 18 should be rephrased to read: "All documents concerning the adverse effects in people who consume tuna fish containing methylmercury." Document request 20 is allowed.


Finally, it is possible that documents exist that were generated after 2004, but nevertheless pertain to the Defendant's knowledge of the abovementioned issues or acts taken in connection therewith prior to 2005. Accordingly, Defendant shall produce all documents that were generated after 2004, but which pertain to the claims and/or defenses asserted in this lawsuit within the Defendant's knowledge during the relevant time period of 1993 through 2004. Accordingly, each of the document demands and interrogatories shall be amended to meet these scope requirements.

Defendant is to bear the cost of production at this time. If the search process now results in the magnitude described by Defendant in its motion for a protective order, the Court will reconsider the shifting of costs of production after a hearing to determine the magnitude, costs and necessity of the discovery.

The parties are directed to meet and confer within ten (10) days of the date hereof to discuss Defendant's responses to Plaintiff's interrogatories, which will be revised in a manner consistent with this Letter Order.

Finally, the stay of discovery ordered by this Court on February 18, 2011 is hereby vacated, effective March 18, 2011. The parties shall appear for an in-person status conference on April 4, 2011 at 11:30 a.m.

SO ORDERED



Joseph A. Dickson, U.S.M.J.

cc: Honorable Dennis M. Cavanaugh, U.S.D.J.