




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June 22, 2012

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Honorable Joseph A. Dickson,
 United States District Court
 Martin Luther King, Jr. Federal Building & U.S. Courthouse
 50 Walnut Street
 Newark, NJ 07101

Re: Deborah Fellner v. Tri-Union Seafoods, LLC
 Civil Action No. 2:06-cv-00688-DMC-JAD

Dear Judge Dickson:

This firm represents Plaintiff, Deborah Fellner in the above captioned matter. On June 7, 2012 the parties held a telephone conference with Your Honor to discuss the progress of discovery regarding the production of documents by Tri-Union from prior litigation involving methyl-mercury in its tuna product. During that call, counsel addressed areas of discovery where agreement could not be reached. Your Honor then instructed the parties to file letters with their positions regarding those discovery disputes. This letter is submitted in response to Your Honor's request.

During the June 7th teleconference, Your Honor gave instructions that all documents Tri-Union considers relevant but confidential are to be produced subject to the filing of a confidentiality order. At that time, the parties agreed to the terms of a proposed confidentiality order with the exception of a designation for documents labeled "attorney eyes only." Tri-Union took the position that an "attorney eyes only" designation was needed to prevent Ms. Fellner from viewing certain confidential documents because it feared she would publish such documents notwithstanding a confidentiality order. In response, Your Honor instructed the parties to submit a proposed confidentiality order which included an "attorney eyes only" designation subject to a later determination by the Court as to whether such designation will ever be used. Your Honor then instructed counsel for Tri-Union to include in their letter the documents it wished to designate "attorney eyes only" and explain the reason for such designation. Plaintiff would then have an opportunity to dispute that designation in her letter. In its letter dated June 14, 2012, Tri-Union did not propose an "attorney eyes only" designation for any documents. For that reason, Plaintiff is unable to address the "attorney eyes only" issue in

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her letter. Therefore, Plaintiff's letter will only address the documents Tri-Union refuses to produce as described in its letter to Your Honor, dated June 14, 2012 and filed on June 15, 2012.

Renshaw Nos. 31 & 32: "Defendants' Motion to Compel Plaintiff to Respond to Discovery Requests;" and "Motion for Order that the Matter in Requests for Admission Be Deemed Admitted."

Defendant argues that these documents are not relevant. These documents are relevant in determining Tri-Union's position regarding methyl-mercury discovery issues in prior litigation. Depending on the position Tri-Union took in prior litigation, it may be judicially estopped from arguing a different position in this litigation.¹ Therefore these documents are relevant to the instant litigation.

Renshaw Doc. No. 42: "Deposition transcript of Jane M. Hightower, M.D."

In the Renshaw litigation, Plaintiff designated Jane M. Hightower as a treating physician and an expert witness. (See attached **Ex. A**, Plaintiff's Expert Witness List and Declaration from Renshaw Litigation). In his declaration, counsel for Renshaw declared that "Dr. Hightower has performed extensive research and clinical studies regarding mercury poisoning and the dangers of mercury in fish." *Id.* at 2-3. As such, this document is clearly relevant to the issues of causation and damages related to Plaintiff's consumption of Tri-Union's tuna product in the instant litigation. Therefore, we deem this document to be highly relevant to the instant litigation.

Renshaw Doc. No. 44: "Motion in Limine regarding Plaintiff's proffered expert witness, Dr. Hightower."

Documents related to Dr. Hightower's testimony are clearly relevant to the issues of causation and damages related to Plaintiff's consumption of Tri-Union's tuna product. Therefore we deem this document to be highly relevant to the instant litigation.

Renshaw Doc. No. 48: "Unexecuted Letter of Guarantee and Indemnification."

Because consumption of Tri-Union's product in the Renshaw action took place at the same time Fellner consumed Tri-Union's product, information regarding a party that may be liable to pay damages in this action is relevant. It doesn't matter if the document is unsigned or undated so long as it may lead to discovery of a party that may be liable to pay damages. Therefore we deem this document to be highly relevant to the instant litigation.

¹ Judicial estoppel is a discretionary tool used by courts to prevent "a party from playing fast and loose with the courts by adopting conflicting positions in different legal proceedings (or different stages of the same proceeding)." *In re Teleglobe Communs. Corp.*, 493 F.3d 345, 377 (3d Cir. 2007). Judicial estoppel is appropriate where the party to be estopped convinced a court to "accept [i.e., relied upon] its earlier position." *U.S. v. Pelullo*, 399 F.3d 197, 223 (3d Cir. 2005) (quoting *Montrose Medical v. Bulger*, 243 F.3d 773, 778 (3d Cir. 2001)).

Proposition-65 Doc. Nos. 5-14: These documents are described only as tax documents.

During the June 7th teleconference with Your Honor, Plaintiff's counsel explained that Plaintiff is not interested in obtaining dollar amounts from these documents. Rather, to the extent that these documents contain expenses identifying such information as the sources of raw material in Tri-Union's tuna products, distribution of its tuna products including number of cans produced and sold, expenses for testing and research, expenses for lobbying including lobbying the FDA regarding mercury warnings on tuna cans, expenses related to market research including tuna consumption, or any information related to factual or legal issues in this case, this information is relevant to the issues of duty to warn, causation, and damages.

For example, tuna that is caught in different waters contain different levels of mercury. To the extent we can identify from whom and thus from what waters Tri-Union obtained the fish it canned and sold, that information is relevant to the level of mercury in Tri-Union's product.

The number of cans of tuna that Tri-Union manufactured and sold is relevant for a number of reasons. First, the number of cans of tuna that Tri-Union produced is relevant to the issue of methyl-mercury testing to determine if the number of cans it tested was a statistically, representative sample of the level of mercury in its product. For example, if Tri-Union only tested 50 cans each year for methyl-mercury but sold millions of cans each year, the level of methyl-mercury in the 50 cans tested may not be a statistically representative sampling of the millions of cans sold. The number of cans sold is also relevant to the issue of Tri-Union's duty to warn and its duty to investigate, including conducting its own research as to the harmful effects of consuming tuna containing methyl-mercury.

Expense information for testing and research is relevant because it will lead to the identity of the entity that was paid to conduct the testing and/or research and can lead to the production of that test data and research from that entity. The test data and research is relevant to the type of warning Tri-Union should have included on its product. For example, research concerning consumer consumption of tuna is directly relevant to the failure to warn claim. It is also relevant to Tri-Union's defense that Ms. Fellner's one-can-a-day consumption of tuna was abnormal.

Expense information regarding Tri-Union's lobbying activities concerning methyl-mercury in tuna, especially with the FDA, is highly relevant to the issue of Tri-Union's defense that a methyl-mercury warning was not required because the FDA made a determination not to require such warning labels. What communications Tri-Union had with the FDA, including its lobbying activities with the agency, are highly relevant to the claims and defense at issue in this litigation.

Proposition-65 Doc. Nos. 17, 20, 27, 44, 46, 55, 54, 59-60, 63, 65, 66, 67, 71, 72, 90, and 119.

The parties resolved the issues concerning these documents during a conference call on June 6th, and these documents were not raised during the telephone conference with Your Honor on June 7th. Therefore, it is unknown why counsel for Tri-Union included these documents in its June 14th letter to the Court.

Proposition-65 Doc. Nos. 32, 36, & 62: “Tri-Union’s Responses to Public Media Center’s 1st Set of Special Interrogatories,” “Tri-Union’s Responses to Public Media Center’s 2nd Set of Special Interrogatories,” and “Tri-Union’s Responses to State of California’s 1st Set of Special Interrogatories.”

Tri-Union produced these documents but redacted information regarding sales data. As explained previously, the number of cans of tuna that Tri-Union manufactured and sold is relevant for a number of reasons. First, the number of cans of tuna that Tri-Union produced is relevant to the issue of testing for methyl-mercury to determine if the number of cans it tested was a statistically, representative sample of the number of cans it sold. The number of cans sold is also relevant to the issue of Tri-Union’s duty to warn and its duty to investigate, including conducting its own research as to the harmful effects of consuming tuna containing methyl-mercury.

Proposition-65 Doc. Nos. 47 & 48: “Del Monte Answer to State of California Complaint,” and “Bumble Bee Answer to State of California Complaint.”

These documents are relevant because Del Monte and Bumble Bee produce and/or distribute tuna products like Tri-Union. In addition, all three entities were defendants in the same litigation regarding methyl-mercury in tuna products. Any admissions or responses by a producer or distributor of tuna products related to methyl-mercury in tuna products is factually relevant to the issues in the instant litigation, including failure to warn, causation and damages.

Proposition-65 Doc. No. 74: “Correspondence from Senior Vice President of Marketing for Chicken of the Sea to defense counsel.”

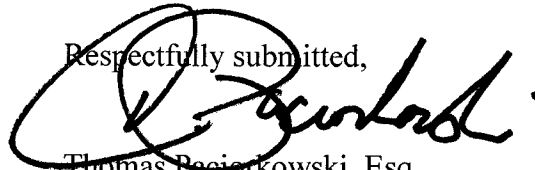
To the extent that these documents contain expense information identifying the sources of raw material in Tri-Union’s tuna products, distribution of its tuna products including number of cans produced and sold, testing and research, lobbying including lobbying the FDA regarding mercury warnings on tuna cans, market research including tuna consumption, or any information related to factual or legal issues in this case, this information is relevant for the same reasons raised in Plaintiff’s response to **Proposition-65 Doc. Nos. 5-14, *supra***.

Proposition-65 Doc. No. 76, 124, 125, 126 & 135: Tri-Union has represented that these documents contain sales and other financial data.

To the extent that these documents contain expense information identifying the sources of raw material in Tri-Union's tuna products, distribution of its tuna products including number of cans produced and sold, testing and research, lobbying including lobbying the FDA regarding mercury warnings on tuna cans, market research including tuna consumption, or any information related to factual or legal issues in this case, this information is relevant for the same reasons raised in Plaintiff's response to **Proposition-65 Doc. Nos. 5-14, *supra***.

For all the aforementioned reasons, Plaintiff respectfully requests that the Court Order Tri-Union to produce the withheld documents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Pacierkowski', written over the typed name below.

Thomas Pacierkowski, Esq.