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June 29, 2012

Via ECF

Honorable Joseph Dickson, U.S.M.J.
United States District Court
U.S. P.O. & Courthouse Building
Federal Square
Newark, New Jersey 07101

Re: *Deborah Fellner v. Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea*
Civil Action No. 06-CV-688 (DMC)

Dear Judge Dickson:

We represent Tri-Union Seafoods, L.L.C. in the above-captioned matter.

In accordance with the parties' telephone conference with the Court (Dickson, J.) on June 7, 2012, and having initially submitted on June 15, 2012, Tri-Union now replies to the letter the Plaintiff submitted to the Court on June 22, 2012.

I. Renshaw

No. 31: Defendants' Motion To Compel Plaintiff To Respond to Discovery Requests (Aug. 1, 2005)

While the Plaintiff has argued that the doctrine of judicial estoppel should be applied here, defendant respectfully disagrees. The doctrine of judicial estoppel does not apply here. As Tri-Union has previously explained, it produced the documents that were the subject of the Motion To Compel – Defendants' 2nd Set of Requests for Production and Defendants' 2nd Set of Specially Prepared Interrogatories, (*Renshaw Index Nos. 26 and 27*, respectively) – as it acknowledged the relevance of such documents up front and without equivocation. Tri-Union produced these documents to the Plaintiff in their original and unredacted form on April 13, 2012, which should ameliorate the Plaintiff's concern regarding "determining Tri-Union's position regarding methyl-mercury discovery issues in prior litigation." (*Pl. June 22, 2012 ltr. at 2.*) The Motion To Compel will add nothing to the Plaintiff's understanding of Tri-Union's position on this issue. It merely asks the California trial court to order Mr. Renshaw to respond to the discovery requests, copies of which the Plaintiff already has.

No. 32: Motion for Order that the Matter in Requests for Admission Be Deemed Admitted (Aug. 1, 2005)

Similar to Renshaw Index No. 31, Tri-Union respectfully submits that the equitable doctrine of judicial estoppel does not apply to this document. As Tri-Union has previously explained, it has already produced the document that was the subject of the Motion for Order, Defendants' 1st Set of Requests for Admission, (*Renshaw Index No. 25*), and acknowledged its relevance. Tri-Union produced this document to the Plaintiff in its original and unredacted form on April 13, 2012, which should ameliorate the Plaintiff's concern regarding "determining Tri-Union's position regarding methyl-mercury discovery issues in prior litigation." (*Pl. June 22, 2012 ltr. at 2.*) The Motion For Order will add nothing to the Plaintiff's understanding of Tri-Union's position on this issue, as it merely asks the California trial court to order Mr. Renshaw to respond to the Requests for Admission, a copy of which the Plaintiff already has.

No. 42: Deposition Transcript of Jane M. Hightower, M.D. (Sept. 21, 2005)

The Plaintiff's letter brief to the Court simply ignores the very basic arguments that Tri-Union made in its initial submission regarding this document. Instead, the Plaintiff cites Dr. Hightower's research and studies. However, Dr. Hightower's participation in several recent scientific studies is not the benchmark for discoverability in this case. Instead, as Tri-Union has previously discussed and noted its reliance, this Court's March 11, 2011 Letter Order established the parameters for appropriate subjects of discovery in this case.

The threshold issue is whether the subject document falls within the alleged exposure period. Here, the deposition took place on September 21, 2005 after the exposure period, so the transcript has no bearing on Tri-Union's knowledge relative to mercury warnings from 1993-2004. The secondary issue is whether the contents of the deposition transcript can be said to relate back to knowledge that Tri-Union had of methylmercury in tuna during the alleged exposure period. Again, as Tri-Union addressed during its initial submission, the transcript does not. Dr. Hightower testified as a treating physician, not an expert, and did not offer any opinions regarding Tri-Union's knowledge of methylmercury in tuna. Finally, the document upon which the Plaintiff relies to deem Dr. Hightower to have acted as an expert witness in the *Renshaw* case does not, by its own express terms, do so. (*See Plaintiff's Expert Witness List and* Declaration, *COSI 434-436, attached to Pl. June 22, 2012 ltr.*)

- "All of the persons listed above[, which include Dr. Hightower,] have been plaintiff's treating physician's. *They have not been retained by plaintiff to render expert opinions*, except that plaintiff *intends to retain* Dr. Hightower to render expert opinions." (*COSI 435 (emphasis added).*)

- "Dr. Hightower has been on an extended vacation and, thus, *has not yet specifically advised plaintiff's counsel that she has agreed to testify at trial.*" (*COSI 436 (emphasis added).*)

Thus, Mr. Renshaw's attorney, in his proffered Expert Witness List, dated September 6, 2005, more than two weeks before Dr. Hightower's deposition, acknowledged that he had not yet retained Dr. Hightower as an expert witness. During her deposition, fifteen days later, Dr.

Hightower testified that she had not yet even discussed serving as Mr. Renshaw's expert with his counsel. (*Hightower depo. at 41:12-17 (excerpts of depo. submitted with Tri-Union's June 14, 2012 ltr.).*)

Accordingly, given that Dr. Hightower testified (1) outside the alleged exposure period; and (2) as a fact witness, treating physician only, and not as an expert, providing opinion testimony, her deposition transcript from the *Renshaw* litigation is not relevant to this case.

No. 44: Motion In Limine regarding Plaintiff's Proffered Expert Witness, Dr. Hightower (Sept. 23, 2005)

Tri-Union maintains that this document is irrelevant for all the same reasons that Dr. Hightower's deposition transcript is irrelevant. Further, as the Plaintiff's Expert Witness List and Declaration (*COSI 434-436, attached to Plaintiff's June 22, 2012 submission to the Court.*) from *Renshaw* states expressly, and as Tri-Union has repeatedly represented, Dr. Hightower was Mr. Renshaw's treating physician, and was never retained as an expert witness on his behalf. The fact of Dr. Hightower's "extensive research and clinical studies regarding mercury poisoning and the dangers of mercury in fish" is irrelevant to the discoverability of the Motion in Limine. (*COSI 435-436.*) As Mr. Renshaw's Expert Witness List and Declaration states clearly, Dr. Hightower "ha[d] not yet specifically advised plaintiff's counsel that she . . . agreed to testify at trial." (*COSI 436.*) This admission by counsel, taken in conjunction with Dr. Hightower's deposition testimony that she had not agreed to testify as an expert witness for Mr. Renshaw were the bases for Tri-Union's Motion in Limine to exclude Dr. Hightower as an expert witness. Tri-Union continues to use the Court's March 11, 2011 Letter Order as the parameters for appropriate discovery guidelines in this case. Accordingly, where the Motion in Limine was created after the alleged exposure period, and does not contain information relating back in time that reflects Tri-Union's knowledge of methylmercury in its tuna fish, it is not properly the subject of discovery, and is therefore irrelevant for purposes of Ms. Fellner's lawsuit.

No. 48: Unexecuted Letter of Guarantee and Indemnification (undated)

In her June 22, 2012 letter brief, the Plaintiff argues that this document is relevant because "it may lead to discovery of a party that may be liable to pay damages." Tri-Union represents to this Court that this letter is a fill-in-the blank form agreement, which was not filled out. The language of the form essentially states that Chicken of the Sea International agrees to defend and indemnify an entity whose name is to be filled in the blank.

This document is a blank form, much like a Blumberg[1] legal form. The Plaintiff will not be discovering any additional information concerning additional parties that may be liable to pay damages in this case. (*See Pl. ltr. at 4.*) Further, as Tri-Union has previously indicated, nothing in this document suggests that it: (1) was created within the alleged exposure period; (2) contributed to Tri-Union's understanding regarding methylmercury in tuna; (3) concerns the

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allegations of the Amended Complaint; or (4) is likely to lead to the discovery of admissible evidence.

II. Proposition 65

Nos. 5-14: Tax documents for Alaska, Colorado, Connecticut, Florida, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, California, Wisconsin, Arkansas, Indiana, Michigan, Georgia, Hawaii, and Illinois (2000 – 2003)

Not surprisingly, the Plaintiff's letter brief does not address the legal precedent Tri-Union cited, which requires her to prove her prima facie entitlement to punitive damages before she may seek discovery of documents concerning Tri-Union's financial condition. *Herman v. Sunshine Chem. Specs., Inc.*, 133 N.J. 329, 346 (1993); *Hudak v. Fox*, 215 N.J. Super. 233, 235-36 (App. Div. 1987) ("Since the right of plaintiffs herein to punitive damages hinges ultimately on proof of actual malice, prima facie proof thereof is prerequisite to pretrial discovery of defendant's financial worth."). Indeed, the Plaintiff utterly ignores the issue regarding her likelihood of success for obtaining punitive damages against Tri-Union. Unless and until she has done so, the Plaintiff is not entitled to discovery of any of Tri-Union's financial information. *See Herman*, 133 N.J. at 345 ("Discovery of income tax returns . . . may go too far.") (citing *Lepis v. Lepis*, 83 N.J. 139, 158 (1980)).

Further, tax returns, such as those documents that comprise Nos. 5 through 14 of the Proposition 65 Index, do not contain much of the information that the Plaintiff identifies in her June 22, 2012 letter. Rather, a corporate tax return identifies the income, deductions, credits, and adjusted gross income for a company. Accordingly, unless and until the Plaintiff establishes her right to Tri-Union's financial information, she is not entitled to discovery of documents containing such information, such as the tax returns in Nos. 5 through 14 of the Proposition 65 Index.

No. 32: Tri-Union's Responses to Public Media Center's 1st Set of Special Interrogatories (Aug. 14, 2003)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

No. 36: Tri-Union's Responses to Public Media Center's 2nd Set of Special Interrogatories (Sept. 25, 2003)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

No. 47: Del Monte Answer to State of California Complaint (July 21, 2004)

The Plaintiff asserts in her June 22, 2012 letter that Del Monte's July 21, 2004 Answer in the Proposition 65 case is relevant to this case because Del Monte "produce[s] and/or distribute[s] tuna products *like Tri-Union*." (*Pl. ltr. at 4 (emphasis added).*) Such an assertion is not sufficient grounds to establish relevancy. Further, the Plaintiff's contention does not demonstrate that it is more likely than not that anything contained in Del Monte's Answer is likely to lead to the discovery of admissible evidence. Finally, as Tri-Union has previously noted, the Defendants from the Proposition 65 case subsequently filed a single Amended Answer on April 15, 2005, and Tri-Union produced a copy of this Answer to the Plaintiff on April 13, 2012. (*See Proposition 65 Index No. 64.*) Thus, the Plaintiff has a copy of Del Monte's official, final Answer to the State of California's Complaint from the Proposition 65 case.

No. 48: Bumble Bee Answer to State of California Complaint (July 22, 2004)

The Plaintiff asserts in her June 22, 2012 letter that Bumble Bee's July 22, 2004 Answer in the Proposition 65 case is relevant to this case because Bumble Bee "produce[s] and/or distribute[s] tuna products *like Tri-Union*." (*Pl. ltr. at 4 (emphasis added).*) Such an assertion is not sufficient grounds to establish relevancy. Further, the Plaintiff's contention does not demonstrate that it is more likely than not that anything contained in Bumble Bee's Answer is likely to lead to the discovery of admissible evidence. Finally, as Tri-Union has previously noted, the Defendants from the Proposition 65 case subsequently filed a single Amended Answer on April 15, 2005, and Tri-Union produced a copy of this Answer to the Plaintiff on April 13, 2012. (*See Proposition 65 Index No. 64.*) Thus, the Plaintiff has a copy of Bumble Bee's official, final Answer to the State of California's Complaint from the Proposition 65 case.

No. 62: Tri-Union's Responses to State of California's 1st Set of Special Interrogatories (Mar. 1, 2005)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

No. 74: Correspondence from Senior Vice President of Marketing for Chicken of the Sea to Defense Counsel (Aug. 25, 2005)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36. Further, the cover letter preceding the financial information is a privileged attorney-client communication.

No. 76: Tri-Union's Supplemental Responses to State of California's 2nd Set of Requests for Production (Sept. 7, 2005)

In her June 22nd letter, the Plaintiff completely ignores one of the central issues concerning the redacted information on these pages. The financial information in question is not

just Tri-Union's. Rather, as Tri-Union has previously explained, the redactions serve to protect the financial information of other tuna producers who are not parties to this case. During previous telephone conferences between the parties, in which the Court participated, counsel for the Plaintiff acknowledged that such information is irrelevant to the Plaintiff's failure to warn claim, and that the Plaintiff had no interest in obtaining such information.

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36. Furthermore, insofar as the redacted information pertains to certain of Tri-Union's Co-Defendants from the Proposition 65 litigation, that information falls within the scope of the Protective Order of the Proposition 65 case.

No. 124: Tri-Union's Answers to Plaintiff's Interrogatories Nos. 26 and 27 concerning Gross Sales, Contribution Margins, Apportioned Expenses, and Profit and Loss from Canned Tuna Sales in California from June 2000 through December 2000 (undated)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

No. 125: Tri-Union's Answer to Plaintiff's Interrogatory No. 28 Concerning Current Assets, Liabilities, and Total Equity of Chicken of the Sea as of June 30, 2005; and Net Sales and Net Income from July 1, 2004 through June 30, 2005 (undated)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

No. 126: Tri-Union's Response to Plaintiff's Document Request No. 10 Concerning Audited Financial Statements from June 30, 2000 through June 30, 2005 (undated)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

No. 135: Tri-Union's Answers to Plaintiff's Interrogatories Nos. 26 and 27 Concerning Gross Sales, Contribution Margins, Apportioned Expenses, and Profit and Loss from Canned Tuna Sales in California from June 2000 through June 2005 (undated, though after June 30, 2005)

As Tri-Union has previously explained, the redacted information in this document contains sales data, which is financial information to which the Plaintiff is not entitled unless and until she has proven her prima facie entitlement to punitive damages against Tri-Union. *See Herman*, 133 N.J. at 346; *Hudak*, 215 N.J. Super. at 235-36.

Discovery Confidentiality Order

In her June 22nd letter, the Plaintiff suggests that it was her understanding that Tri-Union was to submit, in conjunction with its June 14th letter, documents that it wished to designate as attorney's eyes only under the not-yet-approved Discovery Confidentiality Order. Tri-Union submits that it does not share the Plaintiff's understanding concerning that issue. Rather, it was Tri-Union's understanding after the June 7th conference call with the Court, that the parties were to work together to agree on the terms of a Proposed Discovery Confidentiality Order, and then present such a Proposed Order to the Court for its review and approval. It was Tri-Union's understanding that, once such an Order was in place, Tri-Union might then seek to designate as "attorney's eyes only" those documents it wished to prevent the Plaintiff from viewing. At that time, and not now, defense counsel will approach counsel for the Plaintiff, and then the Court regarding this issue. It was also Tri-Union's understanding that the parties were to submit letter briefs to the Court concerning those documents over which there is currently a discovery dispute regarding relevancy. This the parties have now done.

With regard to the Proposed Discovery Confidentiality Order, the parties have narrowed the issue down to the scope of the designation of "attorney's eyes only." At this time, Tri-Union is waiting for the Plaintiff to submit a proposed response concerning this issue, which counsel for the Plaintiff has advised should be accomplished within a reasonably short period of time. Counsel for the parties have been working together amicably on this issue, and will present a Proposed Order to the Court forthwith as soon as they agree on this final issue, which counsel anticipate should be accomplished shortly.

Respectfully Submitted,

Kenneth A. Schoen

cc: Thomas Paciorkowski, Esq.
John A. Kiernan, Esq.