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April 26, 2004

Via Overnight Mail

Hon. William Lockyer
California Attorney General
1300 "I" Street
Sacramento, CA 95814

**Re: Methyl Mercury Exposure From Canned Tuna
California Proposition 65**

Dear Attorney General Lockyer:

Our firm has been approached over the past several months by a number of individuals concerned over the dangerously high levels of mercury found in canned tuna. More specifically, many of these individuals have suffered from methyl mercury poisoning through consumption of canned tuna. Like many people, these individuals greatly increased their intake of this product in recent years based on government reports and industry advertising touting the health benefits of eating fish, including canned tuna.

As both of your agencies well know, large predatory fish species accumulate mercury in their tissues as shown by numerous tests. When humans consume such fish, approximately 95% of mercury is transmitted and absorbed. See Exhibit A. The industry has known of this contamination for years, but fails to warn consumers of mercury levels through notice on individual cans of tuna, despite now clear evidence indicating the toxicity of canned tuna through both governmental and private testing.

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Because both the Environmental Protection Agency and the National Academy of Sciences have expressly identified canned tuna as a health risk, the people who have approached us do not understand why state and federal agencies have not taken action to ensure that the canned tuna industry fully and clearly warns the public of the mercury risk as required by law.

We would like to tell the individuals who contact us that state and federal agencies will require the tuna canning industry to post clear warnings on canned tuna disclosing mercury levels. One of these individuals, Ms. Wendy Moro of Burlingame, California, has taken her case to governmental agencies and the media hoping to effect change that way, but to no avail. Ms. Moro has appeared on nationally-televised new programs, and numerous local and national publications have covered her battle with mercury poisoning as a result of her eating canned tuna regularly for roughly three years.

We view this matter as a clear violation of California's Proposition 65 as the canned tuna industry's product contains mercury and methyl mercury without providing a clear and effective warning as required by Health and Safety Code Section 25249.6. *See* Exhibit B.

The law offices of Cotchett, Pitre, Simon & McCarthy have identified Bumble Bee, Chicken of the Sea and Starkist, among others, as brands which fail to provide clear and reasonable warnings. We have reviewed scientific studies conducted by Dr. Jane Hightower, the Mercury Policy Project and the FDA. *See* Exhibits A and C, respectively; *see also* www.epa.gov/waterscience/fishadvice/advice.html. Both mercury and methyl mercury are listed as chemicals known to the state and federal governments as causing reproductive toxicity and other ill effects. More important, the federal government began publishing reports of elevated mercury levels in canned tuna in 1993. *See* Exhibit C. Thus, the identified companies have known that they were in violation of Proposition 65's warnings requirements for more than a decade.

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We are aware that a lawsuit was filed nearly two years ago, entitled *Public Media Center v. Tri-Union Seafoods, L.L.C., H.J. Heinz Co., and Bumble Bee Seafoods, Inc.* Case No. 01-402975 (May 31, 2002). However, our check of the files indicates that neither of your agencies have intervened or otherwise participated in this case. We are concerned that this case may be inappropriately resolved absent your active participation and oversight in this very important issue.

Please advise us as soon as possible whether you intend to bring an action to require mercury warnings on tuna can labels. We would hope to hear from you within 60 days to avoid our filing an action. Should you have any questions, please do not hesitate to contact me at (650) 697-6000.

Sincerely,



GLORIA D. SMITH

Enclosures

CERTIFICATE OF MERIT
Health and Safety Code Section 25249.7(d)

I, Gloria D. Smith, hereby declare:

- (1) This Certificate of Merit accompanies the attached sixty-day notice(s) in which it is alleged the parties identified in the notices have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.
- (2) I am the attorney for the noticing party.
- (3) I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.
- (4) Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.
- (5) The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: April 24, 2004

CERTIFICATE OF SERVICE

I am employed in San Mateo County, which is where service of the document(s) referred to below occurred. I am over the age of 18 and not a party to the within action. My business address is Cotchett, Pitre, Simon & McCarthy, San Francisco Airport Center, 840 Malcolm Road, Suite 200, Burlingame, California 94010. I am readily familiar with Cotchett, Pitre, Simon & McCarthy's practices for the service of documents. On this date, I served or caused to be served a true copy of the following document(s) in the manner listed below:

PROPOSITION 65 60-DAYS NOTICE LETTER

XXX BY MAIL: I caused the sealed envelope containing the aforementioned document(s) to be deposited with the United States Postal Service on that same day in the ordinary course of business.

[SEE ATTACHED SERVICE LIST]

_____ **BY OVERNIGHT COURIER SERVICE:** I caused the sealed envelope containing the aforementioned document(s) to be delivered via overnight courier service to the addressee(s) specified below:

_____ **BY FACSIMILE:** I caused the document(s) to be transmitted to the telephone number(s) of the addressee(s) specified below:

_____ **HAND DELIVERY:** I caused the sealed envelope containing the aforementioned document(s) to be hand delivered to the addressee(s) specified below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Burlingame, California, on April 26, 2004.

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