UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: BABY FOOD PRODUCTS LIABILITY LITIGATION This Document Relates to: ALL ACTIONS	Case No. 24-md-3101-JSC MDL 3101 Hon. Jacqueline Scott Corley **JOINT STATEMENT FOR NOVEMBER 7, 2024 CASE MANAGEMENT CONFERENCE** Date: November 7, 2024 Time: 11:00 a.m. PT Location: Courtroom 8 19th Floor 450 Golden Gate Ave. San Francisco, CA 94102

Plaintiffs and Defendants[1] respectfully submit this Case Management Conference Statement in advance of the November 7, 2024 Case Management Conference.

I. STATUS OF SERVICE OF MASTER COMPLAINT

As of the date of this filing, Plaintiffs have received proof of service on all Defendants except for Defendant Hero, A.G. Defendants have confirmed that Defendant Hero, A.G. has been served. Plaintiffs have not received proof of service despite diligent and multiple follow up attempts. Once Plaintiffs receive proof of service for all Defendants, Plaintiffs will serve the "Notice of Completed Service," triggering Defendants' deadlines to respond to the Master Complaint.

II. PLAINTIFFS' PRESERVATION STATEMENT

Defendants' General Position:

In Pretrial Order No. 8, the Court ordered Plaintiffs to file a statement "detailing all of the steps ***each*** Plaintiff has taken for evidence preservation." Dkt. No. 244 at 1 (emphasis added). Plaintiffs' statement, which was filed on October 11, 2024, is insufficient for at least three reasons: (1) it lacks information about what Plaintiffs did, as opposed to what they were instructed to do; (2) it lacks information about any individual Plaintiff, and speaks only to Plaintiffs generally; and (3) it fails to describe the efforts undertaken to protect some of the most important information in each case (e.g., information regarding each Plaintiff's purchase history).

Preservation is a duty that attaches to Plaintiffs and Defendants alike. *See Bright Sols. for Dyslexia, Inc. v. Doe 1*, No. 15-CV-01618-JSC, 2015 WL 5159125, at *2 (N.D. Cal. Sept. 2, 2015) (Corley, M.J.) ("Once a complaint is filed, parties to a lawsuit are 'under a duty to preserve evidence that is relevant or could reasonably lead to the discovery of admissible evidence.'") (quoting *Echostar Satellite LLC v. Freetech, Inc.*, No. C–07–06124 JW, 2009 WL 8399038, at *2 (N.D. Cal. Jan. 22, 2009)). A party's obligation to preserve generally attaches "'[a]s soon as a

[1] As used herein, "Defendants" does not include any defendant who has not yet appeared in the action (or who is challenging jurisdiction).

potential claim is identified, [whereby] a litigant is [then] under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.'" *Gay v. Parsons*, No. 16-cv-05998-CRB, 2024 U.S. Dist. Lexis 167574, at **7-8 (N.D. Cal., Sept. 17, 2024) (quoting *In re Napster, Inc. Copyright Litig*., 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006)).

In the parties' experience in related state court litigation, the importance of preserving evidence exclusively within the knowledge or control of Plaintiffs has become apparent. Unlike some other MDLs where the critical records may be limited to medical records exclusively in the possession of third-party medical providers with reliable preservation procedures, here, Plaintiffs possess, and/or have control and the unique ability to access, at least three categories of evidence that are central to Plaintiffs' claims and critical to Defendants' defenses: (1) purchase and loyalty records for retailers where Plaintiffs bought food, including Defendants' baby food; (2) credit card and debit card statements; and (3) photos and videos.

The first two categories of information are necessary to establish the consumption of Defendants' baby food products which is an essential part of these cases – as well as consumption of other foods during the time period relevant to each Plaintiff.[2] In the two cases in Los Angeles Superior Court that have gone through extensive discovery, the plaintiffs' parents' memories of what they fed the plaintiffs did not match the actual evidence of food purchases from the retailer records. Not only did the plaintiffs use (in some instances, extensively) products that they did not remember, but more importantly, they claimed a memory of using products that they never purchased. The level of unreliability of parental memory, while understandable years after the fact, cannot be adequately addressed by Defendants without this documentation. For this reason, preservation of purchase records and credit card statements is critical. Purchase records may

[2] A Plaintiff's total dietary history—including products sold by Defendants *and other products*—is important to the defense of these cases. A Plaintiff may have eaten, for example, baby food products sold by companies who are not named in this litigation or other products containing the same or higher levels of the heavy metals Plaintiffs contend are harmful. For example, in one state court case, Defendants learned that the plaintiff ate more baby food products made by non-defendants than defendants, and the plaintiff's use of non-defendant foods, whether baby food or not, eclipses his use of the defendants' products. All of this information is important to understanding a Plaintiff's exposure to heavy metals.

include receipts, online purchase records, or information residing with third party retailers including records of purchases and records from customer loyalty programs that Plaintiffs belong to at retail stores. Credit card and debit card statements reflect the dates and stores where Plaintiffs' caregivers purchased foods. Importantly, for most retailers, this is not information Defendants can obtain without information maintained solely by Plaintiffs (or their parents) including the customer loyalty number, phone number, and credit card number. Some retailers also need the exact date and amount of each transaction – which can potentially be reconstructed by credit or debit card information not known to Defendants.

The third category of information, photos and particularly videos of Plaintiffs, is highly valuable for demonstrating the child's developmental history. Experience has also shown that these images may reflect what foods the child ate. Given how easy it is for people to take photos on their phones and how many photos parents may take starting at birth, this is an enormous and invaluable source of highly relevant information in these cases.

Preservation of these categories of evidence is critical to Defendants, not only because of the importance of the evidence, but also because case-specific discovery may not commence for several months and, absent the guiding hand of counsel, Plaintiffs and their parents are relatively unsophisticated in terms of their experience with preservation. In light of the import of preservation, Defendants raise three concerns with Plaintiffs' preservation statement.

First, Plaintiffs provide no information regarding the steps any Plaintiff has actually taken. *See* Dkt. 251; *see also* Pretrial Order No. 8 (ordering Plaintiffs to detail "all the steps each Plaintiff ***has taken***," not what steps each Plaintiff will take or has been instructed to take). Rather, Plaintiffs' statement provides only a general description of what Plaintiffs' counsel told individual Plaintiffs to do. While Plaintiffs' counsel have instructed Plaintiffs to take action, Defendants have no information about whether any individual Plaintiff actually took steps to, for example, shut off an auto-delete feature on an iPhone or back-up photos taken on a mobile device. In the case currently being worked up in state court, *Landon R.*, the plaintiff's mother purportedly dropped her phone in a swimming pool and the photos located on the phone would have been lost had they not been backed up to a cloud-based storage system. Defendants cannot evaluate the sufficiency of

each Plaintiff's preservation efforts if they do not know what any Plaintiff did.

Second, the preservation statement speaks only to Plaintiffs generally without reference to any individual Plaintiff. *See* Dkt. 251; *see also* Pretrial Order No. 8 (ordering Plaintiffs to detail "all the steps ***each Plaintiff*** has taken," not what Plaintiffs collectively have done). Again, Defendants cannot evaluate the sufficiency of preservation if they do not know what each and every Plaintiff did to preserve information.

Third, the preservation statement does not provide information on what Plaintiffs are doing to notify third parties over whom they have a unique ability to identify and preserve records of their preservation obligations, or to obtain third party information before it is destroyed. Plaintiffs provide no information, for example, as to whether they downloaded online credit card statements so that information is not later unavailable to them because of the passage of time. They have not indicated whether they have identified the stores at which Plaintiffs' parents purchased food or the credit cards used to purchase that food, or whether they asked those third-party retailers to preserve their purchase history and customer loyalty data.

Plaintiffs contend that the transcript of the September 26, 2024 hearing suggests that the Court did not intend to require the statement to include what *each* Plaintiff did, nor what the Plaintiff *did*, as opposed to what counsel instructed the Plaintiff to do. The Court's order is clear and required Plaintiffs to identify "all the steps ***each*** Plaintiff ***has*** taken." Pretrial Order No. 8 (emphasis added). But more importantly, the Court *should* order *each* Plaintiff to identify what steps were actually taken—without this information, Defendants have no way of assessing what preservation steps have actually been taken.

Plaintiffs contend that preservation is too burdensome if it must be done as to each Plaintiff in an MDL This MDL is not like a typical MDL where the evidence in a Plaintiffs' control is limited to medical records stored by third parties with reliable preservation methods. Here, the information is directly in the hands of Plaintiffs, or it is information that Plaintiffs control and can access or request. And it is disappearing every day: Many retailer locations keep customer loyalty data for a limited period of time, and each month, more information is destroyed under standard retention policies. Several banks permit Plaintiffs to request online bank records for a set number

of months, meaning obtaining statements will become more difficult with the passage of time, if they are preserved at all. Plaintiffs should not be allowed to use the MDL procedural mechanism to avoid preservation obligations, particularly where the parties' prior experience demonstrates that the evidence is highly relevant and some amount of it will be lost with passage of time.

Accordingly, Defendants ask that Plaintiffs (and their caregivers) be required to do the following:

1. Identify what ***each*** Plaintiff has already done to preserve their own data and relevant third-party information.
2. Preserve all photos and videos of the Plaintiff to a cloud-based back-up.
3. Identify to Plaintiffs' counsel all stores where Plaintiffs' caregivers purchased food for the Plaintiff, regardless of whether it was baby food.
4. Identify to Plaintiffs' counsel all credit card and/or debit card numbers for accounts that Plaintiffs' caregivers used to purchase food for the Plaintiff, regardless of whether it was baby food.
5. Identify to Plaintiffs' counsel all customer loyalty card/account numbers for stores where Plaintiffs' caregivers purchased food for the Plaintiff, regardless of whether it was baby food.
6. Download a copy of any online credit card and/or debit card statements for accounts that Plaintiffs' caregivers used to purchase food for the Plaintiff, regardless of whether it was baby food.

Armed with the stores at which Plaintiffs purchased food, the credit or debit card used to purchase food, and customer loyalty information, counsel for either side can provide notice to the third-party retailers of their preservation obligations. Accordingly, Defendants request that Plaintiffs' counsel be ordered to send a preservation letter to every store where Plaintiffs' caregivers purchased food for the Plaintiff, regardless of whether it was baby food. Alternatively, Defendants are willing to send the letters if Plaintiffs provide them with information regarding the stores at which Plaintiffs' caregivers purchased food, the credit or debit card used to purchase food, and customer loyalty information.

None of Defendants' requests place an undue burden on Plaintiffs. In the face of losing the very evidence Defendants need to assess whether Plaintiffs even used any of their products, Defendants have proposed a phased approach which merely requires Plaintiffs at this time to identify where they purchased food and the credit card and loyalty information they used to purchase food.

Defendants do not, as Plaintiffs suggest, ask each Plaintiff to identify specific transactions or purchase amounts at this time. With the information Defendants identify, either side can reach out to the third-party retailers. Defendants are willing to participate in this process if Plaintiffs are willing to provide the information to Defendants.

Nor do the steps Defendants suggest constitute premature discovery on discovery. Retailer records are relevant. They need to be preserved. The steps above will achieve preservation. Defendants ask only that Plaintiffs disclose the specific retailers, credit card numbers, and loyalty account information to their attorneys; Defendants would only receive such information to the extent Plaintiffs want to put the burden on Defendants to send a letter to these retailers to preserve the evidence.

Finally, Plaintiffs suggest that the proper procedure is to address any "perceived inadequacy in preservation" at the time a specific case is selected for discovery. Plaintiffs' framework is wrong: Deficiencies in *preservation* must be addressed and corrected now.[3] Defendants cannot wait until a specific case has been selected to confirm that each Plaintiff has properly preserved this evidence. The evidence disappears each month, unfortunately, and Defendants do not have sufficient information to request its preservation without information from Plaintiffs. Plaintiffs need to act to preserve the evidence now. If they wait to preserve the evidence until bellwether selection is completed, some evidence will almost certainly disappear in the ensuing time.

Plaintiffs' Position:

Plaintiffs are in complete agreement with the foundational principle Defendants identify above: that the preservation of evidence is a duty that applies to Plaintiff and Defendants alike. Consistent with that duty, undersigned counsel have communicated to each individual Plaintiff the specific steps necessary to preserve potentially relevant evidence. In particular, counsel has

[3] Plaintiffs have raised with respect to Defendants' preservation statements concerns regarding perceived deficiencies in *production*, such as purported (but disputed) failure to disclose search terms. *Production* deficiencies should be addressed in the context of Defendants' productions, not adjudicated based on hypothetical concerns. But *preservation* deficiencies, i.e., concerns about preservation efforts undertaken by a party, should be addressed at the outset of the action, before data are lost.

instructed each Plaintiff to preserve all evidence potentially relevant to their claims, including all evidence in the form of electronically stored information or social media platform content. Counsel has further instructed each Plaintiff that potentially relevant information includes, but is not limited to, (1) medical records detailing the injury/injuries at issue; (2) medical bills and/or other relevant expenses; (3) receipts of other documentation for purchases of the baby food products at issue; (4) images or videos document the injury/injuries and/or the baby food products at issue; (5) communications regarding the baby food products at issue; and (6) communications regarding Defendants. Dkt 251 at 1-2.

Plaintiffs respectfully submit that these actions fully comport with the Court's PTO No. 8 and its guidance concerning that PTO. 09/26/24 Transcript, at 8:1-5 ("I was going to require them to do what I required you to do, which is by I think it's October 11th, they give me and you a written submission that identifies all the steps *you've take[n] to get your clients to preserve all their evidence*.") (emphasis added).

Yet, Defendants want more. They seek to prescribe precisely what counsel must communicate to Plaintiffs regarding their preservation obligations. Defendants' attempt to micromanage this process may be well-meaning, but it is entirely unnecessary. Plaintiffs' counsel are experienced attorneys fully capable of working with their clients to ensure they are meeting their preservation obligations. There is also no basis for Defendants' demand that each Plaintiff individually certify to the Court what steps they have taken to fulfill their responsibility to preserve. It should be presumed, not doubted, that counsel's preservations instructions will be heeded. Indeed, no one is asking each of the relevant witnesses at each of the Defendants to describe for the Court exactly what steps have been taken to preserve.

Defendant's position is misguided for three (3) additional reasons as well:

1. Defendants prematurely request additional information on Plaintiffs' ESI sources;

2. Defendants impermissibly seek unwarranted "discovery on discovery"; and

3. Defendants seek to impose obligations far beyond what any MDL involving consumer over-the-counter products has ever required.

First, Plaintiffs have provided a list of categories that clients have been instructed to preserve. That is enough to satisfy preservation obligations and PTO 8. Despite the fact that the MDL (at the Defendants' request) has been bifurcated, Defendants want each Plaintiff to file a statement attesting to each step they individually took to preserve the documents. This request is akin to requiring each corporate representative to file a preservation statement on the particular steps they (personally) took to preserve evidence. This type of request, especially in a bifurcated MDL, is unprecedented; particularly since much of the additional information sought by Defendants is in the possession of Plaintiff's parents who are, for all intents and purposes, third-parties subject to a different discovery standard than litigation parties. Now that the steps counsel have taken regarding preservation been articulated to Defendants, the proper procedure is to address any perceived inadequacy in preservation on a case-specific basis if and when a case is elevated to case-specific litigation.

Our duty under PTO 8 is to advise what steps we have taken to have our clients preserve evidence, and counsel have done that for the three (3) categories of evidence that Defendants identified in their position statement, *supra*.[4] Demanding Plaintiffs to file detailed information for each of Plaintiffs' ESI sources on the MDL's public docket also implicates privacy concerns for both the parents (who are non-parties) and their children. Defendants can request this information in discovery and any disagreements or purported deficiencies can be briefed at a later time. Requiring Plaintiffs to disclose such detailed information now via public filing is premature and oppressive.

Second, although nowhere in PTO No. 8, Defendants state that Plaintiffs should be required to identify "what ***each*** Plaintiff has already done to preserve its own data and relevant third-party information." (Emphasis in original). Defendants' request is impermissible "discovery

[4] For clarity, Plaintiffs' preservation efforts are not limited to these three (3) categories of evidence.

on discovery" of Plaintiff's preservation efforts, which is only permitted when the party seeking the discovery can produce "specific and tangible evidence" where a party "materially failed to fulfil its preservation and production obligations." *In re Diisocyanates Antitrust Litig.*, No. 18-1001, 2023 WL 11938951, at *6 (W.D. Pa. Nov. 7, 2023). While Defendants provide hypothetical scenarios of ostensibly unreliable memories of Plaintiffs' parents, Defendants fail to provide specific and tangible evidence that would warrant this type of discovery on discovery at this early juncture. *Id*. Even so, ***all*** Plaintiffs have been advised to preserve ***all*** of the categories of evidence that Defendants request. Nothing more is needed.

Last, Defendants' requests go far beyond what any MDL involving over-the-counter consumer products would require of plaintiffs at this stage. Defendants state that Plaintiffs should file separate Preservation Statements for over ***forty (40)*** Plaintiffs. Plaintiffs' counsel explained to Defendants that counsel sent a comprehensive, uniform preservation letter to all Plaintiffs' parents/guardians in the MDL - requiring separate filings for each Plaintiff would thus be unnecessarily duplicative. As for loyalty programs, Plaintiffs' position is that how data is stored, retained, and maintained through third-parties (no different than medical providers) is outside Plaintiffs' possession, custody, and control. That said, in the spirit of compromise, Plaintiffs have offered to send preservation letters to the third party retailers identified by the third-party parents/guardians. Defendants, however, have now taken this a step further and demand that Plaintiffs identify ***all*** purchases from ***every*** retailer where Plaintiff purchased food for their family – regardless of whether they purchased baby food there – and send a preservation letter to those third parties. This is simply not feasible or required. The burden of identifying these third parties – at this early juncture in the absence of a specific discovery request – outweighs any purported benefit because it would implicate large swathes of irrelevant documents and information. Plaintiffs therefore request that the Court restrict the burdens Defendants impose on Plaintiffs at this stage of the MDL and let the parties focus on general causation, as requested by the defense.

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III. DEFENDANTS' PRESERVATION STATEMENTS

Plaintiffs' Position:

Plaintiffs believe that Defendants' Preservation Statements are deficient in various ways. To that end, the parties have been meeting and conferring to try and reach a solution. If the parties cannot reach full agreement, plaintiffs will raise any remaining disputes at an appropriate case management conference.

Even so, several defendants did not file Preservation Statements. Plaintiffs request the Court Order all defendants to file a Preservation Statement with 7 days. Even if the statement is that they have not yet preserved anything because they believe their Rule 12 Motion will be granted (which seems to be their position), Plaintiffs have a right to know that for future spoilation arguments. These Defendants have been sued, they have been served, and they should not ignore the Court's Orders.

Defendants' Position:

Defendants believe that they have fully complied with their obligation under Pretrial Order No. 7 to file complete preservation statements. Defendants continue to meet and confer with Plaintiffs with respect to the concerns they have raised.

With respect to Plaintiffs' position that certain Defendants have not yet filed a preservation statement, the defendants at issue are each moving to dismiss the master complaint for lack of jurisdiction over them and/or had not appeared at the time the preservation statements were ordered.

Foreign Parents Challenging Jurisdiction: The foreign, indirect-parent defendants Nestlé S.A. and Danone S.A., both of whom are challenging personal jurisdiction in this action, respectfully disagree with Plaintiffs' belated assertion that they should be required to file preservation statements at this time.[5] Nestlé S.A. and Danone S.A.'s position is consistent with both the Court's and the Parties' approach to the foreign parent companies thus far, including on

[5] As noted above, Hero, A.G., a third foreign parent entity, was only recently served, has not yet appeared, and is in the process of securing representation.

this precise issue. In particular, at the July 25, 2024 Case Management Conference, the Court specifically carved out defendants challenging personal jurisdiction from the meet-and-confer process it ordered regarding the ESI protocol and preservation. *See* 07/25/24 Transcript, at 40 (instructing "each defendant, other than those who are moving to dismiss for lack of personal jurisdiction, [to] set up a meeting with [Plaintiffs]" to address ESI and preservation).

As such, Plaintiffs, appropriately, did not seek to engage the foreign parents in any of the preservation meet-and-confer discussions leading up to the August 22, 2024 Case Management Conference, at which the Court ordered the defendants engaged with Plaintiffs on these issues to file preservation statements. *See* 08/22/24 Transcript, at 43. Nor did Plaintiffs, up until a few days ago, ever suggest that the foreign parents challenging jurisdiction were required to file preservation statements. Indeed, contrary to Plaintiffs' suggestion here that the foreign parents have "ignore[d] the Court's Orders," Plaintiffs did not suggest any deficiency in this regard in the September 24, 2024 Case Management Conference statement (ECF No. 242)—despite devoting a section to preservation efforts and preservation statements—or during the September 26, 2024 Case Management Conference, where preservation was discussed. Rather, Plaintiffs took the opposite tack by jointly proposing with Defendants that any disputes regarding the application of the ESI protocol to defendants challenging personal jurisdiction be deferred until *after* the resolution of their jurisdictional motions.

That approach was and remains appropriate in light of the foreign parents' forthcoming motions challenging personal jurisdiction. In any event, Nestlé S.A. and Danone S.A. are cognizant of and in compliance with their preservation obligations.

Campbell Soup Company: Campbell Soup Company ("CSC") complied with PTO No. 7. Plum, PBC, was an indirect wholly owned subsidiary of CSC from 2013 until 2021. CSC's and Plum, PBC's preservation and litigation hold activities in this period are co-extensive and described in Plum's September 12, 2024 Statement Regarding Preservation (ECF No. 234, Exhibit E). As that statement confirms, CSC possesses and preserves legacy Plum, PBC documents from the period before CSC sold its interest in Plum to Sun-Maid Growers of California on May 3, 2021, pursuant to a stock purchase agreement.

Sun-Maid Growers of America ("Sun-Maid"): Sun-Maid had not been served with any complaint in this litigation at either the time Pretrial Order No. 7 was entered or by the date the Defendants' Preservation Statements were due. However, had PTO 7 been applicable to Sun-Maid, Sun-Maid would have adopted Plum's preservation statement for the period since May 2021, which is when Sun-Maid purchased Plum. For that time, its preservation efforts have been co-extensive with Plum's.

IV. DISCOVERY UPDATE PURSUANT TO PRETRIAL ORDER NO. 7

Defendants represent that they have now produced all documents identified in the Court's August 22, 2024 Pretrial Order No. 7 (ECF No. 224), with the exception of Nurture, which has not yet produced its formulas because Nurture and Plaintiffs are currently negotiating a protective order as to those formulas. Nurture and Plaintiffs have agreed to brief extension, through November 6th, for Nurture to produce its formulas or bring a motion for a protective order. Because, as set forth below, the October 31, 2024 productions are still in the process of being uploaded to Plaintiffs' document platform, Plaintiffs cannot confirm that each Defendant produced everything required pursuant to Pretrial Order No. 7. Once Plaintiffs have had an opportunity to review the productions, they will confer with each defendant regarding deficiencies, if any.

Plaintiffs reserve the right to request additional discovery after they have had the opportunity to review defendants' respective productions.

V. SCHEDULE FOR GENERAL CAUSATION

Plaintiffs' position:

Rule 12 Motions: As set forth above, Plaintiffs have yet to receive confirmation of service of the Master Complaint for Defendant Hero, A.G. Until that is received, the Rule 12 briefing schedule remains a moving target. In the Parties June 27, 2024 "Stipulated Schedule for Filing of Master Complaint and briefing of Motions to Dismiss and Motions for Alternative Service," the parties stipulated to a briefing schedule that is triggered by Plaintiffs' filing of the "Notice of Completed Service." Plaintiffs agree that they should be in a position to file the Notice of Completed Service in the near future and request that the Court wait to set an oral argument schedule until that is filed. Once the Notice of Completed Service is filed, both the Court and the

parties will actually know the briefing deadlines. Right now, defense is merely proffering a guess.

General Causation: Defendants made their first discovery production last week. As of the date of this filing, despite diligent efforts, the documents are still in the process of being uploaded to Plaintiffs document platform. For that reason, it is difficult, indeed impossible, for Plaintiffs to know the sufficiency of the various productions and what discovery remains. Even so, and based on prior litigation experience, Plaintiffs expect that several third-party subpoenas will need to be issued to co-manufacturers, especially to Wal-Mart's co-manufacturers, and several depositions will need to occur. Because the proposed schedule, below, was not sent to Plaintiffs' counsel early this morning (prior versions of the CMC Statement only included a vague reference to "six months"), counsel has not had an opportunity to meaningfully consider the proposed deadlines with the leadership team and confer with our experts. Even so, Plaintiffs suggest that the Court provide a brief period to assess what discovery has been produced and what additional discovery will be required and then the parties can propose a general causation plan that includes specific deadlines.

Defendants' position:

In light of the recent exchange of documents, Defendants ask that the Court set a timeline for the hearings on Rule 12 motions and for the general causation proceedings, including Rule 702 motions, and specifically, that the Court set hearings on Rule 12 motions for February 2025 and hearings for Rule 702 motions for the last two weeks of June 2025.

At the September 26, 2024 hearing, the Court stated that even if Plaintiffs had not fully reviewed Defendants' productions, at the November conference the parties would "be in a better position then to start thinking about the schedule," knowing the scope of the productions. 09/26/24 Transcript, at 13:15-18.

With respect to motions under Rule 12, all Defendants have been served and therefore, Defendants anticipate that Plaintiffs will promptly file a notice of completed service (and if not, Defendants need not wait for Plaintiffs to file a notice of completed service to file their Rule 12 motions). Based on the stipulated briefing schedule for those motions, Defendants believe that all Rule 12 motions will be fully briefed no later than late January 2025. Defendants propose that the

Court set a hearing for Rule 12 motions in February 2025.

Additionally, Defendants propose a schedule for general causation proceedings of just under six months, which would have Rule 702 general causation motions briefed by June 2, 2025. Specifically, Defendants propose the following schedule, which accounts for some changes proposed by Plaintiffs:

Event	Proposed Interval	Deadline
Substantial completion of production per PTO 7	October 31, 2024	10/31/2024
Plaintiff expert reports	45 days after completion of production	12/16/2024
Defense expert reports	30 days after Plaintiff reports	01/15/2025
Plaintiff rebuttal expert reports	14 days after Defense reports	01/29/2025
Close of GC discovery	60 days after rebuttal reports	03/31/2025
Rule 702 motions	21 days after close of discovery	04/21/2025
Rule 702 oppositions	28 days after motions	05/19/2025
Rule 702 replies	14 days after oppositions	06/02/2025
Rule 702 Hearing	At Court's convenience	TBD

While Plaintiffs have only recently received Defendants' additional productions of testing results and formulas, they have received over 150,000 documents in prior litigations and have had years to review and assess those documents with their experts. For some Defendants, last week's productions consisted of fewer than 100 additional documents, and Defendants estimate that the productions in total contained fewer than 5,500 documents.

Completing discovery and briefing in six months is entirely reasonable. Indeed, at the outset of this litigation, Plaintiffs represented to the Court: "And candidly, there may be a way for us to present all this in the ***next few months*** for general causation. I mean, we have a full roster of experts. I have hundreds and hundreds of pages of expert reports ready to go." 05/16/24 Transcript, at 28:12-15 (emphasis added). Counsel explained that the reports needed to be

"tweaked" but that it "may be possible" to complete a general cause hearing in a "few months." *Id.* at 28:12-18.

Plaintiffs suggest that they cannot respond to this proposed schedule because they first received it this morning. In fact, Defendants sent the proposed schedule—keyed at that time to an unknown date for substantial completion of production—on September 16, 2024. Defendants met and conferred with Plaintiffs on this schedule on September 19, 2024, and included a revised schedule, including proposed changes from Plaintiffs, in the September CMC statement, a draft of which was first sent to Plaintiffs on September 23, 2024. Plaintiffs briefed this schedule in the September CMC statement, saying that it was premature to discuss a schedule before document productions—productions which have now occurred. Dkt. 242, Joint Statement for September 26, 2024 Case Management Conference, at 2. Since September, the only change to this proposed schedule is that the parties now know the date of substantial completion of the document production—October 31, 2024—which allowed Defendants to fill in the actual dates based on the proposed intervals the parties have been discussing for more than seven weeks.

Plaintiffs were unwilling to discuss a schedule before document productions at the last Case Management Conference. Those productions are now complete. Further delay is not necessary. Defendants propose that the Court set a hearing on these Rule 702 motions in the last two weeks of June 2025.

VI. RETAILER DEFENDANTS' MOTION TO DISMISS

Per the Court's October 25, 2024 Order (ECF No. 255), the Court will hear oral arguments on the Retailer Defendants' Motion to Dismiss during the November 7, 2024 Case Management Conference.

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Dated: November 5, 2024

Respectfully submitted,

WAGSTAFF LAW FIRM

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Dated: November 5, 2024

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Defendants' Liaison Counsel

ATTESTATION OF CONCURRENCE IN FILING

In accordance with Northern District of California Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the signatories who are listed on the signature page.

Dated: November 5, 2024

/s/ Brooke Killian Kim
Brooke Killian Kim
Defendants' Liaison Counsel

CERTIFICATE OF SERVICE

I certify that on November 5, 2024, I electronically filed the foregoing Joint Statement with the Clerk of the Court using the ECF system, which sent notification of such filing to all counsel of record.

/s/ Brooke Killian Kim
Brooke Killian Kim