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 DECEMBER 12, 2024 CASE MANAGEMENT CONFERENCE** Date: December 12, 2024 Time: 9:00 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 December 12, 2024 Case Management Conference.

I. GENERAL CAUSATION PROCEEDING SCHEDULE

In Pretrial Order No. 9 (ECF No. 261), the Court ordered expert discovery as to the general causation phase to commence in April 2025 "to ensure sufficient time for the Court to rule on any forthcoming Rule 12(b) motions before the parties commence such discovery." The Court also set a five-day hearing (as needed) on General Causation to commence on December 8, 2025. The Court ordered the parties to meet and confer to set the interim schedule and include a proposed schedule in this case management conference statement.

Plaintiffs' position:

On November 11, 2024, Plaintiffs made an initial proposal regarding expert discovery.

Plaintiffs' Proposal	
Event	**Date**
Plaintiff expert reports	05/16/2025
Defense expert reports	06/16/2025
Plaintiff rebuttal expert reports	07/08/2025
Close of GC discovery	08/29/2025
Rule 702 motions	09/05/2025
Rule 702 oppositions	10/13/2025
Rule 702 replies	11/03/2025
Rule 702 Hearing	12/08/2025

Defendants sent a competing proposal on November 15, 2024 and then, following a meet and confer, a second proposal on November 20, 2024:

[1] As used herein, "Defendants" does not include any defendant who is challenging jurisdiction.

Defendants' Proposals		
Event	**First Proposal**	**Second Proposal**
Plaintiff expert reports	04/11/2025	04/25/2025
Defense expert reports	05/23/2025	06/06/2025
Plaintiff rebuttal expert reports	06/06/2025	06/20/2025
Close of GC discovery	08/15/2025	08/22/2025
Rule 702 motions	09/12/2025	09/19/2025
Rule 702 oppositions	10/10/2025	10/24/2025
Rule 702 replies	10/24/2025	11/07/2025
Rule 702 Hearing	12/08/2025	12/08/2025

During this same time, Plaintiffs have been reviewing the discovery produced by Defendants that have agreed to engage in discovery (other Defendants have refused to engage in discovery pending resolution of their Rule 12 motions) and have identified serious gaps and issues with those productions. Plaintiffs have serious concerns with entering an expert discovery schedule, without knowing when general causation discovery will be completed.

On December 3 and 4, 2024, Plaintiffs met and conferred with a subset of Defendants—the ones that proposed the above expert discovery schedule. The Defendants that are challenging jurisdiction have not participated in a conversation involving expert discovery.

As it stands, Plaintiffs will be able to make expert disclosures in April 2025 ***only if*** general causation discovery is substantially completed from *all* Defendants by January 15, 2025. Plaintiffs need at least 120 days after obtaining discovery to process the information, input it into a useable format / database, have Plaintiffs' exposure specialists calculate and process the data, and then have Plaintiffs' general causation experts incorporate the exposure data as part of an expert report. If significant general causation discovery is still outstanding by January 15, 2025—which, based on recent meet and confers with Defendants seems to be an almost surety—then requiring expert disclosures from Plaintiffs by April 2025 is not feasible or fair, especially when those disclosures

will form the basis of a summary judgment challenge by Defendants. Plaintiffs have been diligent in pursuing general causation discovery from all Defendants, but have encountered several issues.

1. **The Foreign Defendants:** The Foreign Defendants play a central role in dictating the scientific policies and standards used by their subsidiaries in manufacturing baby food products—a point highlighted by the discovery so far. Nearly every scientific document discussing neurotoxicity of heavy metals, and the witnesses put forward by the subsidiaries to discuss such topics, originate from the parent companies. Emails confirm that these Foreign Defendants have substantial discovery related to general causation. And yet, the Foreign Defendants take the position that they will not engage in any general causation discovery until their Rule 12 motions are decided—which will not likely occur prior to March 2025. Then, following those motions, the Foreign Defendants will need time to produce their discovery, and Plaintiffs will need time to review it. On this point alone, and considering the Foreign Defendants' refusal to participate in discovery—either directly as a named and duly served Defendant or as a third-party—an April 2025 expert disclosure is not possible.

2. **Third-Party Discovery**: Plaintiffs have begun serving third-party co-manufacturers to obtain general causation discovery. As the Court may recall, certain Defendants like Walmart do not have any testing, which has forced Plaintiffs to obtain that information from Walmart's co-manufacturers and suppliers. The domestic third-party co-manufacturers have already been served and have indicated that they will "respond to the subpoenas"—whether that means they will actually produce documents is unknown—by mid-February 2025. Walmart has objected to some of the requests served on the third parties and that issue, including whether Walmart has any standing to make any objections, is being briefed and submitted to the Court. Regarding the foreign third-party co-manufacturers, Walmart's Counsel indicated that they might consider accepting service on behalf of the foreign third-parties, but only if Plaintiffs agree to restrict the requests in way

Walmart dictates. This is obviously not acceptable to Plaintiffs, so Plaintiffs are proceeding with effectuating service on the foreign third parties using formal processes (which, historically, takes months to complete). Based on the status of discovery on the third-party co-manufacturers and suppliers, it does not appear that Plaintiffs will have their responsive general causation discovery by January 15, 2025, making an April 2025 expert disclosure impossible.

3. **Discovery Produced to Date**: Of the discovery produced from the subset of Defendants so far, there are numerous issues. Some of those issues need to be resolved so that Plaintiffs can make sense of the discovery produced so far. Those issues are the subject of ongoing meet-and-confers. Should those disputes require Court intervention, it is highly unlikely that general causation discovery from the willing Defendants will be completed by January 15, 2025.

The discovery produced by Defendants so far is being processed and significant resources are being spent to collect, collate, and input the data into a usable format, so that it can then be incorporated by Plaintiffs' experts. It is Plaintiffs hope that this discovery constitutes the lion share of what Plaintiffs need for general causation, but that will not be known until the Foreign Defendants and third-party co-manufacturers/suppliers begin responding to discovery.

Thus, Plaintiffs do not believe it would be appropriate to set an expert schedule at this time. Instead, Plaintiffs believe that this Court should:

- Order the Foreign Defendants to participate in general causation discovery and produce their documents by January 15, 2025. The Foreign Defendants have been served. Thus, whether they are required to participate in discovery as named Defendants—subject to their Rule 12 motions—or as third parties, it does not matter. They have relevant information and should be required to produce it. And, because this Court has jurisdiction over them, whether as a Defendant or as a third-party, ordering them to participate in discovery is appropriate. Otherwise, the MDL will continue to be held hostage and getting to *Daubert* hearing in December 2025 seems unlikely.

- Set a special hearing in early January for the Court to rule on all pending issues related to the discovery produced to date. Each Defendants' production will need to be addressed separately. Plaintiffs request that such a hearing be set separately from the CMC, and be in person at the Courthouse to facilitate potential resolutions of these issues.
- Delay entering a scheduling order on expert discovery until the Court is confident that a date of substantial completion of all general causation discovery is set, and Plaintiffs are given 120 days following that date to make initial disclosures.

Defendants' arguments below miss the point. Plaintiffs do not assert that an April 2025 expert disclosure date is impossible under any circumstances. Rather, as explained, the proposed April date is workable provided that the significant number of issues with Defendants' production, not to mention production from Defendants, the Defendant parent companies, and third parties, are completed by January 15, 2025. Defendants' argument that the production from the earlier state court cases provides Plaintiffs with everything they need to prepare reports by April, 2025 is a fiction.

First, the prior state court cases did not involve the same constellation of Defendants. For example, in the Landon case proceeding to trial in the summer of 2025, Walmart (who conducted no metal testing) is not a defendant, not to mention that neither of the two state court cases worked up for trial involved any parent entities. Accordingly, the *Landon* plaintiff has not had to devote the significant time and resources obtaining third party production of metal testing from Walmart's suppliers and parent companies – something the MDL Plaintiffs must do and which, as explained above, will take considerable time.

Second, the state court cases involved a significantly smaller number of products (no more than one hundred or so) compared to the more than **600** products at issue in this MDL – many of which have no testing available from the Defendants and for which Plaintiffs must obtain production from a large number of third parties. The considerable time that it will take to collect, collate, organize, and analyze the testing render an April 2025 expert disclosure date impossible unless this production is completed by January 15, 2025. Defendants' out of context quotes of

Plaintiffs' counsel at the start of the MDL underscore this point. Plaintiffs' counsel was referencing to the discovery that Plaintiffs had obtained and expert opinions worked up with respect to the small number of products and Defendants involved in the state court cases.

Third, the state court cases were on an expedited trial settings which did not afford sufficient time to resolve the significant gaps and issues that Plaintiffs have identified with Defendants' MDL production. Again, given the likelihood that the production issues identified by Plaintiff and the outstanding production will not be completed by January 15, 2025, an April 2025 disclosure date would be neither feasible nor fair.

With respect to the parent entities, Defendants assert that these Defendants do not possess materials that Plaintiffs would need for general causation workup. Not true. In addition to the prominent role played by the parents in researching and forming opinions on the science as it relates to the relationship between metal exposure and neurodevelopmental harm (i.e., general causation), the parent companies also conducted heavy metal testing of the products and ingredients at issue that Plaintiffs must discover. None of this discovery was conducted in the state court litigation because the parent entities are/were not parties to those actions. Moreover, Defendants' position that the parent companies will simply participate in general causation (if the jurisdictional challenges are denied) with sufficient time to allow for an April 2025 disclosure date is fictional. As explained above, should an April 2025 date be implemented, by the time the jurisdictional challenges are resolved, the parties will be on the eve of expert disclosures while the parent companies will barely begin to participate in discovery. Plaintiffs would, literally, have had no opportunity to conduct any discovery on these Defendants until it is far too late because of these Defendants' refusal to participate in discovery pending the jurisdictional challenges.

Defendants cannot have their cake and eat it too – on the one hand insisting on the April general causation schedule but refusing to participate in discovery and with extensive discovery outstanding.

Defendants' position

Plaintiffs' position, that the parties cannot conduct a general causation proceeding over the next year with a hearing in December 2025, is untenable and entirely at odds with the existing

posture of this litigation, as well as the position Plaintiffs have repeatedly taken in this and other courts. At the initial MDL Case Management Conference, Plaintiffs' counsel boasted that "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). Now, though, Plaintiffs assert that the parties cannot even begin to discuss a schedule for many months. And they make this plea at the same time these same lawyers are pressing for a trial in the JCCP in April 2025, with a request for general causation discovery and hearings in March 2025. There is no dispute that this is a mature litigation. Plaintiffs have had the discovery from the Manufacturing Defendants for years, and Plaintiffs took extensive depositions discovery from the key witnesses of those Defendants. The notion implicit in the Plaintiffs' position that the parties are starting from scratch, or that any of the supposedly remaining discovery is necessary to proceed to general causation – fundamentally, a scientific inquiry – is not well-taken or reflective of the reality of this litigation.

Defendants have proposed a rational schedule for proceeding after conferring with Plaintiffs. A summary of the positions, with Defendants' proposed compromise proposal, is set forth below:

Event	**Plaintiffs' Proposal**	**Defendants' Proposal**	**Defendants' Proposed Compromise Deadlines**
Plaintiff expert reports	05/16/2025	04/11/2025	04/25/2025
Defense expert reports	06/16/2025	05/23/2025	06/06/2025
Plaintiff rebuttal expert reports	07/08/2025	06/06/2025	06/20/2025
Close of GC discovery	08/29/2025	08/15/2025	08/22/2025
Rule 702 motions	09/05/2025	09/12/2025	09/19/2025
Rule 702 oppositions	10/13/2025	10/10/2025	10/24/2025
Rule 702 replies	11/03/2025	10/24/2025	11/07/2025

Rule 702 Hearing	12/08/2025	12/08/2025	12/08/2025

The April 2025 expert disclosure that is the starting point for Defendants' above schedule comes directly from PTO 9, in which the Court ordered expert disclosures to occur in April 2025. The Court chose this date to "[build] in time to deal with these discovery disputes." *See id.* 32:16-22 ("I'm building in time to deal with these discovery disputes. . . . What I'm doing is building in – it's a reasonable schedule. It's a reasonable schedule. There's no reason it shouldn't be met."). Plaintiffs agreed with the Court. In response to the Court expressing its intent to set an April 2025 date for expert discovery and a December 2025 hearing on general causation motions, Plaintiffs' counsel did not protest, and even stated that "that sounds just fine to us" (11/7/24 Hearing Tr. 29:18) and that "I think what you lay out, among one of the reasons that it works very well is that it should give us time to get any additional discovery that we need." *Id.* 29:24 – 30:1. Plaintiffs' about-face position, that it is virtually impossible for them to provide expert disclosures by April 2025, as ordered in Pretrial Order No. 9, cannot be reconciled with what they've said on the record or with the posture of this litigation.

Plaintiffs' justification for demanding that the Court revisit the schedule is meritless. First, Plaintiffs vaguely allude to "serious gaps" and "numerous issues" with Defendants' productions. Defendants made those productions for the first time in state and federal courts many months, and in many cases, *years* ago. And they made them to the same MDL leadership counsel here. In those prior cases, Defendants and the same MDL counsel here engaged in extensive meet and confer and motion practice regarding the scope and format of those productions. Plaintiffs also deposed dozens of witnesses for hundreds of hours based on the documents produced. Defendants have been clear from the outset, including before the JPML, that they will freely make available the extensive discovery that has already transpired in the previous cases. Defendants even went through the formalistic process of "re-producing" these documents in the MDL, documents that had already long been on hand with Plaintiffs' counsel. But neither before or since those productions, have Plaintiffs identified any specific issues with the productions. If Plaintiffs had serious concerns in light of all they previously knew about the documents produced and the focus of new discovery

solely on matters going to general causation, it was incumbent on them to have raised them before now, when they suddenly claim that such deficiencies are so material that they cannot even discuss a schedule for a general causation scientific proceeding. Moreover, regardless of any complaints Plaintiffs might ultimately raise, the Court's schedule already has sufficient time built in to address them – as Plaintiffs themselves acknowledged on the record at the last conference.[2] *See id.* at 32:16.

Second, Plaintiffs argue that they will be unable to secure discovery from the foreign parents due to the timing of the motion to dismiss schedule (under which the foreign parents' jurisdictional motions will be heard in February), in the hypothetical event that any of the foreign parents challenging jurisdiction are ultimately adjudicated to be subject to jurisdiction. Plaintiffs do not identify what discovery they believe is in the possession of the foreign parents—and not already produced—that is relevant to general causation discovery, particularly when none of the foreign parents made, sold, or tested any of the products at issue. Plaintiffs reference "scientific document[s]" that they say "originate" from the foreign indirect parents, but whatever documents plaintiffs might have in mind, they acknowledge they already possess from the domestic subsidiaries they have been litigating against for years. Further, the Court already contemplated this issue when it built time into the schedule for discovery in light of the fact that jurisdictional motions to dismiss are pending, explaining that "if [the Court were to] deny them and they're in, they have to participate in the expert discovery." *Id.* 30:16-17. There is simply no reason to postpone expert disclosures based on Plaintiffs' supposition that some of the foreign parents *may* be in the case and *may* have some unspecified evidence relating to the issue of general causation.

[2] Additionally, Plaintiffs fail to explain how 120 days is required to "process" data when the vast majority of this data had already been produced by Defendants. Plaintiffs' counsel have had access to over 150,000 documents produced by Defendants for months, if not years. Just about 5,500 documents were produced for the first time in this litigation. Plaintiffs' counsel have taken dozens of depositions of Defendants' company witnesses using those documents, have prepared more than 20 expert reports (including on general causation) using those documents in a state court case, and came within weeks of producing expert reports in two additional cases, one state and one federal. Given the extensive amount of time Plaintiffs have already spent with the overwhelming majority of Defendants' documents, they and their experts do not need four more months to review the materials.

As for Plaintiffs' unsupported suggestion that the named foreign parents are subject to "jurisdiction . . . as third parties" and should be ordered to produce "general causation" discovery notwithstanding the pendency of their Rule 12(b)(2) motions, it is well settled that defendants challenging personal jurisdiction are not properly subject to merits discovery unless and until they are adjudicated to be in the case. *See, e.g., Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (noting that defendants challenging jurisdiction "submit[] to the jurisdiction of the court for the limited purpose of challenging jurisdiction [and] agree[] to abide by that court's determination on the issue of jurisdiction"); *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 220, 231 (4th Cir. 2019) (permitting discovery from foreign defendants "despite their objections to personal jurisdiction [was] equivalent to a denial of a motion to dismiss" and thus improper). Plaintiffs' untimely and unusual request for general causation discovery from the foreign parents prior to the adjudication of their Rule 12(b)(2) motions is contrary to the *Bauxites* Supreme Court ruling and its progeny limiting the Court's jurisdiction to a personal jurisdiction inquiry. Any outstanding issue with respect to general causation discovery on the foreign parents should be deferred until the resolution of the Rule 12 motions as scheduled.

Finally, Plaintiffs argue that obtaining discovery from Walmart's co-manufacturers will somehow prevent them from complying with the Court's general causation schedule. Not so. As detailed in the joint statement regarding Walmart's motion for a protective order (Dkt. 286), the Court permitted Plaintiffs to serve discovery on Walmart's co-manufacturers for the limited purpose of obtaining heavy metal test results for Walmart's baby food products identified in Appendix A to the Master Complaint. Walmart does not object to Plaintiffs' subpoenas seeking such test results and repeatedly offered to attempt to facilitate the production of such test results as expeditiously as possible. The other 21 requests for production included in Plaintiffs' subpoenas, however, go well beyond the heavy metal testing permitted by the Court and have no bearing on general causation. Thus, the pending disputes related to Plaintiffs' subpoenas to Walmart's co-manufacturers do not in

any way impede Plaintiffs' ability to meet the Court's general causation schedule. [3]

The Court should deny Plaintiffs' request to have the foreign parents participate in discovery prior to resolution of the motions to dismiss and enter the compromise schedule proposed by Defendants.

II. STATUS UPDATE ON PLAINTIFFS' PRELIMINARY FACT SHEETS / PRESERVATION DISCLOSURE

In Pretrial Order No. 9 (ECF No. 261), the Court ordered that the "parties shall meet and confer regarding a short form Plaintiff Fact Sheet with the goal of finalizing the form of the fact sheet by the end of the year." The Court further ordered the parties to provide a status update in this case management conference statement. Since Pretrial Order No. 9 was issued, the parties have met and conferred but four issues remain unresolved. Each issue is addressed below.

1. Whether the Document Is a Preliminary Fact Sheet, Signed By the Plaintiff, or a Preservation Disclosure, Signed By Counsel

Plaintiffs' Position:

The purpose of the anticipated "fact sheet" is to provide information to Defendants so that they can take whatever actions they need to preserve third-party discovery they believe might be relevant. Thus, this disclosure is not a "fact sheet" in the traditional sense, nor is it a vehicle for plaintiff-specific discovery. Rather, it is a targeted disclosure document to facilitate third-party information preservation. The history of this issue, as it has emerged in this MDL, confirms as much.

Defendants refuse to engage in Defendant-specific discovery unless that discovery is narrowly confined to issues of general causation—and, even there, they have taken the position that the only discovery they are willing to produce is what has been produced before and testing

[3] Walmart's counsel did not indicate it would accept service on behalf of any co-manufacturer, and it is not authorized to do so. Rather, Walmart's counsel stated that it would make a good faith effort to help facilitate the prompt production of test results from the co-manufacturers, including any efforts to facilitate service of subpoenas on its international co-manufacturers. In response, Plaintiffs refused to limit their subpoenas to permitted general causation discovery (*i.e.*, the test results). Walmart, however, remains committed to making a good faith effort to assist Plaintiffs with obtaining test results even though Plaintiffs are unwilling to compromise.

results. If general causation is going to be the focus of this proceeding, then the limitation on discovery must go *both* ways. Defendants cannot evade discovery – the vast majority of which is being put on hold – while, at the same time, engage in plaintiff-specific discovery before any bellwether process is negotiated. To be clear: Plaintiffs would prefer that *all* discovery proceed in this case, on *both* sides. Getting all the documents produced, one time, and depositions taken, one time, is profoundly more efficient than proceeding in a phased manner. But, that is not how this MDL is proceeding. It is going to address general causation discovery first. And, if so, then the limitations on discovery must be enforced equitably.

Defendants raised an issue regarding preservation of evidence. They argue that because general causation will take some time to work through—a phased process that they insisted on—they are worried that potentially relevant information is not being preserved. Now, there is no question that information in each Plaintiff's possession, custody, or control is being preserved. That obligation exists and Plaintiffs' counsel takes that obligation seriously. Rather, the issue Defendants raised centers on whether information is being preserved by third parties, i.e., retailors, medical facilities, etc. Defendants worry that documents that are not in a Plaintiff's possession, custody, or control may be destroyed while the MDL addresses general causation discovery. It was within that specific context, i.e., preservation of evidence from third parties, that the notion of a "fact sheet" was proposed.

However, here, Defendants are using this "fact sheet" to seek information that has nothing to do with third-party preservation and is aimed, squarely, at general case-specific discovery. They are insisting on a document, to be prepared and signed by the Plaintiff's parent / guardian, that provide factual information about their case and product usage. In other words, Defendants want case-specific discovery that is not tethered to preservation. But, that is not the purpose of this disclosure, nor is it consistent with the phased nature of this MDL. Defendants should not be allowed to make an end-round on the blanket "general causation only" limitation that they insisted in this MDL and begin Plaintiff-specific discovery. The limitation imposed on discovery must cut both ways—otherwise, the entire agreement to proceed in a phased manner will have been for naught. If Defendants are allowed to violate the "general causation only" proscription on

discovery, then the Court should simply open all discovery and let the litigants move forward with an orderly process of both Defendant and Plaintiff-specific discovery on *all* issues.

If, however, the phased nature of this MDL is maintained, then this "fact sheet" should be titled a "Preservation Disclosure" wherein each Plaintiff's counsel provides information to facilitate Defendants taking whatever actions they believe are necessary to preserve documents in the possession, custody, or control of third parties. It should not extend further than that limited purpose.

This disclosure is meant to give Defendants information they need to preserve information in the possession, custody, or control of third parties. Because that information is not formal discovery, such a document does not need to be signed by the Plaintiffs' parent or guardian. Preservation letters and disclosures are typically signed by attorneys. It is an intermediate step *before* discovery begins. Such letters and disclosures should not be used to be used to "impeach" a Plaintiff's parent / guardian later, nor are they intended to become discovery vehicles. Requiring such a document to be signed by the Plaintiff's parent / guardian would effectively convert a preservation document into a full-blown set of case-specific interrogatories—which would fundamentally violate the entire purpose of phased discovery. Moreover, requiring a parent's signature would only slow down the speed at which these disclosures can be made.

Below, Defendants believe the Plaintiffs' parents / guardian should make an attestation to engaging in certain acts related to preservation. To be clear, such a requirement has never been imposed on any litigant. None of the Defendants have attested, in writing, signed by a company representative, that they have taken specific actions to preserve information. Asking Plaintiffs to be treated differently is unfair and unfounded.

Defendants' concerns regarding preservation and "delay" between the general causation phase and case-specific workup are red herrings. The streamlined process outlined by Plaintiffs above ensures that relevant information is preserved and preliminary disclosures are made without engaging in the "gotcha" game for which Defendants advocate. Anything more would obliterate the purpose of phased proceedings and unjustly shift the focus from general causation to case-specific discovery.

Defendants' Position:

During the November 7, 2024 case management conference, following a discussion on short form complaints, the Court explained the purpose of this initial Plaintiff Fact Sheet:

> **THE COURT:** All right. So now, actually, what I want to talk about moving simultaneously is I want to talk about short plaintiff fact sheets, and here's why. One is so that when we get through general causation, we don't have a long period of delay while we do that; right? That's one.
>
> Two is, a lot -- this case involves a lot -- things that happened in the past; and the plaintiffs need to remember -- try to remember; right? And I think this takes care of their preservation concerns.
>
> You -- and I accept that -- have told your clients 'You need to preserve these things.' But if now we were to ask them, 'Well, where did you shop? What baby food to you believe you remember you did buy?' they're going to actually go back and look at their photos and talk to their family members and look at their credit card statements. In other words, it will all make sense because they'll actually now start doing it. And we might as well do it sooner rather than later while it's fresher in their mind. So, why are you looking at me like that?
>
> But, so what I was thinking is you should start working on a short plaintiff fact sheet, not one -- just a short one that gets sort of what's the medical diagnosis, you know, the basic stuff, that kind of stuff, that sort of gets to your concern about preservation because, actually, they're going to have to go dig up all this stuff now to answer this thing.
>
> That's, anyway, what I was thinking might be the way to cut through it and keep the case moving.

11/7/24 Hearing Tr. 36:15-37:17. Subsequently, the Court added, "a lot of times with, especially, individual plaintiff litigation in these MDLs, the plaintiffs feel like they're here and ignored and they have nothing to do with it. It actually then brings them into the litigation. Now I'm actually participating. And I think there's value just in that as well, having people feel heard." *Id.* at 38:9-14.

The Court set forth multiple purposes of the document: (1) to avoid a long delay following the general causation proceeding, assuming Plaintiffs' claims get past that stage; (2) to obtain Plaintiffs' memories regarding events in the past while they are fresh; (3) to address Defendants' preservation concerns, including in light of the known fact that critical retailer discovery is being lost on an ongoing basis; and (4) to allow individuals plaintiffs to participate in the litigation to make them feel heard. *Id.* During the parties' meet-and-confer efforts, however, Plaintiffs have taken the position that they were ordered only to negotiate what essentially amounts solely to a

preservation statement—not a fact sheet—and they insist that the preservation statement will be signed by counsel, not individual plaintiffs. Nowhere in the discussion did the Court limit the purpose of the document to preservation only. *See* 11/7/24 Hearing Tr. 36:15-38:18, *passim*.

For any fact sheet process to be meaningful, an individual plaintiff must sign the fact sheet, with the signature indicating that the plaintiff performed a diligent search for the relevant information, reviewed the responses, and believes the responses are accurate to the best of her or his knowledge. If Plaintiffs, via their parents or representatives, are not personally attesting to their own investigation of available materials and preservation of same, as well as the accuracy of the basic information provided, the information Defendants receive will have little or no purpose or reliability. Repeated experience in this litigation, including in the pending cases before Judge Riff in California state court, has shown that a process by which Plaintiffs and their parents/guardians answer questions from their own counsel or paralegals by phone or video call – after which Plaintiffs' counsel or paralegals complete a form on plaintiff's behalf without actually having personal knowledge of what exists – does not result in even remotely accurate information being provided to Defendants.

Indeed, none of the purposes outlined by the Court are satisfied by a statement signed only by counsel. Without Plaintiffs' review and signature, individual Plaintiffs will be required to verify discovery should the case progress past the general causation proceeding, leading to the long delay the Court expressly wished to avoid. Without Plaintiffs' review and signature, Plaintiffs will first provide verified responses to discovery more than a year from now, meaning that Defendants will not obtain Plaintiffs' memories while they are "fresher in their minds." And without Plaintiffs' review and signature, the Court's goal of engaging individual plaintiffs in the litigation is plainly not met.

Plaintiff Fact Sheets are routinely signed by the plaintiffs themselves in multi-district litigations, and Plaintiffs raise no justification to deviate from this practice. Indeed, Defendants found it somewhat puzzling that Plaintiffs stated during the case management conference that Plaintiffs would be more willing to provide information if the Plaintiff Fact Sheet was not "under the penalty of perjury." But as a compromise to address this concern, Defendants' proposal

omitted any "under the penalty of perjury language"—merely requiring Plaintiffs to sign the fact sheet.

Plaintiffs' insistence on a narrow disclosure, rather than an initial Plaintiff Fact Sheet, finds no support in the discussion the parties had with the Court at the November Case Management Conference, nor in PTO 9. Rather, Plaintiffs rely entirely on so-called fairness arguments. But Discovery in MDLs is typically phased, with the burden shifting to each side at different times in the litigation—and there is nothing wrong with that. During general causation and liability phases, the burden typically lies primarily with the defense, while in plaintiff-specific phases, the burden lies primarily with the plaintiffs. Here, the Court opened general causation discovery first and Defendants bore the burden of discovery, including productions of over 150,000 documents (most of which have been collected, reviewed, and produced in other litigations over the course of three years at substantial cost and effort to Defendants) that constitute the type of documents the Court ordered produced based on their relevance to general causation. *See* 8/22/24 Hearing Tr. 6:7-8:8 (stating the Court planned to order production of testing results of Appendix A products because those would be sufficient for Plaintiffs to argue general causation); Pretrial Order No. 7 at 1-2. Now, the Court is merely requiring some limited basic information from Plaintiffs, requiring individual plaintiffs to participate in discovery in this MDL for the first time. Nothing about the Court's discovery plan is inequitable, and simply because the Court is requiring Plaintiffs to provide limited information does not require the Court to also authorize full-blown discovery of Defendants. It bears repeating, moreover, that Plaintiffs' counsel already have access to full-blown discovery of Defendants – that is what they took in the state cases before Judge Riff.

For this short form preliminary Plaintiff Fact Sheet process to be meaningful, Plaintiffs must, at a minimum, sign the Plaintiff Fact Sheet, simply acknowledging that they have read and understood the questions asked, and that the information provided is true and correct to the best of their knowledge following a reasonably diligent search for available information that they personally and actively engaged in identifying.

2. Whether the Fact Sheet / Disclosure Should Be Limited to Commercial Baby Foods

Plaintiffs' Position:

Defendants' proposed "fact sheet" / preservation disclosure asks the Plaintiff's parent / guardian to identify every place they ever purchased any food, from anywhere, for all time. This request is overbroad at this stage and should be limited to identification of the locations where Plaintiff's parent/guardian purchased commercial baby food. Plaintiffs have agreed to include with this list: (1) the store/website loyalty account number and phone number associated with the account; (2) the payment methods used; and (3) where applicable, credit card or debit card numbers used at the store. This gives Defendants the information necessary to make efforts it deems necessary to preserve purchasing records at those retailers at this stage of the litigation. Yet, Defendants want more. They seek a list of every place Plaintiff's parent/guardian ever purchased food at any time during the Plaintiff's life – regardless of whether they purchased baby food there and regardless of whether Plaintiff consumed that food. Plaintiffs have three concerns with Defendants' position.

First, it is simply not feasible to ask a parent/guardian to list every place they ever purchased food for the entire family, which could be interpreted to include everything from restaurants to farmers' markets, and more. Such a list would be expansive, but would almost certainly be incomplete and inaccurate, due to the burden of attempting to list every place food was ever purchased for the family. The question should be focused on where commercial baby food, which is what this case is about, was purchased. It will no doubt be the case that for most Plaintiffs, the stores where their parent/guardian bought commercial baby food are the same stores where they bought the majority of food for the rest of the family and that the Plaintiff may have consumed in addition to commercial baby food.

Second, as noted above, this document is about preservation, and Defendants are seeking to expand this document into *expansive* case-specific discovery that would take dozens of hours to prepare each disclosure. It is unduly burdensome at the general causation stage to ask Plaintiffs to

comb through documents to identify every place where they may have purchased some food for any member of the family for many years.

Third, Defendants' request seeks irrelevant information relating to foods purchased for other members of Plaintiffs' family. Food that another family member may have eaten has no relevance to the issues in this case and is certainly irrelevant to general causation.

Plaintiffs' position – limiting food purchasing records to commercial baby food – focuses on the products and purchases at issue, without unduly burdening Plaintiffs at this stage of the litigation and implicating large swathes of irrelevant information about foods not at issue and what family members may have eaten. Plaintiffs therefore request that the Court restrict the question to focusing on retailers where commercial baby food Plaintiff consumed was purchased at this stage of the MDL.

Defendants' Position:

Defendants' draft short form Plaintiff Fact Sheet requests basic information such as customer loyalty information and credit cards used for purchases at retailers at which each plaintiffs' caregivers purchased any foods. Plaintiffs contend that they should be only required to provide and preserve information necessary to determine which commercial baby foods each plaintiff ate. Plaintiffs' position is untenable for many reasons.

First, and most fundamentally, Plaintiffs' core allegation is that Defendants' baby foods are defective and caused ASD/ADHD because they contain "detectable" levels of heavy metals. It is undisputed that such heavy metals are not exclusive to baby foods but rather come from and are thus widely found in the kinds of fruits, vegetables, and grains baby foods contain. One cannot "shop one's way around" the issue. This means that any heavy metal exposure analysis *must* consider the totality of Plaintiffs' food consumption – not just baby food consumption – which Defendants have a right to test with evidence of what families *actually* bought and fed Plaintiffs, documented by purchase records. This is true not just because the heavy metal exposure from other foods may be as great or greater than from Defendants' baby foods, but also because a diverse diet that varies the amount and frequency of foods eaten is considered one of the best ways to reduce heavy metal exposure from any particular dietary source.

Second, purely as a practical matter, it is highly unlikely that Plaintiffs' parents or guardians can reliably identify and exclude from their Plaintiff Fact Sheets retailers where they bought foods but *not* Defendants' baby foods during the time period they put at issue. Past experience has repeatedly shown that families buy baby foods along with other foods and that they often make baby food purchases even at stores they do not readily recall as stores where they shopped for baby food. Defendants are entitled to know the full range of potential retailers where information regarding Defendants' baby food purchases may be found and thus should be preserved.

Third, past experience shows that Plaintiffs' caregivers may apply an unduly narrow interpretation of "baby food" – not only focusing exclusively on Defendants' products and ignoring the many other baby food brands, but also ignoring foods that may be considered table foods but are frequently consumed by babies and toddlers. Again, as Defendants have seen in other cases (and as public health data also confirms), by the time children can self-feed, such "non-baby foods" often make up a far more substantial portion of Plaintiffs' diets than Defendants' foods. If Plaintiffs do not disclose and make efforts to preserve all retailer records covering all food purchases, Defendants may permanently lose their chance to test Plaintiffs' memories and discover all purchases, including purchases not identified fed by Plaintiffs, of foods fed to babies.

Finally, there is no undue burden from Defendants' request. Just the opposite. It is far easier for Plaintiffs' caretakers to pull together a full list of where they made food purchases, including by reviewing credit card information, than it is to pick and choose based on memories that are years old. To date, state court plaintiffs have each identified a dozen or fewer stores at which they shopped for groceries, and similar numbers are expected here. Moreover, it should be in everyone's interest to avoid a situation where information has been lost because Plaintiffs' caregivers failed to be as inclusive as they are able at this early stage. Credit and debit card statements are generally available—and are the best evidence—to assist plaintiffs in identifying stores where they purchased groceries and food. In short, Defendants ask for nothing more and nothing less than what the Federal Rules require, and the same standard to which Plaintiffs hold

Defendants: each plaintiff is required to conduct a reasonably diligent search for the information requested.

3. Whether the Fact Sheet / Disclosure Should Contain Product Identification

Plaintiffs' Position:

Defendants' request that Plaintiffs identify every commercial baby food they ate by brand and type, regardless of whether the manufacturer is a named Defendant. Defendants conceded during the meet and confer that this information is not related to preservation. It is simply case-specific discovery.

It is true that Plaintiffs intend to identify products they recall eating to the best of their knowledge for each named Defendant in their Short Form Complaints. But that is an entirely different procedural posture than formal discovery. Plaintiffs' parents should not, in addition to that identification, have to comb through records at this stage of the litigation to identify every commercial baby food they fed Plaintiffs when they do not even have a complete identification from Defendants of what commercial baby food products they manufactured and sold during the relevant time period. As Defendants' position statement points out, memory alone is a starting point for identification of the commercial baby food products purchased and consumed, but past cases have shown there is a need to review purchase records. This is case-specific and time-consuming discovery. Plaintiffs have agreed to preserve information within their possession, custody, or control, and to provide Defendants information they deem necessary to ensure purchase records in the possession of third parties are preserved so that the information can be provided during the specific causation stage of the MDL. No more is required from Plaintiffs during the general causation stage.

Plaintiffs have indicated to Defendants that they would be happy to engage in product identification discovery provided it is *mutual*. That is, Plaintiffs will agree, in an actual discovery vehicle, to identify baby foods products consumed by the Plaintiff so long as Defendants also disclose, what products they made, when they made them, and where they sold them. Defendants have rejected this. They want product identification discovery to be one-sided. They want to

prevent a Plaintiff's parent / guardian from being able to review a list of available baby food products as part of their identification process—which would help ensure an accurate and complete identification of products. Instead, they want parents / guardians to simply remember, off the top of their head, what products they purchased years ago, and to do so with specificity or recourse to a product list of foods. The reason is simple—when a parent / guardian invariably mixes up "Apple Blueberry Biscuits" with "Apple Blueberry Teethers," Defendants can say "gotcha" and then use the "discrepancy" to call the parent / guardian a liar. This is not hyperbole. This is exactly what Defendants did in the *N.C.* case, where they argued that because N.C.'s mother's memory was not perfect and she mixed up a few products, she must be lying. One-sided discovery being used as trap does not further the purpose of discovery, nor does it facilitate the ascertainment of truth. If Defendants want product identification discovery, then they should operate in good faith and it should be *mutual*.

Importantly, if mutual product identification discovery is going to proceed, then it should not be part of a preservation disclosure. Rather, it should be done with a separate online form that facilitates the collection of information and is made pursuant to formal rules of discovery. Plaintiffs would be happy to negotiate a process for product identification discovery, but it should not be included as one-sided discovery in a preservation disclosure form.

Lastly, in the state court cases, Judge Riff specifically ordered that Plaintiffs would not be bound by any preliminary disclosures that they make, but that they would be free to review the list of products produced by Defendants to help refresh their recollections as to which products were purchased/consumed and update their responses accordingly

Defendants' Position:

During the November 7, 2024 case management conference, the Court stated that the short form Plaintiff Fact Sheet should include basic information like the products each plaintiff's caregiver remember the child consuming. 11/7/24 Hearing Tr. at 37:1-15. To respond to these requests, Plaintiffs would then be required "to actually go back and look at their photos and talk to their family members and look at their credit card statements." *Id.* Plaintiffs have already agreed to provide this information in their short form complaints prior to a general causation proceeding,

represented to this Court that they are "not trying to hide the ball on the products that the kids ate," and have not raised any burden argument associated with identifying the products they allege they consumed. 6/20/2024 Hearing Tr. 26:4-27:14. Thus, the question really boils down to when, rather than if, this information will be provided by Plaintiffs. Consistent with the guidance of the Court, Defendants believe Plaintiffs should provide the list of Defendants' baby food products they remember eating in a short form Plaintiff Fact Sheet based on their review of their records, photos, and discussions with family members. Providing this information in a Plaintiff Fact Sheet, as opposed to a short form complaint, means that individual plaintiffs need not move to amend the short form complaint with every change they want to make to the list of products they ate—and from experience, the parties know individual plaintiffs will update the list of products consumed over time—nor will the Court have to address motions to amend or motions to dismiss amended complaints on this basis.

Plaintiffs' sole basis for refusing to provide this information is that they should not be required to identify the products each plaintiff ate before Defendants identify an expansive list of every product ever made at any time. But these are independent and unrelated issues. Plaintiffs' duty is not to reverse engineer a selection of what products they want to put at issue from a list of all Defendants' products after also reviewing heavy metal testing for those products. Plaintiffs' duty is to state, in the first instance as the parties bringing suit and filing complaints (presumably) with a factual basis, what products they believe were consumed and caused them to develop ASD/ADHD – based on their own on memory and/or record evidence of products purchased and consumed. Judge Riff addressed this precise issue in the ongoing *Landon R.* case and ruled that the plaintiff's parents were required to provide their recollections of what baby foods their child ate before receiving any lists from Defendants of what products each Defendant made during the child's period of consumption. This was to ensure that Defendants (and the Court) received the unvarnished recollections of the parents on this critical issue.

Also, previous and ongoing experience in state court litigation has shown that Plaintiffs' product usage memories prompted by lists (and visuals) – limited to only Defendants' products – are fundamentally flawed. In two consecutive cases where the plaintiffs' parents created their list

of products at issue from pictures just of Defendants' baby food products, they repeatedly erred in both directions; they picked products that they never bought and failed to pick products that they did buy. Crucially, *they also failed to report substantial purchases of baby food brands other than those made by Defendants*. While mistakes in selecting food products the plaintiffs' caregivers fed their children years ago, particularly when presented only with a list of Defendants' baby food products, are understandable, it is no way to get to true and unbiased recollections of what Plaintiffs ate and what should be at issue in these cases. Defendants respectfully submit that the short form Plaintiff Fact Sheet is the appropriate place for Plaintiffs to identify the foods they believe they ate.

III. PRESERVATION UPDATE

A. Plaintiffs' Preservation Efforts

In PTO 9, the Court ordered that "Plaintiffs will provide Defendants with information regarding any customer loyalty programs in which they participated on a rolling basis." Defendants have yet to receive any customer loyalty information from any plaintiff; therefore, Defendants request that Plaintiffs begin providing that information.

Plaintiffs believe this information is exactly what is being discussed as part of the preservation disclosure issue, listed above. The entire purpose of such a disclosure is to avoid piecemeal and *ad hoc* sharing of information from different counsel representing different Plaintiffs in this MDL.

Defendants believe PTO 9 is clear: In paragraph 3, the Court required Plaintiffs to provide Defendants with customer loyalty information "on a rolling basis," and separately, in paragraph 5, the Court ordered the parties to meet and confer "regarding a short form Plaintiff Fact Sheet." PTO 9, ¶¶ 3, 5. These requirements are not one in the same. Similarly, at the November Case Management Conference, Defendants expressed a concern that the initial Plaintiff Fact Sheet proposed may not alleviate all of their preservation concerns, 11/7/24 Transcript, at 37:21-24, and the Court noted: "That's different. The retailer thing, we can talk about that because they've actually offered to contact," *id.* at 37:25-38:2. After the initial Plaintiff Fact Sheet discussion, the Court moved on to a separate topic, "So, now, what about those loyalty programs and trying to get

the retailers to preserve that information?" *Id.* at 41:4-5. Plaintiffs responded that they were "willing to either provide it to defense…or will send preservation letters to these entities." *Id.* at 41:13-15. As opposed to the initial Plaintiff Fact Sheet, which the Court ordered be completed by the end of the year, the Court asked Plaintiffs to provide the information they said they were willing to provide "on a rolling basis," asking Plaintiffs, "[s]o how quickly can you start?" *Id.* 41:21-22, 42:7-8. Plaintiffs indicated that some firms had already collected the necessary information and agreed to provide it on a rolling basis:

> **MS. KIM:** Well, I would argue if they have it now – it's a big task, and we – like I said, we're losing this every month. So for the firms that have already collected it on intake, if they could provide ***that now and on a rolling basis***, that would be appreciated.
>
> **MS. WAGSTAFF:** Of course.
>
> **THE COURT**: Yeah. Okay. Yeah. Sure. You're doing their work for them.
> **MS. WAGSTAFF**: I will speak with you after this hearing, and we can figure out a plan, I'm confident.
>
> *Id.* at 47:23-48:3.

Defendants request that the Court clarify that Plaintiffs should be providing information necessary for Defendants to preserve retailer and bank/credit card records on a rolling basis, starting immediately with information already in Plaintiffs' possession.

B. Defendants' Preservation Efforts

Plaintiffs' Position:

Under court order Defendants filed "a document detailing all the steps Defendants have taken for evidence preservation, including when litigation holds have been placed and how implemented. PTO 7 ECF No. 224. In issuing this order the Court explained, "[Defendants are] going to start by telling – by putting in writing to me everything that they've done, and then we'll have a very specific conversation and you can tell me why I need that." Plaintiffs raised the sufficiency of these statements with the Court in the Parties' Joint Case Management Statement in advance of the November 7, 2024 Case Management Conference. See ECF No. 257 at 11.

Later the Court ordered, "to the extent any defendant has refused to file a preservation statement, Plaintiffs shall send such defendants a letter setting forth the matters they believe subject to preservation holds." PTO 9 ECF No. 261 at 2. Defendants Campbell Soup Company, Danone S.A., Nestle Holdings, Inc., Nestle S.A., and Sun-Maid Growers of California failed to file preservation statements and Plaintiffs sent letters in accordance with PTO 9 on November 19, 2024.

Separately, on October 28, 2024, Plaintiffs sent each of the other filing Defendants a letter outlining the vital information Plaintiffs assert is lacking from those preservation disclosures. Among other things, Plaintiffs highlighted potential gaps in Defendants' preservation efforts, incomplete information regarding the scope of litigation holds, and lack of any information regarding Defendants' efforts to preserve documents in the possession of third parties. On October 30, 2024, the parties held a meet and confer that briefly discussed Defendants' preservation efforts in general without discussing each Defendant separately. Defendants committed to responding to Plaintiffs' concerns in writing. And on November 20, 2024, Defendants responded to Plaintiffs' letter. In their response, Defendants claimed that Plaintiffs' concerns were misplaced, premature, and cumulative. With respect to third-party documents, Defendants claimed they were under no duty to act in any way to preserve those documents.

Plaintiffs have consistently raised questions about Defendants preservation efforts because of deficiencies in earlier productions. Now that those productions have been re-issued in this MDL Plaintiffs' concerns about Defendants' scope of preservation across time have been re-newed. In an attempt to continue potential resolution of this issue with Defendants Plaintiffs have again, and since receiving Defendants' pre-Thanksgiving response, raised these issues in a discovery letter to Defendants and formally in the discovery requests discussed below.

Defendants' Position:

At the September 26, 2024 Case Management Conference, the Court ordered Plaintiffs to meet and confer with Defendants regarding any issues they identified in Defendants' preservation statements before noting, "it also somewhat seems like a tail wagging the dog. Like, they're on notice. They have preservation. They've told you what they do. Is there something they're not

preserving that you're afraid -- I feel like we're litigating this before we even know -- and there's unlikely to be, because I expect, as I expect with you, that all these fine attorneys are going to ensure that the evidence is preserved." 9/26/24 Transcript, at 15:19-16:1.

Plaintiffs waited more than a month to send a meet and confer letter, which Defendants received on October 28, 2024. The letter was directed primarily at deficiencies Plaintiffs believed existed in prior productions, not preservation. Defendants met and conferred with Plaintiffs two days later. At the November Case Management Conference, Plaintiffs raised preservation issues relating to third-party co-manufacturers and the foreign parent companies and the Court permitted certain third-party subpoenas and asked Plaintiff to serve preservation notices on the foreign parent companies, which Plaintiffs did. In the more than four weeks since the November Case Management Conference, Plaintiffs have not raised any further concerns with Defendants' preservation notices, until less than two hours before this statement was due.[4] Defendants cannot further respond without understanding what documents Plaintiffs are concerned Defendants are not appropriately preserving.[5]

IV. DISCOVERY UPDATE

A. Renewed and New Discovery Requests

On July 18, 2024, Plaintiffs served Interrogatories and Requests for Production on Defendants. Plaintiffs subsequently suspended the response date for the discovery requests

[4] As Campbell Soup Company ("CSC") stated in the Joint Statement for the November 7, 2024 Case Management Conference (ECF No. 257 at 12), and again in a December 5, 2024 letter to plaintiffs, 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 the preservation statement confirms, CSC possesses and preserved 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.

[5] The defendants challenging jurisdiction declined to file preservation statements in light of the Court's guidance at the November CMC that the way to handle the matter with respect to those defendants would be for plaintiffs to send defendants letter outlining what they believe to be subject to preservation. As defendants stated in the Parties' Joint Case Management Statement in advance of the November 7, 2024 Case Management Conference, the defendants challenging jurisdiction are cognizant of preservation obligations and in compliance with them.

indefinitely, and Defendants have not yet responded to those requests. On November 22, 2024, Plaintiffs served additional Interrogatories and Requests for Production on Defendants, with a response date of December 23, 2024. The manufacturer Defendants met and conferred with Plaintiffs on December 4, 2024 regarding disputes as to the discovery requests. Nevertheless, the parties are at an impasse regarding several issues. Accordingly, the parties request that the Court set a schedule at the December 12 case management conference to brief these issues for the Court. Each side's summary of the issues in dispute is set forth below.

Plaintiffs Position:

As part of Plaintiffs' discovery requests tailored to general causation, Plaintiffs propounded contention interrogatories that ask each Defendant to state the levels of heavy metals in their products and ingredients—an issue that will be central to the general causation phase. Specifically, Interrogatory No. 3 asks what each Defendant contends is "the average concentration (in ppb) of" arsenic, inorganic arsenic, lead, mercury, cadmium, and aluminum in their baby food products. Interrogatory No. 5, subparts 2-7, seeks the same information on the ingredients used in each product. This information is clearly relevant to general causation as it pertains to the levels of heavy metals found in each Defendant's products and ingredients—levels that Plaintiffs' experts will rely upon as part of their general causation opinions. Defendants will ultimately take the position that the levels of heavy metals in their baby foods could not harm a baby's brain (because the levels, according to Defendants, are "trace" or "low") and will attack Plaintiff's experts' opinions regarding the levels of heavy metals in Defendants baby foods. Accordingly, Plaintiff is entitled to discover the average levels of metals that Defendants believe existed.

Defendants object that they are unable to answer such contention interrogatories because they did not track the average levels of metals in their baby foods. Well, if Defendants do not have a contention regarding the average levels of metals in their products, they need to respond accordingly—and they will be forced to live with that response. The point of contention interrogatories is to determine whether a party has contentions regarding factual issues in the case. The lack of a position does not permit a refusal to respond. That said, the record from the depositions in the state court litigation indicate that certain Defendants—as attested by their

respective company witnesses—tracked historical metal averages across product portfolios. If Defendants did in fact track such averages, they need to identify such contentions in response to Plaintiffs' Interrogatories. And if they did not, Defendants likewise must respond accordingly. Defendants also assert that the interrogatories seek premature expert opinions. Not so. Plaintiffs are entitled to discover *Defendants'* contentions regarding the levels of metals in their products independent of the opinions of litigation experts. Defendants, as large, multinational corporations that hire a cadre of personnel with expertise in a variety of scientific disciplines are well-positioned to identify—to the extent available—the average levels of metals they believe existed in their baby food products. That a litigation expert may in the future proffer an opinion on behalf of Defendants does not relieve Defendants of their discovery duties of responding to contention interrogatories seeking Defendants' positions on factual issues today—especially when those factual issues go to the core of general causation discovery.

Defendants additionally assert that Plaintiffs Interrogatory Requests 13-25 and Request for Production 8 seek information outside the bounds of general causation, related to preservation efforts, and mooted by this Court's orders. Not so. The information and materials sought by Plaintiffs' request is the same information they have sought since originally proposing Rule 26 and disclosures in accordance with the Northern District of California's ESI checklist and guidelines on May 24, 2024. As part of the ESI Protocol, Defendants stipulated to "cooperate in good faith and be reasonably transparent in all aspects of the discovery process, including the identification, preservation, and collection of sources of potentially relevant ESI". ECF No. 249 at 4-5. In addition, the order provides:

> In order to facilitate discovery, the Parties will disclose a preliminary list of (a) potential custodians likely to possess potentially relevant information (b) custodial and non-custodial data sources likely to contain potentially relevant Documents and ESI, and (c) third parties likely to possess potentially relevant information in accordance with Fed. R. Civ. P. 26(f), this District's ESI Guidelines, any applicable Orders entered by this Court and participate in Rule 26(f) discussions guided by this District's ESI Checklist. The custodian and data source exchanges will include explanations of the rationale for their selections, for example, for custodians, their current job titles, dates of employment, and descriptions of their work, and for data sources, location information and description.

Id. at 11. More importantly, discovery "is an iterative process, and the discovery outlined in PTO 7 is the first step in that process, not the last." ECF No. 242.

Among other things, Plaintiffs' requests seek information and materials related to the identification of any systems and software that may include heavy metal testing/sourcing materials; categories of information maintained in structured (i.e. non-custodial) data sources and the technologies used to manage this structure information including, but not limited to systems which store heavy metal testing results and related materials; and information related to the maintenance and storage of business information, such as heavy metal testing, that may also be in the possession of third parties. Despite Plaintiffs' request for this type of information from the outset of this MDL, and certain Defendants promises to follow up with select information following court-ordered ESI meet and confers in August, no Defendant has provided any information to Plaintiffs in writing about where or how the discovery they have propounded was located and produced. In addition, no Defendant has conferred with Plaintiffs about new, MDL discovery that is yet to be produced in accordance with the ESI protocol. No Defendant has provided to MDL Plaintiffs a list of testing results by bates number. Defendants are correct that the Plaintiffs' now face in this MDL the very problems they sought to avoid at the outset of this litigation.

Now that Plaintiffs have Defendants initial productions, which consist almost entirely of materials produced in other, earlier litigations, Plaintiffs need confirmation from Defendants of what exactly this material consist of from where it came. Indeed, the 2015 comment to Rule 26(b)(1) affirms the appropriateness of learning about the "existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment. The comment states: "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples." *Id.*[6]

[6] Defendants' refusals to participate in informal exchanges of this information or Rule 26 disclosures, leave Plaintiffs with no choice but to seek this information through formal discovery.

MDL discovery has already been made less efficient because of Defendants refusal to provide basic information about their systems, policies, and efforts to locate relevant documents. The information and materials sought by this discovery are critical to a cooperative and transparent discovery process. *See* ECF No. 249.

The very existence of these systems, policies, materials, and organizational roles is directly relevant to Plaintiffs claims. If Defendants do not have these items, they never had, or those items were lacking, it supports the claim that Defendants were negligent in monitoring - effectively or at all - the presence of heavy metals in their products. And also tends to suggest that Defendants do or did not ever possess adequate heavy metal testing that this Court has deemed vitally important to the general causation stage of this litigation.

Defendants' Position:

As a general matter, Plaintiffs' discovery requests are overbroad, inappropriate, and duplicative of one another and what the Court has already ordered produced – and in many cases, Plaintiffs' newly-propounded discovery is aimed at requiring Defendants to reorganize or to help Plaintiffs review and assess what has already been produced by Defendants. Additionally, several of Plaintiffs' requests are also far outside the bounds of general causation. More specifically, the parties remain in dispute on at least two issues.

First, Plaintiffs' request for production and 13 interrogatories related to preservation efforts have been mooted by the Court's orders requiring both extensive meet and confers and the filing of preservation statements. Plaintiffs' insistence that these requests be answered is not the approach the Court asked the parties to take. The Court repeatedly told Plaintiffs to review the products and to return if they identified any concerns about preservation—and to raise them "in context." Plaintiffs have skipped that step and instead demand that Defendants respond to the interrogatories. This is inappropriate discovery-on-discovery, and it should be withdrawn. Notably, Plaintiffs do not refute or even address this issue in their summary above.

Plaintiffs' response (below) reveals what appears to be the true issue: Plaintiffs are not concerned about preservation; they want information relating to the scope and manner of the productions made in this and prior actions—that is, they want discovery on discovery. The Court

already provided guidance to the parties, ordering them to meet and confer regarding these issues. Defendants have met and conferred individually and extensively with Plaintiffs regarding the document preservation, collection, and production process—all in advance of the *August* CMC. Plaintiffs indicated they would send each Defendant a list of follow-up questions. Despite the passage of more than three months' time, Defendants have not received those questions. Instead, Plaintiffs want written discovery on discovery. The parties have discussed this issue at length with the Court, which has instructed Plaintiffs to "get the documents and then you see if there's a problem." 9/26/24 Transcript, 22:9-11. The Court made it clear that we should be addressing these issues in *context*, "I want to address it in context, and I just think we're kind of spinning wheels here otherwise."

Second, Plaintiffs have served interrogatories asking Defendants what they contend is the "average concentration" of six different heavy metals found in each of Defendants' products and each ingredient within that product. These contention interrogatories are improper because (a) Defendants' "contention" is irrelevant to the question of whether Plaintiffs can demonstrate through reliable expert evidence that Defendants' baby food products contain levels of heavy metals that can cause autism or ADHD; (b) Defendants have already explained in previous litigation that they do not maintain calculations of the "average" lead, arsenic, inorganic arsenic, or mercury concentrations for their products – thus, any "contention" would require Defendants to either to do math they are not obliged to do and that Plaintiffs or their experts can do just as easily based on already-produced test results, or improperly ask Defendants to preview their experts' opinions; and (c) the interrogatories are so vague and ambiguous that Defendants cannot discern what they are seeking. Plaintiffs do not substantively address any of these points in their summary, nor do they offer any meaningful justification of their improper attempt to get a sneak peek at Defendants' expert calculations or demand Defendants' contentions as to heavy metals levels. Defendants are prepared to brief these issues in greater depth under whatever schedule the Court deems appropriate.

B. Subpoenas Relating to Walmart Suppliers and Co-Manufacturers

Plaintiffs' Position:

These subpoenas seek relevant, discoverable material – namely, test results regarding Walmart's products and documents needed to interpret those results – that Walmart admits are not available by other means or from other sources. Plaintiffs' subpoenas seek more than just laboratory heavy metal test results because laboratory test results alone do not provide sufficient information to reliably evidence the levels of heavy metals in Defendants' products. Indeed, test results frequently do not even contain sufficient information to specifically identify the tested product/ingredient and/or whether that product/ingredient was ever sold. Without the test results and the documents necessary to interpret those results, the Parties' experts cannot reliably opine regarding whether Walmart's products contained dangerous levels of heavy metals capable of causing ASD and ADHD. The subpoenaed materials are essential to resolving the litigation's core issues.

Walmart seeks to deprive Plaintiffs of these critical materials on relevance and burden grounds and because, Walmart alleges, the subpoenas may annoy Walmart's business partners or expose commercially sensitive information. But Walmart lacks standing to quash the subpoenas on either relevance or burden grounds, and none of the subpoenaed parties have raised these concerns. *See* Fed. R. Civ. Pro. 45; *In re Telescopes Antitrust Litig.*, No. 20-cv-03639-EJD, 2023 WL 2396780, at *1-2 (N.D. Cal. Mar. 7, 2023) ("As a general matter, a party has no standing to move to quash or for a protective order on the grounds that a subpoena seeks irrelevant information or would impose an undue burden on the non-party" absent a claim of a personal right or privilege with respect to the documents requested in the subpoena). Walmart claims that the subpoenaed materials constitute or contain commercially sensitive information, but that claim does not give rise to standing where the Parties have entered a stipulated Protective Order. *See Wells Fargo & Co. v. ABD Ins., No. C 12-03856 PJH DMR*, 2012 WL 6115612, at *3 (N.D. Cal. Dec. 10, 2012) (holding that Defendants lacked standing under Rule 45(c) in a case involving a stipulated protective order). Walmart does not substantiate its claim that the subpoenas may annoy its business partners; further, if mere annoyance sufficed to quash subpoenas, then no subpoena

could ever be enforced, as responding always involves *some* unwanted burden.

The subpoenaed parties can and will confer with Plaintiffs regarding any scope or burden concerns they may have. A satisfactory solution may be reached through the conferral process. Plaintiffs' position is that the Court can defer judgment unless and until a party with standing to do so brings a motion to quash.

Defendants additionally assert that Plaintiffs Interrogatory Requests 13-25 and Request for Production 8 seek information outside the bounds of general causation, related to preservation efforts, and mooted by this Court's orders. Not so. The information and materials sought by Plaintiffs' request is the same information they have sought since originally proposing Rule 26 and disclosures in accordance with the Northern District of California's ESI checklist and guidelines on May 24, 2024. As part of the ESI Protocol, Defendants stipulated to "cooperate in good faith and be reasonably transparent in all aspects of the discovery process, including the identification, preservation, and collection of sources of potentially relevant ESI". ECF No. 249 at 4-5. In addition, the order provides:

> In order to facilitate discovery, the Parties will disclose a preliminary list of (a) potential custodians likely to possess potentially relevant information (b) custodial and non-custodial data sources likely to contain potentially relevant Documents and ESI, and (c) third parties likely to possess potentially relevant information in accordance with Fed. R. Civ. P. 26(f), this District's ESI Guidelines, any applicable Orders entered by this Court and participate in Rule 26(f) discussions guided by this District's ESI Checklist. The custodian and data source exchanges will include explanations of the rationale for their selections, for example, for custodians, their current job titles, dates of employment, and descriptions of their work, and for data sources, location information and description.

Id. at 11. More importantly, discovery "is an iterative process, and the discovery outlined in PTO 7 is the first step in that process, not the last." ECF No. 242.

Among other things, Plaintiffs' requests seek information and materials related to the identification of any systems and software that may include heavy metal testing/sourcing materials; categories of information maintained in structured (i.e. non-custodial) data sources and the technologies used to manage this structure information including, but not limited to systems which store heavy metal testing results and related materials; and information related to the maintenance

and storage of business information, such as heavy metal testing, that may also be in the possession of third parties. Despite Plaintiffs' request for this type of information from the outset of this MDL, and certain Defendants promises to follow up with select information following court-ordered ESI meet and confers in August, no Defendant has provided any information to Plaintiffs in writing about where or how the discovery they have propounded was located and produced. In addition, no Defendant has conferred with Plaintiffs about new, MDL discovery that is yet to be produced in accordance with the ESI protocol.

Now that Plaintiffs have Defendants initial productions, which consist almost entirely of materials produced in other, earlier litigations, Plaintiffs need confirmation from Defendants of what exactly this material consist of from where it came. Indeed, the 2015 comment to Rule 26(b)(1) affirms the appropriateness of learning about the "existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment. The comment states: "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples." *Id.*[7]

MDL discovery has already been made less efficient because of Defendants refusal to provide basic information about their systems, policies, and efforts to locate relevant documents. The information and materials sought by this discovery are critical to a cooperative and transparent discovery process. *See* ECF No. 249.

The very existence of these systems, policies, materials, and organizational roles is directly relevant to Plaintiffs claims. If Defendants do not have these items, they never had, or those items were lacking, it supports the claim that Defendants were negligent in monitoring - effectively or at all - the presence of heavy metals in their products. And also tends to suggest that Defendants do or did not ever possess adequate heavy metal testing that this Court has deemed vitally important to the general causation stage of this litigation.

[7] Defendants' refusals to participate in informal exchanges of this information or Rule 26 disclosures, leave Plaintiffs with no choice but to seek this information through formal discovery.

Walmart's Position:

Walmart's position regarding the overbreadth of Plaintiffs' subpoenas is detailed in the joint statement regarding Walmart's motion for a protective order. *See* Dkt. 286. As Walmart repeatedly informed Plaintiffs, Walmart does not object to Plaintiffs obtaining heavy metal test results from Walmart's co-manufacturers for the baby food products identified in the Master Complaint. Indeed, Walmart has offered to attempt to facilitate the production of such test results from the subpoenaed entities to expedite the discovery process. But Plaintiffs' subpoenas go well beyond heavy metal testing—unilaterally attempting to expand discovery beyond general causation and the scope of this MDL to non-baby food products. Walmart undoubtedly has an interest in protecting its confidential information that is not at issue at this stage of the litigation and to protect its relationship with its co-manufacturers. And the Court indisputably has the authority to limit third party discovery to general causation under Federal Rule of Civil Procedure 26. Plaintiffs' arguments that they somehow need to review all internal communications from third-party manufacturers, each third party's manufacturing policies and procedures, and all documents "relating to any potential association, causal or otherwise, between a child's exposure to heavy metals…and neurodevelopmental harm" to understand the test results that will be produced is meritless. Nor is discovery into baby food products or infant formula products not currently at issue in this MDL warranted under Rule 26. The Court should therefore grant Walmart's motion of a protective order, thereby limiting Plaintiffs' subpoenas to obtaining test results from Walmart's co-manufacturers for baby food products at issue in this MDL.

C. Update on Nurture Formula Protective Order

Pursuant to Pretrial Order No. 9 (ECF No. 261), the parties met and conferred regarding a formula protective order related to production of Nurture's product formulas. On November 14, 2024, the parties notified the Court (ECF No. 267) that they had reached a resolution that works within and relies upon the already-existing Product Formula Protective Order in *Landon R. v. Hain Celestial Group, Inc., et al.*, Case No. 23STCV24844, Los Angeles Superior Court. The parties agree that they no longer have a need to submit new proposed formula protective orders to the Court at this time.

D. Defendants' Privilege Logs

Plaintiffs' position:

As required by the ESI Order, Defendants Sprout, Gerber, Beech-Nut, and Plum served the previously produced privilege logs along with their reservice of discovery proffered in *NC v. Hain Celestial Group, Inc.*, Case No. 21STCV22822 (Cal. Super.); *Landon, R. v. Hain Celestial Group, Inc., Case No. 23STCV24844 (Cal. Super.); Watkins v. Nurture, LLC, Case No. 22-551 (E.D. La.).* *See* ECF No. 249 at 9-10. Plaintiffs have requested logs from those Defendants from whom none were received. Plaintiffs have not received any logs from any Defendant specific to productions made only in this MDL.

In accordance with the ESI Order, Plaintiffs are assessing the thousands of entries on Defendants' log and will shortly issue challenges to these logs. *Id.* at 9. Most notably among the issues Plaintiffs encounter on these logs is that information sufficient to assess privilege is lacking, many entries over which Defendants assert privilege include third parties, and/or there are no privileged names listed on the logs. If the Parties are unable to resolve these issues through the process outlined by the ESI protocol, the Parties will raise these entries with the Court.

Defendants' position:

Defendants have not received from Plaintiffs any specific concerns regarding privilege logs and cannot address this issue out of context. Plaintiffs are incorrect: Hain, Nurture, and Walmart have produced privilege logs from prior cases. The reason Plaintiffs have not received privilege logs for documents produced for the first time in this litigation is that nothing has been withheld based on a claim of privilege.

V. STATUS OF PLEADINGS AND PLEADINGS CHALLENGES

A. Motion to Dismiss of Amazon and Whole Foods

On December 3, 2024, the Court granted Amazon and Whole Foods' motion to dismiss the *Watkins* Plaintiffs' claims for negligent undertaking and under the Louisiana Products Liability Act (LPLA). *See* ECF No. 285. The motion was granted without leave to amend, except that the Court granted Plaintiffs leave to amend the negligent undertaking claim against Amazon. The Court denied Amazon and Whole Foods' motion to strike Plaintiffs' redhibition claim.

The *Wakins* Plaintiff intends to amend his complaint with respect to Amazon by the deadline set forth in the Court's Order.

B. Status of Short-Form Complaints

The parties met and conferred with respect to the process for a short form complaint. In general terms, pursuant to PTO 9, Plaintiffs will begin preparing a short form complaint. Plaintiffs will share the short for complaint with Defendants for the purpose of meeting and conferring with respect to any procedural issues raised by the form of pleading. The parties will also negotiate a proposed pretrial order pertaining to the process of filing short form complaints. The parties will aim to negotiate this order and the form of the short form complaint in advance of the January Case Management Conference to ensure the complaint and order are ready for use following the Court's order on Rule 12 motions directed at the Master Complaint.

C. Pleadings and Service Motions Filed December 2, 2024

On December 2, 2024, the following motions were filed with the Court:

1. Motion of Defendants Beech-Nut Nutrition Company, Gerber Products Company, Hain Celestial Group, Inc., Nurture, LLC, Plum, PBC, Sprout Foods, Inc., Walmart Inc., Campbell Soup Company, and Neptune Wellness Solutions, Inc. to Dismiss Plaintiffs' Master Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and Motion to Strike pursuant to Fed. R. Civ. P. 12(f). ECF No. 283.
2. Motion of Defendant Campbell Soup Company to Dismiss the Master Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF No. 275.
3. Motion of Defendant Sun-Maid Growers of California to Dismiss the Master Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1). ECF No. 276.
4. Motion of Defendant Nestlé S.A. to Dismiss the Master Complaint pursuant to Fed. R. Civ. P. 12(b)(2). ECF No. 277.
5. Motion of Defendant Hero AG to Dismiss the Master Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6). ECF No. 281.
6. Motion of Defendant Nestlé Holdings, Inc. to Dismiss the Master Complaint and individual complaints against Nestlé Holdings, Inc. pursuant to Fed. R. Civ.

P. 12(b)(2) or, alternatively, pursuant to Fed. R. Civ. P. 12(b)(6), and Motion to Strike pursuant to Fed. R. Civ. P. 12(f). ECF No. 282.

7. Motion of Defendant Danone S.A. to Dismiss the Master Complaint and each individual complaint served on Danone S.A., pursuant to Fed. R. Civ. P. 12(b)(2) or, in the alternative, pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 284.

8. Plaintiffs' Motion for Alternate Service of Process on Foreign Defendants Nestlé S.A., Danone S.A., Hero A.G., and Neptune Wellness Solutions, Inc. ECF No. 279.

Pursuant to the November 12, 2024 Stipulation by the parties (ECF No. 266), opposition briefs to each of the above-listed motions are due on January 16, 2025 and reply briefs are due on February 6, 2025. Pursuant to Pretrial Order No. 9 (ECF No. 261), oral argument on the motions will be heard by the Court on February 27, 2025 at 9:00 a.m.

Dated: December 10, 2024

Respectfully submitted,

WAGSTAFF LAW FIRM

By: */s/ Aimee H. Wagstaff*

Aimee H. Wagstaff (SBN: 278480)
940 N. Lincoln Street
Denver, Colorado 80203
Telephone: 303.376.6360
Facsimile: 303.376.6361
awagstaff@wagstafflawfirm.com

WISNER BAUM, LLP

By: */s/ R. Brent Wisner*

R. Brent Wisner (SBN: 279023)
rbwisner@wisnerbaum.com
100 Drakes Landing Rd., Suite 160
Greenbrae, CA 94904
Telephone: (310) 207-3233
Facsimile: (310) 820-7444

Co-Lead Counsel for Plaintiffs in MDL 3101

Dated: December 10, 2024

DLA PIPER LLP (US)

By: */s/ Brooke Killian Kim*

Brooke Killian Kim (CA Bar No. 239298)
4365 Executive Drive, Suite 1100
San Diego, CA 92121
Telephone: (619) 699-3439
Facsimile: (858) 677-1401
E-mail: brooke.kim@dlapiper.com

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: December 10, 2024

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

CERTIFICATE OF SERVICE

I certify that on December 10, 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