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September 30, 2020

VIA ECF

The Honorable Hildy Bowbeer
United States Magistrate Judge
734 Federal Building
316 N. Robert Street
St. Paul, MN 55101

Re: *Peterson, et al.*, No. 19-cv-1129 (JRT/HB); *In re Cattle Antitrust Litigation*, No. 19-cv-1222 (JRT/HB); *In re DPP Beef Litigation*, No. 20-cv-1319 (JRT/HB); and *Erbert & Gerbert's, Inc.*, No. 20-cv-1414 (JRT/HB)

Your Honor:

With permission from Chambers, I write on behalf of all Defendants concerning the current discovery orders and deadlines. As the Court is aware, on September 28, 2020, Chief Judge Tunheim entered the Memorandum Opinion and Order Granting Defendants' Motions to Dismiss the *Cattle* and *Peterson* second amended complaints.¹ Although Judge Tunheim granted Plaintiffs leave to amend their complaints within 90 days of the Order, it is far from clear that any amended pleading would survive a motion to dismiss under the criteria articulated by Judge Tunheim in his opinion. In addition, the *In re DPP* and *Erbert & Gerbert's* complaints are essentially duplicative of the *Cattle* and *Peterson* second amended complaints and suffer from the same pleading defects identified in Judge Tunheim's Order.²

Given there are currently no operative or viable complaints in any action following Judge Tunheim's Order, Defendants respectfully submit that all discovery orders and deadlines should be suspended pending Plaintiffs' amended complaints and further order of this Court. This approach is consistent with the Court's order in *In re Pork Antitrust Litig.*, 18-cv-1776 (JRT/HB) (ECF No. 367) following Judge Tunheim's dismissal of the operative complaints.

Specifically, the suspension should apply to the upcoming deadlines set forth in the Court's Second Order on Discovery Pending Resolution of Motions to Dismiss, including the deadlines for the parties to meet and confer regarding Rule 34 requests, custodians, and noncustodial sources. Such suspension also should apply to the production required by the Court's Order on Plaintiffs' Motion

¹ See ECF No. 204 in 19-cv-1129; ECF No. 278 in 19-cv-1222 (as amended to correct a docket reference, ECF No. 205 in 19-cv-1129; ECF No. 279 in 19-cv-1222).

² Defendants have asked the *In re DPP* and *Erbert & Gerbert's* Plaintiffs whether they intend to dismiss their complaints or amend them.

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to Narrowly Lift Discovery Stay. In requiring that production, the Court directed Defendants to produce only those documents that are relevant to Plaintiffs' claims in these cases. *Peterson*, ECF No. 189, at 8-9. In conducting such review, Defendants were to "operate on the assumption that their motions to dismiss will be denied in their entirety." *Id.* at 9. That assumption is no longer valid. Since the entry of that Order, Judge Tunheim granted the motions to dismiss and dismissed all of Plaintiffs' claims in their entirety. While Plaintiffs have indicated that they intend to amend their complaints, any assessment of relevance cannot occur until Plaintiffs have done so. To require otherwise would transform an order to conduct discovery pending the resolution of motions to dismiss into an order to conduct discovery pending *the filing of a complaint itself*. And because there is significant uncertainty that any amended pleading will survive a motion to dismiss under the standards set forth in Judge Tunheim's Order, whether any production based on the forthcoming amended complaints should be required is a question that should be considered only after those amended complaints are filed.

Of course, Defendants are mindful of preservation considerations. Therefore, consistent with this Court's post-dismissal Order in *Pork*, which stated "all obligations and orders to preserve evidence, documents, and data remain in effect," *In re Pork Antitrust Litig.*, 18-cv-1776 (JRT/HB) (ECF No. 367), Defendants will continue to preserve the documents and data subject to Plaintiffs' prior complaints.

Respectfully submitted,

/s/ Jessica J. Nelson

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