SpencerFane

JESSICA J. NELSON
DIRECT DIAL: 612-268-7006
EMAIL: JNELSON@SPENCERFANE.COM

October 2, 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*, No. 19-cv-1222 (JRT/HB); *In re DPP Beef Litig.*, No. 20-cv-1319 (JRT/HB); & *Erbert & Gerbert's*, No. 20-cv-1414 (JRT/HB)**

Your Honor:

I write on behalf of all Defendants concerning Plaintiffs' October 1, 2020 letter ("Ltr.") in opposition to the suspension of discovery deadlines and orders in light of Judge Tunheim's recent Order dismissing the *Cattle* and *Peterson* second amended complaints—suspension that would be consistent with the approach the Court adopted following the dismissal of the operative *Pork* complaints in 2019. *In re Pork Antitrust Litig.*, 18-cv-1776 (JRT/HB) (ECF No. 367).

In their letter, Plaintiffs do not deny that there are no truly operative or viable claims in any of the pending actions.[1] Rather, Plaintiffs candidly acknowledge that *they seek the CID materials in order to try to plead a viable amended complaint.* Ltr. at 2 ("Such transaction data, along with the other materials produced to the DOJ, will assist Plaintiffs in including the defendant-by-defendant detail that Judge Tunheim found missing"). This bold request for pre-complaint discovery turns the Federal Rules of Civil Procedure on its head. *See, e.g.*, *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.*, 296 F.R.D. 1, 2–3 (D.D.C. 2013) (denying motion for discovery after dismissal of complaint with leave to amend and stating that the "Rule 8 screening function would be rendered toothless if [plaintiffs] were entitled to pre-complaint discovery in order to fish for conduct that gives rise to an antitrust violation"); *In re Flash Memory Antitrust Litig.*, 2008 WL 62278, at **1, 5 (N.D. Cal. Jan. 4, 2008) (rejecting plaintiffs' request for production, prior to amendment of complaint, of DOJ antitrust grand jury materials because "[s]uch pre-action discovery is generally not permitted" as it "obviates" the protections provided by the Federal Rules). Plaintiffs cannot demand the production of documents by Defendants in order to try to solve the problems Judge Tunheim identified with their deficient claims.

Nothing in the few cases that Plaintiffs cite suggests that pre-complaint discovery is proper. For example, in *Lithium* case, no motion to dismiss had been granted and the court found the plaintiffs were not "seeking pre-complaint discovery" as there were "more than 70 complaints on file … from which to

[1] Although Plaintiffs suggest in passing that the *DPP* and *Erbert & Gerbert* "complaints remain operative," Ltr. at 2, those complaints mirror the complaints Judge Tunheim just dismissed, and Defendants therefore could move to dismiss them now. To avoid burdening the Court with unnecessary motion practice, Defendants have reached out to inquire whether they intend to dismiss their complaints or to seek to amend. In any event, none of the CID materials could be relevant to *any* claims that Judge Tunheim has determined are not viable.

measure the relevance of the requested discovery." Case No. 13-md-02420, ECF No. 200 (N.D. Cal. May 21, 2013) (attached as Ex. M to *Cattle*, ECF No. 219) at 3.[2]

Nor did the Court's ruling on the CID materials remotely suggest that such pre-complaint discovery would be appropriate. Rather, the Court made clear that Plaintiffs could not "do an end-run" around the Federal Rules of Civil Procedure and that Defendants were entitled to assess the relevance of the CID materials in light of Plaintiffs' claims and Defendants' Rule 34 responses. *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.

Given Judge Tunheim's ruling, that assumption is no longer valid. So Plaintiffs now ask the Court to impose a new assumption – *i.e.*, that any amended complaint will necessarily "provide the details sufficient to establish" a viable claim. Ltr. at 2; *see also id.* at 3 (the amended complaint will "bolster the detailed allegations supporting the *existing* claims of conspiracy") (emphasis in original).[3] But neither the Court nor Defendants should be forced to blindly speculate about what the amended complaints will look like. And Plaintiffs have made this same argument before. Then, as now, Plaintiffs argued that their claims would necessarily survive the motions to dismiss. *Peterson*, ECF No. 143, at 10 (claiming that a discovery stay was not warranted because "Plaintiffs have supplied Defendant-specific information that the Court found was lacking in *Pork*"). But Judge Tunheim found otherwise.

Plaintiffs also suggest that getting the documents now is more efficient than requiring them to file amended complaints now and then immediately seeking leave for yet another amendment after they have received the documents (*see* Ltr. 3). But that presumes that the Court will allow discovery after the case has already been dismissed once, that the allegations in the amended complaints would warrant the production Plaintiffs seek, and that the productions would include information that actually supports Plaintiffs' claims.

Defendants respectfully submit that all discovery orders and deadlines should be suspended and that Plaintiffs' improper request for pre-complaint discovery should be denied. Whether any production based on the forthcoming amended complaints should be required is a question that should be considered only after their amended complaints are filed.

Defendants are available for oral argument on these letters but believe that, as in *Pork*, the outcome here is straightforward such that argument may not be warranted.

Respectfully submitted,

*/s/ Jessica J. Nelson*

Jessica J. Nelson

---

[2] In *Broiler Chicken*, there were operative complaints and the court had not yet ruled on any motions to dismiss. 2017 WL 4417447, at *4 (N.D. Ill. Sept. 28, 2017). And in *Raymond*, there is no suggestion that the plaintiff sought discovery to amend her complaint. *See* 2014 WL 4215378, at **6–7 (D. Idaho Aug. 25, 2014).

[3] In this regard, Plaintiffs assert that they have already identified Witnesses 1 and 2—an assertion that is simply false. Indeed, when Defendants requested such information before filing their motions to dismiss, Plaintiffs refused to provide it. *See Cattle*, ECF Nos. 141-1 (letter from defense counsel to plaintiffs' counsel requesting identification of Witnesses 1 and 2); 141-2 (letter from plaintiffs' counsel stating that plaintiffs "do not regard it appropriate to provide the information sought"). In any event, Plaintiffs' deficiency goes beyond refusing to name the witnesses and their employers, as Judge Tunheim explained. *Peterson*, ECF No. 205.