BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE FRITO-LAY BEAN DIP MARKETING AND SALES PRACTICES LITIGATION		**MDL DOCKET NO. 2413**

FRITO-LAY'S RESPONSE TO MOTION TO TRANSFER RELATED CASES FOR CONSOLIDATED PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407 AND CROSS MOTION TO CONSOLIDATE MDL PROCEEDINGS

INTRODUCTION

Defendant Frito-Lay North America, Inc. ("Frito-Lay") respectfully submits this Response to the Motion of Plaintiff Kelli Altman for Transfer of Actions to the Southern District of Florida Pursuant to 28 U.S.C. § 1407 (the "MDL 2413 Motion"), and Cross Motion to consolidate proceedings on the MDL 2413 Motion with proceedings on the Motion of Plaintiff Kimberly Fleishman for Transfer of Actions to the Northern District of Illinois Pursuant to 28 U.S.C. § 1407 (the "MDL 2414 Motion"). All of the actions identified in the MDL 2413 and 2414 Motions involve the same core allegation: that "Natural" labeling on Frito-Lay products is misleading because the products are made from vegetables grown from genetically modified seeds. Frito-Lay submits that centralization in a single district of all of the actions in the MDL 2413 and 2414 Motions is appropriate under the consolidated MDL caption: *In re Frito-Lay North America, Inc.,"Natural" Litigation*.

Frito-Lay also submits that the Eastern District of New York is the appropriate transferee district for consolidated pre-trial proceedings. Five out of the ten actions identified in the two MDL Motions are already pending in that Court before the same judge and magistrate judge. Moreover, four of the actions in that district assert claims challenging labeling for all three of the Frito-Lay products at issue in the two MDL Motions: Tostitos, SunChips and Bean Dip.

Frito-Lay has been attempting to consolidate actions challenging "Natural" labels on its

chips and dip products for nearly a year. While Frito-Lay's initial efforts were successful—both the Southern District of Florida and the Northern District of California have granted motions by Frito-Lay to transfer actions challenging labeling on Bean Dip, Tostitos, and SunChips to the Eastern District of New York[1]—certain plaintiffs and their counsel continue to file copycat complaints in federal courts across the country challenging the same labeling for the same products after each 1404 transfer. Frito-Lay similarly engaged in informal efforts to centralize the litigation and those efforts also were initially successful: through voluntary agreement, three different cases, involving three different plaintiff's counsel, were transferred to and consolidated in the Eastern District of New York—a venue selected by the plaintiffs in those cases. Informal efforts to transfer the more-recently filed actions to the Eastern District of New York have failed. As documented below, plaintiffs in those cases have opposed Frito-Lay's efforts toward orderly coordination and consolidation of the actions in a single district at every juncture, unnecessarily exacerbating litigation costs, draining court resources and impeding the efficient administration of these cases. Requiring Frito-Lay to continue litigating time-consuming and expensive first-to-file and § 1404 transfer motions in different federal courts across the country (and respond to various plaintiffs' procedural maneuvering to thwart consolidation) would be a significant and unnecessary waste of judicial and party resources. Centralization of the actions in the Eastern District of New York is appropriate so that the common issues and boilerplate complaints can be efficiently addressed in a single district.

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[1] *See* Transfer Order, *Schwartz v. Frito-Lay North America*, No. 12-cv-02740-EDL (N.D. Cal. Sept. 12, 2012), ECF No. 27 ("*Schwartz* Transfer Order") (attached hereto as Exhibit A); *see* Transfer Order 4, *Foust v. Frito-Lay North America, Inc.*, No. 12-cv-21975-CMA (S.D. Fla. Oct. 5, 2012), ECF No. 29 ("*Foust* Transfer Order") (attached hereto as Exhibit B).

PROCEDURAL HISTORY

The procedural history of the cases culminating in the MDL 2413 and 2414 Motions provides strong support for Frito-Lay's position and will illuminate for the Panel the costly and inefficient tactics of one group of plaintiffs to move the cases out of the E.D.N.Y.

A. The E.D.N.Y. Consolidated Actions: *Frito-Lay North America, Inc. "All Natural" Litigation* (*Gengo*, *Zuro*, and *Shake*)

The first lawsuit challenging "Natural" labeling on Frito-Lay products, *Gengo v. Frito-Lay North America, Inc.*, No. 12-cv-00854-RRM-RLM (E.D.N.Y.) ("*Gengo*"), was filed on December 14, 2011 in the Central District of California. It alleged that "Natural" labeling on various Tostitos and SunChips products was misleading because the products were made from vegetables grown from genetically modified seeds, and sought relief on behalf of a nationwide class of purchasers. A second suit, *Zuro v. Frito-Lay North America, Inc.*, No. 12-cv-00885-RRM-RLM (E.D.N.Y.) ("*Zuro*"), was filed on December 23, 2011 in the Northern District of California, and a third suit, *Shake v. Frito-Lay North America*, *Inc., and PepsiCo, Inc.*, No. 12-cv-00408- RRM-RLM (E.D.N.Y.) ("*Shake*"), was filed on January 27, 2012 in the Eastern District of New York. Like the *Gengo* action, the *Zuro* and *Shake* actions alleged that "Natural" labeling on Tostitos and SunChips products was misleading because the products were made from vegetables grown from genetically modified seeds, and sought relief on behalf of a nationwide class of purchasers.[2]

Due to the substantial similarities among the complaints in the three actions, plaintiffs and Frito-Lay conferred and ultimately all parties in the *Gengo* and *Zuro* actions stipulated to

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[2] *See* Class Action Compl., *Gengo*, No. 12-cv-00854-RRM-RLM (E.D.N.Y.), ECF No. 1, ¶¶ 3-8, 25-26; Class Action Compl., *Zuro*, No. 12-cv-00885-RRM-RLM (E.D.N.Y.), ECF No. 1, ¶¶ 3-8, 23-24; Class Action Compl., *Shake*, No. 12-cv-00408-RRM-RLM (E.D.N.Y.), ECF. No. 1, at 1, 7-9.

transfer the cases to the Eastern District of New York for consolidation with the *Shake* action.[3] On March 20, 2012, E.D.N.Y. Judge Roslynn R. Mauskopf, who was presiding over all three related actions, entered an order consolidating the actions under the caption: *Frito-Lay North America, Inc. "All Natural" Litigation* (the "E.D.N.Y. Consolidated Actions").[4]

After *Gengo*, *Zuro*, and *Shake* were consolidated, plaintiffs in the actions filed a Consolidated Complaint (the "E.D.N.Y. Consolidated Complaint") bringing claims relating to Tostitos, SunChips, and Bean Dip products.[5] The Consolidated Complaint alleges the same core theory as the original complaints—that "Natural" labeling on the products is misleading because the products are made from vegetables grown from genetically modified seeds. *Id*. at 1-2. It asserts putative class action claims on behalf of a nationwide class of purchasers. *Id*. ¶ 68.

B. The Law Offices of Howard W. Rubinstein, P.A. Complaints (*Schwartz*, *Foust*, and *Berkowitz*)

More than five months after the first action against Frito-Lay (*Gengo*) was filed (and more than two months after Judge Mauskopf consolidated *Gengo*, *Zuro* and *Shake*), two virtually identical suits were filed on two different coasts by the same plaintiffs' firm, the Law Offices of Howard W. Rubinstein, P.A., in a span of five days. *See Foust v. Frito-Lay North America, Inc.*, No. 12-cv-21975-CMA (S.D. Fla.) ("*Foust*") (filed May 25, 2012); *Schwartz v. Frito-Lay North America, Inc.*, No. 12-cv-2740-EDL (N.D. Cal.) ("*Schwartz*") (filed May 29, 2012). The

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[3] *See* Order Transferring Action to the Eastern District of New York, *Gengo*, No. 12-cv-00854-RRM-RLM (E.D.N.Y.), ECF No. 9; Order Transferring Action to the Eastern District of New York, *Zuro*, No. 12-cv-00885-RRM-RLM (E.D.N.Y.), ECF No. 13.

[4] *See* March 20, 2012 Consolidation Order, *Frito-Lay North America, Inc. "All Natural" Litigation*, No. 12-cv-00408-RRM-RLM (E.D.N.Y.), ECF No. 5.

[5] *See Frito-Lay North America, Inc. "All Natural" Litigation*, No. 12-cv-00408-RRM-RLM (E.D.N.Y.), ECF No. 18. A copy of the E.D.N.Y. Consolidated Complaint is attached hereto as Exhibit C.

complaints in both actions alleged that "Natural" labels on Tostitos, SunChips and Bean Dip products were misleading because the products were made using vegetables grown from genetically modified seeds, and brought putative class action claims on behalf of a nationwide class of purchasers.[6] On June 7, 2012, and June 8, 2012, Frito-Lay filed motions in the Southern District of Florida and the Northern District of California to transfer the *Foust* and *Schwartz* actions to the Eastern District of New York for consolidation with the E.D.N.Y. Consolidated Actions under 28 U.S.C. § 1404 and the first-to-file rule.[7]

Shortly after Frito-Lay filed its initial motion to transfer *Schwartz* from the Northern District of California to the Eastern District of New York, the Schwartz plaintiff filed an amended complaint excising her claims relating to Tostitos and SunChips, and asserting claims only relating to Bean Dip,[8] requiring Frito-Lay to file a renewed transfer motion based on plaintiff's amended complaint.[9] On September 12, 2012, the court issued a written order (the *Schwartz* Transfer Order) granting Frito-Lay's motion to transfer the action to the Eastern District of New York. In its order, the court specifically rejected Schwartz's argument that her Bean-Dip only amended complaint differed from the claims in the E.D.N.Y. Consolidated Complaint. *See Schwartz* Transfer Order at 5 (Exhibit A) ("The only difference Plaintiff points to—that she purchased only Bean Dip, while the named plaintiffs in the New York case

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[6] Compl., *Foust*, 12-cv-05017-RRM-RLM (E.D.N.Y.), ECF No. 1, ¶¶ 1, 12, 31, ECF No. 1; Compl., *Schwartz*, 12-cv-04638-RRM-RLM (E.D.N.Y.), ECF No. 1, ¶¶ 1, 12, 31.

[7] Def.'s Mot. To Transfer Action To E.D.N.Y., *Foust*, 12-cv-05017-RRM-RLM (E.D.N.Y.), ECF No. 3; Def.'s Mot. To Transfer Action To E.D.N.Y., *Schwartz*, 12-cv-04638-RRM-RLM, ECF No. 6.

[8] Am. Compl., *Schwartz*, 12-cv-04638-RRM-RLM (E.D.N.Y.), ECF No. 11.

[9] Def.'s Mot. To Transfer Action To E.D.N.Y., *Schwartz*, 12-cv-04638-RRM-RLM (E.D.N.Y.), ECF No. 14.

purchased multiple Frito-Lay products, [ ] is inconsequential, particularly since the New York case includes Bean Dip purchasers.") (internal citation omitted). The court also held that transfer to the Eastern District of New York was appropriate because "Frito-Lay was already litigating in New York, and the same witnesses and evidence would be relevant to both cases." *Id*. at 7. *Schwartz* was transferred to the Eastern District of New York on September 17, 2012 and assigned to Judge Roslynn R. Mauskopf and Magistrate Judge Roanne L. Mann (who were already presiding over the E.D.N.Y. Consolidated Actions). *See Schwartz*, No. 12-cv-04638-RRM-RLM (E.D.N.Y.).

In *Foust*, on June 25, 2012, Southern District of Florida Chief Judge Cecilia Altonaga held a status conference on Frito-Lay's transfer motion, during which plaintiff's counsel asked the court for a brief period of time to discuss a "voluntary" transfer of *Foust* to the E.D.N.Y. with plaintiffs' counsel in the E.D.N.Y. Consolidated Actions. Frito-Lay consented to this request and Judge Altonaga administratively closed the case for ten days. *Foust*, 12-cv-21975-CMA (S.D. Fla.), ECF No. 16. Then, later that *same* day, without having apprised Judge Altonaga, the same law firm filed a second complaint against Frito-Lay in the Southern District of Florida, *Berkowitz v. Frito-Lay North America, Inc.*, No. 12-cv-22436-CMA (S.D. Fla.) ("*Berkowitz*") (filed June 29, 2012). The *Berkowitz* complaint was a word for word identical copy of the *Foust* complaint, except that like the amended complaint in *Schwartz*, it dropped claims relating to Tostitos and SunChips and only challenged labeling on Bean Dip.[10] Accordingly, on July 2, 2012, Frito-Lay filed a related case notice on the *Berkowitz* and *Foust* dockets.[11]

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[10] *See* Exhibit D (a redline of the *Foust* and *Berkowitz* complaints reflecting their identical nature).

[11] *See* Notice of Pending Related and Similar Actions, *Berkowitz*, No. 12-cv-22436-CMA (S.D. Fla.), ECF No. 5; *Foust*, No. 12-cv-21975-CMA (S.D. Fla.), ECF No. 19.

On July 10, 2012, Judge Altonaga held a second status conference in *Foust*. During the conference, Judge Altonaga inquired about the new *Berkowitz* action and related case notice and asked plaintiff's counsel if she should accept transfer of the case from Judge Jose E. Martinez (originally assigned the *Berkowitz* action), if requested.[12] Remarkably, plaintiff's counsel opposed having *Berkowitz* transferred to Judge Altonaga—even though both *Foust* and *Berkowitz* were pending in the same district, and both involved claims relating to Bean Dip. Judge Altonaga concluded that she would "gladly accept [*Berkowitz*] as . . . it would make all the sense in the world to have the same judge become familiar with bean dip and assorted products that may or may not have GMOs." *Id*. at 7. Mr. Rubinstein then requested additional time to confer with lead counsel in the E.D.N.Y. Consolidated Actions regarding a potential voluntary transfer and, accordingly, Judge Altonaga administratively closed *Foust* for sixty days.[13]

Foust's counsel's voluntary "discussions" with lead counsel in the E.D.N.Y. Consolidated Actions collapsed almost immediately. Foust's counsel then took the extraordinary step of formally opposing transfer of *Berkowitz* to Judge Altonaga (despite her explicit instruction that she would accept the case), requiring Frito-Lay to file an "opposed" motion asking Judge Martinez to transfer the case. *See Berkowitz*, No. 12-cv-22436-CMA (S.D. Fla.), ECF 8.[14] That motion was successful, and on August 1, 2012, *Berkowitz* was transferred to

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[12] *See* July 10, 2012 Status Conf. Transcript, *Foust*, No. 12-cv-21975-CMA (S.D. Fla.) (attached hereto as Exhibit E), at 4.

[13] *See* Order Administratively Closing Case, *Foust*, No. 12-cv-21975-CMA (S.D. Fla.), ECF No. 23 ("Plaintiff is in the process of conferring with New York counsel involved in related litigation pending in the Eastern District of New York to determine whether plaintiff will agree to a transfer of this action.").

[14] Notably, when *Berkowitz* was filed, plaintiff's counsel also attempted to avoid relation of the case to the earlier filed *Foust* action by indicating (on the civil cover sheet for the case) that it

[Footnote continued on next page]

Judge Altonaga, who accepted transfer because the case was "nearly identical" to *Foust* and because "Plaintiffs in both actions [were] represented by the same counsel."[15] Judge Altonaga immediately administratively closed *Berkowitz* on the same terms as *Foust* due to its duplicative nature. *Id*. ("Presumably, if Foust's case is transferred . . . the present action will also be transferred. Accordingly, to preserve judicial resources and the resources of the parties . . . the case is administratively closed. . . .").

On September 10, 2012, the parties in *Foust* submitted a Joint Status Report, advising the court that Foust's counsel was unable to reach agreement with counsel in the E.D.N.Y. Consolidated Actions and that neither Foust nor Berkowitz (both represented by Howard Rubinstein) were willing to agree to transfer their cases to the E.D.N.Y. Joint Status Report, *Foust*, No. 12-cv-21975 (S.D. Fla.), ECF No. 25. On October 5, 2012, Judge Altonaga issued a written order granting Frito-Lay's motion to transfer *Foust* to the Eastern District of New York. *See Foust* Transfer Order (Exhibit B). In her Order, Judge Altonaga relied on the *Schwartz* Transfer Order, noting that "[t]he material allegations in *Schwartz*, as identified by Judge Laporte in her Order, are strikingly similar to those in *Foust*." *Foust* Transfer Order at 5 (Exhibit B). Judge Altonaga further noted that "Schwartz's causes of action, like those stated by Foust, are furthermore subsumed by the [E.D.N.Y.] Consolidated Complaint. . . ." *Id*. *Foust* was transferred to the E.D.N.Y. the same day and assigned to Judge Mauskopf and Magistrate Judge

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[Footnote continued from previous page]
was related to a completely different action against a different company. No. 12-cv-22436-CMA (S.D. Fla.), ECF 1.

[15] *See* Order Administratively Closing Case, *Berkowitz*, No. 12-cv-22436-CMA (S.D. Fla.), ECF No. 11.

Mann (already presiding over the E.D.N.Y. Consolidated Actions and *Schwartz*). *Foust*, No. 12-cv-05017-RRM-RLM (E.D.N.Y.).[16]

C. The Carbon Copy Complaints and MDL Motions (*Altman*, *Roman* and *Fleishman*)

The day after the Northern District of California issued its order transferring *Schwartz* to the Eastern District of New York (and it became clear that the Southern District of Florida would do the same in *Foust*), the "other lawyers around the country" that Mr. Rubinstein had mentioned he had been in touch with[17] began entering the fray. On September 13, 2012, *Altman v. Frito-Lay North America, Inc.*, No. 12-cv-61803-WJZ (S.D. Fla.) (*"Altman*"), was filed in the Southern District of Florida by The Eggnatz Law Firm, P.A. On September 18, 2012, and September 20, 2012, *Roman v. Frito-Lay North America, Inc.*, No. 12-cv-7492 (N.D. Ill.) ("*Roman*") and *Fleishman v. Frito-Lay North America, Inc.*, No. 12-cv-7547 (N.D. Ill.) ("*Fleishman*"), were filed in the Northern District of Illinois by the same firm, Brunick, LLC.

The *Altman* complaint is a word-for-word copy of the *Berkowitz* complaint, except that it was brought on behalf of a Florida-only class of consumers and excises some paragraphs.[18] Just like *Foust*, *Schwartz, Berkowitz* and the E.D.N.Y. Consolidated Actions, *Altman* alleges that "Natural" labeling on Frito-Lay Bean Dip is misleading because the product is made from vegetables grown from genetically modified seeds.[19]

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16 On October 5, 2012, after receiving a copy of the MDL 2313 Motion, Judge Altonaga issued an order in *Berkowitz* staying the action *sua sponte* pending the MDL 2313 Motion "because it may be consolidated before the Judicial Panel for Multidistrict Litigation." *See* Order, *Berkowitz*, 12-cv-22436-CMA (S.D. Fla. Oct. 5, 2012), ECF No. 18.

17 *See* July 10, 2012 Status Conf. Transcript, *Foust*, No. 12-cv-21975-CMA (S.D. Fla.) (Exhibit E), at 9.

18 *See* Exhibit F (a redline comparison of the *Berkowitz* and *Altman* complaints).

19 Compl., *Altman*, No. 12-cv-61803-WJZ (S.D. Fla.), ECF No. 1, ¶¶ 1, 13.

On September 21, 2012, Frito-Lay filed a motion to transfer *Altman* to Judge Altonaga, (who was presiding over the earlier filed *Foust* and *Berkowitz* actions proceeding in the same district). *Altman*, No. 12-cv-61803-WJZ (S.D. Fla.), ECF No. 7. The motion was required because Altman's counsel refused to consent to the transfer to Judge Altonaga (notwithstanding the fact that that Southern District of Florida Internal Operating Procedure 2.15.00 clearly provides for transfer of later-filed related cases to the judge presiding over earlier-filed suits to preserve judicial and party resources). *Altman*, No. 12-cv-61803-WJZ (S.D. Fla.), ECF No. 10. On the same day, Altman filed the MDL 2313 Motion for § 1407 centralization. Notably, Altman failed to include *Foust* as a related case in the MDL 2413 Motion despite the fact that it includes Bean Dip Claims and misleadingly suggested to this Panel that *Foust* is a chips-only action. *See* MDL 2413 Motion at 4 ("*Foust* involves chip products and is therefore not related to the subject of this MDL Motion, which is only in regards to Frito-Lay Bean Dip."). Altman's MDL 2413 Motion also requested that the Bean Dip cases be transferred to Judge Zloch in the Southern District of Florida (MDL 2413 Motion at 11-12), despite the fact that two other earlier-filed actions challenging "Natural" labels on Bean Dip products (*Foust* and *Berkowitz*) were already pending in front of Judge Altonaga in the same district.[20]

In the Northern District of Illinois actions, *Roman* (filed Tuesday, September 18, 2012) and *Fleishman* (filed Thursday, September 20, 2012), the story is similar. Both actions were filed by the same plaintiffs' firm, Brunick LLC, and the complaints are identical (except that *Roman* only includes Bean Dip as a challenged product and *Fleishman* only includes SunChips as a challenged product). *See* Exhibit G attached hereto (redline of *Roman* against *Fleishman*).

[20] On September 26, 2012, after receiving notice of the 2413 MDL Motion filing, Judge Zloch stayed *Altman sua sponte* and closed the case for administrative purposes. Order Staying Action, *Altman*, No. 12-cv-61803-WJZ (S.D. Fla.), ECF No. 9.

On Monday, September 24, 2012, Fleishman filed the MDL 2414 Motion. The MDL 2414 Motion is a carbon copy of the MDL 2413 motion, except that it requests centralization in the Northern District of Illinois of the Tostitos and SunChips cases (where the *Fleishman* chips case was pending for a *single* business day). *See* Exhibit H (redline comparing the MDL 2313 and 2314 Motions). The MDL 2414 Motion suggests that the cases proceed separately from Bean Dip-only cases, and requests that MDL 2414 (the so called "Chips" MDL) be transferred to N.D. Ill. Judge John F. Grady.[21] Remarkably, the MDL 2414 Motion requests inclusion of *Foust* and the E.D.N.Y. Consolidated Actions in the "Chips" MDL, despite the fact that both of those cases include Bean Dip as a challenged product, in addition to Tostitos and SunChips. Counsel for *Roman* (who filed both the *Roman* and *Fleishman* complaints in the N.D. Ill., and requested centralization of the chips cases in the N.D. Ill. in the MDL 2414 Motion) also filed a response to the MDL 2413 Motion supporting centralization of the Bean Dip cases in the Southern District of Florida. Roman Resp. In Support Of Transfer To S.D. Fla., MLD No. 2413, ECF No. 13.

Following the filing of the MDL 2413 and 2414 Motions, counsel for the *Schwartz* and *Berkowitz* and *Foust* plaintiffs, the Law Offices of Howard W. Rubinstein, P.A. (and its co-counsel L. DeWayne Layfield), who have resisted orderly coordination of the similar actions for many months, filed responses supporting separate centralization of the Bean Dip and Chips cases in two different federal districts (other than the Eastern District of New York). Schwartz Resp., MDL No. 2413, ECF No. 8; Berkowitz Resp., MDL No. 2413, ECF No. 9; Foust, Resp., MDL No. 2414, ECF No. 8.

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[21] Both *Roman* and *Fleishman* were originally assigned to Judge Grady, who immediately requested reassignment of the actions under 28 U.S.C. § 294(b). *Roman* was reassigned to Judge Marvin Aspen and *Fleishman* to Judge Ruben Castillo. Therefore, the MDL 2414 Motion requests assignment of the entire chips MDL to a judge who had the case less than a week.

The chart below reflects the products and proposed classes at issue in each of the actions.

Case Caption	Court	Civil Action No.	Judge	Products at Issue	Proposed Class
E.D.N.Y. Consolidated Action (*Gengo*, *Zuro*, and *Shake*) (MDL 2414)	E.D.N.Y.	12-cv-00408	Mauskopf	Tostitos SunChips Bean Dip	Nationwide
Foust v. Frito-Lay North America, Inc. (MDL 2414)	E.D.N.Y. (transferred by Judge Altonaga)	12-cv-05017	Mauskopf	Tostitos SunChips Bean Dip	Nationwide
Schwartz v. Frito-Lay North America, Inc. (MDL 2413)	E.D.N.Y. (transferred by Judge Laporte)	12-cv-04638	Mauskopf	Bean Dip	Nationwide
Berkowitz v. Frito-Lay North America, Inc. (MDL 2413)	S.D. Fla.	12-cv-22436	Altonaga	Bean Dip	Nationwide
Altman v. Frito-Lay North America, Inc. (MDL 2413)	S.D. Fla.	12-cv-61803	Zloch	Bean Dip	Florida
Fleishman v. Frito-Lay North America, Inc. (MDL 2414)	N.D. Ill.	12-cv-07547	Castillo	SunChips	Illinois
Roman v. Frito-Lay North America, Inc. (MDL 2413)	N.D. Ill.	12-cv-07492	Aspen	Bean Dip	Illinois

As the chart reflects, the actions tagged in the two different MDL 2413 and 2414 Motions contain overlapping claims and allegations. Indeed, the actions involve millions of overlapping putative class members, as the E.D.N.Y. Consolidated Actions and *Foust* bring claims on behalf of purchasers of Bean Dip, Tostitos and SunChips nationwide, and subsume the proposed classes in all of the other actions.[22]

Critically, all of the cases contain the same core allegation that "Natural" labeling on Frito-Lay products is misleading because the products are made from vegetables grown from

[22] E.D.N.Y. Consol. Compl. ¶¶ 68-73; *Foust* Compl. ¶ 31; *Schwartz* Am. Compl. ¶ 4; *Berkowitz* Compl. ¶ 31; *Altman* Compl. ¶ 19; *Roman* Compl. ¶ 24; *Fleishman* Compl. ¶ 23.

genetically modified seeds.[23] Plaintiffs in all of the actions also seek similar relief, including injunctive relief prohibiting or modifying the challenged labeling, damages, restitution and attorneys' fees and costs.[24] Virtually no discovery has occurred in any of these cases and Frito-Lay has not yet responded to any of the complaints.

ARGUMENT

I. Transfer and Consolidation Are Warranted Under 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407(a), when "civil actions involving one or more common questions of fact are pending in different districts," this Panel may transfer the actions to a single district for coordinated or consolidated pretrial proceedings if it determines that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." All of these criteria are met here.

A. The Actions Involve Overlapping Factual Allegations

All of the complaints in MDLs 2413 and 2414 assert the same core allegation: that "Natural" labels on Frito-Lay products are misleading because the products are made with vegetables grown from genetically modified seeds. The Panel has previously centralized duplicative litigation in which "putative nationwide class actions arise out of allegations" of "deceptive marketing" by failing to disclose the same underlying fact.[25] This Panel also has

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[23] E.D.N.Y. Consol. Compl. ¶¶ 1, 6; *Foust* Compl. ¶¶ 2-4; *Schwartz* Am. Compl. ¶ 2; *Berkowitz* Compl. ¶¶ 3-4; *Altman* Compl. ¶¶ 3-4; *Roman* Compl. ¶ 2; *Fleishman* Compl. ¶ 2.

[24] E.D.N.Y. Consol. Compl. ¶¶ Prayer for Relief; *Foust* Compl. Prayer for Relief; *Schwartz* Am. Compl. Prayer for Relief; *Berkowitz* Compl. Prayer for Relief; *Altman* Compl. Prayer for Relief; *Roman* Compl. Prayer for Relief; *Fleishman* Compl. Prayer for Relief.

[25] *See*, *e.g.*, *In re Grand Theft Auto Video Game Consumer Litig. (No. II)*, 416 F. Supp. 2d 1350, 1351 (J.P.M.L. 2006) (all actions alleged that a video game contained hidden sexually explicit content); *In re AOL Time Warner Inc. Sec. Litig.*, 235 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002) (consolidating actions that "share[d] factual questions arising out of alleged misrepresentations or omissions").

determined that it is appropriate to consolidate actions challenging the same labeling or marketing practices of the same defendant, as is the case here.[26]

Furthermore, ***all*** parties in the putative class actions at issue in MDL 2413 support centralization, because they recognize that there are significant opportunities to streamline these proceedings and to reduce duplication within the MDL framework.[27] The parties disagree, however, on the scope and location of the centralization. Frito-Lay respectfully submits that the two-MDL approach suggested by counsel for plaintiffs in the later-filed copycat actions is problematic because the earlier-filed E.D.N.Y. Consolidated Actions and *Foust* (the first action filed by the Rubinstein firm) challenge labeling on all three products in the two MDLs: Tostitos, SunChips and Bean Dip. Indeed, as two different federal courts have recognized, it makes no sense for complaints challenging the same labeling, on the same products, based on the same theory of liability, to proceed in different districts. *See Schwartz* Transfer Order at 5 (Exhibit A) ("The only difference Plaintiff points to—that she purchased only Bean Dip, while the named plaintiffs in the New York case purchased multiple Frito-Lay products, [ ] is

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[26] *See In re PepsiCo, Inc., Bottled Water Mktg. & Sales Practices Litig*., 560 F. Supp. 2d 1348, 1349 (J.P.M.L. 2008) (transferring and consolidating four cases where all of the "actions arise from allegations that Pepsi misled consumers of its Aquafina bottled water into believing that the water source of Aquafina was something different from and better than tap water"); *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 536 F. Supp. 2d 1369, 1370-71 (J.P.M.L. 2008) (consolidating actions alleging that defendant's milk labels misled consumers into believing that the milk they were purchasing was "organic" or "USDA Organic," when the milk failed to meet federal organic standards); *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 609 F. Supp. 2d 1379, 1379-80 (J.P.M.L. 2009) (consolidating actions challenging misrepresentations related to labeling of certain aspirin products).

[27] In this respect, this petition is distinguishable from some other MDL petitions that the Panel has denied where the parties disagreed about the benefits of consolidation. *See In re Skinnygirl Margarita Beverage Mktg. & Sales Practices Litig.*, 829 F. Supp. 2d 1380 (J.P.M.L. 2011); *In re Nutella Mktg. & Sales Practices Litig.*, 804 F. Supp. 2d 1374, 1375 (J.P.M.L. 2011). Here, there is agreement across the board that centralization is appropriate.

inconsequential, particularly since the New York case includes Bean Dip purchasers." (internal citation omitted)); *Foust* Transfer Order at 6 ("the chronology of the filings, the similarity of the parties, and the similarity of the issues support application of the first-to-file rule, while fairness does not prevent the rule's application"); *see also* Exhibit E (*Foust* Conf. Tr.) at 7 ("THE COURT: . . . it would make all the sense in the world to have the same judge become familiar with bean dip and assorted products that may or may not have GMOs.").

B. Centralization Will Prevent Duplicative Discovery and Other Pretrial Proceedings and Promote Efficient Conduct of the Litigation

As the complaints tagged in the MDL 2413 and 2414 Motions indicate, each of the plaintiffs challenges "Natural" labeling on Frito-Lay products over the past few years based on the same theory, meaning that each plaintiff almost certainly would seek highly similar (if not identical) information during discovery if the actions were to proceed separately. This Panel has consistently held that transfer under § 1407 is appropriate to prevent duplicative discovery.[28]

Here, the savings in time and expense that would result from centralization and consolidated pretrial practice would be substantial. Frito-Lay anticipates that plaintiffs in the actions identified in the MDL 2413 and 2414 motions will seek to depose many of the same individuals and will seek discovery of many of the same documents, both with respect to class certification and merits issues. Without centralization, Frito-Lay almost certainly would be subjected to numerous duplicative discovery demands, and witnesses would face redundant

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[28] *See*, *e.g.*, *In re Starmed Health Pers. Fair Labor Standards Act Litig.*, 317 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004) (consolidating two actions because, *inter alia*, transfer was necessary to "eliminate duplicative discovery" and "conserve the resources of the parties"); *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1230 (J.P.M.L. 1978) ("[Plaintiffs] will have to depose many of the same witnesses, examine many of the same documents, and make many similar pretrial motions in order to prove their . . . allegations. The benefits of having a single judge supervise this pretrial activity are obvious.").

depositions. Indeed, as the Northern District of California and Southern District of Florida have recognized, because the cases tagged in the MDL 2413 and 2414 Motions will involve extensive overlap in discovery, coordinating them will serve the "convenience of parties and witnesses and will promote the just and efficient conduct of" this litigation.[29] And while Frito-Lay disagrees with the plaintiffs' proposed separate MDL venues, Frito-Lay agrees with plaintiffs that the complexity of this litigation demonstrates that centralization is appropriate. *See* MDL 2413 Motion, ECF No. 1-1, at 11; MDL 2414 Motion, ECF No. 1-1, at 12.

Furthermore, virtually no discovery has yet occurred in any of the actions, so transferring the cases to a single district consolidated proceedings now would provide the maximum opportunity for the parties and a district court to implement an efficient, coordinated pretrial schedule and discovery program.[30] Moreover, in the event that additional class actions are filed against Frito-Lay, the requested transfer will permit prompt centralization before duplicative litigation begins in earnest. *See*, *e.g.*, *In re Compression Labs.*, *Inc. Patent Litig.*, 360 F. Supp. 2d 1367, 1368 (J.P.M.L. 2005) (considering the possibility of future related actions as part of the transfer calculus).

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[29] *See Foust* Transfer Order at 7 (Exhibit B) ("the section 1404(a) factors compel a transfer where, as in *Schwartz*, the convenience of the parties and witnesses, the availability of evidence, and the feasibility of consolidation of the claims weigh in favor of the EDNY"); *Schwartz* Transfer Order at 7 (Exhibit A) ("As to the convenience of the parties and witnesses and the availability of evidence, Frito-Lay is already litigating in New York, and the same witnesses and evidence would be relevant to both cases. Although Plaintiff claims that it would be inconvenient for her to travel to New York to give her evidence . . . [t]he inconvenience to Defendant of having to litigate the same issues in multiple courts is far greater.").

[30] *Compare In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 653 (J.P.M.L. 1981) (transferring where "little or no discovery" had occurred in most of the actions), *with In re Cable Tie Patent Litig.*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980) (denying transfer when two actions had been pending for more than three years and discovery concerning the common factual questions was "well advanced").

C. Centralization Will Prevent Conflicting or Inconsistent Pretrial Rulings, Particularly With Respect to Issues of Class Certification for Overlapping Classes

The actions included in the MDL 2413 and 2414 Motions clearly contain overlapping issues and classes. *Foust* and the E.D.N.Y. Consolidated Actions bring claims on behalf of nationwide classes including purchasers of Frito-Lay Tostitos, SunChips, and Bean Dip. Issues in the actions identified in both MDL Motions will be litigated those cases. Thus, absent centralization in a single district, the parties and courts will be forced to grapple with overlapping classes asserted in different districts (indeed, if a new case were filed relating to Bean Dip, Tostitos and SunChips, it is impossible to determine where the proponents of the two MDLs would want it sent). This would, of course, create a risk of duplicative or inconsistent rulings at virtually every stage in the litigation, including class certification. The Panel has "consistently held" that "the existence of and the need to eliminate" even the "*possibility* of inconsistent class determinations" under Rule 23 presents a "highly persuasive" and "crucial" reason favoring transfer of overlapping classes for consolidated pretrial management. *In re Roadway Express, Inc. Emp't Practices Litig.*, 384 F. Supp. 612, 613 (J.P.M.L. 1974) (emphasis added).[31] Potentially inconsistent injunctive relief is a similarly important reason for

[31] *See also In re Pharmacy Benefit Managers Antitrust Litig.*, 452 F. Supp. 2d 1352, 1353 (J.P.M.L. 2006) (emphasizing the need to prevent conflicting pretrial rulings, "especially on the issue of class certification"); *In re Family Mut. Ins. Co. Overtime Pay Litig.*, 416 F. Supp. 2d 1346, 1347 (J.P.M.L. 2006) (same); *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 492-93 (J.P.M.L. 1968) (explaining that Section 1407 was designed to prevent "pretrial chaos" resulting from "conflicting class action determinations"). In addition, this Panel has frequently ordered transfer when consolidation will otherwise work to "prevent inconsistent pretrial rulings." *See, e.g.*, *In re Foundry Resins Antitrust Litig.*, 342 F. Supp. 2d 1346, 1347 (J.P.M.L. 2004); *In re Dow Chem. Co. "Sarabond" Prods. Liab. Litig.*, 650 F. Supp. 187, 188 (J.P.M.L. 1986) (*per curiam*) (same).

centralization.[32]

The potential for inconsistent rulings in different districts on many of the significant issues in these cases—including class certification, as well as plaintiffs' requests for injunctive relief and other remedies that they seek on behalf of the overlapping putative classes—creates substantial and unwarranted uncertainty for all of the parties and imposes redundant burdens on the judiciary. Consolidation would avoid this inefficient and unnecessary result.

D. Frito-Lay Supports Consolidation of the Actions and Submits That the Eastern District of New York Is An Appropriate Transferee Court

All of the parties support some kind of centralization. With respect to location, plaintiffs in the MDL 2413 actions support centralization of the Bean Dip-only cases in the Southern District of Florida, and plaintiffs in the MDL 2414 actions support (or will support) centralization of *Foust* (Bean Dip, Tostitos and SunChips), the E.D.N.Y. Consolidated Actions (Bean Dip, Tostitos and SunChips) and *Fleishman* (SunChips) in the Northern District of Illinois or the Eastern District of New York. Frito-Lay, the only party that is in all of the cases, strongly supports centralization as well (of all of the actions in both MDLs), and believes that the Eastern District of New York is the appropriate transferee court.

i. Convenience of the Parties. This Panel has often considered convenience to parties and witnesses when determining the location for MDL proceedings.[33] Here, the Eastern District of New York is the most convenient for Frito-Lay. Five of the actions in the two MDL Motions are already pending in that district in front of Judge Mauskopf and Magistrate Judge

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[32] *In re Operation of Mo. River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (J.P.M.L. 2003); *In re Gen. Motors Class E Stock Buyout Sec. Litig.*, 696 F. Supp. 1546, 1547 (J.P.M.L. 1988).

[33] *See*, *e.g.*, *In re Merck & Co.*, *Sec.*, *Derivative & "ERISA" Litig.*, 360 F. Supp. 2d 1375, 1377 (J.P.M.L. 2005) (noting that the transferee district was "conveniently located for the parties and witnesses taken as a whole").

Mann; Frito-Lay's corporate parent, PepsiCo, Inc., is headquartered in Purchase, New York; and there are almost thirty non-stop flights per day from Miami, Florida (where two of the plaintiffs live) to New York City and almost fifty non-stop flights from Chicago, Illinois (where two other plaintiffs live) to New York City. Frito-Lay's outside counsel are also located in Washington, D.C., and there are a number of travel options to New York (nearly sixty non-stop flights per day, as well as hourly Amtrak trains).

ii. Appropriateness of Judge Mauskopf. Judge Mauskopf is currently presiding over five cases alleging that "Natural" labels on Frito-Lay products, including Tostitos, SunChips and Bean Dip, are misleading because the products are made from vegetables grown from genetically modified seeds. She has extensive experience with class action lawsuits at all stages of litigation.[34] Her docket has also included cases involving consumer-protection statutes.[35] Moreover, she is not currently overseeing any other MDL proceedings. There is therefore every reason to believe that Judge Mauskopf will handle these cases efficiently and effectively.

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Finally, it must be said that the real issue behind the separate MDL 2413 and 2414 Motions before this Panel is an attempt by a later-filed plaintiffs' counsel (and their colleagues),

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[34] *See, e.g.*, *Oskar v. IDS Property Cas. Ins. Co.*, No. 09-cv-4516, 2011 WL 1103905 (E.D.N.Y. Mar. 23, 2011) (motion to dismiss); *Scaggs v. N.Y. State Dep't of Educ.*, No. 06-cv-799, 2009 WL 890587 (E.D.N.Y. Mar. 31, 2009) (class certification); *Scott v. SSP Am., Inc.*, No. 09-cv-4399, 2011 WL 1204406 (E.D.N.Y. Mar. 29, 2011) (summary judgment); *Bogosian v. All Am. Concessions*, No. 06-cv-1633, 2012 WL 1821406 (E.D.N.Y. May 18, 2012) (post-judgment attorneys' fees).

[35] *See, e.g.*, *Ng v. HSBC Mortg. Corp.*, No. 07-cv-5434, 2011 WL 3511296, at *6-8 (E.D.N.Y. Aug. 10, 2011) (addressing claims under N.Y. Gen. Bus. L. § 349); *Oskar*, 2011 WL 1103905, at *5-6 (same); *Bogosian v. All Am. Concessions*, No. 06-cv-1633, 2008 WL 4534036, at *4 (E.D.N.Y. Sept. 30, 2008) (same).

to file multiple duplicative lawsuits in order to obtain a stake in earlier-filed litigation. As discussed above, the same law firm that represents *Foust, Berkowitz* and *Schwartz*, has attempted every tactic imaginable to avoid orderly consolidation in the Eastern District of New York:

- Five months after the first suit was filed, the Rubinstein law firm filed copycat complaints relating to Tostitos, SunChips and Bean Dip (*Foust* and *Schwartz*) in Florida and California in a span of five days.
- In the California case (*Schwartz*), the Rubinstein firm attempted to evade transfer by filing an amended complaint that only related to Bean Dip. Nonetheless, the California court ultimately granted a second transfer motion Frito-Lay filed and transferred the case to the E.D.N.Y. for consolidation with the E.D.N.Y. Consolidated Actions.
- In the Florida case (*Foust*), the Rubinstein firm similarly resisted Frito-Lay's efforts to consolidate *Foust* with the actions in E.D.N.Y. Despite representations by Mr. Rubinstein to the Florida court during the first status conference that he would discuss voluntary transfer of the case to the E.D.N.Y. with lead counsel for plaintiffs in the E.D.N.Y. Consolidated Actions, the Rubinstein firm filed *another* complaint in the same district the same day (*Berkowitz*), this time only relating to Bean Dip (a tactic similar to their amended complaint in the *Schwartz* case), and indicated on the civil cover sheet that it did not relate to *Foust* but instead to an entirely different case against a different company pending before a different judge. Then, after a second status conference during which Judge Altonaga recognized that it "made all the sense in the world" for her to have both the *Foust* and *Berkowitz* cases, the Rubinstein firm nevertheless opposed intra-district transfer of *Berkowitz* to Judge Altonaga, requiring Frito-Lay to engage in additional motion practice, which was successful given the S.D. Fla.'s established internal procedures. Ultimately, just as Judge Laporte did in California, Judge Altonaga ordered *Foust* transferred to the E.D.N.Y. for consolidation with the E.D.N.Y. Consolidated Actions.
- The day after Judge Laporte transferred *Schwartz* to the E.D.N.Y., the Eggnatz firm filed *Altman*, a carbon copy of *Berkowitz*, in Florida. Then, ten days later, the Eggnatz firm filed the MDL 2413 Motion (requesting centralization of Bean Dip only cases), failed to tag *Foust* or the E.D.N.Y. Consolidated Actions as related (despite their inclusion of Bean Dip), and asked the Panel to transfer the cases to Judge Zloch (rather than Judge Altonaga). Altman also opposed transfer of her case to Judge Altonaga, despite the fact that Altman's complaint was completely subsumed by the earlier filed *Berkowitz* and *Foust* actions pending in front of Judge Altonaga.
- In the meantime, the Brunick firm filed *Roman* (relating only to Bean Dip) and *Fleishman* (relating only to SunChips) in Chicago just two days apart, and then three days later, filed the MDL 2414 Motion (requesting centralization of "Chips" cases – including *Foust* and *Berkowitz*, which include Bean Dip as a challenged product – in Chicago). Brunick then filed a response to the MDL 2413 Motion, supporting centralization of the Bean Dip cases, including his own *Roman* case, (which he filed in Chicago) in Florida.

All of this has to stop. The judicial system is not designed to work this way. The procedural gamesmanship by the Rubinstein, Eggnatz and Brunick firms to avoid orderly consolidation of the cases has reached the point where the interests of justice are clear: this Panel should transfer all of the cases challenging "Natural" labeling on Frito-Lay products based on the genetically modified vegetable seeds theory to the E.D.N.Y. for consolidated proceedings. Consolidation of the actions would clearly serve "the convenience of parties and witnesses and promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a).

CONCLUSION

Frito-Lay respectfully requests that this Panel consolidate proceedings on the MDL 2413 and 2414 Motions and enter an order transferring the related actions to a single district for consolidated proceedings.

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Respectfully submitted,

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