

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

**In re: *FRITO LAY TOSTITOS & SUNCHIPS
MARKETING & SALES PRACTICES LITIGATION***

MDL No.

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TRANSFER
OF ACTIONS PURSUANT TO 28 U.S.C. § 1407**

I. INTRODUCTION

There are currently three (3) overlapping class actions pending in three different districts involving virtually identical allegations—namely that Frito-Lay North America, Inc. (“Frito-Lay” or “Defendant”) made unlawful statements and/or misrepresentations in regards to its SunChips and Tostitos products, including the following:

- i. Tostitos Restaurant Style Tortilla Chips;
- ii. Tostitos Bite Size Rounds Tortilla Chips;
- iii. Tostitos Crispy Rounds Tortilla Chips;
- iv. Tostitos Multigrain Tortilla Chips;
- v. Tostitos Scoops Tortilla Chips;
- vi. Tostitos Multigrain Scoops Tortilla Chips;
- vii. Tostitos Restaurant Style with a Hint of Lime Flavored Tortilla Chips;
- viii. Tostitos Restaurant Style with a Hint of Jalapeno Flavored Tortilla Chips;
- ix. Tostitos Restaurant Style with a Hint of Pepper Jack Flavored Tortilla Chips;
- x. Tostitos Artisan Recipes Fire-Roasted Chipotle Flavored Tortilla Chips;
- xi. Tostitos Artisan Recipes Baked Three Cheese Queso Flavored Tortilla Chips;
- xii. Tostitos Artisan Recipes Roasted Garlic and Black Bean Flavored Tortilla Chips;
- xiii. Tostitos Artisan Recipes Toasted Southwestern Spices Flavored Tortilla Chips;

- xiv. SunChips Original Flavored Multigrain Snacks;
- xv. SunChips Garden Salsa Flavored Multigrain Snacks;
- xvi. SunChips French Onion Flavored Multigrain Snacks;
- xvii. SunChips Harvest Cheddar Flavored Multigrain Snacks; and
- xviii. SunChips Jalapeno Flavored Multigrain Snacks (the “Products”)

As a result, consumers were misled into believing that Defendant’s Products noted above are “All Natural,” when they are not, because they contain Genetically Modified Organisms (GMO’s); primarily in the form of soy and/or soy variations that have been modified through biotechnology.

Plaintiff, Kimberly Fleishman, respectfully submits this memorandum, pursuant to 28 U.S.C. § 1407 (“Section 1407”) and Rule 6.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, to transfer and consolidate for pretrial purposes three substantially similar cases relating to the uniform deceptive practices by Defendant (as defined below) to the Northern District of Illinois.

As set forth below, the cases at issue satisfy the prerequisites for transfer and consolidation since: (a) they “involv[e] one or more common questions of fact;” (b) the transfer and consolidation of the cases would further “the convenience of [the] parties and [the] witnesses;” and (c) the transfer and consolidation will “promote the just and efficient conduct of [the] actions” by ensuring oversight of pretrial proceedings. 28 U.S.C. § 1407(a). In addition, consolidation in the Northern District of Illinois is ideal, as it is a centrally located, sophisticated and well-resourced district court to handle this complex litigation. Therefore, the Northern District of Illinois is an ideal and logical choice as a court to handle this consumer class action case.

II. **BACKGROUND**

A. **PROCEDURAL HISTORY**

No court has yet had the opportunity to analyze or consider the issue of whether an MDL is the proper venue here. The three subject cases only pertain to Defendant's Tostitos and SunChips—not Defendant's bean dip products—as bean dip purchasers are an entirely different class of purchasers with different damage models, which is already the subject of a pending MDL, *In re Frito-Lay Bean Dip Marketing and Sales Practices Litigation*, MDL No. 2413.

Here, Plaintiff, Kimberly Fleishman, in the Northern District of Illinois action, Plaintiffs Julie Gengo, Valerie Zuro, Lisa Summerlin, and Chris Shake in the Eastern District of New York case styled *Frito-Lay North America, Inc. "All Natural" Litigation* ("New York Case"), and Plaintiff David Foust in the Southern District of Florida action (collectively, "Plaintiffs") filed class action complaints against Defendant, Frito-Lay North America, Inc., a Texas corporation ("Defendant" or "Frito-Lay") regarding its Tostitos and SunChips products. See Schedule of Actions submitted herewith. The *New York Case* originally only involved Tostitos and SunChips products; however after receiving notice of the *Schwartz* bean dip only case, *Schwartz v. Frito-Lay North America, Inc.*, Case No.: 12-cv-4638-RRM-RLM (E.D. N.Y.) (formerly N.D. Cal.) ("*Schwartz*"), the New York plaintiffs amended their complaint to include the unrelated bean dip products.

In addition, all Plaintiffs here filed in federal court because the actions arise under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the jurisdiction of the Federal Courts over any class action in which any member of the Plaintiff class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of

interest and costs. Plaintiffs seek to represent a national class with this MDL. Plaintiffs allege that the total claims of the individual members of the Plaintiff Class in this action are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2), (5). Furthermore, more than two thirds of the putative Class in this action are citizens of states other than the state of which Defendant is a citizen. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A).

All of the cases are in the early stages of litigation. The first filed action was the *New York Case*, 12-408-RRMLM (E.D.N.Y.), which involves plaintiffs (Chris Shake, Julie Gengo, and Valerie Zuro) and a putative “California class,” and asserts New York, Florida, and California law claims relating to various Frito-Lay “All Natural” chip products. The transfers leading up to the consolidation of these cases were by agreement, rather than by successful motion, so no court has properly analyzed whether an MDL is the more appropriate venue. The second filed case was *Foust*, filed on May 25, 2012, and then this case, *Fleishman*, which was filed on September 20, 2012. At the present time, *Foust* is currently being treated as a related case to *Berkowitz v. Frito-Lay North America, Inc.*, Case No.: 12-cv-22436-CMA; however, *Berkowitz* involves bean dip products and is therefore not related to the subject of this MDL Motion, which is only in regards to Frito-Lay’s Tostitos and SunChips products.

Furthermore, on July 10, 2012, in *Foust*, the United States District Court for the Southern District of Florida did not grant Defendant’s Motion to Transfer the action to New York. Judge Cecilia M. Altonaga agreed with the plaintiff’s attorney, Howard W. Rubinstein, that an MDL action would be appropriate in this case. *Foust*, Mot. to Trans. Hr’g Tr. 7:3-18, 9:1-13. **Judge Altonaga stated, “[i]t sounds to me as though this should be an MDL.”** *Id.* at 7:13-14. (Emphasis added).

Simply put, Tostitos and SunChips cases should be separate from the bean dip cases. Each will require different proofs and different damage models, as each involves different sources of the GMO ingredient. Additionally, the “chip” cases primarily involve soy-based GMO ingredients, whereas the bean dip cases involve primarily corn based GMO ingredients. Accordingly, this motion seeks to consolidate the “Tostitos and SunChips” cases only.

B. GENERAL ALLEGATIONS

The actions arise out of Frito-Lay’s misleading and unfair uniform message that its Tostitos and SunChips are “All Natural,” when they are not because they contain GMOs. Plaintiffs brought their actions to stop Frito-Lay’s unlawful business practices. Plaintiffs seek an injunction requiring Frito-Lay to cease representing that its Tostitos and SunChips are “All Natural.” As a direct and proximate result of Defendants’ conduct, Plaintiffs and the Class have suffered and/or will suffer irreparable and irreversible damage. As such, Plaintiffs, on behalf of the Class, each seek injunctive relief, actual, compensatory, and punitive damages, along with statutory penalties and restitution, based on the following causes of action:

a) *Fleishman*:

- i. Violation of Illinois’ Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 ILCS 505/1 *et seq.*; and
- ii. Unjust Enrichment.

b) *Foust*:

- i. Violation of Florida’s Deceptive and Unfair Trade Practices Act (FDUTPA), *Florida Statutes* §§ 501.201, *et seq.*
- ii. Unjust Enrichment;
- iii. Negligent Misrepresentation;

- iv. Intentional Misrepresentation;
- v. Fraudulent Concealment;
- vi. Breach of Implied Warranty Fitness for Purpose; and
- vii. Breach of Express Warranty; and
- viii. Violation of Magnusson-Moss Act.

c) *New York Case:*

- i. Violation of Magnusson-Moss Act;
- ii. Violation of New York General Business Law § 349 (Deceptive Acts and Practices);
- iii. Violation of New York General Business Law § 350 (False Advertising);
- iv. Violation of California's Unfair Competition Law, Business & Professions Code §§ 17200, *et seq.*, (Deceptive Acts and Practices);
- v. Violation of California's False Advertising Law, Business & Professions Code §§ 17500, *et seq.*, (Deceptive Acts and Practices);
- vi. Violation of California Consumers Legal Remedies Act, Cal. Civ. Code. §§ 1750, *et seq.*;
- vii. Violation of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.*;
- viii. Breach of Express Warranty Under New York Law;

- ix. Breach of Express Warranty Under California Law;
- x. Breach of Express Warranty Under Florida Law;
- xi. Intentional Misrepresentation Under New York Law;
- xii. Intentional Misrepresentation Under California Law; and
- xiii. Intentional Misrepresentation Under Florida Law;

As evidenced by the similar causes of action and facts alleged in each of the three (3) cases herein described, the cases are ideal for multidistrict coordination.

III. **ARGUMENT**

A. **TRANSFER AND COORDINATION PURSUANT TO 28 U.S.C. § 1407 IS APPROPRIATE**

Transfer and pretrial coordination of two or more civil cases is appropriate upon a finding that: (1) the cases “involve[] one or more common questions of fact,” (2) the transfers would further “the convenience of the parties and witnesses,” and (3) the transfers “will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a). All subject actions satisfy these criteria, as explained below.

i. *The Cases Involve Common Questions of Fact*

Overlapping class action lawsuits like those at issue here involve the type of common questions that are particularly well suited for transfer and coordination under 28 U.S.C. § 1407. *See In re IDT Corp. Calling Card Terms Litig.*, 278 F. Supp. 2d 1381, 1381 (J.P.M.L. 2003) (transfer ordered where two actions shared claims of fraud and negligent misrepresentation

based on defendants' alleged failure to adequately disclose rates, fees, and surcharges applied to their telephone cards).

The cases at issue share many common questions. Most significantly, the complaints all state nearly identical allegations of unlawful misrepresentations and deceptive business practices in violation of each case's state consumer protection law, resulting from Defendant misrepresenting, through its labeling, advertising, and/or marketing, that its Tostitos and SunChips are "All Natural," when they are not, because they contain GMOs.

Because the complaints assert the same common nucleus of operative facts, transfer and coordination under Section 1407 is appropriate. *In Re Southern Pacific Transp. Co. Emp. Practices Lit.*, 429 F. Supp. 529, 531 (J.P.M.L. 1977) (litigation transferred to district where related case contained broadest allegations); *In re Air West, Inc. Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974) ("when two or more complaints assert comparable allegations against identical defendants based upon similar transactions and events, common factual questions are presumed"). Furthermore, the defendant in all cases—Frito-Lay—is identical. *See In re Sugar Indus. Antitr. Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975) (finding that the defendant's presence as a defendant in each of the cases "certainly gives rise to common factual issues").

B. COORDINATION OF THE CASES WILL FURTHER THE CONVENIENCE OF THE PARTIES, WITNESSES AND THE COURTS

Coordination under 28 U.S.C. § 1407 will be convenient for the parties, the witnesses and the courts. Plaintiffs in the subject actions are represented by some of the same counsel and have been in contact with each other regarding the filing of this MDL Motion, and Frito-Lay is represented by the same counsel in every case. Coordination will avoid duplicative discovery and redundant litigation of the same issues in different courts. Transfer and coordination to the Northern District of Illinois under Section 1407 will place this litigation before a single,

centrally located judge who can formulate a pretrial program that prevents duplication of discovery and conserves the efforts and energies of the parties, witnesses and the presiding judge. *See, e.g., In re Ford Motor Co. Crown Victoria Police Interceptor Prods. Liab. Litig.*, 229 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002) (“Centralization under Section 1407 is thus necessary to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings (such as those regarding class certification), and conserve the resources of the parties, their counsel and the judiciary”).

Plaintiffs anticipate deposing a similar core of individuals believed to be involved in, or who have relevant knowledge about the Product. The time and expense saved by consolidation of these proceedings will benefit Plaintiffs, Defendants, and the judicial system as a whole. Indeed, the Panel has repeatedly recognized that the creation of a centralization MDL forum is appropriate for this very reason. *See, e.g., In re Visa/MasterCard Antitrust Litig.*, 295 F.Supp. 2d 1379, 1380 (J.P.M.L. 2003) (“centralization under § 1407 is thus necessary in order to avoid duplication of discovery . . . and conserve the resources of the parties, their counsel and the judiciary”); *In re Merscorp, Inc., Real Estate Settlement Procedures Act (RESPA) Litig.*, 473 F. Supp. 2d 1379, 1379 (J.P.M.L. 2007) (holding that centralization under Section 1407 was warranted where centralization was necessary in order to eliminate duplicative discovery); *In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, (J.P.M.L. 1981) (transfer and consolidation would “effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities”).

Frito-Lay, which is the only party common to each of the four actions, has already moved for and been granted transfer of the first-filed bean dip case, *Schwartz v. Frito-Lay North America, Inc.*, Case No.: 12-cv-4638-RRM-RLM (E.D. N.Y.) (“*Schwartz* bean dip case), from the Northern District of California to the Eastern District of New York under 28 U.S.C. §

1404(a) and the “First to File Rule” on the grounds that there was overlap between the two cases. However, *Schwartz* was transferred to *The New York Case* that concerns Frito-Lay’s Tostitos and SunChips products, not bean dip, so they are entirely different cases, just as all Toyota vehicles are not to be grouped into the same cases.

Regardless, the issues presented by this MDL Motion have not been analyzed or decided by any court, including the court in *Foust* or the *New York Case*, which was, upon information and belief, a misapplication of the law because an MDL Motion is the proper motion to be filed based on the complex overlapping issues in the cases throughout the United States. Furthermore, although there were only two Tostitos and SunChips cases pending at the time Frito-Lay sought transfer, there has been a subsequent filing of another case, specifically this case, *Fleishman*, in the Northern District of Illinois. Additionally, it is anticipated that more actions may likely be brought against Frito-Lay in connection with the Tostitos and SunChips products.

C. COORDINATION OF THE CASES WILL PROMOTE JUST AND EFFICIENT CONDUCT OF THE CASES

In addition to avoiding duplicative discovery, coordination of this litigation will promote the just and efficient resolution of the parties’ disputes by facilitating a quicker and consistent determination of all contested issues. All cases are in early stages of litigation. The benefits of coordinated proceedings can be realized from the outset and any later-filed, duplicative lawsuits can be included as tag-along proceedings under the Panel Rules. *See In re Gas Meter Antitr. Litig.*, 464 F. Supp. 391, 393 (J.P.M.L. 1979) (major reason for transfer was “providing a ready forum for the inclusion of any newly filed actions in the centralized pretrial proceedings”).

- i. *Coordination or Consolidation of the Cases Will Prevent Conflicting Rulings*

The complaints in the subject actions contain virtually identical factual allegations and legal claims for relief. Where such common questions exist, transfer and coordination is necessary to eliminate the risk of inconsistent rulings. *See In re First Nat'l Bk., Heavener, Okla. Sec. Litig.*, 451 F. Supp. 995, 997 (J.P.M.L. 1978) (transfer and consolidation was necessary to “eliminate the possibility of inconsistent pre-trial rulings”). The Panel has frequently expressed the need for consolidation where there is a likelihood of inconsistent pretrial rulings during various stages of the litigation, including the class certification stage. *See In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975) (observing that the Panel has “consistently held that transfer of actions under § 1407 is appropriate, if not necessary, where the possibility of inconsistent class determination exists”); *see also In re TMJ Implants Prods. Liab. Litig.*, 844 F.Supp. 1553, 1554 (J.P.M.L. 1994) (“Centralization under section 1407 is necessary ... in order to prevent inconsistent rulings”).

Here, the actions assert overlapping claims and each action presents issues that, if subject to different rulings, would result in disparate treatment of members of the proposed classes. Without coordination or consolidation there is a risk of inconsistent rulings in each case. Although all actions involve identical allegations, absent coordination or consolidation, at least three (3) different tribunals will hear these claims and may potentially produce conflicting outcomes, even though the common nucleus of facts and law in all actions is identical and Frito-Lay is the sole defendant in each action based on the same course of conduct. This potential for inconsistent rulings provides a compelling reason for transfer of these cases to a single judge, namely Judge John F. Grady in the Northern District of Illinois.

Therefore, given the claims alleged by the proposed classes in all of the actions, Plaintiffs respectfully submit that the parties and the court would benefit from having Judge Grady oversee the class action issues and pretrial process to avoid duplicative efforts and

inconsistent rulings. See, e.g., *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 568 F. Supp. 1250, 1251 (J.P.M.L. 1983) (centralization necessary where overlapping class certifications sought in all relevant actions); *In re Resource Exploration, Inc. Sec. Litig.*, 483 F.Supp. 817, 821 (J.P.M.L. 1980) (“An additional justification for transfer is the fact that most of the actions before us have been brought on behalf of similar or overlapping classes”).

ii. *The Complexity of This Litigation Warrants Transfer*

All three (3) actions are predicated upon Frito-Lay’s alleged misrepresentation and misleading statement that the Products are “All Natural,” when they are not, because they contain GMOs, which violates each case’s respective state’s consumer protection laws. Thus, resolution of these cases will undoubtedly require the consideration of numerous, complex questions of fact and law, including whether Frito-Lay’s alleged practices violate consumer protection laws, among the other common counts noted *supra*. Without consolidation, discovery on these common factual and legal issues will be needlessly time-consuming, inefficient and repetitive.

B. THE NORTHERN DISTRICT OF ILLINOIS IS AN APPROPRIATE TRANSFEREE DISTRICT

The *Fleishman* action has been assigned to the Honorable Judge John F. Grady, who has extensive experience as a transferee judge with class actions and with consumer protection matters. He received his commission as a federal judge in 1975 and is familiar with MDL litigation. Judge Grady currently is presiding over two MDL’s, *IN RE: "Factor VIII or IX Concentrate Blood Products" Products Liability Litigation*, MDL 986; and *IN RE: Sears, Roebuck & Co. Tools Marketing and Sales Practices Litigation*, MDL 1703, and therefore possesses the time and resources to manage this complex litigation.

In choosing an appropriate transferee court, the Panel often examines whether the candidates have the necessary experience, time and resources to manage the litigation at issue. The Northern District of Illinois has the resources to devote the time to pretrial matters that this litigation is likely to require, and has frequently been selected by the Panel as a transferee district. The potential strain placed on a relatively less experienced transferee Court's docket and resources is an important consideration, and one that militates in favor of the Northern District of Illinois. Additionally, Judge Grady currently only has two (2) pending MDLs on his docket. Given the ability and resources of the Northern District of Illinois, the Panel should transfer the cases pending in other districts there.

Furthermore, the Northern District of Illinois, located in Chicago, provides a geographically central location allowing easy access for all litigants and witnesses. For the parties and witnesses not within driving distance of Chicago, Chicago's O'Hare International Airport is one of America's most convenient airports. Over 70 million people a year travel through O'Hare International Airport, which provides convenient access from all points of the nation due to its geographically central location. Direct, frequent and economical flights to Chicago are available from almost all major cities in the United States. Additionally, Chicago has a vast public transit system and taxis are readily accessible, and there are many nearby hotels to accommodate visiting attorneys and witnesses.

Likewise, the Panel routinely assesses the ease of access to the transferee forum in selecting the transferee forum. *In re Air Crash Near Van Cleve, Miss., On August 13, 1977*, 486 F. Supp. 926, 928 (J.P.M.L. 1980); *In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540, 543 (J.P.M.L. 1981). Thus, the Northern District of Illinois is accessible and convenient to all litigants and potential witnesses.

IV. **CONCLUSION**

For all of the foregoing reasons, the Panel should order transfer of the actions in the Schedule of Actions submitted herewith to the Northern District of Illinois.

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Respectfully Submitted,

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