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

In re: *FRITO LAY BEAN DIP 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 four (4) 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. As a result, consumers were misled into believing that Defendant's Frito Lay Bean Dip (the "Product") is "All Natural," when it is not, because it contains Genetically Modified Organisms (GMO's); specifically in the form of corn and/or corn variations that have been modified through biotechnology.

Plaintiff, Kelli Altman, 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 four substantially similar cases relating to the uniform deceptive practices by Defendant (as defined below) to the Southern District of Florida.

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 Southern District of Florida is ideal, as it is a sophisticated and well-resourced district court to handle this complex litigation and is the district court where two (2) out of the four (4) current cases are pending. Therefore, the Southern District of Florida is an ideal and logical choice for a court to handle this consumer class action case.

II. BACKGROUND

A. PROCEDURAL HISTORY

The four subject cases only pertain to Defendant's Bean Dip—not Defendant's chip products—as chip purchasers are an entirely different class of purchasers. Plaintiff, Kelli Altman, in the Southern District of Florida action, Plaintiff Alyssa Schwartz in the Eastern District of New York action (formerly Northern District of California), Plaintiff William Roman in the Northern District of Illinois action, and Plaintiff Steve Berkowitz 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"). *See* Schedule of Actions submitted herewith.

Plaintiffs 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 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. Plaintiff Alyssa Schwartz filed the first of these actions on May 29, 2012 in the Northern District of California. No court has yet had the opportunity to analyze or consider the issues presented in *Schwartz* because, despite Defendant having its motion granted to transfer *Schwartz* to the Eastern District of New York, where different cases are pending regarding Frito-Lay chip products, the only case regarding Bean Dip in the New York action is the *Schwartz* case that was recently transferred there. The other cases *Schwartz* has been consolidated with are named In re Frito-Lay North America, Inc. "All Natural" Litigation, 12-408-RRMRLM (E.D.N.Y.), which involve California plaintiffs (Chris Shake, Julie Gengo, and Valerie Zuro) and a putative "California class," and asserts 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.

In *Scwartz*, Defendant filed a Motion to Transfer the Action to the Eastern District of New York on or about July 20, 2012. Although the court did transfer the action to the Eastern District of New York, it did not specifically rule that an MDL motion was inappropriate to file for these cases during the hearing. However, it was the court's belief that an MDL would only be proper with hundreds of cases, which is incorrect. *Schwartz*, Mot. to Trans. Hr'g Tr. 6:9-25, 7:11 (Aug. 28, 2012).

Furthermore, on July 10, 2012, in *Foust v. Frito-Lay North American, Inc.*, Case No.: 12-21975-CIV-ALTONAGA, (S.D. Fla.) ("*Foust*"), a case based on Frito Lay chip products, 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. *However, it should be noted that since the time of that hearing two additional cases involving Frito Lay bean dip, not chips, have been filed. The significance of which is that the "bean dip" cases should be separate from the "chip" cases. Each will require different proofs and different damage models, as each involves different sources of the GMO ingredient. Specifically, the "chip" cases involved corn-based materials, whereas the "bean dip" cases involve soy based materials*. Accordingly, this motion seeks to consolidate the "bean dip" cases only.

In regards to the other pending cases, Steve Berkowitz filed his case in the Southern District of Florida on May 25, 2012, Kelli Altman filed her case in the Southern District of Florida on September 13, 2012, and William Roman filed his case in the Northern District of Illinois on September 18, 2012. Again, at the present time, *Berkowitz* is currently being treated as a related case to *Foust*; however, *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.

B. GENERAL ALLEGATIONS

The actions arise out of Frito-Lay's misleading and unfair uniform message that its Bean Dip is "All Natural," when it is not because it contains 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 Bean Dip is "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) *Schwartz*:

i. Violation of California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200 *et seq.*;

ii. Violation of California's False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500 *et seq.*;

iii. Violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*;

iv. Breach of Express Warranty;

v. Intentional Misrepresentation;

vi. Negligent Misrepresentation;

vii. Fraudulent Concealment;

viii. Breach of Implied Warranty Fitness for Purpose; and

ix. Violation of Magnusson-Moss Act.

b) *Roman*:

i. Violation of Illinois' Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.*; and

ii. Unjust Enrichment.

c) *Berkowitz*

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.

d) *Altman*

i. Violation of Florida's Deceptive and Unfair Trade Practices Act, *Florida Statutes* §§ 501.201, *et seq.*; and

ii. Unjust Enrichment.

As evidenced by the causes of action and facts alleged in each of the four (4) cases herein described, the cases are ideal for multidistrict litigation consolidation.

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 Bean Dip is "All Natural," when it is not, because it contains 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 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 under Section 1407 will place this litigation before a single 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 case, *Schwartz*, 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 a case that concerns Frito-Lay's chip products, not Bean Dip. In addition, the transferring court failed to recognize the necessity for an MDL here, as evidenced by the following testimony on August 28, 2012: "Well, I think MDL's, I mean, I don't know there is any hard and fast rule. I haven't had to look at that. Nobody briefed it. But, generally

speaking, we're talking about hundreds of cases." *Schwartz*, Mot. to Trans. Hr'g Tr. 6:9-12. "But, in any case, I think there's, you know, a handful of cases. It's not usually a reason for an MDL. It's usually a huge number of cases, all of the hip replacements, defective, hundreds and hundreds, if not more." *Id*. at 7:3-7. Therefore, the issues presented by this MDL Motion have not been analyzed or decided by any court, 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 Bean Dip cases pending at the time Frito-Lay sought transfer, there has been subsequent filings of two more cases, specifically this case, *Altman*, in the Southern District of Florida, and *Roman* in the Northern District of Illinois.[1] Additionally, it is anticipated that more actions may likely be brought against Frio-Lay in connection with the bean dip product.

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 in all actions is identical and Frito-Lay is the sole defendant in each action. This potential for inconsistent rulings provides a compelling reason for transfer of these cases to a single judge.

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 a single judge 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 four (4) actions are predicated upon Frito-Lay's alleged misrepresentation and misleading statement that the Product is "All Natural," when it is not, because it contains GMOs, which violates each case's respective state 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 SOUTHERN DISTRICT OF FLORIDA IS AN APPROPRIATE TRANSFEREE DISTRICT BECAUSE IT IS THE LOCATION OF TWO OF THE FOUR CASES FILED TO DATE

The Panel has frequently expressed its preference for transferring actions to the district in which the judge handling the pending actions has acquired the greatest familiarity with the nature of the cases and the issues. *See, e.g., In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litigation*, 398 F. Supp. 2d 1361 (J.P.M.L. 2005); *In re Cardiac Devices Qui Tam Litigation*, 254 F. Supp. 2d 1370 (J.P.M.L. 2003); *In re Medco Health Solutions, Inc.*, 254 F. Supp. 2d 1364 (J.P.M.L. 2003).

i. *The Southern District of Florida and Judge William J. Zloch Has the Experience, Time and Resources to Manage this Complex Litigation.*

The *Altman* action has been assigned to the Honorable William J. Zloch, 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 1985. A non-exhaustive list of Judge Zloch's previous experience includes: *Shim v. Echosphere, L.L.C*, 2010 U.S. Dist. Lexis 135984 (S.D. Fla. 2010) (involving class certification under the Fair Labor Standards Act); *Fox v. Porsche Cars North America, Inc.*, 2009 U.S. Dist. Lexis 9702 (S.D. Fla. 2009) (involving Florida's leman law); *Varela v. Moskowitz*, 2008 U.S. Dist. Lexis 48625 (S.D. Fla. 2008 (involving approval of a settlement)

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 Southern District of Florida 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 Southern District of Florida. Additionally, Judge Zloch currently does not have any pending MDL docket. Given the ability and resources of the Southern District of Florida, the Panel should transfer the cases pending in other districts there.

ii. *The Southern District of Florida Is An Accessible Metropolitan District Convenient to the Litigants and Witnesses.*

The Southern District of Florida provides a location allowing easy access for all litigants and witnesses because it contains three (3) major international airports (West Palm Beach, Fort Lauderdale, and Miami). Direct, frequent and economical flights to these three (3) airports are available from almost all major cities in the United States. 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).

Additionally, the *Altman* case is pending in the Ft. Lauderdale division of the U.S. District Court, Southern District of Florida. Ft. Lauderdale has a moderate climate, so weather conditions such as snow are unlikely to delay court hearings, public transit and taxis are readily accessible, the courthouse and Ft. Lauderdale airport have an abundance of parking, and there are many nearby hotels to accommodate visiting attorneys. Thus, the Southern District of Florida 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 on the Schedule of Actions submitted herewith to the Southern District of Florida.

Respectfully Submitted,

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By: /s/ Joshua H. Eggnatz
Joshua H. Eggnatz, Esq.
Fla. Bar. No.: 0067926
THE EGGNATZ LAW FIRM, P.A.
1920 N. Commerce Parkway, Suite 1
Weston, FL 33326
Tel: (954) 634-4355
Fax: (954) 634-4342
JEggnatz@EggnatzLaw.com

Attorney for Plaintiff Kelli Altman