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

In re: *FRITO LAY BEAN DIP MARKETING AND SALES PRACTICES LITIGATION* **MDL No. 2413**

PLAINTIFF, KELLI ALMAN'S REPLY IN OPPOSITION TO 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

Plaintiff, Kelli Altman, in the Southern District of Florida, by and through her undersigned counsel, respectfully files this Reply in Opposition To 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 ("Response and Cross Motion"), and in support thereof states as follows:

1. Plaintiff initiated this MDL proceeding ("MDL 2413: Bean Dip") in order to obtain an order, pursuant to 28 U.S.C. § 1407, transferring the following cases to the Southern District of Florida for the purpose of consolidation for multidistrict litigation:

a. *Kelli Altman v. Frito-Lay North America, Inc.*, Case No.: 12-cv-61803-WJZ (S.D. Fla., Hon. William J. Zloch, presiding) ("*Altman*");

b. *Steve Berkowitz v. Frito-Lay North America, Inc.*, Case No. 12-cv-22436-CMA (S.D. Fla., Hon. Cecelia M. Altonaga, presiding) ("*Berkowitz*");

c. *Alyssa Schwartz v. Frito-Lay North America, Inc.*, Case No.: 12-cv-4638-RRM-RLM (E.D. N.Y., Hon. Roslynn R. Mauskopf, presiding) ("*Schwartz*"); and

d. *William Roman v. Frito-Lay North America, Inc.*, Case No.: 12-cv-7492-JFG (N.D. IL, Hon. John F. Grady, presiding) ("*Roman*").

2. As fully previously set forth in Plaintiff's Motion and Brief in Support thereof, the MDL 2413: Bean Dip motion seeks to consolidate the current four (4) overlapping class actions that involve Frio-Lay's bean dip product (the "Product"). Although Frito-Lay has also engaged in deceptive marketing in connection with other products, such as Frito-Lay chip products, the Product at issue in this MDL proceeding is bean dip only.

3. Subsequent to the filing of this MDL 2413: Bean Dip motion, a second MDL motion was filed by Plaintiff Kimberly Fleishman for Transfer of Actions to the North District of Illinois Pursuant to 28 U.S.C. § 1407 ("MDL 2414: Chip"). The MDL 2414: Chip motion seeks to consolidate the three (3) overlapping class actions that involve Frito-Lay's chip products.

4. Frito-Lay's Response and Cross Motion contends that the MDL 2413: Bean Dip and MDL 2414: Chip motions should be consolidated under one consolidated MDL caption: *In re Frito-Lay North America, Inc., "Natural Litigation*, and that the Eastern District of New York is the appropriate transferee district for consolidated pre-trial proceedings.

ARGUMENT

Frito-Lay's cross motion to consolidate the MDL 2413: Bean Dip and MDL 2414: Chip motions should be denied. As articulated in both the MDL 2413: Bean Dip motion and MDL 2414: Chip motion, these two categories of products should be treated and litigated separately. Frito-Lay cannot lump all of its products in to one category Although Frito-Lay has disseminated a uniform false and deceptive message concerning its "all natural" products generally, the "chip" cases and "bean dip" cases will each require different proofs and different damage models, as each involves a different type of food source, a different product, and a different purchaser. The primary ingredient in the "bean dip" cases is pinto beans, whereas the primary ingredient in the "chip" cases is corn.

The "bean dip" cases involve a protein, whereas the "chip" cases involve a carbohydrate. The human body digests proteins and carbohydrates differently, and each has a different chemical effect on the body. Additionally, Frito-Lay's position assumes that every purchaser of Frito-Lay chip product is also a purchaser of a Frito-Lay bean dip product, and vice versa. The "bean dip" cases will require a different expert and different level of proof concerning the genetically modified nature of the bean dip product and its effect on the body, and the class action discovery will be different for each case.

It is not uncommon for this panel to separate seemingly similar MDL actions. For example, *In re: Silica Products Liability Litigation, MDL No. 1553* and *In re: Asbestos Products Liability Litigation, MDL No. 875* were separate MDL proceedings, despite the fact that both involved the inhalation of dust that often contained both asbestos and silica, and that many of the defendants were the same in the overlapping cases. These two actions were treated separately because silica and asbestos cause different diseases. In our case, the MDL 2413: Bean Dip and MDL 2414: Chip motions involve different products, a different class of purchaser, and the human body's reaction to proteins verses carbohydrates is different.

It is important to note that Frito-Lay's Response and Cross Motion claims that "Altman failed to include *Foust v. Frito-Lay North America, Inc.* No. 12-cv-21975 (S.D. Fla.) ("*Foust*") as a related case in the MDL 2413: Bean Dip Motion despite the fact that it included Bean Dip Claims and misleading suggests to this Panel that *Foust* is a chip's only action." (*See* Response and Cross Motion, p. 10). Frito-Lay's claim that bean dip is the challenged product in *Foust* is an erroneous misreading of the *Foust* Complaint. Although one of the introductory paragraphs of the *Foust* Complaint generally alleges that "[d]efendant manufactures, markets, advertises, distributes and sells snack food, including Tostitos chips, Sunchips, and Bean Dip, et al.," the Complaint specifically alleges that "Plaintiff has purchased a Product that is subject to this

action, SunChips Multigrain chips." (*See Foust*, Compl. ¶¶ 1, 8). A full reading of the *Foust* Complaint shows that the product consumed by the plaintiff in *Foust* is a Frito-Lay chip product. Counsel for *Foust* has filed a Response in Support of the MDL 2414: Chip Motion. (*See Foust's* Response in Support, MDL 2414, Doc. 8). Thus, Counsel in *Foust* recognizes that the *Foust* case involves a Frito-Lay chip product that should be litigated separately from the "bean dip" cases.

Additionally, Judge Cecilia M. Altonaga's recent order transferring *Foust* to the Eastern District of New York even recognizes that "Plaintiff, David Foust filed a Complaint challenging Defendant's "All Natural" labeling and marketing relating to its SunChips products. Plaintiff contends, on behalf of a putative nationwide class, the 'Defendant has represented without qualification that [SunChips] is 'ALL NATURAL,' but has not disclosed and [affirmatively] concealed the fact that the product contains Genetically Modified Organisms ('GMOs').'" (*Foust*, Trans. Order, Oct. 4, 2012, ECF. No. 29) (citing *Foust*, Compl. ¶ 1). Importantly, "on August 1, 2012 while [*Foust*] was still closed, [Judge Altonaga] accepted transfer of . . . *Berkowitz* . . . . The court administratively closed the *Berkowitz* action on the same day, reasoning that if *Foust's* case was ultimately transferred to the EDNY, *Berkowitz's* case would be transferred along with it." (*Foust*, Trans. Order, Oct. 4, 2012, ECF. No. 29). However, rather than transfer *Berkowitz* to the EDNY along with *Foust*, after this MDL 2413: Bean Dip motion was filed, Judge Altonaga ultimately decided to stay *Berkowitz* pending a decision by the Judicial Panel on Multidistrict Litigation. (*Berkowitz*, Order, Oct. 4, 2012, ECF. No. 18). Judge Altonaga's decision to transfer *Foust*, a "chip" case, while at the same time staying the *Berkowitz* action, a "bean dip" case, clearly shows that even Judge Altonaga recognizes a distinction between the "chip" cases verses the "bean dip" case.

Should this Court adopt Frito-Lay's position that the MDL 2413: Bean Dip and MDL 2414: Chip cases be combined, then the MDL's should be consolidated in the Southern District of Florida, not the Eastern District in New York. 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 an overburdened transferee Court's docket is an important consideration, and one that militates in favor of the Southern District of Florida. Judge Zloch, the presiding judge in *Altman*, currently does not have any pending MDL docket, and has the time and resources to devote to this matter.

Alternatively, Judge Altonaga, the presiding judge in *Berkowitz*, should be the transferee judge. Judge Altonaga has previously expressed interest in accepting transfer of these actions. Judge Altonaga stated, "if I receive a request to accept transfer, I would gladly accept it – assuming the case stays in the Southern District of Florida – it would make all the sense in the world to have the same judge become familiar with the bean dip and assorted products that may or may not have GMO's. . . . It sounds to me as though this should be an MDL." *Foust*, Mot. to Trans. Hr'g Tr. 7:3-14. Given the ability and resources of the Southern District of Florida, the Panel should transfer the cases pending in other districts there.

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). Fort 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.

CONCLUSION

For all of the foregoing reasons, as well as the reasons fully briefed in the MDL 2413: Bean Dip and MDL 2414: Chip motions, the Panel should order transfer of the "bean dip" actions in the MDL: 2413 Bean Dip Schedule of Actions to the Southern District of Florida, and deny Frito-Lay's Cross Motion to consolidate and transfer the MDL 2413: Bean Dip and MDL 2414: Chip actions to the Eastern District of New York.

Respectfully Submitted,

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