UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER E. SHUMLIN, in his official capacity as Governor of Vermont; HARRY L. CHEN, in his official capacity as Commissioner of the Vermont Department of Health; and JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management, Movants, v. FRITO-LAY NORTH AMERICA, INC., Respondent.	Case No. 3-16-mc-33

MOTION TO COMPEL NON-PARTY FRITO-LAY NORTH AMERICA, INC. TO COMPLY WITH PROPERLY-SERVED SUBPOENA AND BRIEF IN SUPPORT

William H. Sorrell, Peter E. Shumlin, Harry L. Chen, and James B. Reardon (collectively, "Vermont"), move pursuant to Rule 45 of the Federal Rules of Civil Procedure to compel Frito-Lay North America, Inc. to produce certain documents in its possession, which are not otherwise publicly available, and which are relevant to the claims and defenses raised by the parties in *Grocery Manufacturers Ass'n v. Sorrell*, No. 5:14-cv-117 (D. Vt.) ("the Vermont litigation"). Specifically, Vermont seeks an order compelling Frito-Lay to produce a narrow set of consumer survey research: the results of any consumer surveys that Frito-Lay has conducted since 2005 concerning genetically engineered food products ("GE foods" or "GMOs") and the use of "natural" labels on those products. Vermont has also filed today with this Court a motion to transfer this matter under Federal Rule of Civil Procedure 45(f) to the U.S. District Court for the District of Vermont, which presides over the Vermont litigation. Due to the complex issues

relating to both this motion and Vermont's motion to transfer to the District of Vermont, Vermont believes a hearing could assist in addressing any questions or concerns that the Court may have.

Vermont has conferred in good faith with counsel for Frito-Lay but counsel for Frito-Lay has refused to produce the requested documents.

BACKGROUND

The Case

On May 8, 2014, the Vermont Legislature enacted Act 120, which requires the labeling of foods produced or partially produced with genetic engineering and prohibits the labeling of such foods as "natural" (and similar terms). 2014 Vt. Acts & Resolves No. 120. On June 12, 2014, the Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association and National Association of Manufacturers, all trade associations representing food producers (collectively, "Plaintiffs"), filed suit in Vermont federal district court to enjoin the enforcement of Act 120. The action asserts that Act 120 violates Plaintiffs' members' First Amendment right to free speech, is unconstitutionally vague, violates the Dormant Commerce Clause, and is preempted by federal labeling statutes.

Plaintiffs' Complaint challenges, among other things, the legislative finding that labeling foods produced with genetic engineering as "natural" is misleading. D. Vt. Dkt. No. 5:14-cv-117, ECF No. 37-1, Compl., ¶ 28. Plaintiffs argue that "[t]here is no real likelihood of deception absent the [natural] ban." D. Vt. Dkt. No. 5:14-cv-117, ECF No. 75, at 25. The Complaint also challenges the *need* for GE food products to be labeled, alleging that "a consumer can make the 'informed' purchasing decisions the Act intends to facilitate, without the need for the Act at all." D. Vt. Dkt. No. 5:14-cv-117, ECF No. 37-1, Compl., ¶ 40.

The Subpoena

Vermont has reason to believe that Frito-Lay has documents that bear on (1) whether consumers know or are confused about the presence of GE crops or material in food products; and (2) consumer perception of "nature," "natural," or "naturally" labels on GE food products. In response to interrogatories, Plaintiffs provided Vermont with some guidance on companies that might have relevant documents.

Thus, on October 8, 2015, Vermont served Frito-Lay with a subpoena for the production of documents (the "Subpoena"). Ex. A, App. at 1 – 14. Service of the subpoena was executed that same day. *Id.* The subpoena sought 12 categories of documents relevant to the parties' claims and defenses in this litigation, including the following 3 requests at issue on this motion to compel:

- Request 5: All studies, reports, or analysis in Your possession, including without limitation surveys or consumer complaints, concerning consumer knowledge, awareness or lack of awareness, or confusion about the presence of GE crops or GE material in food products.

- Request 6: All studies, reports, or analyses in Your possession, including without limitation surveys or consumer complaints, concerning consumer purchasing habits related to GE food products, including without limitation consumers' preferences for GE food products or non-GE food products.

- Request 7: All studies, reports, or analyses in Your possession, including without limitation surveys or consumer complaints, concerning the use of the words "nature," "natural," "naturally," "naturally made," "naturally grown," or "all natural" on food labels or advertisements, including without limitation consumers' perceptions of food labels or advertisements that contain any of those terms, and including without limitation any studies, reports, analyses, or complaints that mention or concern the use of those terms on or in relation to GE food products.

The deadline for producing the documents was October 23, 2015. On October 22, 2015, Frito-Lay responded asserting general objections to the entire Subpoena, claiming it is "overly broad, unnecessary, unduly burdensome, and oppressive." Ex. B, App. at 15 – 20.

On November 4, 2015, Vermont's counsel followed up with Frito-Lay to schedule a call to discuss its objections to the subpoena. Ex. C, App. at 21 – 34. After repeated attempts by telephone to reach counsel for Frito-Lay, Vermont's counsel emailed again on November 23, 2015 to arrange a time to confer regarding Frito-Lay's responses. *Id.* Frito-Lay responded on November 23, 2015 asking for a written proposal for narrowing the subpoenas. Counsel for Vermont responded on November 25, 2015, seeking to ascertain whether there was any subclass of documents that Frito-Lay would produce or if it simply intended to stand on its relevancy objection, and agreeing to discuss at one of the times proposed by Frito-Lay. *Id.* Counsel for Vermont and Frito-Lay discussed responses to the subpoena on December 3, 2015. Following that conversation, counsel for Vermont sent a letter proposing a narrowed set of documents that Frito-Lay could produce including studies, reports, surveys, and analysis Frito-Lay created or commissioned on the topics in requests 5-7. *Id.* Vermont also suggested a follow-up conversation if the request remained too burdensome. *Id.* Vermont's counsel followed up by email on December 11, 2015, asking if Frito-Lay was willing to proceed with the narrowed requests. *Id.* There was no response to that communication. Vermont again followed up on December 15, 2015. *Id.* Frito-Lay responded that it refused to produce any documents because the fact discovery deadline had passed, and continued to stand on its general objections. *Id.*

On February 2, 2016, Vermont again contacted Frito-Lay to propose that Frito-Lay produce 5 narrow categories of documents, including the consumer complaints and survey research described above. Ex. D, App. at 35 – 37. Vermont asked Frito-Lay to confirm that it was still unwilling to produce the requested documents. *Id.* Frito-Lay maintained its asserted objections and continued to refuse to respond based on the close of discovery. *Id.*

On March 4, 2016, the Vermont district court made clear that, although the fact discovery deadline remained in place, "the state is free to file motions to compel" and "if responsive documents are obtained" they will not be excluded because they were obtained following the close of fact discovery. D. Vt. Dkt. No. 5:14-cv-117, ECF No. 139, Tr. at 35. Finally, before filing this motion, on March 31, 2016, Vermont contacted Frito-Lay to again narrow the scope of the requested documents in an effort to reach agreement. Ex. E, App. at 38 – 41. Vermont informed Frito-Lay that it intended to move to compel the production of the following category of documents: the results of any consumer surveys that Frito-Lay has conducted since 2005 concerning GMOs or genetically engineered food products. Frito-Lay did not produce documents, and did not consent to transferring this matter to the District of Vermont. *Id.* Vermont thus moves to compel the production of these documents.

ARGUMENT

To date, Frito-Lay has universally objected to producing documents called for by the subpoena and has refused to confer with counsel despite Vermont's repeated attempts to narrow its requests to address the stated concerns regarding burden. Frito-Lay has refused to produce even a limited subset of documents – namely a discrete set of survey research – that would not otherwise be publicly available and that are directly relevant to (1) whether consumers know of or are confused about the presence of GE materials in food products; and (2) whether consumers are misled by "natural" labels on those food products.

"[T]he scope of discovery through a subpoena is the same as that applicable to Rule 34 and other discovery rules." Fed. R. Civ. P. 45 Advisory Committee Notes to 1970 Amendment; *see also Pointer v. DART*, 417 F.3d 819, 821-22 (8th Cir. 2005) (finding that information sought through Rule 45 "fell within the broad scope of Rule 26" and subpoena was thus enforceable).

The "scope of discovery through a subpoena is 'exceedingly broad,'" *O'Brien v. Barrows*, No. 1:10–CV–173, 2010 WL 4180752, at *2 (D. Vt. Oct. 19, 2010) (citing 9A Wright & Miller § 2459, at 42), allowing parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).[1] "[I]t is no longer open to debate that the discovery rules should be given a broad, liberal interpretation." *Edgar v. Finley*, 312 F.2d 533, 535 (8th Cir. 1963) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (explaining that relevancy under Rule 26 "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case"). Here, the information Vermont requests is directly relevant to its defense of Act 120's "natural" prohibition.

A key issue before the Vermont district court is whether consumers are misled by the labeling of GE food products as "natural." Vermont argues that, under the First Amendment, it has the right to regulate misleading speech. Vt. Dkt. 5:14-cv-117, ECF No. 24-1, at 31 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980)). But Plaintiffs contend that Vermont cannot regulate the use of "natural" labels on GE food products because the term "natural" is so meaningless that it cannot be misleading. D. Vt. Dkt. 5:14-cv-117, ECF No. 33-1, at 53, 54 (noting that "[n]atural claims are 'commonly seen, and indeed expected,' in food advertising and labeling generally"). Simultaneously, Plaintiffs contend that "the State . . . failed to demonstrate that the banned use of natural was inherently or

[1] This interplay between Rule 45 and Rule 26 is particularly important in this instance, where Vermont has been sued by associations who, themselves, hold very little relevant information. The standing of these associations is based on the interests of their members. It would be unfair and impractical to shield these members from reasonable discovery that they hold, simply because they opted to have their associations sue rather than do so directly.

actually misleading." 2d Cir. Dkt. 15-1504-cv, ECF No. 142, at 23. On the other hand, Vermont has introduced an expert report noting that consumers believe "natural" means that the food product is not genetically engineered. Given that Frito-Lay has been involved in litigation regarding natural claims on GE food, it likely possesses evidence of independent survey research regarding the use of "natural" labels on GE food products, and consumer awareness and perception of GE food products more generally.[2] The documents are relevant to the claims and defenses of the parties because they would bear directly on whether "natural" labels on GE food products are actually or potentially deceptive, and on whether consumers are generally aware of the presence of GE in food they purchase on a daily basis.

With respect to any burden imposed on Frito-Lay by the subpoena, Vermont has narrowed its request to a limited category of documents that can it believes can be identified and produced without imposing undue burden on Frito-Lay – the results of only its *own* consumer surveys related to GE foods, eliminating the need for Frito-Lay to search its files for copies of publicly available surveys. Moreover, throughout the meet-and-confer process, Vermont has informed Frito-Lay that, if Frito-Lay were to provide additional information about how it maintains the results of its consumer survey research, Vermont would be willing to discuss a reasonable method of searching those documents. Frito-Lay has refused to engage in that discussion.

Although the deadline for completion of fact discovery expired in November 2015, while counsel's negotiations regarding the subpoena requests were ongoing, Vermont has a right to move to compel documents that should have been produced before that deadline. When a

[2] *See In Re Frito-Lay North America, Inc. All Natural Litigation*, Dkt. No. 1:12-md-02413 (E.D.N.Y. 2012). Indeed, while Frito-Lay has repeatedly asserted objections to the subpoena requests on relevance and burden grounds, it has never stated that it does not have the documents Vermont seeks. *See* Exs. B, C, D, and E.

subpoenaed party objects to production, Rule 45 provides that "[a]t any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production." Fed. R. Civ. P. 45(d)(2)(B)(i). Indeed, "courts routinely consider motions related to discovery, even though they are filed outside the discovery period, especially where the time of filing of such a motion is attributable, as it is here, to the parties' attempted settlement of the discovery dispute." *Lurie v. MAPMG*, 262 F.R.D. 29, 31 (D.D.C. 2009).

Despite Frito-Lay's refusal to engage, Vermont has continued to work diligently to narrow its requests and respond to Frito-Lay's objections. Vermont's motion is timely and seeks only "discovery [it] should have already received." *Barnes v. District of Columbia*, 289 F.R.D. 1, 20 (D.D.C. 2012); *see also, e.g.*, *McFadden v. Ballard, Spahr, Andrews, & Ingersoll, LLP*, 243 F.R.D. 1, 10 (D.D.C. 2007) (holding that motion to compel "filed after the deadline for discovery had expired" is timely so long as "it seeks to compel answers and documents that were demanded during the discovery period"); D. Vt. Dkt. No. 5:14-cv-117, ECF No. 139, Tr. at 35 ("If it was before me, the fact that the motion to compel was filed after the expiration of the discovery deadline would not foreclose the ability to file a motion to compel and have it heard."). Despite this, Frito-Lay continues to object to all narrowing proposals and will not produce materials that go to the very core of Plaintiffs' challenges to Act 120. The Court should compel Frito-Lay to comply with the subpoena as narrowed.

Finally, while the "good cause" and "diligence" requirements of Rule 16(b) do not apply here (since Vermont is not seeking any schedule modification), they are nonetheless met. As the Vermont district court explained, in addressing motions to compel, it considers whether the discovery request is valid, "seeks relevant information," is "proportional," whether there is a

"need for it," the "prejudice of denying it," and "how diligently it was pursued." D. Vt. Dkt. No. 5:14-cv-117, ECF No. 139, Tr. at 34. Here, Vermont has diligently pursued and narrowed its requests. The limited delay in filing this motion is attributable to Vermont's first seeking general clarification from the issuing court about the discovery schedule, which it hoped would obviate the immediate need for filing this motion. *See Soltesz v. Rushmore Plaza Civic Ctr.*, No. 11-5012-JLV, 2013 WL 175802, at *4-6 (D.S.D. Jan. 16, 2013) (considering motion on the merits when delay was reasonable, noting that "[c]ourts do not ordinarily rigidly enforce timing issues with regard to motions to compel"). Additionally, there is no prejudice to either Frito-Lay or Plaintiffs. Frito-Lay has yet to produce any documents and no trial date has been set in the underlying case. *See id.* at *6 ("Delay alone, without accompanying prejudice to the opposing party, is not enough to deny a motion to compel."). Moreover, as described above, the discovery will likely lead to relevant information. *Casagrande v. Norm Bloom & Son, LLC*, No. 3:11-CV-1918, 2014 WL 5817562, at *2 (D. Conn. Nov. 10, 2014) ("good cause" considers such factors as diligence, imminence of trial, whether request is opposed, prejudice, whether the need for discovery was foreseen, and the likely relevance of the discovery). Thus, even if this motion were untimely – it is not – there is ample good cause to consider it on the merits.

CONCLUSION

For these reasons, Vermont respectfully requests that this motion be granted and that Frito-Lay be compelled to comply with the subpoena, as modified, and produce the results of any consumer surveys that Frito-Lay has conducted since 2005 concerning GMOs or genetically engineered food products.

Date: April 8, 2016

STATE OF VERMONT

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CERTIFICATE OF CONFERENCE

This is to certify that Vermont has conferred in good faith with counsel for Frito-Lay but counsel for Frito-Lay has refused to produce the requested documents.

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/s/ Kyle H. Landis-Marinello
Kyle H. Landis-Marinello

CERTIFICATE OF SERVICE

I hereby certify that on the April 8, 2016, a copy of the foregoing was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on all parties registered to receive such service. I further certify that I have served a copy on the following via electronic and certified mail:

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