UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RENEE YOUNG, et al.,

Plaintiffs,

v.

L'OREAL USA, INC.,

Defendant.

Case No. 20-cv-00944-JSW

ORDER GRANTING MOTION TO TRANSFER

Re: Dkt. No. 28

Now before the Court is L'Oréal USA, Inc.'s motion to transfer or dismiss under the first-to-file rule and 28 U.S.C. section 1404(a). The Court finds this motion suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). Having carefully reviewed the parties' papers, considered their arguments, and the relevant legal authority, the Court hereby GRANTS L'Oréal's motion.

BACKGROUND

A. THE *YOUNG* CASE

This case is a putative class action brought by consumers who were allegedly misled into purchasing cosmetic products that suffer from labeling and packaging defects arising from a defective pump. L'Oréal manufactures and sells cosmetic products, including the four at issue here: Visible Lift Serum Absolute, Superstay Better Skin Skin-Transforming Foundation, Age Perfect Eye Renewal Eye Cream, and Revitalift Bright Reveal Brightening Day Moisturizer. (Dkt. 26, First Amended Complaint ("FAC") ¶¶ 3, 26-28.) These products are sold in sealed, glass containers and are to be dispensed through a pump, which is permanently attached to the top of the container but is irremovable. (*Id.* ¶¶ 4, 6.)

The named Plaintiffs, Renee Young and Roxanne Tierney, purchased three of these

products. (*Id.* ¶¶ 41, 44, 47.) Their individual experiences with these products is simple. Plaintiffs allege they were misled into purchasing these products when they discovered the pumps attached to the containers failed to dispense a significant amount of the product. (*Id.* ¶¶ 2, 5, 42, 45, 48.) Nor could they access the remaining fluid through reasonable and safe means because the container was sealed. (*Id.* ¶¶ 42, 45, 48.) Had they known they could not access a significant amount of the liquid would not dispense and could not be accessed through reasonable means, Plaintiffs would not have purchased the product or paid less than the retail price. (*Id.* ¶ 16.) An independent laboratory test conducted by Plaintiffs after their purchase revealed these products dispensed anywhere from about 43% to 81% of the advertised net quantity. (*Id.* ¶ 9.)

This pump issue is not new to L'Oréal. Several consumers have complained about the defective pump directly on L'Oréal's website or through its customer service hotline. (*Id.* ¶¶ 30-33.) L'Oréal often responded to the complaints posted on its website and talked about it with those customers who called their customer service hotline. (*Id.* ¶¶ 32-33.)

In February 2020, Plaintiffs filed this putative class action on their behalves and on behalf of similarly situated California consumers, claiming L'Oréal engaged in deceptive practices when they sold these products without disclosing that it used defective pumps that failed to dispense a significant amount of product. (*Id.* ¶¶ 1, 2, 5-6.) They sue for alleged violations of two consumer protection statutes, breach of implied warranty, unjust enrichment, and declaratory relief. All claims are brought under California law. They seek redress for their harms in the form of damages, equitable monetary damages, punitive damages, and declaratory and injunctive relief. (Prayer for Relief ¶¶ A-L.) They are represented by three law firms: Kaplan Fox & Kilsheimer LLP, Snyder Law Firm LLC, and Williams Dirks Dameron LLC. (FAC at 28.)

B. THE *CRITCHER* CASE

Two years before the filing of this case, a similar action was litigated before Judge John G. Koeltl of the Southern District of New York. In that case, four of L'Oréal's products were at issue: Visible Lift Serum Absolute, Age Perfect Eye Renewal Eye Cream, Revitalift Bright Reveal Brightening Day Moisturizer, and Superstay Better Skin Skin-Transforming Foundation. *Critcher v. L'Oreal USA Inc.*, 18-cv-5639 (JGK), 2019 WL 30166394, at *2 (S.D.N.Y. July 11, 2019),

aff'd, 959 F.3d 31 (2d Cir. 2020). The plaintiffs were consumers who purchased these products. *Id.* They were represented by Kaplan Fox & Kilsheimer LLP, Snyder Law Firm LLC, and Williams Dirks Dameron LLC. (Dkt. No. 29, Declaration of Justin D. Lewis ("Lewis Decl.") Ex. A, at 50.) The products were sold in sealed, glass bottles. *Id.* Consumers accessed the cosmetic fluid through a pump. *Id.* Although Plaintiffs agreed the product accurately stated the products' net quantity, they contended the labels were misleading because the pumps failed to dispense a significant amount of the cosmetic fluid. *Id.* Because of the sealed, glass containers, the plaintiffs were unable to remove the pumps safely and access the remaining product. *Id.* The plaintiffs alleged that many consumers complained on L'Oréal's website about their inability to access the products, many of which the latter responded to. *Id.* Had they known of this defect, and that they would not be able to access a significant amount of the liquid because of the packaging, they would not have purchased the product. *Id.* The plaintiffs brought a nationwide putative class action, alleging violations of various state consumer protection statutes, unjust enrichment, breach of implied warranty, and declaratory and injunctive relief. *Id*

Over the ensuing year and a half of litigation, the parties engaged in discovery. (Lewis Decl. ¶ 10.) They prepared a joint Rule 26(f) report and discovery plan. (*Id.*) They made initial disclosures. (*Id.*) The plaintiffs issued interrogatories and requests to produce documents; L'Oréal responded to both. (*Id.*) They agreed to a stipulated protective order and negotiated a protocol for L'Oréal to gather and produce Electronically Stored Information. (*Id.* ¶ 11.) During all of this, two discovery disputes arose and were referred to United States Magistrate Judge Katharine H. Parker. (*Id.*). Judge Parker issued two orders related to those disputes. (*Id.*).

In July 2019, Judge Koeltl granted L'Oréal's motion to dismiss the entire second amended complaint on two independent bases. *Critcher*, 2019 WL 30166394, at *5 First, Judge Koeltl held the plaintiffs' claims were preempted by the Federal Food, Drug, and Cosmetics Act and the Fair Packaging and Labeling Act. *Id.* at *3-4. Second, Judge Koeltl held that the plaintiffs failed to plausibly allege that a "reasonable consumer would be deceived by the products' packaging." *Id.* at *5.

The plaintiffs appealed to the Second Circuit. While that case was pending resolution on

appeal, Plaintiffs filed the *Young* action. Three months later, the Second Circuit affirmed Judge Koeltl's dismissal of the *Critcher* case, holding the FDCA expressly preempted the plaintiffs' claims. *Critcher v. L'Oreal USA, Inc.*, 959 F.3d 31, 36-37 (2d Cir. 2020). The Second Circuit declined to reach whether the FPLA preempted the plaintiffs' claims and whether the plaintiffs failed to state their claims for relief. *Id.* at 34.

L'Oréal now moves to transfer this case to the Southern District of New York under the first-to-file rule and 28 U.S.C. section 1404(a).

ANALYSIS

A. LEGAL STANDARD

The first-to-file rule is a doctrine of federal comity that allows a district court to decline jurisdiction over a subsequently filed action when a similar action is already pending in another district. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011). The rule's purpose is to "avoid placing an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments." *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 750 (9th Cir. 1979), *overruled on other grounds by Animal Legal Def. Fund v. United States Food and Drug Admin.*, 836 F.3d 987 (9th Cir. 2016).

Three factors are analyzed when deciding whether to apply the first-to-file rule: "chronology of the lawsuits, similarity of the parties, and similarity of the issues." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). The first-to-file rule is neither rigid nor inflexible and should be applied with the consideration of sound judicial administration in mind. *Pacesetter Sys. Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). Because disciplined and experienced judges are given ample discretion in deciding to apply the first-to-file rule, *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991), a court should thus strive to "maximize 'economy, consistency, and comity.'" *Kohn Law Grp., Inc.*, 611 F.2d at 1237-39 (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999).

B. JUDICIAL ECONOMY, CONSISTENCY, AND COMITY WARRANT APPLICATION OF THE FIRST-TO-FILE RULE.

1. Chronology of the Actions

The first factor "simply requires a chronology of the actions." *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1294 (N.D. Cal. 2013). L'Oréal argues the *Critcher* case was the first-filed action. The Court agrees. It is undeniable that the *Critcher* case was filed over a year and a half before this case and is thus the first-filed case.

Plaintiffs contend the *Critcher* case should be disregarded because it had been dismissed and was pending on appeal in the Second Circuit. That argument is unpersuasive. Courts have held that a case can still be considered the first-filed action even if it is pending on appeal. *See, e.g., Molander v. Google LLC*, 473 F. Supp. 3d 1013, 1017-20 (N.D. Cal. 2020) (first-filed action pending in the Seventh Circuit); *Santich v. GNC Holdings, Inc.*, No. 17cv540 DMS(RBB), 2017 WL 5614902, at *2 (S.D. Cal. Nov. 21, 2017) (first-filed action pending in the Third Circuit). Given, however, that the procedural posture of *Critcher* has since changed from when Plaintiffs made this argument, the Court will address that issue and any lingering concerns more fully below.

Accordingly, the first factor weighs in favor of applying the first-to-file rule.

2. Similarity of the Parties

The second factor merely demands that the parties be substantially similar and need not be identical. *Kohn Law Grp., Inc.*, 787 F.3d at 1240. In the class action context, most district courts in this circuit compare "the putative classes rather than the named plaintiffs." *Pedro v. Millennium Prods., Inc.*, No. 15-cv-05253-MMC, 2016 WL 3029681, at *3 (N.D. Cal. May 27, 2016) (collecting cases); *see also Ruff v. Del Monte Corp.*, No. C 12-05251 JSW, 2013 WL 1435230, at *3 (N.D. Cal. Apr. 9, 2013) (finding substantial similarity among three putative class actions relating to product labeling)).

L'Oréal argues the parties are similar because it is the sole defendant in both cases and Plaintiffs were members of the nationwide class alleged in *Critcher*.

The Court finds this argument persuasive. First, L'Oréal is the same and sole defendant in both cases. Second, the plaintiffs in both cases are consumers of the same four products sold by

L'Oréal, and who allege were misled into purchasing those products that suffer from the same labeling and packaging defects arising from defective pumps. *See also Wallerstein*, 967 F. Supp. 2d at 1296 (finding similarity between the putative classes who all purchased the exact products). Third, although the plaintiffs in *Critcher* did not specify the class period, it is reasonable to infer they intended for it to encompass every consumer who *ever* purchased L'Oréal's products. *See id.* Fourth, the *Critcher* plaintiffs' nationwide class sought to represent the same persons and interests at issue here. In *Critcher*, the plaintiffs defined their nationwide class as: "All persons who purchased one or more Liquid Cosmetic Products sold by Defendant in the United States." (Lewis Decl. Ex. B, ¶ 76.) Plaintiffs here define their California class as: "All persons who purchased one or more Liquid Cosmetic Products sold by Defendant in California." (FAC ¶ 51.) Plaintiffs were naturally included as members of the *Critcher* plaintiff's broad definition of their nationwide class. *See also Koehler v. Pepperidge Farm, Inc.*, 13-cv-2644-YGR, 2013 WL 4806895, at *4 (N.D. Cal. Sep. 9, 2013) (finding parties were similar where first-filed action sought to represent a nationwide class and the subsequent case sought to represent only a California class)).

The only notable distinction between the parties, as Plaintiffs argue, is they are residents of different states. Although correct, this fact alone is not enough to outweigh the striking similarities between the parties.

Accordingly, this second factor weighs strongly in favor of applying the first-to-file rule.

3. Similarity of the Issues

Like the second factor, the issues between the two cases need not be identical, only substantially similar. *Kohn*, 787 F.3d at 1240. "To determine whether two suits involve substantially similar issues, we look at whether there is 'substantial overlap' between the two suits." *Id*. at 1241 (citing *Harris Cty., Texas. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 319 (5th Cir. 1999)).

L'Oréal argues the issues are not just similar, but virtually identical because they rest on the same four products, which allegedly deceived consumers based on the products' labeling and packaging. L'Oréal also points out that both cases raise nearly identical claims under various consumer protection statutes, unjust enrichment, breach of implied warranty, and declaratory

relief. L'Oréal further contends both cases seek the same relief in the form of damages, equitable monetary remedies, punitive damages, and declaratory and injunctive relief. Plaintiffs respond and argue that the legal issues are not similar because all these claims are brought under California law, which was not raised in the *Critcher* case.

The Court finds L'Oréal's argument more compelling. The legal issues and remedies in both cases closely parallel each other, and in fact are nearly identical. Both actions assert claims of unjust enrichment, breach of implied warranty, and declaratory relief. Moreover, both actions bring claims under their respective states' consumer protection statutes, all of which have goal of protecting its consumers from unfair and deceptive business practices. All these claims are based on the same predicate facts and legal theory that L'Oréal misled its consumers into purchasing a product that had defective pumps preventing them from being able access all of the product contained within its packaging.

The mere fact that Plaintiffs here assert their claims under California law as opposed to those asserted in the *Critcher* case is not enough to overcome these similarities. Indeed, courts time after time have found legal issues to be substantially similar even when the subsequently filed action brought its claims under different state law. *See Koehler v. Pepperidge Farm, Inc.*, No. 13-cv-02644-YGR, 2013 WL 4806895, at *4-5 (N.D. Cal. Sep. 9, 2013); *Schwartz v. Frito-Lay North America*, No. C-12-02740(EDL), 2012 WL 8147135, at *3 (N.D. Cal. Sep. 12, 2012). This is consistent with the Court's inquiry to see if there is "substantial overlap" between the legal issues. And as discussed here, there is substantial overlap between the legal issues in the *Critcher* case and here.

Accordingly, this factor weighs strongly in favor of applying the first-to-file rule.

4. Additional Considerations

The Court finds it is paramount to address the obvious question that arises following the Second Circuit's decision affirming the dismissal of the *Critcher* case: can a court apply the first-to-file rule even though the first-filed action is no longer pending in either the district or appellate courts?

In most circumstances, courts have applied the first-to-file rule when the first-filed action

is still pending in the district court or was dismissed pending resolution on appeal. *See, e.g.*, *Molander*, 473 F. Supp. 3d at 1017-20 (first-filed action pending in the Seventh Circuit); *SMIC, Americas. v. Innovative Foundry Techs. LLC*, 473 F. Supp. 3d. 1021, 1023-28 (N.D. Cal. 2020) (first-filed action pending in the Western District of Texas). This Court's research, however, has uncovered few cases addressing this exact issue. What these few cases show is that a court is not stripped of its discretion to apply the first-to-file rule even though the first-filed action is no longer pending. *See Alul v. Am. Honda Motor Co., Inc.*, No. 16-cv-04384-JST, 2016 WL 7116934, at *1, 6 (N.D. Cal. Dec. 7, 2016); *Exec. Law Grp., Inc. v. Exec. Law Grp PL*, No. SACV 13-01823 MMM (RNBx), 2014 WL 12577090, at *3 (C.D. Cal. Mar. 24, 2014). Rather, a court must see if the three pillars supporting the first-to-file rule—economy, consistency, and comity—still warrant a transfer, stay, or dismissal of the subsequently filed action.

Take *Executive Law Group, Inc.* for example. There, the plaintiff filed its lawsuit in the Central District of California. *Exec. Law Grp., Inc.*, 2014 WL 12577090, at *1. About four months before that lawsuit, the defendant had filed a separate, yet similar, lawsuit in the Middle District of Florida, but the case was later dismissed for lack of personal jurisdiction. *Id.* at *3. The district court declined to dismiss or transfer the plaintiff's lawsuit under the first-to-file rule, explaining that the "considerations animating the first-to-file rule are no longer present." *Id.* Specifically, there were no risks of inconsistent judgements seeing as the first-filed action was dismissed on jurisdictional grounds and not on the merits. *Id.* The district court further explained there was no concern of duplicative work or any unnecessary burden on the judiciary because the first-filed case was dismissed. *Id.*

A case from this district similarly considered the three pillars of the first-to-file rule in deciding whether to apply the rule when the first filed-action was already dismissed. *See Alul*, 2016 WL 7116934, at *1. In *Alul*, the plaintiffs filed an action in the Northern District of California. *Id.* Before the plaintiffs filed that lawsuit, another different, but similar, putative class action had been filed in the Central District of California. *Id.* The plaintiffs in the latter action voluntarily dismissed their case one month before filing the subsequently filed case. *Id.* The district court declined to transfer the case to the Central District of California, explaining it would

not serve the purpose of "sound judicial administration." *Id.* at *5-6 (quoting *Pacesetter Sys., Inc.*, 678 F.2d at 9595)). Important to the district court's holding was that the dismissal of the first-filed action did not result in unfavorable rulings while it was active. *Id.* at *5. "'[A] suit dismissed without prejudice,'" the district court explained, "leaves the situation the same as if the suit had never been brought in the first place." *Id.* (quoting *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959)).

Here, the Court finds the three pillars—economy, consistency, and comity—support applying the first-to-file rule in this case, despite that the *Critcher* case is no longer pending. First, unlike *Executive Law Group, Inc.* and *Alul*, Judge Koeltl dismissed *Critcher* on the merits after finding the claims were federally preempted and because the plaintiffs failed to plausibly plead that a reasonable consumer would be deceived by L'Oréal's products. This dismissal is not only an adverse ruling, but also carries preclusive effect. *See Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017) ("[D]ismissals under Rule 12(b)(6) operate as judgments on the merits with a claim-preclusive effect[.]"). Unsurprisingly, a little less than seven months after *Critcher*'s adverse ruling, plaintiffs' counsel—the same three law firms that represented the *Critcher* plaintiffs—filed this lawsuit with similar parties, similar legal issues, alleging the same predicate facts, and relying on a nearly identical legal theory. In fact, a closer comparison of the operative complaints in both cases show they are almost word for word the same. (*Compare* Lewis Decl. Ex. A, *with* FAC.) Of course, all this occurred with the Second Circuit's pending decision looming above their heads. While the Court cannot say for certain, there is little doubt that Plaintiffs and plaintiffs' counsel seek to avoid *Critcher*'s adverse ruling and to illicit a favorable, yet inconsistent, judgment. That very conduct is exactly what the first-to-file rule is intended to prevent. Accordingly, the Court finds that maintaining judicial consistency and federal comity counsels strongly for applying the first-to-file rule.

Second, the Court finds it would promote judicial efficiency for the parties to litigate this case in the Southern District of New York seeing as the discovery process was already underway in *Critcher*. The parties already prepared a joint Rule 26(f) report and discovery plan; they made initial disclosures; the plaintiffs issued interrogatories and requested production of documents, to

which L'Oréal responded. Moreover, the parties agreed to a stipulated protective order and negotiated a protocol for how L'Oréal was to gather and produce Electronically Stored Information. That process resulted in two referrals regarding discovery disputes to Judge Katherine H. Parker. Judge Parker later issued two corresponding orders. These facts show that there was an established framework for handling discovery and managing the litigation. If this Court were to ignore the first-to-file rule, it would squander any litigation that had already taken place in *Critcher* and duplicate Judge Koeltl's and Judge Parker's work. *See also Molander*, 473 F. Supp. 3d at 1019-20. The Court has no desire to do either, "all while risking conflicting judgments." *Id.* Thus, the Court finds judicial efficiency also counsels strongly in favor of applying the first-to-file rule.

Accordingly, the Court finds the three pillars—judicial economy, consistency, and comity—of the first-to-file rule warrant transferring this case to the Southern District of New York, despite *Critcher* being dismissed.

5. Exceptions to the First-to-File Rule

In a brief paragraph, Plaintiffs in unclear terms seem to invoke the exceptions to the first-to-file rule. Specifically, they allege that L'Oréal is seeking to move this case to a forum that believes it would provide a favorable result.

A court may decline to apply the first-to-file rule if the balance of convenience and equity weighs in favor of the later filed action. *Alltrade, Inc.*, 946 F.2d at 628. Such circumstances arise where the first-filed action evidences bad faith, anticipatory suits, and forum shopping. *Id.* Plaintiffs misunderstand the law. These exceptions look at whether the party who filed the first-filed action did so in bad faith, as an anticipatory suit, or to forum shop. However, the plaintiffs, not L'Oréal, filed the first suit.

Accordingly, the Court finds no exception applies.

CONCLUSION

With sound judicial administration in mind, the Court concludes the three pillars supporting the first-to-file rule—economy, consistency, and comity—warrant transfer of this case to the Southern District of New York. In so doing, the Court believes this "avoid[s] placing an

unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments." *Church of Scientology*, 611 F.2d at 750. Seeing as the case is being transferred, the Court will not address L'Oréal's remaining argument under 28 U.S.C. section 1404(a). After all, the issue of convenience is one that should be addressed by the court in the first-filed action. *Alltrade, Inc.*, 946 F.2d at 628.

For the foregoing reasons, the Court GRANTS Defendant's motion to transfer. The Clerk shall transfer this action to the Southern District of New York forthwith and shall close this Court's file. Defendant's remaining motion to dismiss is MOOT. (Dkt. 31.)

IT IS SO ORDERED.

Dated: 1/15/21

JEFFREY S. WHITE
United States District Judge

United States District Court
Northern District of California