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**NOT FOR PUBLICATION**  
 IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAXINE RUFF, Individually and on behalf of  
 all others similarly situated,

Plaintiff,

v.

DEL MONTE CORPORATION d/b/a DEL  
 MONTE FOODS and MILO'S KITCHEN,  
 LLC,

Defendants.

No. C 12-05251 JSW  
 No. C 12-05323 JSW

**ORDER GRANTING MOTIONS  
 TO TRANSFER, DENYING  
 WITHOUT PREJUDICE  
 MOTIONS TO DISMISS, AND  
 DENYING WITHOUT  
 PREJUDICE MOTION TO  
 CONSOLIDATE**

\_\_\_\_\_  
 MARY EMILY FUNKE, Individually and on  
 behalf of all others similarly situated,

v.

DEL MONTE CORPORATION and MILO'S  
 KITCHEN, LLC,

Defendants.

**INTRODUCTION**

This matter comes before the Court upon consideration of the motions to transfer or, in the alternative, to dismiss, filed by Defendants, Del Monte Corporation ("Del Monte") and Milo's Kitchen, LLC ("Milo's Kitchen") (collectively "Defendants"). The parties have also asked, by way of stipulation, and the Court has agreed to consider a motion to consolidate these actions, which was filed in a related case, *Langone v. Del Monte Corporation*, 12-CV-4671-

1 JSW.<sup>1</sup> (*See Ruff v. Del Monte Corporation*, 12-CV-5251-JSW (hereinafter “*Ruff*”), Docket No.  
2 32-2.)

3 The Court has considered the parties’ papers, relevant legal authority, and the record in  
4 these cases, and it finds the motions suitable for disposition without oral argument. *See* N.D.  
5 Civ. L.R. 7-1(b). The Court VACATES the hearing scheduled for April 12, 2013, and it  
6 HEREBY GRANTS the motions to transfer.

7 **BACKGROUND**

8 On October 10, 2012, Plaintiff, Maxine Ruff (“Ms. Ruff”), a resident of North Carolina,  
9 filed a putative class action complaint against Del Monte and Milo’s Kitchen, in which she  
10 asserts claims for: (1) violations of California’s Unfair Competition Law (“California UCL”),  
11 California Business and Professions Code Sections 17200, *et seq.*; (2) violations of North  
12 Carolina’s Unfair and Deceptive Trade Practices Act, North Carolina General Statutes Section  
13 75-1.1; (3) violations California’s False Advertising Law (“FAL”), California Business and  
14 Professions Code Sections 17500, *et seq.*; (4) violations of California’s Consumer Legal  
15 Remedies Act (“CLRA”), California Civil Code Section 1750, *et seq.*; (5) violations the  
16 Magnuson-Moss Warrant Act (“MMWA”), 15 U.S.C. Section 2301, *et seq.*; (6) unjust  
17 enrichment; (7) negligence; (8) products liability; and (9) declaratory relief. (*See generally*  
18 *Ruff*, Docket No. 1 (“*Ruff* Compl.”).)

19 On October 16, 2012, Plaintiff, Mary Emily Funke (“Ms. Funke”), a California resident,  
20 filed a putative class action complaint against Del Monte and Milo’s Kitchen, in which she  
21 asserts claims for: (1) violations of the CLRA; (2) violations of the FAL; (3) violations of the  
22 California UCL; and (4) unjust enrichment. (*See Funke v. Del Monte Corporation*, 12-CV-  
23 5323 (“*Funke*”), Docket No. 1 (“*Funke* Compl.”).)

24 Ms. Ruff and Ms. Funke (collectively “Plaintiffs,” unless otherwise noted) premise their  
25 claims on allegations that Defendants made false and misleading representations relating to  
26 Milo’s Kitchen Chicken Jerky Dog Treats (the “Dog Treats”). In brief, Plaintiffs contend that  
27 Defendants represented that the Dog Treats were wholesome and nutritious when, in fact, the

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<sup>1</sup> On February 21, 2013, the plaintiff in *Langone* voluntarily dismissed his case.

1 Dog Treats were contaminated. Plaintiffs also contend that Del Monte and Milo’s Kitchen  
2 knew the Dog Treats were contaminated and failed to warn Plaintiffs and the putative class.  
3 Plaintiffs purchased the Dog Treats based on the representations that the treats were nutritious  
4 and wholesome. However, after they fed the Dog Treats to their dogs, their dogs became sick  
5 and died. (*See generally Ruff* Compl. ¶¶ 1-5, 13-17, 20, 29-30; *Funke* Compl. ¶¶ 1-5, 13-20,  
6 38-42.)

7 Ms. Ruff seeks to represent a class of “[a]ll persons in the United States who purchased  
8 Milo’s Kitchen Jerky dog treats ... for their own or personal, household, or family use, rather  
9 than for resale or distribution,” as well as two proposed sub-classes. (*Ruff* Compl. ¶ 38.) Ms.  
10 Funke also seeks to represent a class of “[a]ll persons in the United States who purchased  
11 Milo’s Jerky at any time from 2007 to the present,” as well as four sub-classes. (*Funke* Compl.  
12 ¶¶ 43, 45.)

13 Plaintiffs were not the first to bring these types of claims against Defendants for injuries  
14 resulting from the allegedly contaminated Dog Treats. On July 19, 2012, Lisa Mazur (“Ms.  
15 Mazur”) filed suit against the Defendants in the United States District Court for the Western  
16 District of Pennsylvania (the “*Mazur* case”). Ms. Mazur has asserted claims against Defendants  
17 for: (1) breach of implied warranty under the Uniform Commercial Code (“UCC”) and the  
18 MMWA; (2) breach of express warranty under the UCC; (3) violations of Pennsylvania’s  
19 Unfair Trade Practices Act and Consumer Protection Law; (4) common law fraud; (5) unjust  
20 enrichment; (6) negligence; (7) strict products liability (defective design or manufacture); and  
21 (8) strict products liability (failure to warn). Ms. Mazur also seeks to represent a nationwide  
22 class of persons who purchased the Dog Treats on most of these claims. (*See Ruff*, Docket No.  
23 8-1, Declaration of Michael J. Partos (“Partos Decl.”), Ex. A (*Mazur* Complaint).)

24 Defendants now move to transfer the *Ruff* and the *Funke* cases to the Western District of  
25 Pennsylvania, where the *Mazur* case is pending. In the alternative, Defendants move to dismiss  
26 the *Ruff* and *Funke* cases under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs move to  
27 consolidate the *Ruff* and *Funke* cases pursuant to Federal Rule of Civil Procedure 42.  
28

1 ANALYSIS

2 Defendants move to transfer both the *Ruff* and the *Funke* cases pursuant to 28 U.S.C.  
3 Section 1404(a). Pursuant to 28 U.S.C. § 1404(a), a district court may transfer a civil action to  
4 any district where the case could have been filed originally, for the convenience of the parties  
5 and witnesses, and in the interest of justice. The burden is on the moving party to demonstrate  
6 that the action should be transferred. *Commodity Futures Trading Comm’n v. Savage*, 611 F.2d  
7 270, 279 (9th Cir. 1979). A district court has discretion “to adjudicate motions for transfer  
8 according to an ‘individualized, case-by-case consideration of convenience and fairness.’”  
9 *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376  
10 U.S. 612, 622 (1964)). In order for a district court to transfer an action under Section 1404, the  
11 court must find that the transferee court is one where the action “might have been brought.”  
12 *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). The parties agree that these  
13 cases could have been brought in the Western District of Pennsylvania. Thus, Defendants have  
14 met their burden under the first prong.

15 Under Section 1404(a), the Court also must find that the convenience of the parties and  
16 witnesses and the interest of justice favor transfer. *See id.* Defendants’ arguments about the  
17 convenience of parties and witnesses and the interests of justice are based upon the “first-to-  
18 file” rule. Under the generally recognized doctrine of federal comity, a district court may  
19 decline jurisdiction over an issue that is properly before another district court. *Kerotest*  
20 *Manufacturing Co. V. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 185-86 (1952). The  
21 purpose of comity is of paramount importance. *Church of Scientology of California v. United*  
22 *States Department of the Army*, 611 F.2d 738, 750 (9th Cir. 1979). The doctrine of comity is  
23 designed to promote judicial efficiency by avoiding any unnecessary burden on the federal  
24 judiciary and by avoiding duplicative or conflicting judgments. *Alltrade, Inc. v. Uniweld*  
25 *Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991); *see also Church of Scientology*, 611 F.2d at  
26 750.

27 Normally, sound judicial administration would indicate that when two identical actions  
28 are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should

1 try the lawsuit and “no purpose would be served by proceeding with a second action.”

2 *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). However, the “first  
3 to file” rule is not rigid or inflexible, rather, it is “to be applied with a view to the dictates of  
4 sound judicial administration.” *Id.* For example, a court may decline to apply the rule where  
5 there is a showing of bad faith, forum shopping, or an anticipatory suit. *Alltrade*, 946 F.2d at  
6 628.

7 A court may also relax the “first to file” rule if the balance of convenience  
8 weighs in favor of the later-filed action. While the *Alltrade* court cautioned  
9 that the respective convenience of the two courts normally “should be  
10 addressed to the court in the first filed action,” rather than to the court in  
the later filed action, ... it observed that “[i]n appropriate cases it would be  
relevant for the court in the the second-filed action to give consideration to  
the convenience of the parties and witnesses.”

11 *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994) (quoting *Alltrade*, 946 F.2d at  
12 628). Although the rule should not be disregarded lightly, the “most basic aspect of the first-to-  
13 file rule is that it is discretionary.” *Alltrade*, 946 F.2d at 625, 628.

14 To determine whether the first-to-file rule should apply, a court must examine three  
15 factors: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the  
16 similarity of the issues. *Alltrade*, 946 F.2d at 625-26; *Pacesetter*, 678 F.2d at 95; *Ward*, 158  
17 F.R.D. at 648. Each of these three factors weigh in favor of applying the first-to-file rule. First,  
18 it is undisputed that the *Mazur* case was the first of these three cases filed. Second, although  
19 there are three different plaintiffs, Defendants are named in all three suits. Further, all three  
20 plaintiffs bring their claims on behalf of nationwide classes that are substantially similar in  
21 scope. Thus, the parties are substantially similar. *See Adoma v. University of Phoenix, Inc.*,  
22 711 F. Supp. 2d 1142, 1148 (E.D. Cal. 2010) (noting that proposed classes were similar in  
23 evaluating similarity of parties). Third, the issues in each of the three cases are similar. Each of  
24 the three cases raise similar claims based on allegations that the Defendants misrepresented the  
25 wholesome nature of the Dog Treats and failed to adequately warn consumers of the alleged  
26 dangers involved.

27 The Court also has considered the traditional Section 1404(a) convenience factors: (1)  
28 plaintiff’s choice of forum; (2) convenience of the parties and witnesses; (3) ease of access to

1 sources of proof; (4) local interest in the controversy; (5) familiarity of each forum with the  
2 applicable law; and (6) relative congestion in each forum. *See Gulf Oil Co. v. Gilbert*, 330 U.S.  
3 501, 508-09 (1947); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th  
4 Cir. 1986). In addition to these convenience factors, the Court considers whether transferring  
5 the action would serve the interests of justice. *See Commodity Futures Trading Comm'n v.*  
6 *Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *Pratt v. Rowland*, 769 F. Supp. 1128, 1133 (N.D.  
7 Cal. 1991) (holding that the interests of justice “may be decisive in ruling on a transfer  
8 motion”).

9 The Court is aware that, in its discretion, it could relax the first-to-file rule if the  
10 traditional Section 1404(a) factors weighed against transfer. The Court, however, finds  
11 *Johansson v. Central Garden & Pet Co.*, 2010 WL 4977725 (N.D. Cal. Dec. 2, 201) instructive.  
12 For the reasons articulated in that case, and when the Court considers the potential for  
13 conflicting rulings, duplicative discovery, and the potential costs to the parties and to potential  
14 witnesses, the Court declines to exercise its discretion to relax the first-to-file rule in this case.  
15 *See Johansson*, 2010 WL 4977725, at \*3-\*5 (granting motion to transfer putative class action  
16 under Section 1404(a) to district where other putative class actions pending).

17 **CONCLUSION**

18 For the foregoing reasons, the Court GRANTS Defendants’ motion to transfer. The  
19 Court denies, without prejudice, Defendants’ alternative motions to dismiss, and it denies,  
20 without prejudice, Plaintiffs’ motion to consolidate. The parties are free to raise those issues  
21 before the court presiding over the *Mazur* case. The Clerk shall transfer these actions to the  
22 Western District of Pennsylvania forthwith, and it shall close these files.

23 **IT IS SO ORDERED.**

24  
25 Dated: April 9, 2013

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28 JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE