UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JINHUA ZOU, et al.,

Plaintiffs,

v.

MARKET AMERICA, INC., et al.,

Defendants.

Case No. 19-CV-01282-LHK

ORDER GRANTING MOTION TO TRANSFER TO THE MIDDLE DISTRICT OF NORTH CAROLINA

Re: Dkt. No. 11

Plaintiffs Jinhua Zou ("Zou"), Yu Xia Lu ("Lu"), Chuanjie Yang ("Yang"), Ollie Lan ("Lan"), and Liu Liu ("Liu") filed this putative class action in the Northern District of California against Market America, Inc. ("Market America"); Market America Worldwide, Inc. ("Marketing"); Shop MA, Inc.; forty-four named individual defendants; and one hundred Doe Defendants (collectively, "Defendants"). ECF No. 1 ¶¶ 26, 28-73, 75, 83 ("Compl."). Plaintiffs allege that Defendants operate an illegal pyramid scheme targeting Chinese-American immigrants. *Id.* ¶¶ 3, 7.

Before the Court is a motion to dismiss, or in the alternative, to transfer to the Middle District of North Carolina or to stay proceedings pending arbitration. Having considered the parties' submissions, the relevant law, and the record in this case, the Court GRANTS the motion

to transfer because the instant action is duplicative of an earlier-filed action in the Middle District of North Carolina. The Court DENIES as moot the motion to dismiss or in the alternative, to stay proceedings pending arbitration.

I. BACKGROUND

A. Factual Background

Plaintiffs allege that Defendants operate an illegal pyramid scheme. Compl. ¶ 7. In a legitimate multilevel marketing business model, "distributors earn money primarily through the direct sales of products to customers," though "distributors also have an incentive to recruit new distributors, as they are promised a percentage of their recruits' sales." *Id.* ¶ 8. An illegal pyramid scheme, however, "pretend[s] to engage in legitimate multilevel marketing while actually siphoning off money from new recruits to pay the people at the top level." *Id.* ¶ 9.

Market America and Marketing allegedly operate such an illegal pyramid scheme by requiring distributors to pay monthly fees for the opportunity to sell third-party products. *Id.* ¶¶ 26-28, 88. To sign up as a Market America distributor, an enrollee must pay an initial fee of $399.00 followed by a monthly fee of $129.00. *Id.* ¶ 89. Furthermore, a distributor must also spend between $130-300 per month on products offered by Shop MA to remain a distributor. *Id.* Market America also requires distributors to attend training, events, and seminars, which all cost additional money. *Id.* Market America and Marketing purportedly make money only through distributors recruiting other participants into the pyramid and sales to those distributors, rather than sales to people outside the pyramid who intend to use the products. *Id.* ¶¶ 7, 9, 101, 105-06.

The individual defendants are all "persons at the top of MarketAmerica's [sic] pyramid" and are all distributors or executives. *Id.* ¶ 113. Individual defendants "actively participate" in the Market America pyramid scheme and "profit from the promotion of the scheme and the compensation plan at the expense of the vast majority of Distributors." *Id.* ¶ 114; *see also id.* ¶¶ 30-73 (alleging that each individual defendant "actively participates in, promotes, and profits" from Market America's pyramid scheme). The individual defendants' statements touting Market America's business allegedly "indicate[] a collusive effort to promote" the pyramid scheme. *Id.*

¶ 118.

Yang, Lan, Liu, Zou, and Lu are all alleged victims of the Market America and Marketing pyramid scheme. *Id*. ¶¶ 127-32. Yang was a distributor from 2010 to 2016, *id.* ¶ 127, Lan was a distributor from December 2015 to the present, *id*. ¶ 128, and Liu was a distributor from 2016 to the present, *id.* ¶ 129. Each lost many thousands of dollars due to Defendants' "unfair, unlawful and fraudulent business practice." *Id.* ¶¶ 127-29. The Complaint simply alleges that Zou and Lu "became [] participant[s] and joined the business." *Id.* ¶¶ 131-32.

B. Procedural History

1. The Central District of California Action

On May 30, 2017, Yang and Lan filed a putative class action in the Central District of California against five of the defendants in the instant action: Market America; Marketing; James Howard Ridinger; Loren Ridinger; and Marc Ashley. *See Yang, et al. v. Market America, Inc., et al.*, No. 2:17-CV-04012-GW (JEMx), ECF No. 1 (C.D. Cal. May 30, 2017) ("the C.D. Cal. action").[1] On July 20, 2017, Yang and Lan filed an amended complaint in the C.D. Cal. action that added Liu as a third plaintiff. *See* ECF No. 11-2 ("Request for Judicial Notice" or "RJN") Ex. A. Additionally, because the alleged arbitration provision provided that arbitration shall take place in Greensboro, North Carolina, the amended complaint included a new argument that the district court lacked subject matter jurisdiction to compel arbitration outside the Central District of California. *Id.*[2] Yang, Lan, and Liu alleged that the defendants in the C.D. Cal. action operated a pyramid scheme targeting Chinese-American immigrants. *Id.* ¶ 3. More specifically, Yang, Lan,

[1] "These court filings and orders are judicially noticeable because they have a direct relation to the matters at issue." *Hypower, Inc. v. Sunlink Corp.*, 2014 WL 1618379, at *1 n.1 (N.D. Cal. Apr. 21, 2014) (citing Fed. R. Evid. 201 and *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007)). Additionally, courts regularly take judicial notice of "undisputed matters of public record, including documents on file in federal or state courts." *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (internal citations omitted).

[2] The Court GRANTS the requests for judicial notice of these documents pursuant to Rule 201(b) of the Federal Rules of Evidence. *Park v. Dole Fresh Vegetables, Inc.*, 964 F. Supp. 2d 1088, 1092 n.3 (N.D. Cal. 2013); Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the territorial jurisdiction of the trial court; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.")

and Liu alleged in the C.D. Cal. action that Market America distributors had to pay an enrollment fee of $399.00 and a monthly fee of $129.00 per month, in addition to spending $130-300 per month on products from Shop MA. *Id.* ¶ 30. According to the amended complaint in the C.D. Cal. action, Market America also required distributors to attend training, events, and seminars, which all cost additional money. *Id.* These revenue sources were the only means for Market America and Marketing to make money, as Market America and Marketing did not typically generate income from sales to people outside the pyramid scheme. *Id.* ¶¶ 6, 43, 46-48.

Yang, Lan, and Liu asserted in the C.D. Cal. action eight claims for relief: (1) judgment declaring an arbitration provision in the agreements unenforceable; (2) an endless chain scheme; (3) unfair and deceptive practices claims; (4) false advertising; (5) Racketeer Influenced and Corrupt Organizations ("RICO") Act violations under 18 U.S.C. § 1962(a); (6) RICO violations under 18 U.S.C. § 1962(c); (7) RICO violations under 18 U.S.C. § 1962(d); and (8) federal securities fraud. *Id.* ¶¶ 107-97.

Yang, Lan, and Liu also sought in the C.D. Cal. action to certify a class of "persons" and a sub-class of "persons residing in California" "who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Market America, and/or purchased products from MarketAmerica [sic] between March 9, 2010, to the present date, who lost money from their participation in the MarketAmerica [sic] scheme." *Id.* ¶¶ 93-94.

On August 3, 2017, defendants in the C.D. Cal. action filed a motion seeking to compel arbitration or alternatively, to transfer, dismiss, or stay the case on the basis of an alleged arbitration-venue provision that called for arbitration in Greensboro, North Carolina. RJN Ex. B. On September 28, 2017, the district court in the C.D. Cal. action took that motion under submission after providing a tentative ruling suggesting it could compel arbitration outside the Central District of California. RJN Ex. C. Nonetheless, to simplify the jurisdictional issue, the court suggested defendants in the C.D. Cal. action file a petition for an order compelling arbitration in the Middle District of North Carolina ("M.D.N.C."). *Id.*

2. The Middle District of North Carolina Action

The defendants in the C.D. Cal. action followed the C.D. Cal. court's suggestion, and on October 5, 2017, they filed a petition for an order compelling arbitration in the Middle District of North Carolina. *See Market America, Inc., et al. v. Yang, et al.*, No. 1:17-cv-897, ECF No. 1 (M.D.N.C. Oct. 5, 2017) ("the M.D.N.C. action"); RJN Ex. D.

On December 18, 2017, the respondents in the M.D.N.C. action—who were the plaintiffs in the C.D. Cal. action—filed a motion to dismiss or, in the alternative, to transfer the petition to the Central District of California. RJN Ex. E. On July 12, 2018, the court in the M.D.N.C. action denied respondents' motion to dismiss or transfer the case. RJN Ex F. On April 10, 2019, the court in the M.D.N.C. action compelled arbitration and stayed the case without prejudice to re-opening at the request of either party or as necessary or appropriate. RJN Ex. G at 25. The court in the M.D.N.C. action determined that the issue of class certification was for the arbitrator to resolve in the first instance. *Id.* at 24 ("[T]he Court will not resolve [the issue of whether class relief is available in the arbitration proceeding], and will refer the matter to the arbitrator, without prejudice to further consideration of these issues if necessary and appropriate in the future.").

More than a month later, on May 13, 2019, the court in the C.D. Cal. action transferred the case to the Middle District of North Carolina in light of the April 10, 2019 order compelling arbitration in the M.D.N.C. action. *See* ECF No. 24-1 ("Second Request for Judicial Notice" or "Second RJN") Ex. 1.

3. The Instant Action in the Northern District of California

On March 8, 2019—a month before the court in the M.D.N.C. action issued its order compelling arbitration—Zou, Lu, Yang, Lan, and Liu filed this putative class action in the Northern District of California against Defendants. Compl. ¶¶ 1, 20. The Complaint acknowledged that three of the plaintiffs in the instant action—Yang, Lan, and Liu—were plaintiffs in the C.D. Cal. action. *Id.* ¶ 20. Plaintiffs seek to represent a class of "persons who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Market America, and/or purchased products from MarketAmerica [sic] between March 9, 2010, to the present date, who lost money from their participation in the MarketAmerica [sic] scheme."

Compl. ¶ 157. Plaintiffs also seek to represent a sub-class of "persons residing in California who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Market America, and/or purchased products from MarketAmerica [sic] between March 9, 2010, to the present date, who lost money from their participation in the MarketAmerica [sic] scheme." *Id.* ¶ 158. This putative class and sub-class are identical to the putative class and sub-class in the C.D. Cal. action. *Compare* Compl. ¶¶ 157-58, *with* RJN Ex. A ¶¶ 93-94.

Plaintiffs in the instant action sued Market America, Inc. ("Market America"); Market America Worldwide, Inc. ("Marketing"); Shop MA, Inc.; forty-four named individual defendants; and one hundred Doe Defendants (collectively, "Defendants"). Compl. ¶¶ 26, 28-73, 75, 83. The Complaint names the following forty-four individual defendants: (1) James Howard Ridinger; (2) Loren Ridinger; (3) Marc Ashley; (4) Marty Weissman; (5) Dennis Franks; (6) Joe Bolyard; (7) Anthony Akers; (8) Eddy Alberty; (9) Steve Ashley; (10) Michael Brady; (11) Kevin Buckman; (12) Peter Gold; (13) Vince Hunt; (14) Chris Peddycord; (15) Brandi Qinn; (16) Sam Ritchie; (17) Eugene Wallace; (18) Jim Winkler; (19) Elizabeth Weber; (20) Joanne Hsi; (21) Benjamin Ginder, Jr.; (22) Dolly Kuo; (23) Ming-Chu Kuo; (24) Frank J. Keefer; (25) June Yu Shan; (26) Ace Lee; (27) Stephanie Lee; (28) Min Liu; (29) Patrick Hsieh; (30) Alice Hsieh; (31) Victor J. Chiou; (32) Alice Chiou; (33) Bill Wu; (34) Maggie Ho; (35) Simon Liu; (36) Wang Chang; (37) Vincent Chang; (38) Lucy Hong Liu; (39) Sarah Lolo; (40) Xiaoying Chen Ji; (41) Kitty Chao; (42) Roger Wu; (43) Karri Wu; and (44) Yang Zhao. Compl. ¶¶ 30-73.

Most of the allegations in the Complaint focus on Market America; Marketing; James Howard Ridinger; Loren Ridinger; and Marc Ashley, *see id.* ¶¶ 88-126, all of whom are also defendants in the C.D. Cal. action, *see* RJN Ex. A ¶¶ 12-16. In regards to the remaining named defendants, the Complaint here generally alleges that these defendants "actively participate[d] in, promote[d], and profit[ed] from MarketAmerica's [sic] pyramid scheme." *See* Compl. ¶¶ 33-73.

Plaintiffs allege seven causes of action against Defendants: (1) an endless chain scheme; (2) unfair and deceptive practices; (3) false advertising; (4) RICO violations under 18 U.S.C. § 1962(a); (5) RICO violations under 18 U.S.C. § 1962(c); (6) RICO violations under 18 U.S.C.

§ 1962(d); and (7) a claim under the California Seller Assisted Marketing Plan Act. *See* Compl. ¶¶ 171-277. Six of these causes of action—all but the claim under the California Seller Assisted Marketing Plan Act—are also brought in the C.D. Cal. action. *See* RJN Ex. A ¶¶ 97-185. The suit in the C.D. Cal. action also asserted two claims not included in the instant action: (1) a claim for judgment declaring the parties' arbitration provision unenforceable, and (2) a claim for federal securities fraud. *See* RJN Ex. A ¶¶ 107-11, 186-97.

4. The Second Action in the Middle District of North Carolina

On March 20, 2019, twenty-eight of the defendants here opened a second case in the Middle District of North Carolina—just as the defendants in the C.D. Cal. action had previously done—seeking to compel arbitration of the claims brought in the instant action. *See Market America, Inc., et al. v. Zou, et al.*, No. 1:19-cv-315, ECF No. 1 (M.D.N.C. Mar. 20, 2019); RJN Ex. H ("Second M.D.N.C. action").

5. The Motion to Dismiss in the Instant Action

In the instant action, on May 6, 2019, twenty-one defendants filed a motion to dismiss, or in the alternative, to transfer to the Middle District of North Carolina or to stay proceedings pending arbitration.[3] ECF No. 11 ("Mot."). These twenty-one defendants are Market America, Marketing, Shop MA, James Howard Ridinger, Loren Ridinger, Marc Ashley, Marty Weissman, Dennis Franks, Joe Bolyard, Anthony Akers, Eddy Alberty, Steve Ashley, Michael Brady, Kevin Buckman, Peter Gold, Vince Hunt, Chris Peddycord, Brandi Quinn, Sam Ritchie, Eugene Wallace, and Jim Winkler. The Court refers to these defendants as "Moving Defendants." Plaintiffs opposed the motion on May 21, 2019, *see* ECF No. 20 ("Opp."), and Moving Defendants filed a reply on June 10, 2019, *see* ECF No. 24 ("Reply").

II. DISCUSSION

[3] The twenty-six defendants who have not responded to this lawsuit are (1) Elizabeth Weber, (2) Joanne Hsi; (3) Benjamin Ginder, Jr.; (4) Dolly Kuo; (5) Ming-Chu Kuo; (6) Frank J. Keefer; (7) June Yu Shan; (8) Ace Lee; (9) Stephanie Lee; (10) Min Liu; (11) Patrick Hsieh; (12) Alice Hsieh; (13) Victor J. Chiou; (14) Alice Chiou; (15) Bill Wu; (16) Maggie Ho; (17) Simon Liu; (18) Wang Chang; (19) Vincent Chang; (20) Lucy Hong Liu; (21) Sarah Lolo; (22) Xiaoying Chen Ji; (23) Kitty Chao; (24) Roger Wu; (25) Karri Wu; and (26) Yang Zhao.

Moving Defendants move to dismiss this suit based on the first-to-file rule. In the alternative, Moving Defendants move to transfer the case to the Middle District of North Carolina under the first-to-file rule or pursuant to 28 U.S.C. § 1404(a) and an alleged arbitration provision in the distributor agreements. Finally, Moving Defendants move to stay the case pursuant to the Federal Arbitration Act, 9 U.S.C. § 3.

The Court first reviews the first-to-file rule and case law. The Court then compares the first-filed case, which is the C.D. Cal. action, to the instant action and determines that transfer is appropriate. However, because the C.D. Cal. action was transferred to the Middle District of North Carolina, Second RJN Ex. 1, the Court transfers the instant action to the Middle District of North Carolina pursuant to the first-to-file rule.

A. First-to-File Rule

"The first-to-file rule is 'a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.'" *Microchip Tech., Inc. v. United Module Corp.*, 2011 WL 2669627, at *3 (N.D. Cal. July 7, 2011) (quoting *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982)). The rule "promotes judicial efficiency and prevents the risk of inconsistent decisions that would arise from multiple litigations of identical claims." *Proofpoint, Inc. v. InNova Patent Licensing, LLC*, 2011 WL 4915847, at *6 (N.D. Cal. Oct. 17, 2011) (quotation omitted); *see also Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) ("The first-to-file rule was developed to serve the purpose of promoting efficiency well[.]" (quotation marks omitted)); *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1292 (N.D. Cal. 2013) ("The rule is primarily meant to alleviate the burden placed on the federal judiciary by duplicative litigation and to prevent the possibility of conflicting judgments." (citing *Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 750 (9th Cir. 1979))). It "should not be disregarded lightly." *Alltrade*, 946 F.2d at 625 (quotation omitted). "The first-to-file rule, however, is not inflexible, as the Ninth Circuit has recognized limited exceptions under various circumstances such as bad faith, anticipatory suit, and forum shopping."

Microchip, 2011 WL 2669627, at *3 (citing *Alltrade*, 946 F.2d at 628).

Additionally, "[a] federal district court has discretion to dismiss, stay, or transfer a case to another district court under the first-to-file rule." *Wallerstein*, 967 F. Supp. 2d at 1292; *Adoma v. Univ. of Phoenix, Inc.*, 711 F. Supp. 2d 1142, 1146 (E.D. Cal. 2010) ("If this action meets the requirements of the first-to-file rule, the court has the discretion to transfer, stay, or dismiss the action."). "The application of the first-to-file rule requires consideration of three threshold factors: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues." *Microchip*, 2011 WL 2669627, at *3 (citing *Alltrade*, 946 F.2d at 625).

1. Chronology of the Actions

The Court "[begins] by analyzing which lawsuit was filed first." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). Courts should "apply[] the first-to-file rule where the instant action was filed later in time." *Retina Assocs. Med. Grp., Inc. v. The Olson Research Grp., Inc., et al.*, 2019 WL 3240110, at *2 (C.D. Cal. Mar. 20, 2019) (citing *Alltrade*, 946 F.2d at 625). The parties do not dispute that the C.D. Cal. action was filed on May 30, 2017, more than twenty-one months before the filing of the instant action on March 8, 2019. Accordingly, the chronology factor for the first-to-file rule is satisfied.

2. Similarity of the Parties

The second factor assessing the similarity of parties between the C.D. Cal. action and the instant action does not require "exact identity," but is instead "satisfied if some [of] the parties in one matter are also in the other matter, regardless of whether there are additional unmatched parties in one or both matters." *Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 959 (N.D. Cal. 2008) (collecting cases); *see also Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006) (ruling that "the sameness requirement does not mandate that the two actions be identical, but is satisfied if they are substantially similar" (quotation marks omitted)).

The Court first analyzes the similarity of the plaintiffs and then turns to the similarity of the defendants.

a. The Plaintiffs are similar

As to the similarity requirement for plaintiffs in the context of a class action, "the majority of district courts in the Ninth Circuit . . . have compared the putative classes rather than the named plaintiffs." *Pedro v. Millennium Prods, Inc.*, 2016 WL 3029681, at *3 (N.D. Cal. May 27, 2016) (collecting cases); *Wallerstein*, 967 F. Supp. 2d at 1295 (collecting cases). The Ninth Circuit has also implicitly endorsed the comparison of putative classes. In *Kohn Law Group, Inc. v. Auto Parts Manufacturing, Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015), the Ninth Circuit cited *Adoma v. University of Phoenix, Inc.*, 711 F. Supp. 2d at 1147, for the proposition that "the first-to-file rule does not require exact identity of parties." *Adoma* was a decision where the district court concluded that "classes, and not the class representatives, are compared" in the context of class actions and the first-to-file rule. 711 F. Supp. 2d at 1147; *see also Pedro*, 2016 WL 3029681, at *3 (explaining that *Kohn* supports the proposition that courts should compare putative classes when deciding the similarity-of-parties prong for the first-to-file rule). Furthermore, "[c]ourts have held that proposed classes in class action lawsuits are substantially similar where both classes seek to represent at least some of the same individuals." *Wallerstein*, 967 F. Supp. 2d at 1296 (citing *Adoma*, 711 F. Supp. 2d at 1148).

In the instant action, the class that Plaintiffs seek to represent is *identical* to the class that plaintiffs in the C.D. Cal. action seek to represent. *Compare* Compl. ¶¶ 157-58, *with* RJN Ex. A ¶¶ 93-94. In the instant action, Plaintiffs seek to represent a class of "persons who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Market America, and/or purchased products from MarketAmerica [sic] between March 9, 2010, to the present date, who lost money from their participation in the MarketAmerica [sic] scheme." Compl. ¶ 157. Plaintiffs also seek to represent a sub-class of "persons residing in California who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Market America, and/or purchased products from MarketAmerica [sic] between March 9, 2010, to the present date, who lost money from their participation in the MarketAmerica [sic] scheme." *Id.* ¶ 158.

Identically, in the C.D. Cal. action, the plaintiffs seek to certify a class of "persons" and a

sub-class of "persons residing in California" "who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Market America, and/or purchased products from MarketAmerica [sic] between March 9, 2010, to the present date, who lost money from their participation in the MarketAmerica [sic] scheme." RJN Ex. A ¶¶ 93-94.

Thus, because the two putative classes and subclasses in the instant action and the C.D. Cal. action are identical, the similarity requirement for plaintiffs is satisfied.

b. The Defendants are similar

Newly added defendants—particularly when the defendants are "closely related" to the "core nucleus of the [existing] parties"—"do[] not render the parties so dissimilar as to preclude application of the first-to-file rule." *Prime Healthcare Servs., Inc. v. Serv. Employees Int'l Union*, 2014 WL 5422631, at *3 (N.D. Cal. Oct. 24, 2014); *accord Widjaja v. YUM! Brands, Inc.* 2009 WL 10673334, at *4 (C.D. Cal. June 8, 2009) (finding similarity of parties because defendants were "adequately represented" in the prior actions).

Both the C.D. Cal. action and the instant action sue Market America, Marketing, James Howard Ridinger, Loren Ridinger, and Marc Ashley. The main allegations in both the instant Complaint and in the C.D. Cal. amended complaint involve how Market America and Marketing operate the pyramid scheme. *Id.* ¶¶ 9, 26-28, 88, 101, 105-06; RJN Ex. A ¶¶ 6, 12-16, 43, 46-48. Both the instant Complaint and the C.D. Cal. amended complaint describe specific remarks and actions by James Howard Ridinger, Loren Ridinger, and Marc Ashley that allegedly "indicate[] a collusive effort to promote" the pyramid scheme. Compl. ¶¶ 26-28, 119-24; RJN Ex. A ¶ 60-67.

However, Plaintiffs in the instant action also sue Shop MA, forty-one new individual defendants, and one hundred Doe Defendants, but these new defendants are "closely related" to the "core nucleus of the parties." *See Prime*, 2014 WL 5422631, at *3. In the Complaint in the instant action, Plaintiffs only allege that each of the new defendants is "at or near the top of the pyramid operated and promoted by the Defendants" and "actively participates in, promotes, and profits" from Market America's pyramid scheme." Compl. ¶¶ 33-73.

As a result, the instant action and the C.D. Cal. action share similar defendants.

3. Similarity of the Issues

The similarity-of-issues factor only requires that the issues in the two actions are substantially similar rather than identical. *Wallerstein*, 967 F. Supp. 2d at 1296 ("Courts have held that the issues in the two actions must be *substantially similar*, rather than identical."); *Schwartz v. Frito-Lay N. Am.*, 2012 WL 8147135, at *3 (N.D. Cal. Sept. 12, 2012) ("The issues need not be precisely identical for the first-to-file rule to apply; the rule can apply even if the later-filed action brings additional claims."); *Intersearch*, 544 F. Supp. 2d at 959 ("[A]s defendant correctly notes, the 'first-to-file' rule is satisfied by a *sufficient* similarity of issues.").

The "core issue" in the instant action and the C.D. Cal. action is identical. *See Wallerstein*, 967 F. Supp. 2d at 1297. In both actions, plaintiffs allege that Market America and Marketing operate an illegal pyramid scheme targeting Chinese-American immigrants. Compl. ¶¶ 3, 7; RJN Ex. A ¶ 3. In both actions, plaintiffs claim that Market America and Marketing make money only through distributors recruiting other participants into the pyramid and sales to those distributors, rather than sales to people outside the pyramid who intend to use the products. Compl. ¶¶ 7, 9, 101, 105-06; RJN Ex. A ¶¶ 6, 43, 46-48. In both actions, plaintiffs allege that Market America, Marketing, and those involved in the conspiracy are liable for "unfair, unlawful and fraudulent business practice[s]." Compl. ¶¶ 127-29; RJN Ex. A ¶¶ 68-70.

Furthermore, both actions are proceeding as putative class actions and share six common causes of action: claims for an endless chain scheme, claims for unfair and deceptive practices, claims for false advertising, claims for RICO violations pursuant to 18 U.S.C. § 1962(a); claims for RICO violations pursuant to 18 U.S.C. § 1962(c), and claims for RICO violations pursuant to 18 U.S.C. § 1962(d). Compl ¶¶ 171-265; RJN Ex. A ¶¶ 97-185. The C.D. Cal. action has two additional causes of action not present in the instant action—a claim for a judgment declaring the parties' arbitration provision unenforceable and a claim for federal securities fraud. *See* RJN Ex. A ¶¶ 107-11, 186-97. The instant action has one cause of action not present in the C.D. Cal. action—a claim under the California Seller Assisted Marketing Plan Act. *See* Compl. ¶¶ 266-77. However, as noted previously, "[t]he issues need not be precisely identical for the first-to-file rule

to apply; the rule can apply even if the later-filed action brings additional claims." *Schwartz*, 2012 WL 8147135, at *3. Indeed, because the "thrust of the lawsuits is identical," the similarity-of-issues factor is met here. *Wallerstein*, 967 F. Supp. 2d at 1297.

4. Equitable Considerations

Finally, the first-to-file rule is discretionary and a "court may still decide to dispense with the rule for equitable reasons." *Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 169 F.R.D. 264, 270 (C.D. Cal. 1998); *see also Alltrade*, 946 F.2d at 628. These reasons include bad faith, anticipatory suit, and forum shopping, as well as efficiency considerations and the balance of convenience. *See Guthy-Renker*, 169 F.R.D. at 270. However, the first-to-file rule "should not be disregarded lightly," *Alltrade*, 946 F.2d at 625 (quotation omitted), and courts should also consider how equitable considerations—such as "promoting judicial efficiency and avoiding the possibility of conflicting judgments"—weigh in favor of applying the rule, *see Wallerstein*, 967 F. Supp. 2d at 1297.

Plaintiffs' sole argument against application of the first-to-file rule relies on "the interests of equity." Opp. at 4. Plaintiffs contend that *Dubee v. P.F. Chang's China Bistro, Inc.*, 2010 WL 3323808 (N.D. Cal. Aug. 23, 2010), prohibits dismissal or transfer under the first-to-file rule. *Id.* at 4. In *Dubee*, the court found the first-to-file rule did not apply because the plaintiff in the first-filed action never pursued class certification such that the lawsuit proceeded as an individual action. *Dubee*, 2010 WL 3323808, at *1-2. The second-filed action, however, was proceeding as a putative class action such that transferring the case under the first-to-file rule was unwarranted. *Id.* at *2.

Dubee does not apply to this case. Here, the court in the M.D.N.C. action determined that the arbitrator should decide in the first instance whether the dispute could proceed on a class-wide basis. *See* RJN Ex. G at 24. The court in the M.D.N.C. action did not rule that the M.D.N.C. action could only proceed on an individual basis, and Plaintiffs have not disclaimed their intention to pursue class certification in the arbitration. Additionally, as far as the Court is aware, a putative class may still be certified by the arbitrator in North Carolina.

In terms of other equitable considerations, the fact that the M.D.N.C. action is currently stayed weighs against application of the first-to-file rule. *See Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 976 (N.D. Cal. 2019) (holding that a stay in the earlier-filed case weighs against applying the first-to-file rule). But a stay in a first-filed case is not an inexorable command against applying the first-to-file rule. *See Nationwide Mut. Ins. Co. v. Universal Fid. Corp.*, 2002 WL 31409850, at *2, 7 (S.D. Ohio July 15, 2002) (dismissing later case under the first-to-file rule even though the earlier-filed case was stayed four months earlier following an order compelling arbitration); *accord* Second RJN Ex. 1 (court in the C.D. Cal. action transferred the case under 28 U.S.C. § 1404(a) to the Middle District of North Carolina more than a month after the court in the M.D.N.C. action compelled arbitration and stayed the case). The first-to-file rule is above all grounded in judicial discretion. *Alltrade*, 946 F.2d at 628 ("The most basic aspect of the first-to-file rule is that it is discretionary.").

The Court exercises that discretion to transfer the instant action to the Middle District of North Carolina. Transfer here will particularly "serve the purpose of the first-to-file rule in promoting judicial efficiency and avoiding the possibility of conflicting judgments." *See Wallerstein*, 967 F. Supp. 2d at 1297. Both actions allege identical putative classes and sub-classes, and the underlying facts giving rise to the claims are also the same such that transferring the action will minimize duplicative rulings and promote judicial efficiency. Additionally, the court in the M.D.N.C. action has already rejected many, if not all, of the arguments against arbitration that Plaintiff raised in its opposition to the instant motion. *See* RJN Exs. F, G. Transferring the instant action to the Middle District of North Carolina and allowing the court there to rule on any remaining issues related to arbitration would avoid the possibility of conflicting judgments.

Furthermore, the Court notes that Plaintiffs appear to have filed the instant action as an anticipatory suit to forum shop. *Alltrade*, 946 F.2d at 628 ("Anticipatory suits are disfavored because they are aspects of forum-shopping." (quotation omitted)). Plaintiffs filed the instant action on March 8, 2019, twenty-one months after some of the same plaintiffs filed the C.D. Cal.

action. By March 8, 2019, the court in the M.D.N.C. action had already denied Yang, Lan, and Liu's motion to dismiss or transfer to the Central District of California, *see* RJN Ex. F (denying motion to dismiss or transfer on July 12, 2018), and would shortly thereafter compel arbitration, *see* RJN Ex. G (granting petition for arbitration on April 10, 2019). Plaintiff's opposition to the instant motion urges the Court to issue an order the conflicts with the M.D.N.C. court order compelling arbitration.

Typically, bad faith, anticipatory suit, and forum shopping are equitable considerations justifying the non-application of the first-to-file rule. *See Microchip*, 2011 WL 2669627, at *3 ("The first-to-file rule, however, is not inflexible, as the Ninth Circuit has recognized limited exceptions under various circumstances such as bad faith, anticipatory suit, and forum shopping."). Here, however, they weigh in favor of applying the first-to-file rule. The timing of Plaintiffs' Complaint in the instant action suggests the instant action is an anticipatory suit filed for forum-shopping reasons. Therefore, equitable considerations militate in favor of applying the first-to-file rule and transferring the instant action to the Middle District of North Carolina.

The only remaining issue is which parties are covered by this order. As noted previously, this motion is brought on behalf of only twenty-one of the forty-seven named defendants. Granting the motion to transfer as to only Moving Defendants would functionally result in severance of those parties. "The Court may *sua sponte* determine whether it would be appropriate to sever . . . claims for the purposes of transfer." *Ahmed v. T.J. Maxx Corp.*, 777 F. Supp. 2d 445, 450 (E.D.N.Y. 2011); *see also Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968) (holding that in cases "where the administration of justice would be materially advanced by severance and transfer," a court may sever the claims for the purpose of permitting transfer); *Joseph v. Signal Int'l L.L.C.*, 2014 WL 12721391, at *3 (E.D. Tex. Dec. 8, 2014) (severing cross-claims *sua sponte* and transferring them to the Eastern District of Louisiana).

Granting the motion to transfer as to only Moving Defendants, however, would keep the instant action as a parallel proceeding to any action in the Middle District of North Carolina and therefore diminish judicial economy and increase the possibility of conflicting judgments. At least

one court has found that even when "not all Defendants moved for a transfer of venue," a court "may *sua sponte* transfer a case . . . in the interest of justice." *Novel v. Lowe*, 2013 WL 3206977, at *9 (N.D.N.Y. June 24, 2013) (quotation marks omitted). The Court in its discretion finds that transferring this entire action to the Middle District of North Carolina promotes judicial efficiency and avoids the possibility of conflicting judgments. *See Wallerstein*, 967 F. Supp. 2d at 1293.

Accordingly, all three factors of the first-to-file rule are satisfied and equitable considerations weigh in favor of applying the first-to-file rule. The Court therefore GRANTS the motion to transfer the instant action to the Middle District of North Carolina as to all Defendants. As this matter is transferred pursuant to the first-to-file rule, the Court need not address transfer under 28 U.S.C. § 1404(a) or Moving Defendants' additional arguments in support of dismissal or stay.

III. CONCLUSION

For the foregoing reasons, the Court concludes that this entire action should be transferred to the Middle District of North Carolina pursuant to the first-to-file rule. Accordingly, the motion to transfer is GRANTED as to all Defendants. Having determined that transfer is appropriate, the Court DENIES the motion to dismiss and the motion to stay as moot.

IT IS SO ORDERED.

Dated: September 12, 2019

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California