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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOY PECZNICK and GIL KAUFMAN,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware
corporation,

Defendant.

CASE NO. 2:22-cv-00743-TL

ORDER CONSOLIDATING CASES,
DENYING MOTION TO DISMISS
OR STAY, AND APPOINTING
INTERIM CLASS COUNSEL

DENA GRIFFITH, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

AMAZON.COM, INC., a Delaware
corporation,

Defendant.

CASE NO. 2:22-cv-00783-TL

1 This matter comes before the Court on Plaintiff Dena Griffith’s Motion to Consolidate
2 and for Appointment of Interim Class Counsel (*Griffith* Dkt. No. 14),¹ Defendant Amazon.com,
3 Inc.’s Motion to Consolidate (Dkt. No. 16), and Plaintiffs Joy Pecznick and Gil Kaufman’s
4 Motion to Dismiss or Stay Griffith; or in the Alternative to Appoint Wilshire Law Firm, PLC as
5 Interim Class Counsel (Dkt. No. 31). For the reasons below, the Court GRANTS the motions to
6 consolidate, DENIES the motion to dismiss or stay the *Griffith* case, and APPOINTS the law firms
7 representing Plaintiff Griffith (BORDE LAW PLLC, Schroeter Goldmark & Bender, and the
8 Law Offices of Ronald A. Marron, APLC) as interim class counsel.

9 I. BACKGROUND

10 On May 31, 2022, Plaintiffs Joy Pecznick and Gil Kaufman filed a putative class action
11 (*Pecznick*) in the Western District of Washington against Defendant Amazon.com, Inc., alleging
12 that the company had changed Amazon Prime members’ contractual benefits without
13 compensation by “unilaterally rescinding” a benefit of their annual subscription. Dkt. No. 1 at
14 8–10, 13. At the time the fee was introduced in 2021, customers had been paying \$119 per year
15 for their Amazon Prime subscriptions, which had—in many locations across the United States—
16 included free grocery delivery from Whole Foods Markets for orders over \$35.00. *Id.* at 5–7.
17 With the policy change, Amazon added a \$9.95 “service fee” to any delivery from Whole Foods.
18 *Id.* at 8. The Pecznick Plaintiffs seek to certify a class of “[a]ll Amazon Prime members residing
19 in the United States who ordered Amazon’s Whole Foods free delivery and were annual
20 members when the \$9.95 fee was introduced on October 25, 2021.” *Id.* at 10. The suit brings four
21 causes of action: violations of the Washington Consumer Protection Act (Wash. Rev. Code
22
23

24 ¹ References to “Dkt. No.” are to filings in the *Pecznick* action (Case No. 22-743) while references to “*Griffith* Dkt. No.” are to filings in the *Griffith* action (Case No. 22-783).

1 § 19.86.020), breach of contract, breach of duty of good faith and fair dealing, and unjust
2 enrichment. *Id.* at 13–15. The case was assigned to the Honorable Tana Lin.

3 On June 7, 2022, Plaintiff Dena Griffith filed a putative class action (*Griffith*) in the same
4 district against Amazon.com, Inc., alleging false and misleading advertising and “bait-and-
5 switch” advertising in connection with “FREE” delivery from Whole Foods Markets. *Griffith*
6 Dkt. No. 1 at 5–10. Griffith alleges that Defendant engaged in deceptive practices by continuing
7 to advertise that it offered “free delivery” from Whole Foods to Prime members after instituting
8 the new fee and that it used “drip-pricing” tactics to sneakily add that fee to Whole Foods orders
9 placed by Prime members on Amazon.com, while not applying any fee to customers picking up
10 items from a Whole Foods store. *Id.* at 7–10. Plaintiff Griffith proposes certification of a
11 nationwide class as well as a California sub-class. *Id.* at 12. The nationwide class would include:
12 “All U.S. citizens who were Amazon Prime members that were charged a service fee in
13 connection with an online delivery from Whole Foods Market from August 1, 2021[,] until the
14 date notice is disseminated to the class, excluding Defendant and Defendant’s officers, directors,
15 employees, agents and affiliates, and the Court and its staff.” *Id.* The California sub-class would
16 include: “All California residents who were Amazon Prime members that were charged a service
17 fee in connection with an online delivery from Whole Foods Market from August 1, 2021[,] until
18 the date notice is disseminated to the class, excluding Defendant and Defendant’s officers,
19 directors, employees, agents and affiliates, and the Court and its staff.” *Id.* The complaint brings
20 eight causes of action: (1) the Washington Consumer Protection Act (Wash. Rev. Code §§
21 19.86.010 *et seq.*); (2) the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*);
22 (3) the False Advertising Law (Cal. Bus. & Prof. Code §§ 17500 *et seq.*); (4) the Unfair
23 Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*); (5) unjust enrichment / quasi
24

1 contract; (6) negligent misrepresentation; (7) concealment / non-disclosure; and (8) fraud. *Id.* at
2 14–25.

3 On the day she filed her complaint, Plaintiff Griffith also filed a notice of related case,
4 alerting the Court that there were now two “putative class actions for claims arising out of a
5 service fee charged by Amazon.com, Inc. in connection with its grocery delivery service from
6 Whole Foods Market.” *Griffith* Dkt. No. 2 at 2. For this reason, the *Griffith* case was also
7 assigned to the Honorable Tana Lin.

8 On June 23, 2022, Plaintiff Griffith and Defendant Amazon.com, Inc. each filed their
9 respective motions to consolidate. *Griffith* Dkt. No. 14; Dkt. No. 16. In her motion, Plaintiff
10 Griffith also requested that the Court appoint her counsel team as interim class counsel. *Griffith*
11 Dkt. No. 14. Plaintiffs in the *Pecznick* action opposed both motions, Dkt. No. 20, and
12 subsequently filed a motion to dismiss or stay the *Griffith* case under the first-filed rule, or
13 alternatively (in case of consolidation) to have their counsel appointed as interim lead counsel.
14 Dkt. No. 31.

15 II. DISCUSSION

16 A. The First-to-File Rule

17 The first-to-file rule is “a generally recognized doctrine of federal comity which permits a
18 district court to decline jurisdiction over an action when a complaint involving the same parties
19 and issues has already been filed in another district.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678
20 F.2d 93, 94–95 (9th Cir. 1982); *accord Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787
21 F.3d 1237, 1240 (9th Cir. 2015). “The purpose of the rule is to eliminate wasteful duplicative
22 litigation, to avoid rulings that may trench upon a sister court’s authority, and to avoid piecemeal
23 resolution of issues calling for a uniform result.” *Ekin v. Amazon Servs., LLC*, No.
24 2:14-cv-00244, 2014 WL 12028588, at *3 (W.D. Wash. May 28, 2014) (citation and quotation

1 omitted). Under the first-to-file rule, a court may dismiss, stay, or transfer a case when a similar
2 case is before a different district court. *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.3d 622, 623
3 (9th Cir. 1991). In order for the first-to-file rule to apply, (1) the relevant action must have been
4 filed prior to the one the Court is being asked to decline jurisdiction over; (2) the same or
5 substantially similar parties must be involved; and (3) the issues raised in the suits must be the
6 same or substantially similar. *See Kohn*, 787 F.3d at 1239–1240.

7 The *Pecznick* action was the first-filed case, and the parties are substantially similar given
8 that plaintiffs have proposed overlapping classes. *See Edmonds v. Amazon.com, Inc.*, No.
9 2:19-cv-01613, 2020 WL 5815745, at *4 (W.D. Wash. Sep. 20, 2020) (finding similarity of
10 plaintiffs in the context of a first-to-file motion where the putative classes encompassed “at least
11 some of the same individuals”) (citations omitted). However, the Court finds the third factor is
12 not met. As to the similarity of the issues between the various actions, the Pecznick Plaintiffs
13 argue in their opposition to the motion to consolidate that both the factual and legal claims are
14 “vastly different,” Dkt. No. 20 at 10–12, and they “still maintain that the issues are not similar”
15 in their motion to dismiss, Dkt. No. 31 at 4, undermining their arguments for a first-to-file
16 dismissal. The Pecznick Plaintiffs assert that if the Court is persuaded by Plaintiff Griffith and
17 Defendant’s arguments for consolidation, then the Court must also find that this third first-to-file
18 factor is met. Dkt. No. 31 at 4. The Court disagrees.

19 First-to-file dismissals are appropriate where “two identical actions are filed in courts of
20 concurrent jurisdiction,” *Pacesetter Sys., Inc.*, 678 F.2d at 95, or where there is significant
21 overlap in issues such that it would be wasteful and duplicative to pursue the claims in separate
22 actions. *Ekin*, 2014 WL 12028588, at *3. Further, a danger of applying the doctrine where claims
23 vary between actions, as they do in this case, is that other potentially independent viable claims
24 may be extinguished on grounds other than their merits. Consolidation, on the other hand, only

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