UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DARREN WONG,

Plaintiff,

v.

OLD LYME GOURMET COMPANY,

Defendant.

Case No. 20-cv-07095-WHO

ORDER GRANTING MOTION TO STAY CASE UNDER FIRST TO FILE RULE AND DENYING MOTION TO DISMISS WITHOUT PREJUDICE

Re: Dkt. Nos. 19, 20

INTRODUCTION

There are two pending motions in this consumer class action brought against Old Lyme Gourmet Company ("Gourmet") because it allegedly used misleading and deceptive labeling for its Gourmet's potato chip products. First, Gourmet asserts that a substantially similar case has already been filed in the Eastern District of New York and argues that this case should be dismissed, transferred or stayed under the first-to-file rule. Alternatively, it moves to dismiss the action for failure to state a claim and lack of jurisdiction under Rules 12(b)(6) and 12(b)(1). For the reasons discussed below, and in the interests of judicial efficiency and comity, Gourmet's motion to stay this action under the first-to-file rule is GRANTED and the lawsuit is STAYED. The alternative motion to dismiss is DENIED WITHOUT PREJUDICE. Gourmet may move to dismiss again on the bases asserted in its alternative motion if this case resumes active litigation.

BACKGROUND

I. FACTUAL ALLEGATIONS CONTAINED IN INSTANT ACTION AND *RANKIN* PROCEEDINGS

The present action brought by plaintiff Darren Wong bears striking similarities to an earlier-filed action brought by Jewel Rankin in the Eastern District of New York. Both actions are

consumer class actions brought against Gourmet, doing business as Deep River Snacks, a corporation organized under the laws of Connecticut and headquartered on 16 Grove Street, Deep River, Connecticut. Complaint ("Compl.") ¶ 34-35 [Dkt. No. 1]; Rankin Compl. ¶ 35-37 *Rankin v. Arca Continental S.A.B. de C.V.*, Case 1:20-cv-01756-RPM-PK (E.D.N.Y.) [Dkt, No. 1]. The *Rankin* action also names as a defendant Arca Continental S.A.C. de C.V. ("Arca"), the Mexican publicly traded parent company of Gourmet, headquartered on Ave. San Jeronima 813 Poniente, Codigo Postal 64640 Monteray, Nuevo León, Mexico. Rankin Compl. ¶ 34. Both lawsuits relate to the allegedly misleading packaging and design of Gourmet's Deep River Snack potato chip products. Plaintiffs Wong and Rankin are represented by the same counsel.

Rankin and Wong allege the following identical facts regarding Gourmet's products and conduct. Six different flavors of Gourmet's Deep River Snack potato chips (collectively, the "Products") contain a seal that depicts two wide blades of grass, imposed on top of the text "Non-GMO Ingredients" with an orange and brown background (the "Gourmet Seal"). Compl. ¶ 4; Rankin Compl. ¶ 4. Wong and Rankin allege that the Gourmet Seal is similar to the certificate of approval used by the Non-GMO Project, which depicts a butterfly on two thin blades of grass imposed on a light blue background to the left of the text stating "Non-GMO Project" imposed on a dark blue background (the "Third Party Seal"). Compl. ¶ 16, Image 1, Image 2; Rankin Compl. ¶16, Image 1, Image 2. The Third Party Seal and Gourmet Seal, as depicted in the complaints, are copied below as Images 1 and 2 respectively. *Id.*

Image 1

Image 2

Wong and Rankin allege that the Non-GMO Project, a non-profit organization founded in 2007, verifies that products on the market are not derived from genetically modified organism

("GMO") crops or animals fed with GMO crops. Compl. ¶ 14; Rankin Compl. ¶ 14. The Non-GMO Project has certified more than 3,000 brands so that consumers may purchase verified non-GMO products. *Id*; *Id*. The Non-GMO Project is part of an industry of independent, third-party validation companies recognized by the Federal Trade Commission ("FTC") and the FTC has issued guidelines against deceptive marketing that would "misrepresent, directly or by implication, that a product, package or service has been endorsed or certified by an independent third party." Compl. ¶ 9; Rankin Compl. ¶ 9; 16 C.F.R. § 260.1.

Wong and Rankin allege that, looking to deceive consumers, Gourmet intentionally fashioned the Gourmet Seal to mimic the Non-GMO Project's Third Party Seal, misrepresenting their Products as being verified as Non-GMO by a third party, when they in fact contain dairy derived from GMO fed cows. Compl. ¶ 11, 12, 18; Rankin Compl. ¶¶ 11, 12, 18. In mimicking the Third Party Seal, Wong and Rankin allege that Gourmet deceived consumers willing to pay premium pricing for non-GMO products and tricked them into purchasing the Gourmet Products that contained GMO ingredients. Compl. ¶ 19; Rankin Compl. ¶ 19.

Both Rankin and Wong allege that they prefer to purchase Non-GMO products and rely on packaging representations to determine if a product is certified as non-GMO by an independent, third-party verifier. Compl. ¶ 24; Rankin Compl. ¶ 24. Both assert that they purchased the Products containing the Gourmet Seal, because they believed the Products had been verified as non-GMO products when they in fact contained dairy derived from cows fed GMO ingredients. Compl. ¶ 27-28; Rankin Compl. ¶ 27-28. They state that, had Gourmet not labeled the Products with the Gourmet Seal, neither would have purchased the Products at all or, would have only been willing to purchase them at a lower price. Compl. ¶ 29; Rankin Compl. ¶ 29. They contend that the Products are worth less than what they paid for them, resulting in injury in fact and lost money due to Gourmet's conduct. Compl. ¶ 30-31; Rankin Compl. ¶ 30-31. Both allege that if they knew the Products' labels were truthfully verified and non-misleading, they would continue to purchase the Products in the future. Compl. ¶ 33; Rankin Compl. ¶ 33.

The present action and the *Rankin* action differ in the named plaintiffs' specific allegations regarding their purchasing activities. Wong is an adult resident of San Francisco, California.

Compl. ¶ 22. Wong purchased Gourmet's potato chip products from around October 2019 to March 2020 in San Francisco. Compl. ¶ 23. Wong does not allege any connection to New York. Rankin is an adult resident of Brooklyn, New York. Rankin Compl. ¶ 22. Rankin purchased Gourmet's potato chip products in the winter of 2018 from a store on Atlantic Avenue in Brooklyn, New York. Rankin Compl. ¶ 23.

The two actions also differ in their putative classes. The *Wong* action describes a nationwide class of all persons who purchased Gourmet's Products beginning in October 12, 2016, but only alleges California causes of action. Compl. ¶¶ 43, 56, 66, 73. The *Rankin* action describes a multistate class of forty-three states and alleges causes of action under all forty-three states' law, including California, and also describes a specific New York class, alleging causes of action under New York law. Compl. ¶¶ 45, 58, 69, 83, 96. The New York class period begins in 2014 and the multistate class is confined to the "applicable limitations period" for each state. Rankin Compl. ¶ 45.

II. PROCEDURAL BACKGROUND

On April 9, 2020, Rankin filed her complaint against Gourmet in the Eastern District of New York. *Rankin v. Arca Continental S.A.B. de C.V.*, Case 1:20-cv-01756-RPM-PK (E.D.N.Y.) [Dkt, No. 1]. That case is still in its early stages, but limited discovery is in process. *Id.* [Dkt. No. 20].

Wong filed his complaint in this court on October 20, 2020, more than six months after the *Rankin* action was filed. Compl. [Dkt. No. 1]. On February 4, 2021, Gourmet filed a motion to dismiss, transfer or stay the present action under the first-to-file rule or Section 1404, on the basis that it is substantially similar to the earlier-filed *Rankin* action. Motion to Dismiss, Transfer, Stay ("FTF Mot.") [Dkt. No. 19]. Concurrently, Gourmet also filed an alternative motion to dismiss the present action under Rule 12(b)(6) and 12(b)(1) for failure to state a claim and lack of jurisdiction. ("12(b)(6) Mot.") [Dkt. No. 20].

LEGAL STANDARD

I. FIRST-TO-FILE RULE

The first-to-file rule is "a judicially created doctrine of federal comity, which applies when

two cases involving substantially similar issues and parties have been filed in different districts." *In re Bozic*, 888 F.3d 1048, 1051 (9th Cir. 2018) (internal quotation marks and citations omitted). "Under that rule, the second district court has discretion to transfer, stay, or dismiss the second case in the interest of efficiency and judicial economy." *Id*. at 1051-52. In deciding whether to apply the first-to-file rule, a court considers: (i) the chronology of the actions; (ii) the similarity of the parties; and (iii) the similarity of the issues at stake. *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir.1991). The rule is discretionary, not mandatory, and a court may disregard the rule in the interests of equity. *Id*. at 628.

DISCUSSION

I. MOTION TO DISMISS, TRANSFER OR STAY UNDER FIRST-TO-FILE RULE

Gourmet moves to dismiss the instant action under the first-to-file rule, or in the alternative transfer venue to the Eastern District of New York, or in lieu of either, to stay the action. Wong does not contest that the first to file criteria favor application of the rule but rather contends that this action cannot be transferred under the first-to-file rule because his case could not have been originally brought in the Eastern District of New York as the court would not have personal jurisdiction over Gourmet. Wong also argues that I should use my discretion to deny Gourmet's request to stay this action. For the reasons discussed below, the first-to-file rule applies to this action but transfer is not permissible. Accordingly, this action is STAYED in light of the earlier-filed *Rankin* action in order to further the interests of judicial efficiency and comity.

A. The First-to-File Rule

There are three elements of the first to file rule--(i) the chronology of the two actions; (ii) the similarity of the parties; and (iii) the similarity of the issues. *Alltrade*, 946 F.2d at 625-626. Gourmet has satisfied each of them.

1. Factor One: Chronology

Under the chronology factor, a court simply asks which action was filed first. The *Rankin* action was filed in the Eastern District of New York on April 2020, about six months before Wong filed the instant action. Rankin Compl; Compl; See e.g., *Trend Micro Inc. v. RPost Holdings, Inc.*, No. 13-CV-05227-WHO, 2014 WL 1365491, at *9 (N.D. Cal. Apr. 7, 2014) (holding this factor

was satisfied where the second-filed action was filed a month after the first-filed action). The first factor weighs in favor of applying the first-to-file rule.

2. Factor Two: Similarity of Parties

To warrant application of the first-to-file rule there must also be substantial similarity between the parties, but they need not be identical. *See Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). Where "both cases could certify similar classes and the defendants are the same, there is similarity between the parties involved." *Scholl v. Mnuchin*, No. 20-CV-05309-PJH, 2020 WL 5095127, at *3 (N.D. Cal. Aug. 29, 2020); *Trevino v. Golden State FC, LLC*, No. 1118-CV-00121-DAD, 2019 WL 2710662, at *5 (E.D. Cal. June 28, 2019) ("Generally, in class actions, the proper comparison is between the classes, rather than the class representatives") (*citing Ross v. U.S. Bank Nat. Ass'n*, 542 F. Supp. 2d 1014, 1020 (N.D. 2008)).

Here, both actions are brought against defendant Gourmet based on Gourmet's alleged conduct and misleading product labeling and they involve overlapping classes. The putative class in this case includes "[a]ll persons who purchased any of Defendants' Products bearing the Non-GMO Ingredients Seal on the label during the period of October 12, 2016 to time of judgement after trial." Compl. ¶ 43. The *Rankin* action includes both a multistate class and New York class:

> **The Multistate Class**. All persons from the states of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming who purchased any of Defendants' Products bearing the Non GMO Ingredients seal on the label within the applicable limitations period.
>
> **The New York Class** - . All persons who purchased any of Defendants' Products bearing the Non-GMO Ingredients Seal on the label during the last six years.

Rankin Compl. ¶ 45 (emphasis added).

The *Rankin* action's putative class includes all persons from forty three of the fifty states, including California. *Compare* Rankin Compl. ¶ 45, 83(d), *with* Compl. ¶ 56, 66, 73, 79. The *Rankin* complaint does not state the exact class period for the multistate class, limiting it only to

the "applicable limitations periods" for each state. Rankin Compl. ¶ 45. In contrast, the *Wong* action specifically identifies the relevant class period as starting in October 16, 2016, approximately four years before it was filed. While the classes are not perfectly identical, they are substantially similar and overlapping. Wong does not contest their similarity in his opposition. The parties are sufficiently similar to weigh in favor of the second factor of the first-to-file rule.

3. Factor Three: Similarity of Issues

In assessing the similarity of issues, a court asks whether there is "substantial overlap" between the issues and claims of the two actions. *Kohn Law Grp. Inc.*, 787 F.3d at 1241. The substantive allegations in the two actions at issue here are virtually identical, other than the named plaintiffs' allegations regarding the dates and locations of their purchases. Compl. ¶ 23; Rankin Compl. ¶ 23.

There is also substantial overlap in the relevant causes of action. The *Wong* action alleges violations of California Business and Professions Code sections 17200 et seq., the unlawful conduct and unfair and fraudulent conduct prongs of the UCL, and 17500, et seq., the false and misleading advertising prongs, as well as California Civil Code sections 1750, et seq., the Consumer Legal Remedies Act. Compl. ¶¶ 56-82. The *Rankin* complaint brings all of these same causes of action on behalf of the multi-state class, as it asserts violations of the forty-three states' consumer protection laws, including:

> **California**: Defendants' practices were and are in violation of California Consumer Legal Remedies Act, Civil Code § 1750, et seq., and California's Unfair Competition Law, California Business and Professions Code § 17200, et seq., and California's False Advertising Law, California Business and Professions Code § 17500, et seq.

Rankin Compl. ¶83(d). The *Rankin* action includes additional causes of action, not present in Wong. *See* Rankin Compl. ¶¶ 58-68, 69-80, 90-97. But, while the *Rankin* action appears broader than the present case, there is clearly "substantial overlap" between the two actions given that all of the claims asserted in *Wong* are also asserted in *Rankin*. *Kohn Law Grp, Inc.*, 78 F.3d at 1241.

Finally, there is significant overlap in the relief sought in both actions. The *Rankin* action seeks actual damages, statutory damages, compensatory damages, restitution, disgorgement and injunctive relief on behalf of its class members. Rankin Compl. ¶¶ 60, 67, 68, 89. The *Wong*

action is again slightly narrower seeking the same injunctive relief, restitution and disgorgement, but no statutory damages. Compl. ¶ 65, 72, 78, 82.

The substantive allegations of these actions are virtually identical and the California causes of action are identical. I find that the third factor weighs in favor of applying the first-to-file rule.

Because all three factors weigh in favor of applying the first-to-file rule, I conclude that application of the rule to this action is warranted.

B. Appropriate Remedy Under First-To-File

Because I have determined that the first-to-file rule applies, I have the discretion to consider transfer, stay or dismissal of this case. *See Bozic*, 888 F.3d at 1052. Gourmet asks for dismissal of the case, or in the alternative to transfer or stay the action. FTF Mot. at 11-12. Wong argues that I should deny Gourmet's motion to transfer because the *Wong* action could not have been originally filed in the Eastern District of New York due to personal jurisdiction and venue requirements. FTF Opp. at 2-3. And Wong also argues that I should deny the motion to stay, asserting that this case is further advanced than the earlier-filed *Rankin* action. *Id*. at 3-4. Wong does not raise specific arguments why this action should not be dismissed under the first-to-file rule.

1. Transfer of the *Wong* Action is Precluded

Transfer to the Eastern District of New York is precluded by venue requirements under 28 U.S.C. §§ 1404(a), 1391 and the Ninth Circuit's holding in *Bozic*, 888 F.3d at 1053-1054. The Eastern District of New York has neither specific jurisdiction nor general jurisdiction over Wong's claims. Wong is a resident of San Francisco, California and bought the Products in California. Compl. ¶¶ 22-23. Gourmet is headquartered and incorporated in the state of Connecticut. Compl. ¶¶ 34-35. Wong does not allege that Gourmet engaged in conduct in or relating to New York that gave rise to Wong's specific claims. The Ninth Circuit is clear that transfer under the first-to-file rule only applies to the later-filed case if "it might have been brought" where the first filed case was brought. U.S.C. § 1404(a); *Bozic*, 888 F.3d at 1054. For these reasons, transfer under the first-to-file rule is not permissible.

2. A Stay of the *Wong* Action is Appropriate

Given that transfer is not an available remedy, I conclude that a stay of this action is appropriate. Gourmet argues that I should exercise my discretion and dismiss or stay the instant action in the interest of comity and judicial efficiency. FTF Mot. at 11; *See Pacesetter*, 678 F.2d at 96. As in *Pacesetter*, the instant action is nearly identical to the first-filed action. Both actions contain virtually identical factual allegations and legal issues, have substantially similar putative classes and involve the same defendant. The *Rankin* action is further along and has begun preliminary discovery while the pending notice of a motion to dismiss is under review. *See Rankin v. Arca Continental S.A.B. de C.V.*, and Old Lyme Gourmet, No. 20-cv-1756 (E.D.N.Y. 2020) [Dkt. No. 17, 18, 20]. These factors all weigh in favor of a stay.

Wong's opposition contends that I should reject the request to stay and cites *Mattero v. Costco Wholesale Corp.*, in which I denied a motion to stay an action under the first-to-file rule. 336 F. Supp. 3d 1109, 1119 (N.D. Cal. 2018). In *Mattero*, the plaintiff had voluntarily dismissed overlapping claims in the first-filed action, eliminating substantial similarity between the cases. *Id*. It is not on point. In the instant case, the parties have reached no agreements that would preclude application of the first to file rule. Staying the instant action serves the interest of judicial efficiency and comity.

For these reasons, I GRANT Gourmet's motion to stay this action under the first-to-file rule.

II. MOTION TO DISMISS UNDER RULES 12(B)(6) AND 12(B)(1)

As an alternative to its motion to dismiss, transfer, or stay under the first-to-file rule, Gourmet moves to dismiss this action under Rules 12(b)(6) and Wong's injunctive relief claim under 12(b)(1). Resolution of this motion is not necessary in light of my decision to stay this action. Gourmet may move to dismiss again if and when the stay is lifted. Gourmet's motion to dismiss under Rules 12(b)(6) and 12(b)(1) is DENIED WITHOUT PREJUDICE.

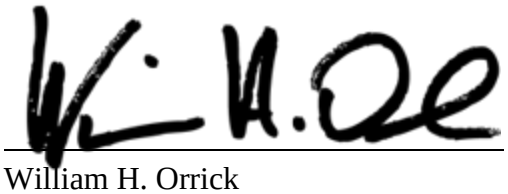
CONCLUSION

For the foregoing reasons, Gourmet's motion to stay this action under the first-to-file rule is GRANTED. Gourmet's alternative motion to dismiss under Rules 12(b)(6) and 12(b)(1) is

DENIED WITHOUT PREJUDICE. The action is STAYED.

IT IS SO ORDERED.

Dated: March 22, 2021



William H. Orrick
United States District Judge