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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Michael Paparella,

10 Plaintiff,

11 v.

12 Plume Design Incorporated, *et al.*,

13 Defendants.  
14

No. CV-22-02040-PHX-JJT

**ORDER**

15 At issue is Defendant Plume Design Incorporated's Motion to Dismiss or, in the  
16 Alternative, Transfer under Federal Comity, Federal Rule of Civil Procedure 12(b)(4), and  
17 28 U.S.C. § 1404(a) (Doc. 5, MTD), to which Plaintiff Michael Paparella filed a Response  
18 (Doc. 10, Resp.) and Defendant filed a Reply (Doc. 11). The Court finds these matters  
19 appropriate for resolution without oral argument. *See* LRCiv 7.2(f). For the reasons that  
20 follow, the Court grants Defendant's Motion to Dismiss.

21 **I. BACKGROUND**

22 There are two separate suits at issue. In both actions, Plaintiff alleges that after  
23 Defendant terminated his employment, Plaintiff was not paid commissions, bonuses, and  
24 unvested stock options to which he was entitled. (Doc. 1-1 at 14–18, Am. Compl.; MTD  
25 at 3, 4, 6, 8.)

26 The first suit was filed on February 9, 2022, in California Superior Court, County  
27 of Santa Clara. (MTD at 4.) The case was later removed to the District Court for the  
28 Northern District of California on March 1, 2022 (the "California Action"). (MTD at 4.)

1 The California Action originally consisted of eight claims: (1) breach of contract; (2) illegal  
2 forfeiture; (3) wage waiting time penalties after termination under California Labor Code  
3 § 203; (4) failure to pay timely wages during employment under California Labor Code  
4 § 210; (5) age discrimination in violation of California’s Fair Employment and Housing  
5 Act (“FEHA”); (6) age harassment in violation of FEHA; (7) failure to prevent  
6 discrimination and harassment in violation of FEHA; and (8) wrongful termination. (MTD  
7 at 4–5.) Plaintiff in the California Action argued that wages he was entitled to included  
8 commissions, bonuses, and unpaid stock options. (MTD at 4–5.)

9 Defendant moved to dismiss all claims in the California Action under Federal Rule  
10 of Civil Procedure 12(b)(6). (MTD at 5.) In Plaintiff’s Response to Defendant’s Motion to  
11 Dismiss, Plaintiff argued for the application of California law pursuant to a California  
12 choice of law and venue provision contained in the Propriety Information and Inventions  
13 Agreement (“PIIA”) that Defendant had incorporated into Plaintiff’s Employment  
14 Agreement by reference. (MTD at 5.) On July 25, 2022, the Northern District granted in  
15 part and denied in part Defendant’s motion to dismiss. (MTD at 5.) After finding that  
16 Plaintiff had failed to show that California statutory law applied to him, the Northern  
17 District dismissed Plaintiff’s FEHA and wage claims. (MTD at 5.) However, that court  
18 found that Plaintiff’s common law claims—breach of contract and illegal forfeiture—were  
19 governed by the choice of law and venue provisions in the PIIA. (MTD at 5–6.)

20 After an unsuccessful mediation on October 3, 2022, Plaintiff filed this action (the  
21 “Arizona Action”) on October 17, 2022, in Arizona Superior Court, County of Maricopa,  
22 and Defendant later removed it to this Court. (MTD at 6.) In the Arizona Action, Plaintiff  
23 claims that Defendant violated A.R.S. § 23-353 by failing to pay him wages, including  
24 commissions, referral fees, bonuses, and stock options. (Am. Compl. at 3.) Plaintiff asserts  
25 that he is entitled to treble damages under A.R.S. § 23-355 and costs and attorney’s fees  
26 under A.R.S. § 23-364(G) and A.R.S. § 12-341.01. (Am. Compl. at 3.) Defendant now  
27 moves to dismiss the Arizona Action or, in the alternative, transfer the Arizona claims to  
28

1 the Northern District under the doctrine of federal comity, Federal Rule of Civil Procedure  
2 12(b)(4), and 28 U.S.C. § 1404(a). (MTD at 1.)

### 3 **II. LEGAL STANDARD**

4 “There is a generally recognized doctrine of federal comity which permits a district  
5 court to decline jurisdiction over an action when a complaint involving the same parties  
6 and issues has already been filed in another district.” *Pacesetter Sys., Inc. v. Medtronic,*  
7 *Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982) (citation omitted). “Normally sound judicial  
8 administration would indicate that when two identical actions are filed in courts of  
9 concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit  
10 and no purpose would be served by proceeding with a second action.” *Id.* at 95. This is  
11 called the “first to file” rule. *Id.*

12 “The ‘first to file’ rule normally serves the purpose of promoting efficiency well  
13 and should not be disregarded lightly.” *Id.* (internal quotation omitted). “When applying  
14 the first to file rule, courts should be driven to maximize ‘economy, consistency, and  
15 comity.’” *Kohn L. Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th  
16 Cir. 2015) (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir.  
17 1999)).

18 When deciding whether to apply the first to file rule, district courts look to three  
19 factors: (1) chronology of the lawsuits; (2) similarity of the parties; and (3) similarity of  
20 the issues. *Kohn L. Grp.*, 787 F.3d at 1240. “However, [the] ‘first to file’ rule is not a rigid  
21 inflexible rule to be mechanically applied, but rather is to be applied with a view to the  
22 dictates of sound judicial administration.” *Pacesetter*, 678 F.2d at 95.

### 23 **III. ANALYSIS**

24 Defendant argues that all of Plaintiff’s claims in the Arizona Action should be  
25 dismissed or, in the alternative, transferred to the District Court for the Northern District  
26 of California pursuant to Federal Rule of Civil Procedure 12(b)(4) and 28 U.S.C. § 1404(a).  
27 (MTD at 1–2.) First, Defendant contends that Plaintiff’s claims should be dismissed or  
28 transferred under the first to file rule. (MTD at 7–9.) Second, Defendant asserts that

1 Plaintiff should be judicially estopped from opposing the dismissal or transfer. (MTD  
2 at 9-12.) Third, Defendant requests that the Court issue an Order to Show Cause regarding  
3 why Plaintiff and his counsel should not be sanctioned under Federal Rule of Civil  
4 Procedure 11 for filing the Arizona Action. (Reply at 7.) In Plaintiff’s Response, he agrees  
5 with Defendant’s alternative request to transfer the Arizona Action to the Northern District  
6 but contends that the claims should not be dismissed. (Resp. at 5.)

7 **A. The First to File Rule**

8 Defendant argues that all three factors analyzed under the first to file rule support  
9 the dismissal or transfer of Plaintiff’s claims. (MTD at 7.) In his Response, Plaintiff only  
10 disputes the similarity of the issues between the two lawsuits. (Resp. at 5–6.) Plaintiff does  
11 not dispute that the California Action was filed before the Arizona Action and that the  
12 parties in both suits are identical, and the Court finds that the first two requirements of the  
13 first to file rule are met. Thus, the only factor to be analyzed is the similarity of the issues.

14 **1. The Issues in Both Lawsuits Are Substantially Similar**

15 In its Motion, Defendant argues that the issues in both the Arizona Action and the  
16 California Action are substantially similar because two issues are central in both actions:  
17 (1) Plaintiff’s Employment Agreement and whether he is entitled to certain commissions,  
18 bonuses, and stock options under that agreement; and (2) the nature of Plaintiff’s  
19 termination and whether its circumstances impact Plaintiff’s alleged entitlements under the  
20 Employment Agreement. (MTD at 9.) On the other hand, Plaintiff contends that the issues  
21 are different because he never filed Arizona claims in the Northern District. (Resp. at 6.)

22 Under the first to file rule, issues between the two lawsuits only need to be  
23 substantially similar. *See Kohn L. Grp.*, 787 F.3d at 1240–41 (citation omitted). When  
24 analyzing if two lawsuits have substantially similar issues, the Court must determine  
25 whether there is “substantial overlap” between the issues. *Id.* at 1241.

26 The issues in both the Arizona Action and the California Action substantially  
27 overlap. Both lawsuits will require a court to determine whether Plaintiff is entitled to  
28 commissions, bonuses, and stock options under his Employment Agreement with

1 Defendant. Few issues, if any, are unique to the Arizona Action. Both suits involve the  
2 same facts and, in both, Plaintiff claims damages of unpaid commissions, bonuses, and  
3 stock options. For this reason, the third factor of the first to file rule is met.

4 **2. Dismissal Without Prejudice of the Arizona Action Is**  
5 **Appropriate Under the First to File Rule**

6 Once a court determines that the first to file rule applies, the District Court may  
7 transfer, stay, or dismiss the action. *C21FC LLC v. NYC Vision Cap. Inc.*, No. CV-22-  
8 00736-PHX-SPL, 2022 WL 2646168, at \*2 (D. Ariz. July 8, 2022) (citing *Alltrade, Inc. v.*  
9 *Uniweld Prods., Inc.*, 946 F.2d 622, 623 (9th Cir. 1991)).

10 The proper procedure for Plaintiff to bring his claims in the California Action is by  
11 way of a motion to amend under Federal Rule of Civil Procedure 15, so the Court finds  
12 dismissal without prejudice of the Arizona Action is appropriate. *See Horner v.*  
13 *Youghiogheny Commc'ns, L.L.C.*, No. CV 05-3800-PHX-NVW, 2006 WL 1328803, at \*6  
14 (D. Ariz. May 12, 2006) (noting that a dismissal without prejudice is the practical  
15 equivalent of a transfer of venue). Since the Court finds that dismissal without prejudice  
16 under the first to file rule is appropriate in this case, the Court does not reach the merits of  
17 Defendant's other arguments.<sup>1</sup>

18 **B. Sanctions Under Federal Rule of Civil Procedure 11**

19 In its Reply, Defendant asks the Court to issue an Order to Show Cause why Plaintiff  
20 and his counsel should not be sanctioned under Federal Rule of Civil Procedure 11 for their  
21 respective conduct in filing and maintaining the Arizona Action. (Reply at 7.) The Court  
22 does not find that Plaintiff's or his attorney's conduct rises to the level of sanctionable  
23 behavior. *See* Fed. R. Civ. P. 11(c)(3). For that reason, the Court declines Defendant's  
24 request to issue an Order to Show Cause under Rule 11.

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<sup>1</sup> Defendant also moves to dismiss under Federal Rule of Civil Procedure 12(b)(4), but it  
is unclear to the Court how that rule is implicated here.

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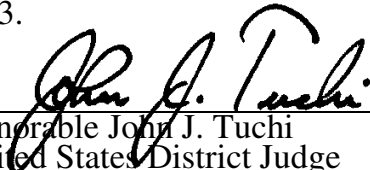
**IV. CONCLUSION**

For the reasons stated above, the Court grants Defendant’s Motion to Dismiss under the first to file rule and declines to issue an Order to Show Cause under Federal Rule of Civil Procedure 11.

**IT IS THEREFORE ORDERED** granting Defendant’s Motion to Dismiss (Doc. 5). All counts are dismissed without prejudice.

**IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment and close this case.

Dated this 10th day of March, 2023.

  
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Honorable John J. Tuchi  
United States District Judge