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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MELISSA SANTICH and KEITH  
BLACKMER, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

GNC HOLDINGS, INC.,

Defendant.

CASE NO. 17cv540 DMS(RBB)

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS PLAINTIFFS' AMENDED  
COMPLAINT**

This case comes before the Court on Defendant's motion to dismiss Plaintiffs' Amended Complaint. Plaintiffs filed an opposition to the motion, and Defendant filed a reply. The motion came on for hearing on November 17, 2017. James Shah appeared for Plaintiffs and Sean Sullivan appeared for Defendant. After thoroughly considering the issues, the Court grants the motion.

**I.**

**BACKGROUND**

On March 17, 2017, Plaintiffs filed the present case, on behalf of themselves and a proposed class of California and nationwide consumers, alleging claims against Defendant for breach of contract, violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"), California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* ("CLRA"), and California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.* ("FAL"). In response to the

1 Complaint, Defendant filed a motion to dismiss, or in the alternative, to transfer this  
2 case to the United States District Court for the Western District of Pennsylvania,  
3 presumably so it could be consolidated with *Cook v. General Nutrition Corp.*, Case No.  
4 17-135. The Court denied the motion to transfer, and granted in part and denied in part  
5 the motion to dismiss. Specifically, the Court denied the motion to dismiss Plaintiffs’  
6 breach of contract claim and granted the motion to dismiss Plaintiffs’ remaining claims  
7 with leave to amend.

8 Plaintiffs filed their Amended Complaint on September 18, 2017. In response,  
9 Defendant filed the present motion.

10 **II.**  
11 **DISCUSSION**

12 As in the first motion to dismiss, Defendant argues Plaintiffs’ claims should be  
13 dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant also asserts,  
14 for the first time, that the case should be dismissed pursuant to the first-to-file rule.<sup>1</sup>

15 The first-to-file rule “is a generally recognized doctrine of federal comity which  
16 permits a district court to decline jurisdiction over an action when a complaint involving  
17 the same parties and issues has already been filed in another district.” *Pacesetter Sys.*  
18 *v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9<sup>th</sup> Cir. 1982) (citations omitted). *See also*  
19 *Alltrade, Inc. v. Uniweld Prods.*, 946 F.2d 622, 623 (9<sup>th</sup> Cir. 1991). (stating first-to-file  
20 rule gives federal district courts discretion “to transfer, stay, or dismiss an action when  
21 a similar complaint has already been filed in another federal court[.]”) “The first-to-file  
22 rule was developed to serve[ ] the purpose of promoting efficiency well and should not  
23 be disregarded lightly.” *Alltrade*, 946 F.2d at 625 (internal quotation marks and  
24 citations omitted). Courts analyze three factors to determine the applicability of the

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26 <sup>1</sup> Defendant did not raise the first-to-file rule in its motion to dismiss the original  
27 Complaint. Indeed, it specifically disputed the implication that it was required to  
28 address the rule in its motion to dismiss. (*See* Docket No. 15 at 2) (Def.’s Resp. to  
Motion for Leave to Participate as *Amicus Curiae*). The plaintiffs in *Cook*, who  
attempted to participate in Defendant’s previous motion as *amicus*, wanted to file a brief  
on the first-to-file rule, but their request to participate as *amicus* was denied. Thus, the  
first-to-file rule was not at issue in Defendant’s previous motion.

1 first-to-file rule: (1) “chronology of the lawsuits,” (2) “similarity of the parties,” and (3)  
2 “similarity of the issues.” *Kohn Law Grp., Inc. v. Auto Parts Mfg., Miss., Inc.*, 787 F.3d  
3 1237, 1240 (9<sup>th</sup> Cir. 2015).

4 **A. Chronology of the Lawsuits**

5 The first factor, chronology of the lawsuits, “simply requires that the case in  
6 question was filed later in time.” *Therapy Stores, Inc. v. JGV Apparel Grp., LLC*, No.  
7 4:16-CV-02588-YGR, 2016 WL 4492583, at \*4 (N.D. Cal. Aug. 26, 2016) (citations  
8 omitted). Here, there is no dispute this case was filed after *Cook*. (Mem. of Law in  
9 Opp’n to Mot. at 16.)

10 Plaintiffs argue, however, that the *Cook* case “no longer exists” because the  
11 district court dismissed the case with prejudice. (Mem. of Law in Opp’n to Mot. at 14.)  
12 In this situation, Plaintiffs assert the first-to-file rule no longer applies because “there  
13 is no concurrent action pending.” (*Id.*) Plaintiffs cite a number of cases to support this  
14 argument, but each is distinguishable from the facts of the present case. In *ABB*  
15 *Automation, Inc. v. Honeywell Inc.*, No. C-2-01-325, 2002 WL 483523 (S.D. Ohio Mar.  
16 20, 2002), and *Freed Designs, Inc. v. Sig Sauer, Inc.*, No. 2:14-cv-09068-ODW(AGR<sub>x</sub>),  
17 2015 WL 12656279 (C.D. Cal. June 10, 2015), the first-filed case was dismissed for  
18 lack of standing. In *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F.Supp.2d 1289  
19 (N.D. Cal. 2013), the first-filed case was voluntarily dismissed by the plaintiffs. And  
20 in *Executive Law Group, Inc. v. Executive Law Group PL*, No. SACV 13-01823 MMM  
21 (RNB<sub>x</sub>), 2014 WL 12577090 (C.D. Cal. Mar. 24, 2014), the first-filed case was  
22 dismissed for lack of personal jurisdiction. Under these circumstances, it makes sense  
23 that the first-to-file rule would not apply because there was no decision on the merits,  
24 and hence no efficiencies to be gained by consolidating the cases in one court. Here,  
25 by contrast, *Cook* was dismissed on the merits in a lengthy order. Furthermore, unlike  
26 in any of the cases cited by Plaintiffs, the plaintiffs in *Cook* have appealed the dismissal  
27 of their case. Thus, although the case is not currently active in the district court, it is  
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1 pending before the United States Court of Appeals for the Third Circuit.<sup>2</sup> Plaintiffs’  
2 suggestion that the first-to-file rule does not apply here because *Cook* was dismissed is,  
3 therefore, not persuasive. Rather, *Cook* remains pending, and it is the first-filed case.

4 **B. Similarity of the Parties**

5 The second factor, similarity of the parties, “does not require exact identity of the  
6 parties.” *Kohn Law Grp., Inc.*, 787 F.3d at 1240 (citations omitted). Rather, the  
7 first-to-file rule “requires only substantial similarity of parties.” *Id.* (citations omitted).

8 There is no dispute this requirement is met here. Defendant in each case is the  
9 same, and although the named plaintiffs in each case are different, the classes they  
10 purport to represent are identical. Therefore, this requirement is met.

11 **C. Similarity of the Issues**

12 Lastly, the third factor requires the Court to look to the similarity of the issues  
13 in the relevant actions. The first-to-file rule does not require identical issues or “exact  
14 parallelism,” but requires substantial similarity of the issues. *See Kohn Law Grp., Inc.*,  
15 787 F.3d at 1240; *see Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989) (“exact  
16 parallelism does not exist, but it is not required. It is enough if the two proceedings are  
17 ‘substantially similar.’”). In order to determine whether the actions involve  
18 substantially similar issues, courts “look at whether there is ‘substantial overlap’  
19 between the two suits.” *Kohn Law Grp., Inc.*, 787 F.3d at 1240.

20 Here, both cases involve proposed classes of nationwide and California  
21 consumers who purchased a membership in Defendant’s Gold Card Program. That  
22 Program, and its terms, are at the core of each case. Furthermore, the claims in each  
23 case are identical.

24 Plaintiffs attempt to avoid that conclusion by arguing the breach of contract claim  
25 asserted here is different from that alleged in *Cook*. They argue the contract at issue

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27 <sup>2</sup> The case also remains pending in the district court on any matters not appealed,  
28 *e.g.*, attorneys’ fees, costs, *etc.* *See Taylor v. Messmer*, No. 09-cv-1116, 2011 U.S. Dist.  
LEXIS 106495, at \*3 (W.D. Penn. Sept. 20, 2011) (stating once notice of appeal is  
filed, district court loses jurisdiction only over matters appealed).

1 in *Cook* is admittedly governed by an on-line agreement concerning the Gold Card  
2 Program and the Gold Card itself, whereas the contract at issue here is different.  
3 Plaintiffs claim the contract at issue here is not dependent on that evidence, but rather  
4 depends from representations made to Plaintiffs that they would be provided with a  
5 one-year membership in the Gold Card Program in exchange for a \$15 fee. However,  
6 the allegations in the Amended Complaint reveal that Plaintiffs were, in fact, advised  
7 of the Program, (*see* Am. Compl. ¶¶ 18, 22), and that the Program is based on the Gold  
8 Cards. (*Id.* ¶¶ 37, 39.) Thus, despite Plaintiffs' artful pleading, the breach of contract  
9 claim alleged here is the same as the breach of contract claim alleged in *Cook*.

10 **III.**

11 **CONCLUSION**

12 Because all of the requirements are satisfied, the first-to-file rule applies to this  
13 case. Pursuant to the rule, the Court grants Defendant's motion to dismiss and  
14 dismisses this case without prejudice.<sup>3</sup>

15 **IT IS SO ORDERED.**

16 DATED: November 21, 2017

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18 HON. DANA M. SABRAW  
19 United States District Judge

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<sup>3</sup> In light of this conclusion, the Court declines to address Defendant's 12(b)(6) arguments.