

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELIZABETH DE COSTER *et al.*, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware
corporation,

Defendant.

Case No. 2:21-cv-00693-RSM

MOTION TO CONSOLIDATE
RELATED ACTIONS UNDER LOCAL
RULE 42

NOTED FOR MOTION CALENDAR:
August 20, 2021

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I. INTRODUCTION

Pursuant to Local Rule 42(a), Plaintiffs¹ respectfully move to consolidate their proposed class action against Amazon with two later-filed, proposed class actions, which are related and are currently pending before this Court: *Angela Hogan v. Amazon.com, Inc.*, Case No. 2:21-cv-00996 (W.D. Wash.) (“*Hogan*”), and *Andrea Seberson v. Amazon.com, Inc.*, Case No. 2:21-cv-01009 (W.D. Wash.) (“*Seberson*”) (together, “Related Cases”).

Plaintiffs’ pending class action (“*De Coster*”) reflects the combination of three previously filed, related, proposed class actions, which asserted consumer harm stemming from Amazon’s anticompetitive conduct. And this Court has already approved of a leadership team to manage that combination of cases and other “antitrust cases brought by and on behalf of consumers who purchased from Defendant Amazon’s retail platform and were harmed by Amazon’s anticompetitive conduct.” Order Granting Motion for Appointment of Interim Co-Lead Class Counsel and Plaintiffs’ Executive Committee (“Leadership Order”) (Dkt. 19) at 1. Nevertheless, in disregard of that order, counsel for the Related Cases now seek to separately litigate actions involving overlapping claims, asserted on behalf of overlapping putative classes, for overlapping damages, based on duplicative allegations of anticompetitive conduct by Amazon. Proceeding without consolidation would squander judicial and party resources in cases that this Court has emphasized will likely entail “expensive and complicated litigation.” *Id.* To avoid such waste and to promote fairness and efficiency, Plaintiffs respectfully move the Court to consolidate the Related Cases into *De Coster*, pursuant to Local Rule 42.

II. STATEMENT OF FACTS

The *De Coster* action reflects the combination of three proposed antitrust class actions on behalf of consumers harmed by Amazon’s anticompetitive conduct. Two of those actions stipulated to consolidation,² and the third action was voluntarily dismissed by the plaintiff so that

¹ “Plaintiffs” are Elizabeth De Coster, Maya Gold, John Mariane, Osahon Ojeaga, Megan Smith, Robert Taylor, Kenneth David West, and Emma Zaballos.

² *De Coster and West v. Amazon.com, Inc.*, Case No. 2:21-cv-00694 (W.D. Wash.).

1 she could join the consolidated action.³ The Court appointed counsel for the newly consolidated
2 action—*De Coster*—to serve as Interim Co-Lead Class Counsel and as members of the
3 Plaintiffs’ Executive Committee. Leadership Order, Dkt. 19. In that Order, the Court specified
4 that the leadership structure would cover all “antitrust cases brought by and on behalf of
5 consumers who purchased from Defendant Amazon’s retail platform and were harmed by
6 Amazon’s anticompetitive conduct.” *Id.* With the leadership structure in place, the *De Coster*
7 Plaintiffs filed their operative Consolidated Amended Complaint (“CAC”). Dkt. 20.

8 Plaintiffs allege in the CAC that Amazon has “gained and maintains monopoly power,”
9 pointing to a variety of anti-competitive conduct. For example, the CAC argues that Amazon
10 obtained and exerts its monopoly power “*in part* through its enforcement of its [Most Favor
11 Nation, or] MFN policies.” CAC at ¶¶ 175 & 176 (emphasis added). The CAC also points out
12 that Amazon does so through “tie[s] with Amazon’s fulfillment services,” or “FBA” services. *Id.*
13 at ¶ 74. Specifically, the CAC alleges, Amazon has “tied its fulfillment infrastructure . . . to
14 [third-party merchants’] access to Prime customers,” which “strengthens and reinforces”
15 Amazon’s market power. *Id.* at ¶ 80. Improper tying agreements are therefore one component of
16 Amazon’s illegal and anticompetitive agreements with third-party merchants, which lead to the
17 supra-competitive fees and prices for consumers on Amazon’s marketplace. *See, e.g., id.* at
18 ¶ 168.

19 Without regard to the Court’s Leadership Order and without contacting the Court-
20 appointed leadership team, plaintiffs in the Related Cases just last week filed their proposed class
21 actions against Amazon, on July 26 and July 28.⁴ Like *De Coster*, the Related Cases are
22 “antitrust cases brought by and on behalf of consumers who purchased from Defendant
23 Amazon’s retail platform and were harmed by Amazon’s anticompetitive conduct.” Leadership
24

25 ³ *See Smith v. Amazon.com, Inc.*, 2:21-cv-00838 (W.D. Wash.), Dkt. No. 11. Consistent with the Court’s order, Ms.
26 Smith’s individual counsel did not receive a leadership role.

27 ⁴ Counsel in the Related Cases were surely aware of prominent filings in their area of practice, including the three
28 complaints that were combined to produce the *De Coster* CAC, the leadership application of counsel for the
combined cases, and the Court’s order establishing a leadership structure. Yet they are only now attempting to file a
largely redundant action on behalf of a subset of the same proposed class; this attempt to circumvent the Court’s
Leadership Order is untimely.

1 Order, Dkt. 19, at 1. The only real difference between those cases and *De Coster* is that they
2 focus exclusively on one aspect of the universe of anticompetitive conduct that *De Coster*
3 discusses: the tying of Amazon’s FBA services to third-party merchants’ access to Prime
4 customers and the Amazon “Buy Box.” See *Hogan* Complaint; *Seberson* Complaint; CAC. The
5 *De Coster* CAC, meanwhile, addresses that conduct, but also goes beyond it to examine other
6 facets of Amazon’s anticompetitive actions.

7 In accordance with Local Rule 42(b), the parties have met and conferred. Counsel for
8 plaintiffs in the Related Cases disagree that their cases should be consolidated with *De Coster*,
9 arguing instead that their tying claim should proceed separately. Counsel for Defendant Amazon
10 has not communicated Defendant’s position as of the time of this filing.

11 III. LEGAL STANDARD

12 “If actions before the court involve a common question of law or fact,” Rule 42 of the
13 Federal Rules of Civil Procedure provides that the Court may “consolidate the actions.” Fed. R.
14 Civ. P. 42(a)(2). “A district court generally has ‘broad’ discretion to consolidate actions”
15 *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1203 (9th Cir. 2008) (quoting *Investor’s Research Co.*
16 *v. U.S. Dist. Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989)). “The Court
17 considers a number of factors in analyzing the appropriateness of consolidation, including
18 judicial economy, whether consolidation would expedite resolution of the case, whether separate
19 cases may yield inconsistent results, and the potential prejudice to a party opposing
20 consolidation.” *First Mercury Ins. Co. v. SQI, Inc.*, 2014 WL 496685, at *2 (W.D. Wash. Feb. 6,
21 2014).

22 IV. ARGUMENT

23 A. The Cases Largely Overlap and Therefore Should Be Consolidated

24 As explained in the CAC, Amazon violated both Section 1 and Section 2 of the Sherman
25 Act through a variety of anticompetitive practices and policies, including, but not limited to, its
26 enforcement of MFN policies. Critically, the CAC alleges that Amazon overcharges Plaintiffs
27 and class members for purchases on Amazon’s marketplace because third-party merchants must
28

1 set higher prices to compensate for Amazon’s significant fees—including commissions and fees
2 for Amazon FBA services. CAC, ¶¶ 8, 58-63. The CAC further alleges that Amazon’s MFN
3 policies and its monopoly power are the root causes of these overcharges. *See, e.g., id.* at ¶¶ 1-
4 28. Notably, the CAC’s monopoly claim encompasses *all* of Amazon’s asserted anticompetitive
5 conduct, including tying arrangements, and specifically notes that the MFN policies are only a
6 “part” of that conduct. *Id.* at ¶ 176.

7 The Related Cases likewise assert that Amazon overcharges Plaintiffs and class members
8 for purchases on Amazon’s marketplace because third-party merchants must set higher prices to
9 compensate for Amazon’s significant fees. But these complaints focus singularly on one type of
10 fee: fees for Amazon’s FBA services. And they focus on only one type of anti-competitive
11 conduct leading to those inflated fees: Amazon’s tying of FBA services with third-party
12 merchants’ access to Prime customers and the Buy Box. *See Hogan* Complaint ¶ 118 (describing
13 how “the majority of Sellers have been forced by Amazon to use Fulfillment by Amazon and
14 therefore have access to the Buy Box”); *Seberson* Complaint ¶ 174 (same); *see also* CAC ¶¶ 74,
15 80 (“Amazon has also tied its fulfillment infrastructure—which represents an extremely high
16 fixed cost—to access to Prime customers”). The CAC therefore covers the four corners of the
17 complaints in the later-filed Related Cases and goes beyond those complaints to examine other
18 aspects of Amazon’s anticompetitive conduct.

19 In their Notices of Related Actions, plaintiffs in the Related Cases acknowledge that their
20 cases “satisfy the criteria for relatedness set out in Local Rule Civil Rule 3(g)” with respect to
21 *De Coster*. *Hogan*, Dkt. 10; *Seberson*, Dkt. 2. They also acknowledge that their proposed class
22 actions “concern many of the same parties” as *De Coster*, namely “Amazon and persons who
23 made purchases through its website,” and that “[t]hese cases also concern many of the same
24 transactions, namely purchases through the Amazon website.” *Id.* Plaintiffs in the Related Cases
25 nonetheless assert that their “claims are based on factual allegations and legal theories different
26 from those in *De Coster*.” *Id.* at 2. Not so. The CAC includes broad antitrust claims that
27 encompass all of Amazon’s anticompetitive conduct. CAC at ¶¶ 175 & 176. And the CAC
28 specifically alleges that the tying conduct (which is at the core of the Related Cases) is

1 anticompetitive and significantly contributes to the alleged overcharges by Amazon. CAC at
2 ¶¶ 74 & 80. Moreover, at bottom, all three cases are about the same core issue—whether
3 Amazon violated the Sherman Act, causing class members in the putative class to overpay on
4 their Amazon transactions during the relevant period. Compare CAC ¶¶ 74, 80, and First,
5 Second, and Third Causes of Action, with *Hogan* § VII and *Seberson* Claims 1 and 2.

6 Plaintiffs in the Related Cases next argue that their cases are distinct because the cases
7 are “premised not on price-fixing agreements but on an unlawful tying arrangement.” *Hogan*,
8 Dkt. 10; *Seberson*, Dkt. 2. But the presence of different legal theories is “not significant” for
9 purposes of consolidation “when the actions still arise from a common factual core.” See *In re*
10 *Oxycontin Antitrust Litig.*, 542 F. Supp. 2d 1359, 1360 (J.P.M.L. 2008). What’s more, if the *De*
11 *Coster* Plaintiffs ultimately determine that it is in the best interest of the proposed class to
12 emphasize the tying conduct discussed in the Related Cases, or to claim a longer Class period by
13 asserting fraudulent concealment, as the Related Cases have done, Plaintiffs could simply and
14 easily move to amend their CAC or otherwise incorporate all of those allegations into their
15 action. See *Miller v. Ventro Corp.*, 2001 WL 34497752, at *5 (N.D. Cal. Nov. 28, 2001)
16 (explaining that even if different theories involve the need to “prove additional elements,”
17 consolidation was appropriate because there is “no bar to one plaintiff alleging multiple theories
18 of recovery”).

19 The high degree of overlap among the present action and the later-filed Related Cases
20 readily satisfies the standards for consolidation in this District. Consolidation here will, among
21 other things, “serve the interests of judicial economy by eliminating the need to file separate
22 motions in each case on similar issues” and allow the Court “to address any overlapping issues
23 contained in the two cases in a more streamlined fashion.” *First Mercury Ins. Co.*, 2014 WL
24 496685, at *3; see also *Cornell v. Soundgarden*, 2021 WL 1663924, at *2 (W.D. Wash. Apr. 26,
25 2021) (consolidating actions where core issues of one action were “directly raised” in the other).

26 Further, because plaintiffs in the Related Cases seek antitrust overcharge damages on the
27 same underlying transactions, there is the potential—absent consolidation—for Amazon to be
28 subject to duplicative judgments. Therefore, in addition to consolidation’s being appropriate

1 under Local Rule 42, joinder is compulsory under Federal Rule of Civil Procedure 19. *See* Fed.
2 R. Civ. P. 19(a)(1)(B)(ii) (Person must be joined as a party when “disposing of the action in the
3 person’s absence may . . . leave an existing party subject to a substantial risk of incurring double,
4 multiple, or otherwise inconsistent obligations because of the interest.”).

5 **B. The Court’s Leadership Order Subsumes the Related Cases Under the Appointed**
6 **Leadership Structure**

7 This Court has already appointed counsel in *De Coster*—which itself represents the
8 combination of three previously filed antitrust cases against Amazon—as Interim Co-Lead Class
9 Counsel and members of the Plaintiffs’ Executive Committee. That Order makes clear that the
10 appointed leadership structure covers “antitrust cases brought by and on behalf of consumers
11 who purchased from Defendant Amazon’s retail platform and were harmed by Amazon’s
12 anticompetitive conduct.” Leadership Order, Dkt. 19, at 1. As described above, the Related
13 Cases are precisely this type of case brought on behalf of this type of consumer against this
14 defendant for this type of conduct. The Related Cases therefore fall squarely within the existing
15 leadership structure ordered by the Court. And, as the Court said in its Order, this leadership
16 structure “will aid in achieving efficiency and economy in what is likely to be expensive and
17 complicated litigation” and “will enhance fairness to all parties concerned, as well as the
18 proposed classes.” *Id.*

19 **V. CONCLUSION**

20 Consolidation of the Related Cases under the *De Coster* action and the Consolidated
21 Amended Complaint will aid in achieving efficiency and economy in what is likely to be
22 expensive and complicated litigation, and will enhance fairness to all parties concerned, as well
23 as to the proposed classes. The Related Cases are significantly similar actions properly
24 consolidated with the existing consolidated cases. For the foregoing reasons, Plaintiffs
25 respectfully request that the Court consolidate the Related Cases under the banner of the
26 *De Coster* action, and sustain its existing Leadership Order. Dkt. 19.

1 DATED: August 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, a true and correct copy of the foregoing was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

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