

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
3

4 SIMON V. GARCIA, an individual

5 Plaintiff,

6 v.

7 GORDON TRUCKING, INC., a
8 California Corporation, which will
9 transact business in California as
10 L GORDON; STEVE GORDON, an
11 individual; BOB GOLDBERG, an
12 individual; and Does 1 through 20,
13 inclusive,

14 Defendants.

1:10-CV-00324-OWW-SKO

MEMORANDUM DECISION AND ORDER
RE MOTION FOR STAY AND
APPOINTMENT OF INTERIM CLASS
COUNSEL

(DOC. 52)

13 CHRISTOPHER YANEZ and EMMA YANEZ
14 on behalf of themselves, all
15 others similarly situated, and the
16 general public,

17 Plaintiffs,

18 v.

19 GORDON TRUCKING, INC., a
20 Washington corporation, and DOES 1
21 through 100, inclusive,

22 Defendants.

1:11-CV-00272-OWW-SMS

MEMORANDUM DECISION AND ORDER
RE PLAINTIFFS' MOTION FOR
CONSOLIDATION OF PENDING
ACTIONS AND APPOINTMENT OF
INTERIM CLASS COUNSEL

(DOC. 37)

23 I. INTRODUCTION

24 Before the court are two putative class actions filed
25 against Gordon Trucking, Inc. ("Defendant"): (1) Simon Garcia
26 ("Plaintiff Garcia") v. Defendant etal. (1:10-cv-324-OWW-SKO)
27 ("*Garcia*"), and (2) Christopher Yanez and Emma Yanez ("Yanez
28 Plaintiffs") v. Defendant etal. (1:11-cv-272-OWW-SMS) ("*Yanez*").

1 Yanez Plaintiffs move (1) to consolidate the *Garcia* and
2 *Yanez* lawsuits, and (2) for appointment of James R. Patterson and
3 Allison H. Goddard ("*Yanez* Counsel") as interim class counsel.
4 *Yanez* Doc. 37. Defendant and Plaintiff Garcia filed an opposition
5 in the *Yanez* lawsuit (*Yanez* Docs. 41 and 42, respectively), to
6 which Yanez Plaintiffs replied (*Yanez* Doc. 46).

8 Plaintiff Garcia moves (1) to stay the hearing on Yanez
9 Plaintiffs' motion for consolidation and (2) alternatively, for
10 appointment of S. Brett Sutton ("*Garcia* Counsel") as interim
11 class counsel. *Garcia* Doc. 52. Yanez Plaintiffs filed a motion to
12 intervene in the *Garcia* Lawsuit and opposition to the motion to
13 stay (*Garcia* Doc. 58), to which Plaintiff Garcia replied (*Garcia*
14 Doc. 59).

15
16 The motions were heard July 11, 2011.

17
18 II. BACKGROUND

19 A. *Garcia* Lawsuit

20 The *Garcia* lawsuit against Defendant and individual
21 Defendants Steve Gordon, Bob Goldberg, and Does 1 to 20 was filed
22 in this court on February 23, 2010. *Garcia* Doc. 1. Plaintiff
23 Garcia filed a First Amended Complaint on July 7, 2010 (*Garcia*
24 Doc. 28) and a Second Amended Complaint ("*SAC*") on July 22, 2010
25 (*Garcia* Doc. 33).

26 The *Garcia* action seeks to represent the following putative
27 classes:
28

- 1 a. All similarly situated persons employed by GTI who were
2 driving tractor-trailer combinations and performing
3 services related thereto within the State of California
4 at any time within the Relevant Time Period, and were
5 compensated on a per-mile basis for at least part of
6 their compensation. This putative class will be
7 referred to herein collectively as the 'CALIFORNIA
8 EMPLOYEES' .
- 9 b. All similarly situated persons employed by GTI who were
10 driving tractor-trailer combinations and performing
11 services related thereto within any State excepting the
12 State of California at any time within the Relevant
13 Time Period, and were compensated on a per-mile basis
14 for at least part of their compensation. This putative
15 class will be referred to herein collectively as the
16 'NATIONWIDE EMPLOYEES' .

17 *Garcia* Doc. 33, ¶ 21.

18 The *Garcia* SAC asserts the following causes of action:

- 19 (1) First Cause of Action: Failure to pay minimum wages for
20 all hours worked in violation of the Fair Labor
21 Standards Act ("FLSA") (29 U.S.C. § 206);
- 22 (2) Second Cause of Action: Failure to pay minimum wages
23 for all hours worked in violation of California Labor
24 Code §§ 221-223, 1194, 1194.2, and 1197 and Industrial
25 Welfare Commission Wage Order 9, § 11;
- 26 (3) Third Cause of Action: Failure to provide mandated meal
27 periods or to pay an additional hour of wages in
28 violation of California Labor Code §§ 226.7 and 512 and
Industrial Welfare Commission Wage Order 9;
- (4) Fourth Cause of Action: Failure to provide mandated
rest periods or to pay an additional hour of wages in

1 violation of California Labor Code §§ 226.7 and 512 and
2 Industrial Welfare Commission Wage Order 8, § 11;

3 (5) Fifth Cause of Action: Failure to issue mandated
4 accurate itemized wage statements in violation of
5 California Labor Code §§ 226, 226.6, 1174, 1174.5, and
6 1175 and Industrial Welfare Commission Wage Order 9;

7
8 (6) Sixth Cause of Action: Failure to reimburse business
9 expenses in violation of California Labor Code § 2802
10 and Industrial Welfare Commission Wage Order 9;

11 (7) Seventh Cause of Action: Failure to timely pay wages
12 due at termination in violation of California Labor
13 Code §§ 201, 202, and 203;

14 (8) Eighth Cause of Action: Violation of unfair competition
15 law, California Business and Professions Code §§ 17200
16 et seq.; and

17 (9) Ninth Cause of Action: Recovery under the Labor Code
18 Private Attorneys General Act of 2004.

19
20 *Garcia* Doc. 33. In *Garcia*, Plaintiff seeks to certify the First
21 Cause of Action as a collective action under 29 U.S.C. § 216(b),
22 for all acts within three years preceding the original Complaint
23 and through the time of trial. *Id.* at ¶¶ 4-5. Plaintiff Garcia
24 seeks to certify the Second through Eighth Causes of Action as a
25 class action under Federal Rule of Civil Procedure 23, for all
26 acts within four years preceding the original Complaint and
27
28

1 through the time of trial. *Id.* at ¶¶ 4,6.

2 B. Yanez Lawsuit

3 The *Yanez* action was filed in the Superior Court of
4 California, County of San Diego on October 12, 2010. *Yanez* Doc.
5 1, Ex. A. Defendant removed the case to the United States
6 District Court for the Southern District of California on
7 November 12, 2010. *Yanez* Doc. 1. Upon the parties' joint motion
8 (*Yanez* Doc. 24), the Southern District transferred *Yanez* to this
9 court on February 16, 2011 (*Yanez* Doc. 27).

11 The *Yanez* lawsuit is brought on behalf of the following
12 putative class:

13 All persons who have been employed by Defendant as Over the
14 Road Drivers in the State of California at any time during
15 the Class Period.

16 *Yanez* Doc. 1, Ex. A, ¶ 1. The "Class Period" is the four-year
17 period prior to filing, through disposition of the action. *Id.* at
18 ¶ 3.

19 The *Yanez* Complaint asserts the following causes of action:

- 20 (1) First Cause of Action: Failure to pay wages due in
21 violation of California Labor Code §§ 201, 202, 203,
22 226, 1194, 1194.2 and 1197 and Industrial Welfare
23 Commission Wage Order 9;
24 (2) Second Cause of Action: Failure to provide or authorize
25 meal periods in violation of California Labor Code §
26 226.7 and Industrial Welfare Commission Wage Order 9, §
27
28

1 11;

2 (3) Third Cause of Action: Failure to provide or authorize
3 rest periods in violation of California Labor Code §§
4 200, 500, 512, and 226.7(b) and Industrial Welfare
5 Commission Wage Order 9, § 12;

6
7 (4) Fourth Cause of Action: Failure to provide itemized
8 wage statements in violation of California Labor Code §
9 226;

10 (5) Fifth Cause of Action: Failure to pay with proper
11 instruments in violation of California Labor Code §§
12 212 and 213.

13 (6) Sixth Cause of Action: Failure to timely pay wages due
14 at termination in violation of California Labor Code §§
15 201, 202, and 203; and

16
17 (7) Seventh Cause of Action: Violation of California
18 Business and Professions Code §§ 17200 et seq.

19 *Yanez* Doc. 1, Ex. A.

20
21 III. MOTION TO STAY

22 A. Yanez Plaintiffs' Motion to Intervene in *Garcia* Lawsuit

23 Yanez Plaintiffs move to intervene in *Garcia* for the limited
24 purpose of opposing Plaintiff *Garcia*'s motion to stay the *Yanez*
25 action. Plaintiff *Garcia* does not address Yanez Plaintiffs'
26 motion to intervene.

1 1. Intervention as of Right

2 Rule 24(a) governs intervention as of right:

3 On timely motion, the court must permit anyone to intervene
4 who . . . claims an interest relating to the property or
5 transaction that is the subject of the action, and is so
6 situated that disposing of the action may as a practical
7 matter impair or impede the movant's ability to protect its
8 interest, unless existing parties adequately represent that
9 interest.

10 Fed. R. Civ. P. 24(a)(2). An applicant for intervention as of
11 right must satisfy four requirements:

12 (1) it has a significant protectable interest relating to
13 the property or transaction that is the subject of the
14 action; (2) the disposition of the action may, as a
15 practical matter, impair or impede the applicant's ability
16 to protect its interest; (3) the application is timely; and
17 (4) the existing parties may not adequately represent the
18 applicant's interest.

19 *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 802 (9th Cir. 2002).

20 Rule 24(a) is construed liberally in favor of potential
21 intervenors. *State ex rel. Lockyer v. United States*, 450 F.3d
22 436, 440 (9th Cir. 2006).

23 Yanez Plaintiffs satisfy the requirements for intervention
24 as of right. Plaintiff Garcia seeks to delay the *Yanez* hearing on
25 the motion for consolidation until after (1) *Garcia's* July 22,
26 2011 mediation and (2) *Garcia's* motion for class certification is
27 filed July 15, 2011. The *Garcia* and *Yanez* lawsuits assert the
28 same claims on behalf of the same putative class of California
 employees against the same employer for the same wage and hour
 violations. Yanez Plaintiffs have a significant protectable
 interest, and the disposition of the motion to stay will impair

1 or impede Yanez Plaintiffs' ability to protect their interests
2 and to proceed with their lawsuit. Yanez Plaintiffs' motion to
3 intervene for the sole purpose of opposing Plaintiff Garcia's
4 motion to stay the *Yanez* lawsuit was timely filed on June 13,
5 2011, fourteen days before the original hearing date on the
6 motion to stay. No party in the *Garcia* lawsuit adequately
7 represents the Yanez Plaintiffs' interests with respect to the
8 motion to stay, as they oppose it.
9

10 Yanez Plaintiffs' motion for intervention as of right in the
11 *Garcia* lawsuit for the limited purpose of opposing the motion for
12 stay is GRANTED.

13 2. Permissive Intervention

14 Rule 24(b) governs permissive intervention:

15 On timely motion, the court may permit anyone to intervene
16 who . . . has a claim or defense that shares with the main
17 action a common question of law or fact. . . . In exercising
18 its discretion, the court must consider whether the
19 intervention will unduly delay or prejudice the adjudication
20 of the original parties' rights.

21 Fed. R. Civ. P. 24(b). An applicant seeking permissive
22 intervention must show: "(1) it shares a common question of law
23 or fact with the main action; (2) its motion is timely; and (3)
24 the court has an independent basis for jurisdiction over the
25 applicant's claims." *Donnelly v. Glickman*, 159 F.3d 405, 411 (9th
26 Cir. 1998). "Even if the applicant satisfies those threshold
27 requirements, the district court has discretion to deny
28 permissive intervention . . . In exercising its discretion, the

1 district court must consider whether intervention will unduly
2 delay the main action or will unfairly prejudice the existing
3 parties." *Id.*

4 The requirements for permissive intervention are met: (1)
5 *Garcia* and *Yanez* share common claims and the common question of
6 whether the proposed stay is proper, and the underlying claim is
7 predominately identical with the exception of the claimants; (2)
8 *Yanez* Plaintiffs' motion is timely; and (3) the court already has
9 jurisdiction over the *Yanez* lawsuit and *Yanez* Plaintiffs.
10

11 Allowing *Yanez* Plaintiffs to intervene for purposes of opposing
12 the motion to stay *Yanez* will not unduly delay the motion or
13 unfairly prejudice Plaintiff *Garcia*; rather, denying *Yanez*
14 Plaintiffs' motion to intervene may prejudice *Yanez* Plaintiffs.
15

16 *Yanez* Plaintiffs' motion for permissive intervention in the
17 *Garcia* lawsuit for the limited purpose of opposing the motion for
18 stay is GRANTED.

19
20 B. Plaintiff *Garcia*'s Motion to Stay *Yanez* Lawsuit

21 1. Legal Standard

22 "[T]he power to stay proceedings is incidental to the power
23 inherent in every court to control the disposition of the causes
24 on its docket with economy of time and effort for itself, for
25 counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248,
26 254, 57 S.Ct. 163 (1936). When considering a motion to stay, the
27 court weighs the competing interests which will be affected by
28

1 the grant or refusal of stay, including: (1) the possible damage
2 which may result from granting the stay; (2) the hardship or
3 inequity which a party may suffer in being required to go
4 forward; and (3) the orderly course of justice measured in terms
5 of the simplifying or complicating of issues, proof, and
6 questions of law which could be expected to result from a stay.
7
8 *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

9 "[A] trial court may, with propriety, find it efficient for
10 its own docket and the fairest course for the parties to enter a
11 stay of an action before it, pending resolution of independent
12 proceedings which may bear upon the case." *Mediterranean Enters.,*
13 *Inc. v. Sangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983)
14 (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857,
15 863-864 (9th Cir. 1979). For a stay to be appropriate it is not
16 required that the issues of such proceedings are necessarily
17 controlling of the action before the court. *Id.*

18
19 The party moving for a stay bears the burden of establishing
20 the need for a stay. *Clinton v. Jones*, 520 U.S. 681, 708 (1997);
21 see also *Landis*, 299 U.S. at 255 ("the justice and wisdom" of a
22 stay lays "heavily on the petitioners").

23
24 2. Discussion

25 Plaintiff Garcia moves for a 45-day stay of the hearing on
26 Yanez Plaintiffs' motion to consolidate filed in the *Yanez* case.
27 Plaintiff Garcia contends that the stay will allow the *Garcia*
28

1 lawsuit to maintain its current briefing schedule with respect to
2 the motion for class certification, which is due July 15, 2011,
3 and to proceed with a scheduled mediation on July 22, 2011.

4 *Garcia* Counsel declares that he has diligently and aggressively
5 pursued the *Garcia* lawsuit for over two years, dedicating over
6 1,000 hours to evaluate and litigate the case, while the *Yanez*
7 lawsuit is still in its infancy and *Yanez* Counsel has not
8 conducted any discovery. Having agreed to a mediator and
9 mediation date and in light of the upcoming deadline to file the
10 motion for class certification, Plaintiff *Garcia* contends that
11 consolidating the lawsuits prejudices the *Garcia* putative class.
12

13 Yanez Plaintiffs contend that a stay would severely
14 prejudice them and the putative *Yanez* class. Yanez Plaintiffs
15 argue that the *Yanez* and *Garcia* actions allege the same
16 California Labor Code Violations, and both actions seek to
17 certify the same class of California workers. Yanez Plaintiffs
18 contend that they have a significant, protectable interest
19 related to the *Garcia* lawsuit, and that granting the stay would
20 block them from participating in the July 22, 2011 mediation.
21

22 The *Yanez* and *Garcia* lawsuits assert the same California
23 Labor Code and Wage Order violations on behalf of the same
24 putative class of California employees. Granting Plaintiff
25 *Garcia*'s motion to stay would unfairly favor the *Garcia* lawsuit
26 over the *Yanez* lawsuit. As both cases encompass the same claims
27
28

1 and same putative class members, hearing on consolidation of the
2 *Yanez* and *Garcia* lawsuits cannot be stayed while the *Garcia*
3 lawsuit proceeds to mediation and class certification. The
4 Supreme Court has explained:

5
6 [A party seeking] a stay must make out a clear case of
7 hardship or inequity in being required to go forward, if
8 there is even a fair possibility that the stay for which he
9 prays will work damage to someone else. Only in rare
circumstances will a litigant in one cause be compelled to
stand aside while a litigant in another settles the rule of
law that will define the rights of both.

10 *Landis*, 299 U.S. at 255. Moreover, as two prospective class
11 actions have been filed against the same Defendant, the interests
12 of all are best protected under Federal Rule of Civil Procedure
13 23 and related Rule 16 case management procedures.

14
15 Plaintiff *Garcia*'s motion for stay of *Yanez*'s hearing on the
16 motion to consolidate is DENIED.

17
18 IV. MOTION TO CONSOLIDATE

19 A. Legal Standard

20 Federal Rule of Civil Procedure 42(a) provides:

21 When actions involving a common question of law or fact are
22 pending before the court, it may order a joint hearing or
23 trial of any or all the matters in issue in the actions; it
may order all the actions consolidated; and it may make such
orders concerning proceedings therein as may tend to avoid
unnecessary costs or delay.

24 Fed. R. Civ. P. 42(a). A district court has broad discretion to
25 consolidate actions. *Pierce v. Cnty. of Orange*, 519 F.3d 985, 996
26 (9th Cir. 2008). "The district court, in exercising its broad
27 discretion to order consolidation of actions presenting a common
28

1 issue of law or fact under Rule 42(a), weighs the saving of time
2 and effort consolidation would produce against any inconvenience,
3 delay, or expense that it would cause." *Heune v. United States*,
4 743 F.2d 703, 704 (9th Cir. 1984). Considerations of convenience
5 and judicial economy "must yield to a paramount concern for a
6 fair and impartial trial." *Johnson v. Celotex Corp.*, 899 F.2d
7 1281, 1285 (2nd Cir. 1990). The party seeking consolidation bears
8 the burden of establishing that judicial economy and convenience
9 outweigh prejudice. *Single Chip Sys. Corp. v. Intermec IP Corp.*,
10 495 F.Supp.2d 1052, 1057 (S.D. Cal. 2007).

11
12 B. Discussion

13 Defendant contends that the *Yanez* and *Garcia* actions are not
14 based on common issues of fact or law. The two lawsuits, however,
15 share the following California claims: (1) failure to pay wages
16 due and owing: Second Cause of Action in *Garcia* and First Cause
17 of Action in *Yanez*; (2) failure to provide or compensate for meal
18 periods: Third Cause of Action in *Garcia* and Second Cause of
19 Action in *Yanez*; (3) failure to provide or compensate for rest
20 periods: Fourth Cause of Action in *Garcia* and Third Cause of
21 Action in *Yanez*; (4) failure to provide accurate/itemized wage
22 statements: Fifth Cause of Action in *Garcia* and Fourth Cause of
23 Action in *Yanez*; (5) failure to timely pay wages at termination:
24 Seventh Cause of Action in *Garcia* and Sixth Cause of Action in
25 *Yanez*; and (6) violation of California Business and Professions
26
27
28

1 Code §§ 17200 et seq.: Eighth Cause of Action in *Garcia* and
2 Seventh Cause of Action in *Yanez*. In addition to their common
3 legal questions, the *Garcia* lawsuit alleges three additional
4 causes of action: (1) First Cause of Action for failure to pay
5 minimum wages in violation of federal law (FLSA); (2) Sixth Cause
6 of Action for failure to reimburse business expenses; and (3)
7 Ninth Cause of Action for recovery under the Labor Code Private
8 Attorneys General Act of 2004. The *Yanez* lawsuit alleges an
9 additional cause of action: Fifth Cause of Action for failure to
10 pay with proper instruments.
11

12 *Garcia* and *Yanez* share common truck driver class members.
13 *Yanez* Plaintiffs contend that the California classes in *Garcia*
14 and *Yanez* are identical. *Garcia* defines its California class as:
15

16 All similarly situated persons employed by GTI who were
17 driving tractor-trailer combinations and performing services
18 related thereto within the State of California at any time
19 within the Relevant Time Period, and were compensated on a
per-mile basis for at least part of their compensation. This
putative class will be referred to herein collectively as
the 'CALIFORNIA EMPLOYEES'.

20 *Garcia* Doc. 33, ¶ 21(a). *Yanez* defines its putative class as:

21 All persons who have been employed by Defendant as Over the
22 Road Drivers in the State of California at any time during
23 the Class Period.

24 *Yanez* Doc. 1, Ex. A, ¶ 1. Defendant rejoins that *Garcia's*
25 proposed class is broader than *Yanez* because *Garcia* presumably
26 includes regional drivers in addition to *Yanez's* putative class
27 of over the road drivers. Defendant also asserts that *Garcia*
28

1 alleges an additional, separate federal class for its federal law
2 claim. Despite Defendant's arguments, it is undisputed that
3 Yanez's putative class is entirely encompassed within Garcia's
4 putative California class.

5 Judicial economy weighs in favor of consolidation. The bulk
6 of Garcia's claims are shared with Yanez, and Yanez's putative
7 class falls within Garcia's putative California class. The two
8 lawsuits share substantial overlapping discovery and proof.
9 Consolidating the two lawsuits would save time, effort,
10 duplication, and valuable judicial resources.

11 Defendant and Garcia Counsel contend that Garcia and Yanez
12 should not be consolidated because the two lawsuits are in
13 different procedural postures. Garcia was filed on February 23,
14 2010; Yanez was filed approximately nine months later on October
15 12, 2010. Garcia Counsel has taken and defended depositions, met
16 and conferred with Defendant's counsel, and requested, received,
17 and reviewed tens of thousands of pages of written discovery.
18 Garcia's motion for class certification is due July 15, 2011 and
19 the motion is scheduled to be heard November 21, 2011. Garcia
20 Doc. 48, 2. Garcia is scheduled for mediation July 22, 2011.

21 In contrast, Yanez's scheduling conference has not yet taken
22 place. Yanez Counsel declares that Defendant requested Yanez's
23 transfer to the Eastern District of California to coordinate with
24 Garcia. Yanez Counsel declares that while Yanez was being
25
26
27
28

1 transferred, *Garcia* Counsel was conducting discovery and
2 Defendant agreed to provide *Yanez* Counsel a copy of all discovery
3 produced in *Garcia*, except for any discovery that related solely
4 to Plaintiff *Garcia*. *Yanez* Counsel contends that they have copies
5 of all discovery, and the two parties are on relatively equal
6 footing in discovery.
7

8 As the *Yanez* claims and class are subsumed within the *Garcia*
9 California class, the *Garcia* lawsuit already includes the *Yanez*
10 class and claims. Consolidation should not require additional
11 discovery except as to *Yanez* Plaintiffs. The motion for class
12 certification is not scheduled for hearing until November 21,
13 2011. Although consolidation will affect *Garcia's* schedule, there
14 is no indication that the delay will be excessive or prejudicial.
15

16 *Garcia* Counsel contends that *Yanez* Counsel unnecessarily
17 delayed filing a motion to consolidate until they were informed
18 that *Garcia* had secured a mediation date. *Yanez* Counsel contends
19 that *Garcia* Counsel and Defendant's counsel acted in concert to
20 allow *Garcia* to gain a head start in the discovery process and
21 freeze out *Yanez*. *Yanez* Counsel declares that they asked, but
22 were denied permission to attend and participate in the July 22,
23 2011 mediation, which *Yanez* Counsel characterizes as "back door
24 mediation." All Counsel are reminded that they are officers of
25 the court and are expected to act in the best interests of their
26 clients and putative class members.
27
28

1 Plaintiff Garcia contends that consolidation would prejudice
2 *Garcia* because the *Yanez* Complaint asserts that "the Class
3 Members' claims as a whole do not exceed the jurisdictional limit
4 of \$5,000,000." *Yanez* Doc. 1, Ex. A, ¶ 11. Plaintiff Garcia
5 asserts that the potential class-wide recovery is far in excess
6 of \$5,000,000, as Defendant points out that the potential
7 exposure on two of *Yanez* Plaintiffs' claims exceeds \$7,000,000.
8 *Yanez* Doc. 1, ¶¶ 9-11. *Yanez* Plaintiffs rejoin that Plaintiff
9 Garcia's claim of prejudice is disingenuous, as *Garcia* Counsel
10 proposed consolidating *Garcia* and *Yanez* on June 6, 2011. *Yanez*,
11 Doc. 43-2.

12
13 The *Garcia* and *Yanez* lawsuits share common issues of law and
14 fact; the *Yanez* putative class and claims are included within the
15 *Garcia* California putative class. Balancing the considerations of
16 judicial economy and convenience against the potential risks of
17 delay and prejudice, the two cases should be consolidated.

18
19 Yanez Plaintiffs' motion for consolidation is GRANTED.

20
21 V. MOTION TO APPOINT INTERIM CLASS COUNSEL

22 *Garcia* Counsel requests appointment as interim class counsel
23 for the putative California and federal classes. *Yanez* Counsel
24 moves for appointment as interim class counsel for the California
25 class and appointment of *Garcia* Counsel as interim class counsel
26 for the putative federal class.

1 A. Legal Standard

2 Federal Rule of Civil Procedure 23(g) (3) provides that
3 "[t]he court may designate interim counsel to act on behalf of a
4 putative class before determining whether to certify the action
5 as a class action." Fed. R. Civ. P. 23(g) (3).

6 B. Discussion

7 As ordered at the July 11, 2011 hearing, *Yanez* Counsel shall
8 participate in the July 22, 2011 mediation. *Yanez* Counsel agreed
9 that they will pay twenty-five percent (25%) of the mediation
10 fees for the July 22, 2011 mediation, and that *Garcia* Counsel
11 will serve as lead counsel at the July 22, 2011 mediation.

12 No interim lead counsel will be appointed. Designation of
13 lead counsel will be deferred until ruling on the motion for
14 class certification. *Garcia* and *Yanez* counsel are reminded that:
15

16 Whether or not formally designated interim counsel, an
17 attorney who acts on behalf of the class before
18 certification must act in the best interests of the class as
19 a whole. For example, an attorney who negotiates a pre-
20 certification settlement must seek a settlement that is
21 fair, reasonable, and adequate for the class.

22 Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment.

23 Plaintiff *Garcia*'s motion for appointment of S. Brett Sutton
24 as interim class counsel is DENIED. *Yanez* Plaintiffs' motion for
25 appointment of James R. Patterson and Allison H. Goddard as
26 interim class counsel is DENIED.

VI. CONCLUSION

For the reasons stated:

1. Yanez Plaintiffs' motion to intervene in the *Garcia* lawsuit to oppose the motion for stay is GRANTED.
2. Plaintiff Garcia's motion for stay is DENIED and motion for appointment as interim counsel is DENIED.
3. Yanez Plaintiffs' motion for consolidation is GRANTED and motion for appointment of interim counsel is DENIED.
4. With respect to the July 22, 2011 mediation: (1) *Yanez* Counsel shall participate in the mediation; (2) *Garcia* Counsel shall serve as lead counsel at the mediation; and (3) *Yanez* Counsel shall pay twenty-five percent (25%) of the mediation fees.
5. Plaintiff Garcia shall submit a proposed form of order consistent with this memorandum decision within five (5) days following electronic service of this memorandum decision.

SO ORDERED.

DATED: July 14, 2011

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge