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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHAON ROBINSON, DANIEL  
CHILDS, DANTE WARD, and  
RAYE JACKSON, on behalf  
of themselves and all  
others similarly situated,  
and the general public,

NO. CIV. S-11-856 LKK/KJN

Plaintiffs,

v.

NESTLE WATERS NORTH AMERICA,  
INC. dba ARROWHEAD WATERS,  
a Delaware Corporation, and  
DOES 1 through 10, inclusive,

O R D E R

Defendants.

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The instant case presents the question of whether this court should decline to exercise jurisdiction over a case while a substantially similar case is pending in the state court. For the reasons stated below, the court finds that exceptional circumstances justify dismissal of this action.

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1 **I. BACKGROUND<sup>1</sup>**

2 **A. State Court Proceedings**

3 On December 27, 2010, named plaintiff Shaon Robinson  
4 ("Robinson") filed a complaint against defendant Nestle Waters  
5 North America, Inc. ("Nestle") in the Alameda County Superior  
6 Court, on behalf of "all non-exempt hourly employees who worked as  
7 Route Sales Representatives in California from October 8, 2005 to  
8 the date of filing." State Complaint, 2, Doc. No. 11-1. The state  
9 complaint alleges failure to pay for scheduled work days in  
10 violation of the Industrial Welfare Commission Wage Orders, failure  
11 to properly compensate employees for all hours worked, failure to  
12 furnish wage and hour statements, failure to maintain employee time  
13 records, and failure to pay wages and other compensation due within  
14 time limits upon employee discharge, in violation of the California  
15 Labor Code; and unfair business practices in violation of the  
16 California Business and Professions Code. Id.

17 On January 31, 2011, defendant moved to change venue to Orange  
18 County, where defendant's California records are located. See  
19 Schumacher Decl., Doc. No 11-5. During the hearing on the motion to  
20 transfer, Robinson's counsel stated that Orange County was not a  
21 "jurisdiction [plaintiff] want[s] to be in," and requested that the  
22 judge remove the action to the Northern District. Transcript March

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24 <sup>1</sup> The court grants defendant's requests for judicial notice,  
25 filed April 8, 2011, and May 2, 2011, as the exhibits are publicly  
26 recorded documents for which judicial notice is proper, and the  
federal plaintiffs have raised no objections to their use. Fed. R.  
Evid. § 201.

1 11 Hearing, 1:24-28, 2:9-19, Doc. No. 11-2. The court denied  
2 Robinson's request. The court held that Alameda was an improper  
3 venue because it was not the site of any of the causes of action,  
4 and transferred the action to Orange County. Alameda Order, Doc.  
5 No. 11-3.

6 **B. Federal Proceedings**

7 On March 29, 2011, named plaintiffs Robinson, Daniel Childs,  
8 Dante Ward and Raye Jackson (together "federal plaintiffs") filed  
9 a complaint in this court, seeking to represent "all non-exempt  
10 hourly employees of Nestle, who worked as Route Sales  
11 Representatives ("RSRs") in California, March 24, 2007 to the date  
12 of filing this complaint," and "all current and former employees of  
13 Nestle who were employed as RSRs at any time within the three years  
14 prior to the filing of the initial complaint." Federal Complaint,  
15 1, Doc. No. 1. The federal complaint alleged largely the same  
16 causes of action as the previously filed state complaint. It  
17 differs from the state complaint in three respects. The federal  
18 complaint includes an additional overtime claim under the FSLA on  
19 behalf of a "nationwide class." The federal complaint includes  
20 three additional named plaintiffs, Daniel Childs, Dante Ward, and  
21 Raye Jackson, who were unnamed members of the putative class in the  
22 state action. Finally, the claim filed in state court sought to  
23 represent RSRs employed during an earlier period, "October 8, 2005  
24 to the date of filing [the state] complaint," as opposed to March  
25 24, 2007. State Complaint, 2, Doc. No. 11-1. On April 8, 2011,  
26 defendant filed the instant motion to dismiss or stay, asserting as

1 a ground comity with the state court system and that the federal  
2 plaintiffs previously filed a substantially similar case in state  
3 court. Motion, Doc. No. 9.

4 **C. Subsequent State Court Proceedings**

5 On April 13, 2011, Robinson moved for dismissal of class  
6 claims from the Orange County action to allow all the claims to be  
7 litigated in the Eastern District. Application to Dismiss, Ex. B to  
8 Opp'n, Doc. No. 12-1. Robinson contended that prejudice to the  
9 California class members would not result from the dismissal. Id.  
10 On the same day, the Orange County Superior Court granted  
11 Robinson's motion to dismiss without prejudice. Order, Ex. C to  
12 Opp'n, Doc. No. 12-1. Defendant has moved for reconsideration of  
13 that order on the grounds that, *inter alia*, defendant was not  
14 served with the motion and, thus, was not provided with an  
15 opportunity to oppose it and that prejudice would result to the  
16 potential California class members. Motion for Reconsideration,  
17 Ex. 2 to RFJN, Doc. No. 16.

18 **II. STANDARD FOR COLORADO RIVER ABSTENTION**

19 "The doctrine of abstention, under which a District Court may  
20 decline to exercise or postpone the exercise of its jurisdiction,  
21 is an extraordinary and narrow exception" to the court's duty to  
22 adjudicate claims properly before it. Colo. River Water  
23 Conservation v. U.S. 424 U.S. 800, 813 (1976). Abdication of this  
24 duty is justified only in "exceptional circumstances." Id.  
25 Generally, the pendency of an action in state court regarding  
26 similar matters will not bar a proceeding in federal court with

1 proper jurisdiction. Id. at 817. However, a court may justify a  
2 stay or dismissal in the interest of "wise judicial administration,  
3 giving regard to conservation of judicial resources and  
4 comprehensive disposition of litigation." Id. at 818.

5 In Colorado River, the Supreme Court identified non-exclusive  
6 factors that a district court may consider when entertaining a  
7 motion to dismiss or stay an action due to a parallel state action.  
8 Colo. River, 424 U.S. at 818-19. The consideration of factors is a  
9 balancing test. No one factor is determinative, and the balance  
10 must always tip heavily in favor of exercising jurisdiction. Id.;  
11 American Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.,  
12 843 F.2d 1243, 1259-60 (9th Cir. 1988). The court must make a  
13 "carefully considered judgment taking into account both the  
14 obligation to exercise jurisdiction and the combination of factors  
15 counseling against that exercise." Colorado River, 424 U.S. at 818-  
16 19. When a court declines to exercise jurisdiction under the  
17 Colorado River doctrine, it concludes that the concurrent state  
18 court litigation is an adequate vehicle for resolution of the  
19 claims. "If there is any substantial doubt as to this, it would be  
20 a serious abuse of discretion to grant the stay or dismissal at  
21 all." Fed. Deposit Ins. Corp. v. Nichols, 885 F.2d 633, 638 (9th  
22 Cir. 1989).

23 A federal court determining whether a stay or dismissal is  
24 appropriate in the event of concurrent jurisdiction may consider  
25 (1) the inconvenience of the federal forum, (2) the desirability of  
26 avoiding piecemeal litigation, and (3) the order in which

1 jurisdiction was obtained by the concurrent forums.<sup>2</sup> Colorado  
2 River, 424 U.S. at 818-19. The court may also consider (4) whether  
3 federal law provides the rule of decision on the merits, and (5)  
4 whether the state court is adequate to protect the litigants'  
5 rights. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460  
6 U.S. 1, 23 (1983). Also, the Ninth Circuit has held that (6) forum  
7 shopping is "another important factor to consider." Travelers  
8 Indemnity Co. v. Madonna, 914 F.2d 1364, 1368 (9th Cir. 1990).  
9 However, the Circuit has cautioned that courts should not decline  
10 to exercise jurisdiction on the basis of the forum shopping factor  
11 alone. Fed. Deposit Ins. Corp., 885 F.2d at 637.

12         The Ninth Circuit also applies a related doctrine applying the  
13 rationale prohibiting plaintiffs from removing cases to federal  
14 court under 28 U.S.C. § 1441 to prohibit such plaintiffs from  
15 filing repetitive lawsuits in federal court to get around the bar.  
16 Am. Int'l Underwriters, 843 F.2d at 1260. The Circuit determined  
17 that, "the removal statute seem[s] to reflect a Congressional  
18 intent that a plaintiff should not be permitted to alter the forum  
19 that [he] selects to litigate [his] claim against a particular  
20 defendant." Id. The court, thus, concluded that a plaintiff "should  
21 not be permitted to accomplish, by the *refiling* of [his] state  
22 court complaint, what would clearly be prohibited if [plaintiff]  
23 tried to remove [from] state court." Id.

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25         <sup>2</sup> In actions relating to property, "the court first assuming  
26 jurisdiction over property may exercise that jurisdiction to the  
exclusion of other courts." Colorado River, 424 U.S. at 818. This  
factor is not relevant to this action.

1 **III. ANALYSIS**

2 The court now balances the Colorado River factors and related  
3 doctrines applicable in this Circuit. For the reasons discussed  
4 below, defendant's motion to dismiss is granted.

5 **A. Inconvenience of the Federal Forum**

6 When evaluating this factor, the question is not whether a  
7 party can demonstrate that the federal forum is the more convenient  
8 forum, but rather whether "the inconvenience of the federal forum  
9 is so great that this factor points toward abstention." Travelers  
10 Indemnity Co., 914 F.2d at 1368. Defendant claims that the Eastern  
11 District is not a convenient forum due to the location of its  
12 business records and relevant witnesses in Orange County where the  
13 state action currently is pending. Motion, 15, Doc. No. 9. The  
14 federal plaintiffs point out that all the named plaintiffs and  
15 defendant's counsel are located in the Eastern District. Opp'n,  
16 3,4, Doc. No. 12. Defendant has not shown that the federal forum is  
17 so inconvenient as to justify the exceptional remedy of abstention.  
18 Thus, this factor does not weigh in favor of abstention.

19 **B. Avoiding Piecemeal Litigation**

20 "Piecemeal litigation occurs when different tribunals consider  
21 the same issue, thereby duplicating efforts and possibly reaching  
22 different results." Am. Int'l Underwriters, 843 F.2d at 1258. In  
23 American International Underwriters, the court determined that by  
24 exercising concurrent jurisdiction, the federal court created a  
25 high risk of piecemeal litigation. In that case, the state court  
26 proceedings had been ongoing for over two years, and had already

1 decided several of the issues that would now come before the  
2 federal court. American Int'l Underwriters, 843 F.2d at 1258. The  
3 court determined that exercising jurisdiction over the case and  
4 deciding those same issues anew would create a high possibility of  
5 inconsistency. Id.

6       While the state proceedings here are not as advanced as they  
7 were in American International Underwriters, the court nonetheless  
8 finds that this factor weighs in favor of abstention. Specifically,  
9 the action pending in Orange County is substantially similar to the  
10 case before this court. The claims are nearly identical and in the  
11 one instance where they are not they are premised on identical  
12 alleged conduct of defendant. Prior to the dismissal of the class  
13 claims on April 13, 2011, several days after defendant's motion was  
14 filed in this court, a majority of the parties were also identical.  
15 Defendant has moved for reconsideration of the state court's  
16 dismissal of the class claims. Ex. 2 to RFJN, Doc. No. 16. Counsel  
17 for defendant represented that the motion is set to be heard in the  
18 next month. Even if the state court denies defendant's motion,  
19 however, it appears that Robinson may nonetheless amend his  
20 complaint to add class allegations and add the other federal  
21 plaintiffs as named plaintiffs because the dismissal was without  
22 prejudice.

23       The Northern District of California considered a similar  
24 question in Ross v. U.S. Bank Nat'l Ass'n, 542 F. Supp. 2d 1014  
25 (N.D. Cal. 2008). In that case, the plaintiff failed to explain why  
26 it did not bring the federal causes of action into the state court



1 action. Id. at 1022. It found that “[p]laintiffs’ failure to bring  
2 all available claims for the [state] class creates the kind of  
3 piecemeal litigation that the Colorado River doctrine intends to  
4 prevent. Therefore, this factor weighs in favor of staying the  
5 current action with respect to the [state] class.” Id. Likewise,  
6 the court finds that this factor weighs strongly in favor of  
7 dismissal in the present case.

8 **C. Order in Which Jurisdiction was Obtained**

9 When determining whether to exercise concurrent jurisdiction,  
10 the court may consider the order in which jurisdiction was obtained  
11 by the two forums. Colorado River, 424 U.S. at 818. This factor  
12 must be applied in a “pragmatic, flexible manner, so that priority  
13 is not measured exclusively in terms of which complaint was filed  
14 first, but rather in terms of how much progress was actually made  
15 in the state and federal actions.” American Int’l Underwriters, 843  
16 F.2d at 1258. As discussed above, little progress has been made in  
17 either forum in this case. The state court action has only begun  
18 discovery. Motion, 12, Doc. No. 9. Therefore this factor does not  
19 suggest that the district court should decline jurisdiction.

20 **D. Whether Federal Law Provides the Rule of Decision**

21 The court’s task in assessing this factor is not to justify  
22 the district court’s exercise of jurisdiction, but rather to  
23 determine whether there are exceptional circumstances that justify  
24 the surrender of that jurisdiction. Cone, 460 U.S. at 25. “The  
25 presence of federal-law issues must always be a major factor  
26 weighing against surrender.” Id. at 26. In Colorado River, the

1 court concluded that despite the presence of federal issues,  
2 exceptional circumstances justified the surrender of federal  
3 jurisdiction. Important state law concerns were more prevalent, and  
4 this coincided with a federal policy of uniform adjudication of  
5 water rights within the state. Colorado River, 424 U.S. at 819-20.

6 In the present case, a single federal overtime claim under the  
7 FSLA is countered by eight claims under California law.  
8 Specifically, to the extent that the FLSA claim applies to  
9 employees under the jurisdiction of California law, the federal  
10 plaintiffs' second state law cause of action may duplicate or  
11 supplant the federal claim for overtime. Federal Complaint 1, Doc.  
12 No. 1. Further, the California Labor Code claims may present  
13 complex and unique questions of state law. Among these, are

- 14 (1) guaranteed minimum pay requirements when employees  
15 appear at the workplace but immediately and  
voluntarily leave without performing work,
- 16 (2) the employer's obligation to provide a timely final  
17 paycheck when employees terminate under various  
circumstances, and
- 18 (3) the proper content of state-mandated wage statements and  
19 whether failure to include that content results in  
recoverable damages.

20 While the existence of these state law questions alone would  
21 not counsel against the exercise of the district court's  
22 jurisdiction, it is clear that state law issues dominate this  
23 claim, and that the state court is better situated to resolve these  
24 questions. This conclusion is further supported by the fact that  
25 the federal plaintiffs only recently came to believe in the  
26 "likely" existence of the FSLA claims. Hoffman Decl., Ex. B to

1 Opp'n, 1, Doc. No. 12-1. The federal plaintiffs' late discovery of  
2 the federal causes of action raises questions about their sincerity  
3 in pursuing these claims.

4 **E. Whether State Court is Inadequate to Protect Litigants'**  
5 **Rights**

6 The court may also consider whether the state court is  
7 inadequate to protect the federal litigant's rights. Travelers  
8 Indemnity Co., 914 F.2d at 1370. Like the choice of law factor  
9 discussed above, this factor is more important when it weighs in  
10 favor of federal jurisdiction, not against it. Id. at 1370.

11 The state court has authority to hear all the claims alleged  
12 in the federal complaint, including the outstanding FSLA claims and  
13 the class claims recently dismissed from the Orange County action.  
14 Although the Superior Court granted Robinson's motion to dismiss  
15 the class claims, that dismissal was granted without prejudice.  
16 Order, Ex. C to Opp'n, Doc. No. 12-1. Robinson may seek to amend  
17 its state complaint to include the dismissed state law claims as  
18 well as the FSLA claims pled in the federal complaint. Defendant  
19 has also sought reconsideration of the dismissal on the grounds  
20 that it did not receive the opportunity to oppose dismissal. Motion  
21 for Reconsideration, Ex. 2 to RFJN, Doc. No 16. However, this court  
22 cannot predict whether defendant's motion will be granted or  
23 whether the court will grant plaintiff leave to bring class claims.  
24 Therefore, this factor weighs only slightly, if at all, in favor of  
25 the exercise of federal jurisdiction. However, that factor is  
26 tempered a great deal by the fact that the differences between the

1 state and federal proceedings were created deliberately by Robinson  
2 and the other federal plaintiffs. Specifically, any apparent  
3 inadequacy of the state forum was created intentionally by them  
4 when Robinson sought a dismissal of the class claims just three  
5 days after defendant filed its motion to dismiss or stay in this  
6 court. Application to Dismiss, Ex. B to Opp'n, Doc. No. 12-1.

7 **F. Forum Shopping**

8 Courts should not decline jurisdiction based on the forum  
9 shopping factor alone. Fed. Deposit Ins. Corp., 885 F.2d at 637. In  
10 Federal Deposit, the Ninth Circuit declined to issue a stay because  
11 the previously filed state court action had been dismissed in its  
12 entirety, prior to defendant's motion for dismissal. Id. at 635.  
13 The court concluded that a stay under the Colorado River doctrine  
14 was not proper because the threshold requirement of the  
15 "contemporaneous exercise of concurrent jurisdictions" was not  
16 present. Id. at 638 (emphasis omitted). Although the federal  
17 plaintiffs had arguably created a forum shopping problem, the  
18 circumstances presented "substantial doubt" as to the adequacy of  
19 the state court litigation for resolution of the issues between the  
20 parties. The Ninth Circuit thus held that the court's decision to  
21 decline jurisdiction was an abuse of discretion. Id. at 638.

22 In the present case, the "contemporaneous exercise of  
23 concurrent jurisdictions" exists in addition to a forum shopping  
24 problem. The state court action is ongoing although the class  
25 related claims have been dismissed without prejudice. That  
26 dismissal is currently under review by the state court. Motion for

1 Reconsideration, Ex. 2 to RFJN, Doc. No 16. Defendant has also  
2 claimed in its motion to reconsider that Robinson's asserted  
3 reasons for seeking the dismissal are pretextual and that prejudice  
4 to potential class members will result from the dismissal. Id.

5 Here, the federal plaintiffs' obvious forum shopping is so  
6 extreme that this factor emerges as the most prevalent  
7 consideration under the Colorado River doctrine. Specifically,  
8 Robinson first filed its action in Alameda County. On motion by  
9 defendant, the case was transferred to Orange County because the  
10 court found insufficient contacts with Alameda County. At that  
11 point, Robinson asked the Orange County court to remove the action  
12 to the Northern District. The court refused, at which time Robinson  
13 and the other federal plaintiffs filed a nearly identical complaint  
14 in the Eastern District with an additional claim under the FSLA  
15 premised by the same conduct underlying some of the state claims.  
16 After defendant submitted its motion to dismiss or stay the federal  
17 action, Robinson sought and received a dismissal of the class  
18 claims from its state complaint. Given the obstacles such blatant  
19 forum shopping creates for "wise judicial administration" this  
20 factor sharply tips the balance in favor of a stay.

21 **G. Policy Behind Removal Statute**

22 Where there is any doubt regarding the district court's right  
23 to decline jurisdiction under the Colorado River doctrine, the  
24 Ninth Circuit's interpretation of the removal statute reaffirms  
25 that right in these circumstances. In American International  
26 Underwriters, 843 F.2d at 1261, the Ninth Circuit held that a

1 district court is justified in dismissing a complaint when the  
2 plaintiff attempts to circumvent the limitations of removal in 28  
3 U.S.C. § 1441. "Noting that a plaintiff in a diversity suit can  
4 choose between a state and federal forum when it initiates the  
5 suit, the court concluded, [h]aving elected state court, plaintiff  
6 should be bound by its choice absent compelling reasons to seek  
7 relief in another forum. . . . [Plaintiff] should not be permitted  
8 to accomplish, by the refileing of its state court complaint, what  
9 would clearly be prohibited if [plaintiff] tried to remove to state  
10 court." American Int'l Underwriters, 843 F.2d at 1261 (internal  
11 quotation omitted).


12 Here, as in American International Underwriters, Robinson  
13 selected a state forum at the time of initial filing. The case  
14 presents no compelling reasons to permit the federal plaintiffs to  
15 seek relief in another forum. Therefore, a stay of the federal  
16 action is justified under American Int'l Underwriters and the  
17 prohibitions against removal by a plaintiff.

18 **IV. CONCLUSION**

19 For the foregoing reasons, defendant's motion to dismiss the  
20 federal action (Doc. No. 9) is GRANTED.<sup>3</sup> The clerk of court is  
21 instructed to close this case.

22 IT IS SO ORDERED.

23 DATED: May 31, 2011.

24   
LAWRENCE K. KARLTON  
25 SENIOR JUDGE  
UNITED STATES DISTRICT COURT

26 <sup>3</sup> The court does not find a stay warranted in this case.