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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE NEST LABS LITIGATION

Case No. [14-cv-01363-BLF](#)

**ORDER DENYING, WITHOUT  
PREJUDICE, MOTION TO APPOINT  
INTERIM CLASS COUNSEL**

[Re: ECF 29]

This is a putative consumer class action involving defendant Nest Labs, Inc.’s allegedly misleading advertisement of its “Nest” thermostat product. Before the Court is the motion by plaintiffs Justin Darisse and Joshua Beloff (collectively, “Plaintiffs”) to appoint law firms Bursor & Fisher, P.A. and Cafferty Clobes Meriwether & Sprengel LLP (“Cafferty Clobes”) as “co-lead interim class counsel.” (Pl.’s Mot., ECF 29) Defendant opposes this appointment as premature. (Def.’s Opp., ECF 30) Having reviewed the parties’ respective written submissions, the Court finds this matter appropriate for submission without oral argument and hereby VACATES the hearing scheduled for September 4, 2014. For the following reasons, Plaintiffs’ Motion to Appoint Interim Class Counsel is DENIED, without prejudice.

Under Federal Rule of Civil Procedure 23(g)(3), the district court may appoint interim counsel to act on behalf of a putative class before determining whether to certify a class. The appointment of interim class counsel is discretionary and is particularly suited to complex actions, as explained in the Manual for Complex Litigation (Fourth):

If the lawyer who filed the suit is likely to be the only lawyer seeking appointment as class counsel, appointing interim class counsel may be unnecessary. If, however, there are a number of overlapping, duplicative, or competing suits pending in other courts, and some or all of those suits may be consolidated, a number of

1 lawyers may compete for class counsel appointment. In such cases,  
2 designation of interim counsel clarifies responsibility for protecting  
the interests of the class during precertification activities . . . .

3 Manual for Complex Litigation (Fourth) § 21.11 (2004). Further, the commentary to Rule 23  
4 notes that “[i]n some cases . . . there may be rivalry or uncertainty that makes formal designation  
5 of interim counsel appropriate.” Fed. R. Civ. P. 23 advisory committee’s note (discussing former  
6 subdivision (g)(2)(A), now renumbered to (g)(3)).

7 This is not the type of case that warrants appointment of interim class counsel. This action  
8 originated as two separate cases with similar complaints. (See *Darisse v. Nest Labs*, No. 5:14-cv-  
9 01363-BLF (Compl., ECF 1); *Beloff v. Nest Labs*, No. 5:14-cv-01697-BLF (Compl., ECF 1)). On  
10 plaintiff Beloff’s motion, this Court related the two cases then granted Plaintiffs’ stipulation to  
11 consolidate the two actions into one. (See Related Case Order, ECF 22; Consolidation Order, ECF  
12 24) Thus, at present, there is only one consolidated action with one consolidated complaint. (See  
13 Consolidated Class Action Compl., ECF 28) Though Plaintiffs allude to potential other “tag-  
14 along” lawsuit on the horizon, they have not identified any complaints actually filed, let alone any  
15 actions that are likely to be consolidated with this one. (Pl.’s Reply 3, ECF 32) This action as it  
16 currently stands therefore does not present special circumstances warranting the appointment of  
17 interim class counsel. See *Donaldson v. Pharmacia Pension Plan*, No. CIV. 06-3-GPM, 2006 WL  
18 1308582, at \*1-2 (S.D. Ill. May 10, 2006) (noting that typical situation requiring appointment of  
19 interim class counsel is one “where a large number of putative class actions have been  
20 consolidated or otherwise are pending in a single court”).

21 “[N]or is there a gaggle of law firms jockeying to be appointed class counsel,” *Parrish v.*  
22 *Nat’l Football League Players Inc.*, No. C 07-00943 WHA, 2007 WL 1624601, at \*9 (N.D. Cal.  
23 June 4, 2007), as the only two law firms on the case seek appointment as co-interim class counsel.  
24 There does not appear to be any rivalry between the two firms, nor any uncertainty as to their  
25 respective roles. In fact, Plaintiffs note that the two firms have been coordinating and  
26 collaborating to prosecute the consolidated actions efficiently. (see Pl.’s Mot. 7-8; Persinger Decl.  
27 ¶ 11, ECF 29-1) As such, greater efficiency and clarity can only be realized if the Court appoints  
28 one firm as interim class counsel. Plaintiffs’ motion, however, does not request that the Court


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choose one over another. The Court thus finds that it is not necessary to appoint interim class counsel merely to maintain the status quo.

For the foregoing reasons, Plaintiffs' Motion to Appoint Interim Class Counsel is DENIED, without prejudice.

**IT IS SO ORDERED.**

Dated: August 18, 2014

  
BETH LABSON FREEMAN  
United States District Judge