

2014 WL 7883689

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United States District Court,
D. New Jersey.

Keith YAEGER, et al., Plaintiffs,

v.

SUBARU OF AMERICA, INC., a New
Jersey Corporation, et al., Defendants.Civil Action No. 14-4490 (JBS/
KMW). | Signed Oct. 8, 2014.**Attorneys and Law Firms**

[Benjamin F. Johns](#), [Joseph G. Sauder](#), [Matthew D. Schelkopf](#),
[Chimicles & Tikellis, LLP](#), Haverford, PA, [Matthew Ross Mendelsohn](#),
[Mazie Slater Katz & Freeman LLC](#), Roseland, NJ, for Plaintiffs.

[Neal D. Walters](#), [Michael Robert Carroll](#), [Michele Clare Ventura](#),
[Ballard, Spahr LLP](#), Cherry Hill, NJ, for Defendants.

ORDER

[JEROME B. SIMANDLE](#), Chief Judge.

*1 This matter comes before the Court by way of counsel for Plaintiffs' application for their appointment as interim co-lead class counsel pursuant to [Federal Rule of Civil Procedure 23\(g\)\(3\)](#). [Docket Item 12.] Plaintiffs filed their initial Class Action Complaint in this litigation on July 16, 2014 [Docket Item 1], followed by an Amended Class Action Complaint on September 17, 2014. [Docket Item 9.] In their Amended Complaint, Plaintiffs generally allege that Defendants' vehicles have allegedly defective engines "that burn a substantial portion of their engine oil, leading to increased emissions, decreased fuel efficiency, and potentially significant damage to the engine, catalytic converter, and other components[.]" despite Defendants' identification of these vehicles as " 'partial zero emission[.]' " (Pls.' First Am. Compl. at ¶¶ 1-2.) Defendants have not at this time filed a response to Plaintiffs' Amended Complaint, nor has the Court certified this action as a class action. Despite the posture of this litigation, counsel for Plaintiffs filed the pending motion for appointment of interim class counsel on September 26, 2014, nine (9) days after the filing of Plaintiffs' Amended Complaint. [Docket Item 3.]

In the motion, counsel for Plaintiffs generally argues that their designation as interim co-lead class counsel will foster an efficient adjudication of this action and best comports with the interests of the proposed classes, because it provides putative class members with a "well-qualified" and "knowledgeable" body of counsel to contact concerning the suit. (Pls.' Br. at 2.) Moreover, because "attorneys from several law firms represent members of the proposed class," counsel asserts that such appointment will clarify "the attorneys' roles and responsibilities, formally empower[] them to act in the best interests of the proposed class," and will assure defense counsel that current counsel constitute "the correct representatives of the proposed class."(*Id.* at 4 (citation omitted).)

Defendant Subaru of America, Inc. (hereinafter, "Subaru") does not oppose the motion on substantive grounds, but instead asserts that "the motion appears to be premature" to the extent this action "is the only [] case pending against Subaru in the United States" and because present "plaintiffs' counsel are the only counsel with whom Subaru will need to coordinate[.]" [Docket Item 18.]

[Federal Rule of Civil Procedure 23\(g\)\(3\)](#) provides that the Court "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." "Although neither the federal rules nor the Advisory Committee Notes expressly so state, it appears to be generally accepted that the considerations set out in [Rule 23\(g\)\(1\)\(C\)](#), which govern the appointment of class counsel once a class is certified, apply equally to the designation of interim class counsel before certification." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y.2006); *Waudby v. Verizon Wireless Servs., Inc.*, 248 F.R.D. 173, 175-76 (D.N.J.2008) (finding that courts choosing interim class counsel can apply the same factors that apply in choosing class counsel at the time of certification of the class, i.e., the standards set forth in [Rule 23\(g\)\(1\)](#)).

*2 Accordingly, in evaluating a request for the appointment of interim class counsel, courts consider: "(i) [t]he work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class." *Durso v. Samsung Elecs. Am., Inc.*, Nos. 12-5352, 12-5412, 12-5440, 2013 WL 4084640, at *3

(D.N.J. Aug.7, 2013) (citations omitted); *see also* FED. R. CIV. P. 23(g)(1)(A)(i)-(iv).

The Manual for Complex Litigation provides further guidance concerning the propriety of interim class counsel appointment prior to class certification. The Manual specifically states:

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 lawyers may compete for class counsel appointment. In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement. In cases involving overlapping, duplicative, or competing suits in other federal courts or in state courts, the lawyers may stipulate to the appointment of a lead interim counsel and a steering committee to act for the proposed class. Such a stipulation leaves the court with the tasks of determining that the chosen counsel is adequate to serve as interim class counsel and making a formal order of appointment. Absent a stipulation, the court may need to select interim class counsel from lawyers competing for the role and formally designate the lawyer selected.

MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.11, at 246 (Federal Judicial Center 2004) (emphasis added).

In seeking appointment, Plaintiffs' counsel do not identify particular issues and/or concerns relevant to the orderly and efficient adjudication of this litigation on a putatively class basis. Nor do Plaintiffs' counsel point to any competing litigation, or representation issues associated with the present

counsel in this action. Rather, Plaintiffs' counsel nebulously argues that interim appointment at this time best serves the interest of the putative class. However, no attorneys other than the movants have entered an appearance on behalf of Plaintiffs, and the "several law firms" acting on Plaintiffs' behalf are presently representing Plaintiffs in concert as local and related *pro hac vice* counsel. (*Id.* at 4 (citation omitted).) Moreover, Plaintiffs' counsel appear likely to seek the appointment as ultimate class counsel, and, as noted by Subaru, therefore act as the only counsel with whom Subaru must deal in connection with this litigation.

*3 The Court therefore finds the appointment of interim class counsel unnecessary at this time.¹ *See Kuzian v. Electrolux Home Prods.*, 937 F.Supp.2d 599, 619–620 (D.N.J.2013) (citing the Manual, and finding appointment of interim class counsel unnecessary prior to class certification, where "no other attorneys [had] made their appearance on behalf of other plaintiffs, and because" the same counsel prosecuted the consolidated cases). In the event the concerns delineated in the Manual for Complex Litigation arise prior to the determination of a motion for class certification, counsel may renew their motion. Consequently, for the reasons set forth herein, and for good cause shown,

IT IS this *8th* day of *October*, 2014, hereby

ORDERED that counsel for Plaintiffs' motion for interim appointment as co-lead class counsel [Docket Item 12] shall be, and hereby is, ***DENIED***, without prejudice to counsel's right to refile such motion at any appropriate time in the litigation.

All Citations

Slip Copy, 2014 WL 7883689

Footnotes

- ¹ In so concluding, the Court questions only the timeliness of the pending motion, not Plaintiffs' counsel's qualifications under Rule 23(g)(1).