

1 Commerce and Labor of the CNMI. The "primary jurisdiction
2 doctrine" does not require or permit this court to refrain from
3 exercising jurisdiction over concurrent federal claims
4 simultaneously with a local administrative agency exercising
5 jurisdiction over local claims, even though the claims arise out
6 of the same facts and have similar remedies. Abstention from
7 the independent federal FLSA claims is not appropriate,
8 notwithstanding the inefficiency and possible waste of judicial
9 resources caused by duplicative litigation. Therefore, the
10 motions to dismiss or stay the entire action are DENIED.
11 However, because the pendent claims are not yet ripe due to
12 plaintiffs' failure to exhaust administrative remedies, those
13 claims are, without prejudice, DISMISSED.

14
15 DEFENDANT'S REPLY MEMORANDUM

16 As a threshold question, plaintiffs objected that
17 defendant's reply memorandum improperly raised for the first
18 time the issue of pendent jurisdiction, or lack thereof, over
19 the CNMI claims. The defendant's original memorandum of points
20 and authorities focused on the doctrine of primary jurisdiction
21 as a basis for dismissing or staying the proceedings. However,
22 a review of that memorandum discloses that staying the pendent
23 claims is argued for on page 2, lines 21-23 (last clause), page
24 4, lines 18-24 (final ¶), and page 5, lines 1-7, albeit without
25 citation to case or statutory authority, or explicit mention of
26 abstention or exhaustion of remedies.

1 In its reply memorandum, defendant argues that this court
2 may not exercise pendent jurisdiction over the CNMI claims until
3 the Department of Commerce and Labor has acted. Reply
4 Memorandum at 4-8. While never using the term "exhaustion of
5 remedies," that is the legal basis for defendant's assertion of
6 lack of jurisdiction over the pendent claims. This is so
7 notwithstanding the fact that defendant stresses that the
8 doctrines of primary jurisdiction and exhaustion of remedies are
9 often confused, and points out the difference between the two.
10 Memorandum at 3. Here, the situation is complicated by the
11 presence of very similar federal and local claims.

12 In its reply memorandum, defendant for the first time
13 cites 3 Commonwealth Code (CMC) §4434(f), which requires
14 exhaustion of administrative remedies before bringing suit in
15 the CNMI Superior Court for Minimum Wage and Hour Act (4 CMC
16 §9211 et seq.) or Non-resident Workers Act (3 CMC §4411 et seq.)
17 violations. The pendent local claims are such violations. At
18 oral argument, defendant also used the word "abstention" for the
19 first time, invoking the Colorado River doctrine. See Colorado
20 River Water Conservation District v. U.S., 424 U.S. 800,
21 96 S.Ct. 1236, 47 L.Ed.2d. 483 (1976).

22 The failure of the defendant to raise jurisdictional
23 objections does not grant this court jurisdiction where none
24 exists. Subject matter jurisdictional objections are never
25 waived and may be raised at any time. Emrich v. Touche Ross &
26 Co., 846 F.2d 1190, 1194 n.2 (9th Cir. 1988); C. Wright &

1 A. Miller, Federal Practice and Procedure §1350 nn.11 & 15
2 (2d ed. 1990). This court may raise defects in jurisdiction sua
3 sponte. Id. In the interests of due process, plaintiffs were
4 granted leave to file a supplemental opposition concerning the
5 propriety of the pendent claims, and a status conference was
6 held a week later on July 26, 1991. Thus, the court will
7 consider all arguments on their merits.

8 9 PRIMARY JURISDICTION DOCTRINE

10 Under the doctrine of primary jurisdiction, "[w]hen there
11 is a basis for judicial action, independent of agency
12 proceedings, courts may route the threshold decision as to
13 certain issues to the agency charged with primary responsibility
14 for governmental supervision or control of the particular
15 industry or activity involved." Port of Boston Marine Terminal
16 Ass'n v. Rederiaktiebolaget Translantic, 400 U.S. 62, 68,
17 91 S.Ct. 203, 208, 27 L.Ed.2d. 203, 208-209 (1970). A district
18 court does not have any element of discretion in applying the
19 primary jurisdiction doctrine. "[A]n issue either is within an
20 agency's primary jurisdiction or it is not, and, if it is, a
21 court may not act until the agency has made the initial
22 determination. Failure to defer when the doctrine so mandates
23 is reversible error [citation], as is deferral in inappropriate
24 situations [citation]." U.S. v. General Dynamics Corp.,
25 828 F.2d 1356, 1364 n.15 (9th Cir. 1987). Four factors are
26 required to invoke the doctrine: (1) the need to resolve an

1 issue that (2) has been placed by Congress within the
2 jurisdiction of an administrative agency having regulatory
3 authority (3) pursuant to a statute that subjects an industry or
4 activity to a comprehensive regulatory scheme that (4) requires
5 expertise or uniformity in administration. General Dynamics,
6 828 F.2d at 1362.

7 If the doctrine applies, the judicial process is suspended
8 and the issues are referred to the appropriate administrative
9 body for its views. U.S. v. Western Pacific Railroad,
10 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d, 126, 132 (1956),
11 quoted in U.S. v. Yellow Freight System, 762 F.2d 737, 739 (9th
12 Cir. 1985) and Farley Transportation Co., Inc. v. Santa Fe Trail
13 Transportation Co., 778 F.2d 1365, 1370 (9th Cir. 1985). Thus,
14 if the defendant's theory is correct, this court would have to
15 wait for up to two years in every FLSA case while awaiting CNMI
16 Department of Commerce and Labor action.

17 Defendant is correct that the doctrine has been applied by
18 federal courts in favor of state administrative agencies.
19 Palmer v. Massachusetts, 308 U.S. 79, 60 S.Ct. 34, 84 L.Ed. 93
20 (1939) (passenger line abandonment in railroad bankruptcy).
21 However, Congress never granted enforcement of the FLSA to the
22 states. 29 U.S.C. § 216(b) does allow employers to bring suit
23 in either state or federal court,¹ at least prior to the filing
24 of a complaint by the U.S. Secretary of Labor, but it sets forth

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26 ¹The relationship between the U.S. and CNMI courts is the
same as that of U.S. and state courts. 48 U.S.C. § 1694c(a).

1 or implies no role for any state agency or the CNMI Department
2 of Commerce and Labor. Therefore, the doctrine of primary
3 jurisdiction is not applicable to this case.
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5 PENDENT JURISDICTION

6 This court undoubtedly has the power to hear the CNMI
7 claims under the concept of pendent jurisdiction. United Mine
8 Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130,
9 16 L.Ed.2d. 218 (1966); C. Wright, A. Miller & E. Cooper,
10 Federal Practice and Procedure §3567.1 (2d ed. 1984 & Supp.
11 1991) (hereafter Wright, Federal Practice). However, the
12 exercise of the power to hear pendent claims is discretionary.
13 Id. Defendant urges the court to apply that discretion to
14 decline to hear the CNMI claims.

15 Yet where, as here, the claims "derive from a common
16 nucleus of operative fact" such that a plaintiff "would
17 ordinarily be expected to try them all in one judicial
18 proceeding," Id., judicial economy strongly counsels against
19 declining to exercise pendent jurisdiction. Therefore, this
20 court will not stay or dismiss the pendent claims on the basis
21 of its discretionary authority to do so.
22

23 ABSTENTION

24 The administrative action before the CNMI Department of
25 Commerce and Labor was filed four days prior to this case.
26 Defendant urged at oral argument that this case be stayed or

1 dismissed to avoid duplicative litigation, relying on Colorado
2 River Water Conservation District v. U.S., 424 U.S. 800,
3 96 S.Ct. 1236, 47 L.Ed.2d. 483 (1976). The Colorado River
4 factors counseling abstention were supplemented in Moses H. Cone
5 Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1,
6 103 S.Ct. 927, 74 L.Ed.2d. 765 (1983). Thus, in seeking
7 "exceptional circumstances" justifying abstention, the factors
8 to be considered are: jurisdiction over any res or property,
9 convenience of the forum, avoidance of piecemeal litigation,
10 chronological priority of jurisdiction, presence of federal law
11 issues, and the inadequacy of local remedies. Id.; see
12 generally Wright, Federal Practice §4247 (2d ed. 1988 & Supp.
13 1991).

14 Here, there is no property involved, and both CNMI and
15 federal courts are equally convenient geographically. However,
16 counsel have noted that resolution of the issues before the CNMI
17 Department of Labor and Commerce will likely take up to two
18 years. It is true that the FLSA claims are within the
19 concurrent jurisdiction of the federal and CNMI courts, and
20 piecemeal litigation could be avoided by dismissing or staying
21 the entire case. However, prompt resolution of all possible
22 issues by this court and the principle of res judicata would
23 also serve judicial economy and avoid piecemeal litigation. The
24 four day priority of the CNMI Department of Labor and Commerce
25 is not dispositive; the administrative proceeding is a long way
26 from ever getting to the CNMI Superior Court. The FLSA is, of

1 course, a federal law. Because Congress has granted state
2 courts concurrent jurisdiction over the FLSA, CNMI courts can
3 provide perfectly adequate remedies. Indeed, plaintiffs argue
4 that the Department of Commerce and Labor can provide additional
5 remedies through its control of immigration work permits and
6 ongoing administrative supervision and monitoring.

7 On balance, the "exceptional circumstances" required to
8 cause this court to surrender its jurisdiction are not present.
9 Nor is forum shopping, alone, grounds for Colorado River
10 abstention. Federal Deposit Ins. Corp. v. Nichols,
11 885 F.2d 633, 637-38 (9th Cir. 1989). Since Colorado River
12 abstention does not apply under the procedural facts of this
13 case, which could be similar to all claims of FLSA and local
14 labor violations, it is unnecessary to consider if such
15 abstention is ever warranted in favor of an administrative
16 agency, as opposed to a court. This court will not abstain from
17 the case under the Colorado River doctrine.

18 EXHAUSTION OF REMEDIES

19 3 CMC §4434(f) expressly requires exhaustion of
20 administrative remedies before bringing suit in the CNMI
21 Superior Court for violations of the CNMI Minimum Wage and Hour
22 Act (4 CMC §9211 et seq.) or CNMI Non-resident Workers Act
23 (3 CMC §4411 et seq.), such as the pendent claims in this case.

24 3 CMC §4434(f) provides:

25 / / /
26

1 Notwithstanding 1 CMC §9112, no civil action may be
2 brought by a non-resident worker after the effective date
3 of this Act against an employer for violation of the
4 Minimum Wage and Hour Act (4 CMC §9211 et seq.) and/or the
5 Non-resident Workers Act (3 CMC §4411 et seq.) unless the
6 non-resident worker has first filed a written complaint
7 concerning those violations with the Chief of Labor no
8 later than 30 days after the violation is alleged to have
9 occurred. Said civil action, if any, shall be commenced
10 in any court only after the Director or his designee,
11 after a hearing, has issued a decision on the complaint
12 favorable to the non-resident worker and the employer
13 fails or refuses to pay any assessment made by the
14 Director within ten days after receiving notification of
15 the Director's decision, the entire sum of money that the
16 decision says is owed by the employer to the employee.
17 Such payment shall be made through the Director.

18 Therefore, the local claims are not ripe before the CNMI
19 Superior Court because of failure to exhaust administrative
20 remedies. Likewise, this court may not entertain pendent
21 statutory claims until the terms of the relevant statute are
22 complied with. Indeed, Article III of the U.S. Constitution
23 requires the existence of a "case or controversy" for
24 adjudication before federal courts. If the Director finds in
25 the employees' favor, the defendant employer could well pay the
26 amount due and no lawsuit would be possible or necessary.

 The relevant CNMI statutes provide only one avenue of
relief, via the Department of Commerce and Labor. This is not a
situation in which a statute grants alternative forums, and the
election of the administrative route forecloses premature
judicial relief even in the absence of a statutory exhaustion of
remedies provision. Rivera v. U.S. Postal Service, 830 F.2d
1037, 1039 (9th Cir. 1987); but see Stevens v. Department of the

1 Treasury, ___ U.S. ___, 111 S.Ct. 1562, 114 L.Ed.2d. 1
2 (April 24, 1991) (unresolved split among circuits).

3 Thus, this court must dismiss the unripe claims. Although
4 the existence of duplicate administrative and judicial
5 proceedings going forward simultaneously in federal and local
6 forums could lead to a waste of resources, it is probable that
7 discovery in one forum will be identical to that in the other,
8 minimizing the need for additional work. The outcome of the
9 first proceeding to conclude will likely be res judicata as to
10 the latter. Regardless, this court has no power to consider
11 unripe claims.

12 It should be noted that such dismissal will not harm the
13 plaintiffs' claims insofar as the statute of limitations is
14 concerned. By filing with the CNMI Department of Commerce and
15 Labor, the plaintiffs have tolled the statute for filing in the
16 CNMI Superior Court. Because plaintiffs may also wish to bring
17 the pendent claims back before this court, assuming they ever
18 ripen and are not disposed of by the outcome of the FLSA claims,
19 the dismissal of the pendent claims is without prejudice.

20 21 CONCLUSION

22 This court may not dismiss the entire case or any part of
23 it on the grounds of the primary jurisdiction doctrine or
24 Colorado River abstention. Discretionary dismissal of the
25 pendent claims is not called for because of the policy favoring
26 resolution of all claims in a single forum if at all possible,

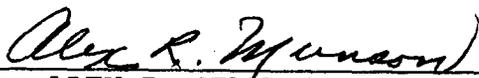
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thus promoting judicial economy. However, this court may not consider cases which are not ripe because of failure to exhaust administrative remedies.

Accordingly, the motions of defendant to dismiss or stay the entire action are DENIED. As stipulated at oral argument, this case will not be certified as a class action. Because the pendent claims are not yet ripe due to plaintiffs' failure to exhaust CNMI administrative remedies, those claims are, without prejudice, DISMISSED.

IT IS SO ORDERED.

DATED this 30th day of July, 1991.



ALEX R. MUNSON
Judge