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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:15-cv-03125-RS **DEFENDANT ALLIED PILOTS ASSOCIATION'S OPPOSITION TO PLAINTIFFS' MOTION TO CONTINUE TRIAL DATE, DISCOVERY CUT-OFF AND EXPERT DEADLINES AND FOR AN ORDER REQUIRING MR. KATZENBACH TO TURNOVER [SIC] LITIGATION FILE** Date: N/A Time: N/A Courtroom: N/A Judge: Hon. Richard Seeborg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

Federal Rules

Treatises

Defendant Allied Pilots Association ("APA") hereby opposes in part Plaintiffs' Motion to Continue Trial Date, Discovery Cut-Off and Expert Deadlines and for an Order Requiring Mr. Katzenbach to Turnover [sic] Litigation File ("Motion"), Docket No. 155. APA does not oppose an order requiring Plaintiffs' original counsel, Christopher Katzenbach, to turn over a copy of his litigation files to the new counsel. Moreover, to accommodate Plaintiffs' new counsel's preparation for trial, APA has already provided them with all discovery materials exchanged by the parties and has offered a two-month continuance of the trial date. *See* Motion at 1:20-21, 23-25; Declaration of Daniel M. Rosenthal, submitted herewith, ¶ 2.

However, APA strongly opposes the other relief that Plaintiffs seek: reopening the fact and expert discovery cutoffs and the expert designation deadlines, in effect giving Plaintiffs a "do-over" of fact and expert discovery and expert designation. As we show below, such relief is unwarranted under the legal standards applicable to Plaintiffs' Motion, and Plaintiffs have not even attempted to make the showing that is their burden in requesting such relief. For that reason, Plaintiffs' Motion should be denied, except as to APA's proposed continuance in the trial date and the requested order to Mr. Katzenbach.[1]

It is clear both from Plaintiffs' Motion and their preceding motion to stay the trial date, Docket No. 152, that Plaintiffs and their new counsel wish to bring a new approach to this case different from Mr. Katzenbach's. Substituting new counsel with a new approach is certainly Plaintiffs' prerogative, assuming their new counsel are appointed by this Court to represent the class, but it does not justify reopening fact discovery, reopening the expert designation and discovery deadlines, or substantially delaying the trial date. Those dates have long been in effect and Defendant APA has relied upon them in preparing its case. New counsel's ideas about how to litigate this case do not justify a "do-over"; rather, they must take this case as they find it. This was made clear in *Porter v. Cal. Dep't of Corrections*, 2006

[1] Plaintiffs additionally seek "a new Case Management Conference regarding mediation after Plaintiffs have had time to obtain the necessary case documents required to participate in a meaningful mediation." Motion at ii:15-17. APA does not believe that a new Case Management Conference is necessary. Rather, the parties can schedule a mediation with the previously-appointed mediator after the Court resolves the Motion, taking into account the additional time that will be necessitated by whatever relief, if any, that the Court grants.

WL 467980, at *1 (E.D. Cal. Jan. 6, 2006): "[T]he crux of plaintiff's motion is her new counsel's desire to have a 'second bite at the apple'. . . . Neither the retention of new counsel nor a Ninth Circuit remand decision constitutes good cause to re-open discovery under Rule 16." *Accord Zone Sports Center, LLC v. Rodriguez*, 2016 WL 224093, at *5 (E.D. Cal. Jan. 19, 2016) ("An eleventh-hour case evaluation by newly retained counsel finding there is need for expert testimony regarding damages does not demonstrate diligence during the course of the litigation. There is simply no evidence [the moving party] was diligent but, because of circumstances outside its control, was unable to meet the November 2012 expert disclosure deadline."); *Cardenas v. Whittemore*, 2015 WL 4410643, at *2 (S.D. Cal. July 16, 2015) ("Mere substitution of counsel is insufficient cause to amend a scheduling order.").[2]

1. Once again, Plaintiffs fail to set forth and apply the governing legal standard, which requires application of a six-factor test, with "diligence" as the most important factor.

In Plaintiffs' previous motion to stay this case, Docket No. 152, they requested this Court to apply the legal standard for issuing a stay of proceedings set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See* Docket No. 152 at 9-10. In response, APA pointed out that *Nken* is inapposite because it sets forth the legal standard for an appellate court to determine whether to stay a lower court's or agency's order or judgment pending resolution of the appeal. *See* Docket No. 153 at 1; *Nken*, 556 at 421, 422, 425-26. APA also demonstrated that Plaintiffs' request was instead governed by the "good cause" standard of Federal Rule of Civil Procedure 16 because

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[2] *See also Steel v. Stoddard*, 2013 WL 12064545, at *12 (S.D. Cal. Feb. 15, 2013) (holding that moving party's counsel's lack of diligence results in denial of motion to modify dates in a Rule 16 Scheduling Order, and "[t]he association of new co-counsel does not alter the outcome."); *Alvarado Orthopedic Research, L.P. v. Linvatec Corp.*, 2012 WL 6193834, at *4 (S.D. Cal. Dec. 12, 2012) ("The appearance of new counsel does not reset the start clock."); *Kenny v. County of Suffolk*, 2008 WL 4936856, at *1 (E.D. N.Y. Nov. 17, 2008) ("Incoming counsel is bound by the actions of his or her predecessor, and to hold otherwise would allow parties to create good cause simply by switching counsel.") (internal quotations and citation omitted); *Marcin Eng'g, LLC v. Founders at Grizzly Ranch, LLC*, 219 F.R.D. 516, 521 (D. Colo. 2003) ("That new counsel is dissatisfied with the state of the case it inherited is not grounds . . . for reopening discovery long after the court-ordered deadlines have passed.").

Plaintiffs' motion to stay sought to alter dates established in a Rule 16 scheduling order (as does their present Motion). *See* Docket No. 153 at 1-3.[3]

In their present motion, Plaintiffs have abandoned their reliance on the *Nken* standard, and admit that their motion is governed by Rule 16's "good cause" standard. Motion at 3 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)). But nowhere do they set forth or discuss the legal test for "good cause." Plaintiffs assume they can satisfy Rule 16 merely by showing that Mr. Katzenbach abandoned them at any point in the litigation. *See* Motion at 3-10. They are wrong.

"A scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson*, 975 F.2d at 610 (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Instead, the moving party "bears the burden of establishing good cause." *POGA MGMT PTNRS LLC v. Medfiler LLC*, 2014 WL 6893778, at *1 (N.D. Cal. Dec. 5, 2014). The Ninth Circuit has established a six-part test for assessing motions to reopen deadlines under Rule 16. That test is set forth in *U.S. ex rel Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), *cert. granted in part*, 519 U.S. 926, *judgment vacated on other grounds*, 520 U.S. 939 (1997):

> (1) Whether trial is imminent; (2) whether the request is opposed; (3) whether the non-moving party would be prejudiced; (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court; (5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the court; and (6) the likelihood that discovery will lead to relevant evidence.

Schumer, 63 F.3d at 1526; Docket No. 153 at 2-3; *accord Fanny Mae v. Laruffa*, 2015 WL 13629323, at *3 (D. Ariz. Sept. 27, 2015) (applying *Schumer* test to motion to reopen discovery).[4]

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[3] Specifically, Plaintiffs seek to reopen deadlines for conducting fact discovery, designating expert witnesses, and conducting expert witness discovery that were set in this Court's scheduling orders issued under Federal Rule of Civil Procedure 16: a non-expert discovery cut-off of December 31, 2017; an expert witness designation cut-off of January 30, 2018; a supplemental and rebuttal expert witness designation cut-off of March 1, 2018; an expert witness discovery cut-off of April 15, 2018; a dispositive motion hearing cut-off of April 5, 2018; a pretrial conference date of April 17, 2019; and a trial date of April 29, 2019. *See* Docket Nos. 85, 145.

[4] In assessing motions to reopen discovery, some courts have held that in addition to satisfying the "good cause" standard of Rule 16, the moving party must also satisfy the "excusable neglect" standard of Rule 6(b)(1)(B), which applies to motions to extend time after a deadline has passed. *See*,

The most important of the *Schumer* factors is a showing of the moving party's diligence in obtaining discovery within the deadline established by the court. *Id.* Indeed, the diligence factor is so important that it alone is conclusive if the moving party fails to show that it acted diligently: "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment. . . . [T]he focus of the inquiry is upon the moving party's reasons for seeking modification. . . . If that party was not diligent, the inquiry should end," *Johnson*, 975 F.2d at 609, "and the motion to modify should not be granted," *Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). It is only if the moving party carries its burden of showing it acted diligently that the court should proceed to analyze the other five *Schumer* factors. And even if the moving party shows diligence, its motion should still be denied if it fails to prevail on the other five *Schumer* factors.

Here, as noted above, Plaintiffs present the issue as turning solely on whether Mr. Katzenbach abandoned them at any point during this case, as though that would itself show "good cause." *See* Motion at 3-10. But "gross negligence/abandonment" is not one of the *Schumer* factors. Rather, it is an argument that litigants have used (mostly unsuccessfully) to attempt to evade responsibility for their counsel's conduct when they cannot show diligence – the primary *Schumer* factor. We discuss below why Plaintiffs' attempt to use that argument fails here because even if that argument could provide a defense to their counsel's lack of diligence, they have not shown that Mr. Katzenbach's conduct was grossly negligent or that he abandoned them at any time actually relevant to their Motion. *See* discussion, *infra*, at 5-12. But, as we also discuss below, even if they had made that showing, and even if their argument could provide a defense to their counsel's lack of diligence, their motion would still

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e.g., *Hammer v. City of Sun Valley*, Case No. 13-cv-211, 2018 BL 297846, at *4-6 (D. Idaho Aug. 20, 2018) (copy attached as Exhibit A to Declaration of Daniel M. Rosenthal, Docket No. 153-1); *Nat'l Corp. Tax Credit Funds III, IV, VII v. Potashnik*, 2009 WL 4049396, at *3-*6 (C.D. Cal. Nov. 19, 2009). The "excusable neglect" standard requires a four-part inquiry: "(1) the danger of prejudice to the opposing party; (2) the length of delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Hammer*, 2018 BL 297846, at *5 n.3 (quotations omitted). Here, for the same reasons discussed below why Plaintiffs cannot satisfy the "good cause" requirement of Rule 16(b), they are equally unable to satisfy the "excusable neglect" requirement of Rule 6. *See Matrix Motor Co., Inc. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 674 (C.D. Cal. 2003) ("Several courts have held that 'good cause' requires more than 'excusable neglect.'").

fail on the basis of the other five *Schumer* factors, as to which they have failed to make any showing, much less carry their burden of proof. *See* discussion, *infra*, at 17-21.

2. Plaintiffs have not shown diligence and cannot escape the diligence requirement by asserting gross negligence.

Plaintiffs make no attempt to show that Mr. Katzenbach acted diligently in timely pursuing the discovery they now seek to take or in providing expert witness disclosures. Indeed, their entire motion is predicated on the admission that he did *not* act diligently, but instead was careless in failing to undertake those tasks in a timely manner. But it is well settled that "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609 (citing numerous Ninth Circuit cases to the same effect).

Plaintiffs try to evade responsibility for Mr. Katzenbach's lack of diligence by arguing that he acted so carelessly that he effectively abandoned them and they should not bear the responsibility for his lack of diligence. Yet, as the Northern District has explained, a litigant's "attempt to blame its former counsel for its lack of diligence is without merit" because the litigant remains responsible for its counsel's conduct. *POGA MGMT PTNRS LLC*, 2014 WL 6893778, at *2. As *POGA* elaborated:

> It has long been the rule that the acts and omissions of an attorney are attributable to the client. *See Link v. Wabash R. Co.*, 370 U.S. 626, 633–634 (1962) (affirming dismissal of action based on plaintiff's counsel's failure to appear at the pretrial conference); *accord Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993) (parties are "held responsible for the acts and omissions of their chosen counsel"); *Casey v. Alberston's, Inc.*, 362 F.3d 1254, 1260 (9th Cir.2004) ("[a]s a general rule, parties are bound by the actions of their lawyers"); *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101–1102 (9th Cir.2006) ("A party will not be released from a poor litigation decision made because of inaccurate information or advice, even if provided by an attorney.").

Id. And as the Supreme Court explained in *Link*, this is as it must be in "our system of representative litigation":

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Smith* v. *Ayer*, 101 U.S. 320, 326 [(1879)].

Link, 370 U.S. at 633-34.

That is not to say that litigants have no remedy for negligent conduct by their counsel, but that remedy is not to be found in a motion to reopen long-passed litigation deadlines. As *POGA* further explained, "While the acts and omissions of [the moving party's] former counsel may give rise to a claim of malpractice, they do not constitute good cause for purposes of a request to modify the Court's pretrial scheduling order." *Id.*; *accord Rashdan v. Geissberger*, 2012 WL 566379, at *2-*3 (N.D. Cal. Feb. 21, 2012) (holding that former counsel's lack of diligence in taking discovery and designating an expert prior to the court-ordered deadlines, even if it constituted malpractice, is chargeable to the plaintiff and precludes her from showing good cause to reopen those deadlines.); *cf. Latshaw*, 452 F.3d at 1101 (noting that an attorney's errors are "more appropriately addressed through malpractice claims," rather than a motion to vacate the judgment).

Plaintiffs ignore the foregoing authorities and argue that they can indeed be relieved of responsibility for Mr. Katzenbach's lack of diligence because it rose to the level of abandonment and gross negligence. *See* Motion at 3-10. But there are at least two separate reasons why this argument must fail, one legal and the other factual.

First, as a legal matter, this Court should not adopt a gross negligence/abandonment exception to the *Schumer* diligence factor. Plaintiffs cite no case in which a court has ever applied such an exception to find good cause to reopen deadlines. Instead, Plaintiffs rely chiefly on *Community Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002). *See* Motion at 8-10. But that case did not consider a motion for relief from expired litigation deadlines under Rule 16, but rather a motion for relief from a default judgment under Rule 60(b)(6), which is governed by the "extraordinary circumstances" standard. That standard requires the moving party to "demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." *Tani*, 282 F.3d at 1168. In discussing that standard, the Ninth Circuit set forth the general rule that "a client is ordinarily chargeable with his counsel's negligent acts," but then "distinguished a client's accountability for his counsel's neglectful or negligent acts – too often a normal part of representation –

and his responsibility for the more unusual circumstance of his attorney's extreme negligence or egregious conduct." *Id.*[5]

However, *Tani* is peculiar to the Rule 60(b) context because it is grounded in the policy, inapposite to the Rule 16 context, of avoiding default judgments. *See id.* at 1169-70. Thus, the *Tani* court held that litigants may be relieved from responsibility for the grossly negligent conduct of their counsel under Rule 60(b) because that rule "is remedial in nature and thus must be liberally applied." *Id.* at 1170. This is not true of Rule 16. *See, e.g., Jules Jordan Video, Inc. v. Canadian Multimedia Entertainment, Inc.*, 2006 WL 8432060, at *6-*12 (C.D. Cal. Oct. 16, 2006) (granting motion to set aside default due to gross negligence/abandonment under Rule 60(b), but denying motion under Rule 16(b) to modify scheduling order). Indeed, the Ninth Circuit made clear in *Tani* that the "extreme negligence or egregious conduct" of counsel standard was *not* even applicable in the related context of setting aside default judgments under Rule 60(b)(1)'s "excusable neglect" standard, finding the two to be "mutually exclusive." *Tani*, 282 F.3d at 1170 n.11.

Because *Tani* is unique to the Rule 60(b) context, and because no court in this district has extended *Tani* to the Rule 16 context, this Court should decline to do so. Further, although some cases outside this district have applied a gross negligence/abandonment exception under Rule 16, most of those cases rejected requests to reopen discovery, and thus their discussion of gross negligence/abandonment is *dicta*. *See Plum Healthcare Group, LLC v. One Beacon Prof'l Ins.*, 2017 BL 134829, at *2-*4 (S.D. Cal. April 24, 2017) (copy attached as Exhibit B to the Rosenthal Decl., Docket No. 153-1); *Zone Sports Center, LLC*, 2016 WL 224093, at *6-*8; *Peck v. The Cincinnati Ins. Co.*, 2015 WL 13469930, at *3 (C.D. Cal. Dec. 3, 2015); *Cardenas*, 2015 WL 4410643, at *2-*3; *Lawrence v. Turner's Outdoorsman Corp.*, 2012 WL 2957105, at *5 n.4 (C.D. Cal. June 1, 2012); *Matrix Motor Co.*, 218 F.R.D. at 672-77.

[5] The *Tani* court analogized the "gross negligence" standard to the type of "errors so egregious that they necessitate the reversal of a criminal conviction." *Id.* at 1170.

Second, as a factual matter, the circumstances here are much less severe than those at issue in the foregoing Rule 16 cases, not to mention those at issue in *Tani*. Thus, even if gross negligence or abandonment could constitute a ground for the moving party to avoid responsibility for its counsel's lack of diligence under Rule 16, the Court should still reject Plaintiffs' argument based on a comparison of the facts of those prior decisions with the facts presented here.

For example, in *Matrix Motor Co.*, the plaintiff's original counsel failed to perform any research, undertake any discovery on behalf of his client, respond to the defendant's document requests, or designate an expert witness. 218 F.R.D. at 670-71. After communications between the plaintiff and his original counsel broke down, the plaintiff's new counsel moved to reopen and extend various case management dates, including the discovery cut-off and trial dates. *Id.* at 668-71. The district court denied the motion because the plaintiff's counsel had not been diligent in conducting discovery or otherwise prosecuting the action. *Id*. at 671-72. In doing so, the court rejected the plaintiff's argument that his former counsel had been grossly negligent. The court held that the original counsel's participation in various aspects of case management other than his wholesale failure to take discovery on behalf of the plaintiff and to designate an expert witness – specifically, participating in an early meeting of counsel, making court appearances, filing a joint settlement election form, making some (incomplete) efforts to respond to the defendant's discovery requests, securing an extension of time to respond to the defendant's interrogatories, and serving answers to those interrogatories, as well as the plaintiff's failure to monitor his counsel's performance, *id*. at 674-75 – distinguished the case from the virtual abandonment found in *Tani*.

The other decisions are similar. In *Plum Healthcare Group, LLC*, 2017 BL 134829, at *1-*4, the court held that there was no good cause to reopen expert and fact discovery deadlines, and the expert witness disclosure deadline, where the moving party's original counsel failed to file a motion to dismiss, after promising to do so; failed to inform his client of a motion for summary judgment filed by the opposite side; missed the expert witness disclosure deadlines and misrepresented to his client that they had been extended; and misinformed his client that fact and expert witnesses discovery had been extended. In *Lawrence*, 2012 WL 12957105, at *5 n.4, the court held that the moving party's counsel's

lack of diligence during the discovery period – which included dismissing several claims without the consent of his client and to the prejudice of his client; failing to appear at a court hearing and refusing to file a stipulation to continue the hearing; and failing within the discovery period to conduct the later-sought discovery – did not rise to the level of extreme negligence or egregious conduct that would justify a departure from the rule that a party voluntarily chooses its counsel and cannot avoid the consequences of its counsel's acts or omissions.

In *Cardenas*, 2015 WL 4410643, at *2-*3, the court denied the defendant's motion to reopen the scheduling order to permit him to amend his counterclaim, finding that his former counsel's omission of two potential claims from his counterclaim was not grossly negligent, but constituted the type of conduct for which the defendant must be held accountable. And in *Peck*, 2015 WL 13469930, at *2-*3, the court held that there was no good cause to reopen the expert witness disclosure deadline where the moving party was aware of potential expert witnesses prior to the expert disclosure deadline, but alleged that her former counsel "dropped the ball" by failing to designate them by the deadline, concluding that she had not thereby demonstrated that her former counsel had been grossly negligent; *accord Zone Sports Center, LLC*, 2016 WL 224093, at *7-*8 (the moving party's former counsel's failure to designate expert witness "is not so egregious that it amounts to extraordinary circumstances to warrant modification of the scheduling order.").

Mr. Katzenbach certainly cannot be found to have been as negligent, much less more negligent, than the counsel in the above-cited cases in which relief was *denied* under Rule 16, and Plaintiffs fail to point to any cases *granting* relief under Rule 16 on a "gross negligence/abandonment" theory, much less any such cases in which the moving party's former counsel's conduct was comparable to that of Mr. Katzenbach. Plaintiffs admit that Mr. Katzenbach "remained engaged and conversational through 2017, preparing declarations, motions and responses, discussing the other SLI cases with us, and helping us draft our Updates to the class members." Declaration of Gregory Cordes in Support of Motion to Stay, Etc. ("Cordes Decl."), Docket No. 152-3, ¶ 9. "[T]hrough November and December [2017, Mr. Katzenbach] was actively involved in all of the depositions and all of the work that entailed." Cordes Decl. ¶ 10. And Mr. Katzenbach continued representing Plaintiffs quite actively through at least June

2018, when he succeeded in defeating Defendant APA's Motion in Limine. *See* Docket Nos. 135 & 140. As Plaintiffs further admit, "In March 2018, Katzenbach did work on the APA Motion in Limine and sent us a copy of it. Once again, it appeared that everything was 'on track.'" Cordes Decl. ¶ 11. Additionally, Plaintiffs note that Mr. Katzenbach was in touch with their newly-retained expert witness, Artemas Keitt Darby III, as early as June 2016, and that they were aware at the time that Mr. Katzenbach was considering retaining his services. *See* Cordes Decl. ¶ 8; *see also* Declaration of Artemas Keitt Darby III in Support of Motion to Stay Etc., Docket No. 152-5, ¶ 13. Plaintiffs do not disclose whether Mr. Katzenbach provided them an explanation of the decision not to retain Mr. Darby and, if so, what that explanation was.

All of this is consistent with the experience of APA's counsel, who found Mr. Katzenbach to be a vigorous participant in discovery. Up to the December 30, 2017 discovery cut-off, Mr. Katzenbach participated extensively in discovery, both propounding and responding to a substantial number of written discovery requests, obtaining and producing voluminous documents, and participating in numerous depositions. *See* Rosenthal Decl., Docket No. 153-1, ¶¶ 2-6. Several of those third-party depositions in which Mr. Katzenbach actively participated were conducted in December 2017, just before the discovery cut-off.

Thus, Plaintiffs cannot show that Mr. Katzenbach failed to participate actively in the case during the relevant time period, i.e., before the December 31, 2017 fact discovery cut-off or the January 30, 2018 expert witness designation cut-off. Mr. Katzenbach both propounded and responded to written discovery requests, participated in depositions, attended scheduling conferences, and zealously litigated motions (successfully certifying the class, preventing the dismissal of the case on summary judgment, and defeating Defendant APA's motion in limine). As the Motion itself admits, "Mr. Katzenbach was still actively participating in discovery in December 2017. . ., filed an opposition to a Motion in Limine in March 2018 . . ., and made court appearances on behalf of Plaintiffs in June and August 2018 . . . and in the related action 3:17-cv-01160-RS on December 20, 2018 . . . ." Motion at 1:10-15 (docket citations omitted). In sum, Mr. Katzenbach did at least as much, if not far more, to litigate the present case during

the discovery and expert witness designation periods than did the moving parties' original counsel in the foregoing cases, where courts rejected "gross negligence" arguments for reopening discovery.

Nor did Mr. Katzenbach allegedly "abandon" Plaintiffs until (at the earliest) August 2018, when he allegedly ceased substantive communications with them. *See* Decl. of Gavin McKenzie, Docket No. 152-4, ¶ 9. That alleged abandonment, however, came long after the discovery and expert witness deadlines had passed in December 2017 and January 2018 and therefore cannot logically provide any basis for a do-over of deadlines that expired more than six months earlier.

In short, Mr. Katzenbach is "guilty" – at most – of failing to designate an expert witness, and perhaps failing to take particular discovery that Plaintiffs' new counsel, with their own view of the case, think he should have taken. But that is precisely the type of conduct that *Plum Healthcare Group* found did *not* provide grounds to extend discovery and expert designation deadlines. 2017 BL 134829, at *3-*4; *accord Zone Sports Center, LLC*, 2016 WL 224093, at *7-*8 (the moving party's former counsel's failure to designate expert witness "is not so egregious that it amounts to extraordinary circumstances to warrant modification of the scheduling order."). Mr. Katzenbach's conduct constitutes, at worst, the sort of "neglectful or negligent acts" that *Tani* observed are "too often a normal part of representation," and for which "a client is ordinarily chargeable," rather than "the more unusual circumstance of his attorney's extreme negligence or egregious conduct," *Tani*, 282 F.3d at 1168, amounting to "virtually abandon[ing] his client, *id*. at 1170, "that results in the client's receiving practically no representation at all," *id*. at 1171. As such, Plaintiffs cannot evade responsibility for Mr. Katzenbach's lack of diligence.

Nor can Plaintiffs rely on *Tani* to support their request – not only because it was a Rule 60(b) case about setting aside a default, rather than a Rule 16(b) case about modifying a scheduling order, but also because Mr. Katzenbach's conduct does not approach the level of attorney misconduct present in *Tani*. There, the defendant's counsel's misconduct occurred at the very outset of the case and continued throughout it: he failed to file a stipulation extending his time to answer; filed the answer late; failed multiple times to serve the answer on the plaintiff's counsel, in violation of a direct order of the court to do so; ignored a court order to participate in a settlement conference; failed to file any opposition to the plaintiff's motions for a preliminary injunction and for a default judgment; failed to attend various court

hearings; and, at the same time, assured the client numerous times that the litigation was proceeding smoothly. *Tani*, 282 F.3d at 1166-67, 71. The Ninth Circuit found, on this basis, that the defendant's counsel "virtually abandoned his client by failing to proceed with his client's defense despite court orders to do so," *id*. at 1170, resulting "in the client's receiving practically no representation at all," *id*. at 1171.[6]

Here, by contrast, Mr. Katzenbach vigorously represented his clients' interests throughout the discovery and expert disclosure period at issue, and the only allegations of "abandonment" date only to August 2018, seven months after the discovery cut-off and six months after the expert witness disclosure deadline.[7] Simply put, Mr. Katzenbach was neither grossly negligent; nor did he abandon the Plaintiffs at any time prior to the expiration of the discovery and expert designation dates they now seek to reopen.

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[6] Plaintiffs' assertion that Mr. Katzenbach's alleged assurance to them on one occasion in Fall 2017 that the case was still "on track," Motion at 9:24 – 10:1, "would by itself justify relief under *Tani*," *id*. at 10 n.4, is meritless. *Tani* noted that the defendant's counsel had given him numerous misleading assurances that his case was still proceeding smoothly, even after the court had entered a default judgment, not merely on one occasion, as is alleged here. *See Tani*, 282 F.3d at 1167, 1171. Moreover, nowhere does *Tani* indicate that numerous such misrepresentations, in isolation, would "by [themselves] justify relief." Motion at 10 n.4. Additionally, in contrast to the defendant's counsel's undisputed misrepresentations to his client in *Tani*, it is not at all clear that Mr. Katzenbach's Fall 2017 statement that the case was "on track" was a misrepresentation to begin with. Indeed, at that time, he had fully participated in discovery and motion practice and would continue to do so thereafter. And there was still more than sufficient time in Fall 2017 for Mr. Katzenbach to retain and disclose an expert witness by January 30, 2018. Indeed, Plaintiffs admit that Mr. Katzenbach had selected and communicated with an expert witness that he contemplated retaining. *See* Declaration of Gregory Cordes in Support of Motion to Stay, Etc., Docket No. 152-3, ¶ 8; *see also* Declaration of Artemas Keitt Darby III in Support of Motion to Stay Etc., Docket No. 152-5, ¶ 13. Even if Mr. Katzenbach subsequently "dropped the ball," that does not mean that his earlier assurance was a misrepresentation.

[7] Plaintiffs assert that Mr. Katzenbach abandoned them by his "repeated failures to communicate, his failure to comply with the expert discovery deadlines, his failure to respond to Plaintiff's [sic] prior motion regarding his adequacy to continue representing the class, [and] his continuing failure to turn over his file to plaintiff's [sic] new counsel following repeated requests and even *after* enlisting the assistance of the State Bar . . . ." Motion at 9:17-21 (emphasis in original). But all of these alleged failures, except failing to designate an expert witness, occurred long *after* the expiration of the deadlines that Plaintiffs now seek to extend. They cannot bootstrap those recent failures into "abandonment" at the relevant time: before those deadlines expired. And the sole pre-expiration failure they point to, the failure to designate an expert witness, does not constitute "abandonment" or "gross negligence" under the decisions discussed above.

3. Plaintiffs, not APA, had a duty to monitor their counsel's discovery strategy.

Remarkably, Plaintiffs assert that APA – not they – should be held responsible for Mr. Katzenbach's failure to designate an expert witness because it "recommend[ed]" to the Court that he be appointed as class counsel and did not inform the Court that he failed to designate an expert witness by the deadline. Motion at 5:1-9. Plaintiffs go so far as to speculate that the reason APA "recommended" Mr. Katzenbach as class counsel was that "it recognized the inadequacy of Mr. Katzenbach's representation at an even earlier date," *id*. at 5 n.2. All of this finger-pointing is frivolous on its face.

APA never "recommended" that the Court appoint Mr. Katzenbach as class counsel. Rather, it took the position that the Court should certify the class on both claims that were then in the case for purposes of liability and equitable relief only and deny class certification on both claims as to damages. *See* Defendant Allied Pilots Association's Response to Plaintiffs' Motion for Class Certification, Docket No. 51, at 19:17 – 20:2. It then took the position that the Court "should appoint the named Plaintiffs as class representatives and Mr. Katzenbach as class counsel," *id*. at 20:2-3, "should grant APA's pending motion for summary judgment, and should enter final judgment in favor of APA and against Plaintiffs and the class they represent," *id*. at 3-5. In other words, APA was not "recommending" the appointment of Plaintiffs and Mr. Katzenbach in order to litigate the case, but only accepting the appointment so that the class could be certified and judgment against the entire class could be entered in favor of APA. This was in no sense a "recommendation" on the merits of Mr. Katzenbach as counsel to litigate the case.

In any event, APA had no reason to oppose Mr. Katzenbach's request to be appointed as class counsel, as he testified to having impressive credentials and ample experience in litigation against labor organizations, including cases (like the present case) alleging breach of the duty of fair representation. *See* Declaration of Christopher W. Katzenbach in Support of Motion for Class Certification, Docket No. 50-1, ¶¶ 1-5. And Plaintiffs were well-suited to assess Mr. Katzenbach's credentials: they had apparently worked with him since 2002, when he helped them form the American Airlines Flow-Thru Pilots Coalition. *See* Declaration of Gregory R. Cordes, Docket No. 152-3. Plaintiffs also raised money for their suit by announcing that Mr. Katzenbach was a "highly respected and experienced attorney specializing in labor law and specifically in DFR issues." *See* Website of AAFTPC, accessed March 12,

2019 (attached as Exhibit A to Rosenthal Decl., filed herewith). In light of Plaintiffs' selection of Mr. Katzenbach and his claimed credentials, APA saw no reason to second-guess that selection.

Not surprisingly, courts have squarely rejected attempts by moving parties to shift the blame for their or their counsel's lack of diligence onto the opposing party. *See, e.g.*, *Johnson*, 975 F.2d at 610 ("The burden was on [the moving party] to prosecute his case properly. He cannot blame [the non-moving party] for his failure to do so."); *Rashdan*, 2012 WL 566379, at *3 (rejecting plaintiff/moving party's claim that she could not complete discovery prior to the cutoff date set by the court because "defense counsel 'ran out the clock and gained a procedural advantage over Plaintiff's former counsel.'") (quoting the plaintiff's motion); *Marcin Engineering, LLC*, 219 F.R.D. at 523 (rejecting moving party's attempt to blame opposing party for moving party's lack of diligence in completing expert discovery). Plaintiffs cite no authority for the remarkable proposition that it was somehow APA's responsibility to inform the Court that Mr. Katzenbach had not designated an expert witness by the deadline for so doing; nor are we aware of any such authority. In short, this Court should reject Plaintiffs' blame-shifting as "wholly inconsistent with our system of representative litigation," *Link*, 370 U.S. at 634, as well as with our adversary system of justice.

It was Plaintiffs, and only Plaintiffs, who carried the obligation to monitor their counsel's performance. As class representatives, Plaintiffs owed a fiduciary duty to the members of the class they represent. *See Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949). As part of that duty, Plaintiffs were at all times obligated to "to monitor the conduct of class counsel throughout the litigation." *Armour v. Network Associates, Inc.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001); *see also id.* at 1052 (characterizing this duty as "crucial"). They were also obligated to "prosecute the action vigorously on behalf of the class." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). In their declarations in support of class certification, Plaintiffs appear to have recognized this obligation. *See, e.g.*, Declaration of Gregory R. Cordes in Support of Motion for Class Certification, Docket No. 50-2, ¶ 24 ("I intend to pursue this matter vigorously. The other individual plaintiffs have indicated that they will be active in this case as well.").

In contrast to the assurances they provided the Court in seeking class certification, however, Plaintiffs now assert that they were not able to monitor Mr. Katzenbach's performance due to their work schedules.[8] *See* Declaration of Gregory R. Cordes, Docket Bo. 155-1, ¶ 5. While that assertion may call into question Plaintiffs' ability to serve as class representatives, it does not allow them to evade their duties. *See, e.g.*, *Zone Sports Center, LLC*, 2016 WL 224093, at *6 (holding that plaintiff's health issues did not excuse him from the diligence requirement of Rule 16). And while Plaintiffs opine that they "did they [sic] best they could reasonably be expected to" under the circumstances of this case, Motion at 7:11-12, they fail to set forth any facts showing what, if any, concrete steps they took during the discovery and expert witness designation period to monitor Mr. Katzenbach's representation and make sure he was prepared to meet the litigation deadlines the Court had set. Apparently, they did nothing. Although Plaintiffs claim they and their new counsel were ignorant of the January 30, 2018 deadline for disclosure of expert witnesses, Motion at 4-5 & n.1, they could have easily educated themselves on that deadline by reading this Court's November 3, 2016 Case Management Scheduling Order, Docket No. 85, which they could have requested from Mr. Katzenbach or accessed independently through PACER. Plainly, "Plaintiffs' excuse that they were unaware that the . . . deadline had passed is insufficient." *Banks v. Gail*, 2009 WL 2246377, at *4 (C.D. Cal. July 27, 2009); *accord Link*, 370 U.S. at 634 (under "our system of representative litigation, . . . each party . . . is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'") (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

Nor did Plaintiffs act diligently after Mr. Katzenbach allegedly abandoned them in August 2018. Plaintiffs testify that they thereafter attempted to contact Mr. Katzenbach on numerous occasions, but without receiving a substantive response. *See* Cordes Declaration, Docket No. 155-1, ¶ 6. They provide no evidence, however, of any action they took in the five succeeding months, after failing to obtain a satisfactory response from Mr. Katzenbach, until they retained new counsel in or about January 2019,

[8] Other than referring to Plaintiff Cordes' schedule, Plaintiffs have introduced no evidence that any of the other individual Plaintiffs lacked the time to monitor Mr. Katzenbach's performance. Notably, the president of Plaintiff American Airlines Pilots Flow-Thru Coalition, Gavin McKenzie, has been retired since March 2017, and thus cannot claim that work has prevented him from monitoring Mr. Katzenbach. *See* Rosenthal Decl., filed herewith, at Exh. B (Reporter's Transcript of Deposition of Gavin Hugh McKenzie, at 15:15-20, 21:2-9).

see Docket No. 149. Had they acted diligently, they surely would have done so after their third or fourth unsuccessful attempt to contact Mr. Katzenbach, and their inaction is yet another reason why their motion should be denied. *See Matrix Motor Co.*, 218 F.R.D. at 667, 677 n.41 (relying on moving party's lack of diligence in retaining substitute counsel, *inter alia*, in denying motion to reopen expired dates in a scheduling order).

If the Court determines that Plaintiffs violated their fiduciary duty to monitor the conduct of class counsel, and that due process requires the Court to take remedial steps to protect the interests of the absent class members, the proper course of action is not to weigh that consideration in the Rule 16 analysis (as Plaintiffs seem to request, *see* Motion at 5:10 – 6:2). Instead, the Court may be forced to decertify the class and permit the absent class members to protect their rights. *See, e.g.*, *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (plaintiff class properly decertified to protect interests of absent class members where plaintiffs' failure to produce evidence of classwide discrimination in terminations "may have been due to inadequate representation of the class interests rather than to absence of classwide discrimination"), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987); *see also Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 374 (5th Cir. 2013); 3 Newberg on Class Actions § 7:38 (5th ed. 2013) (noting that "[d]ecertification or modification of a class certification order is appropriate if, in the course of litigation, the existing class fails to meet the requirements of Rule 23," including where class counsel fails to "competently, responsibly, and vigorously prosecute the suit.") (citations omitted).

Because Plaintiffs have failed to demonstrate that they were "diligent in obtaining discovery" and designating an expert witness "within the guidelines established by the court," *Schumer*, 63 F.3d at 1526, and because they cannot evade responsibility for that lack of diligence, "the inquiry should end," *Johnson*, 975 F.2d at 609, "and the[ir] motion to modify [the scheduling order] should not be granted," *Zivkovic*, 302 F.3d at 1087, without even assessing the remaining five *Schumer* factors. *See also Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1026 n.3 (9th Cir. 2006) (Plaintiff's motion to reopen discovery was properly denied for lack of diligence even where the motion sought leave to obtain evidence that would have prevented the grant of summary judgment dismissing plaintiff's case.). Even

if the Court were to assess those factors, however, Plaintiffs' motion should still be denied, as we next discuss.

4. The remaining five factors favor denial of Plaintiffs' Motion.

Because the diligence factor so clearly weighs against reopening the long-passed litigation deadlines, the Court need not consider the other *Schumer* factors. But those factors also support APA's opposition.

First, trial is imminent, scheduled to commence approximately two months after Plaintiffs' motion will be heard. Even if the Court grants the two-month delay in the trial date that APA has suggested as a reasonable "catch-up" period, trial will still be imminent and the delay will not be sufficient to permit Plaintiffs to conduct the vast amount of discovery they have indicated they will seek (which we discuss below).

Second, Defendant APA opposes Plaintiffs' Motion.

Third, if Plaintiffs need additional discovery outside the original deadlines, that need was entirely foreseeable. *See Schumer*, 63 F.3d at 1526 (Foreseeability, during the allotted discovery period, of the need to obtain particular information through discovery supports denial of a motion to reopen discovery.). Plaintiffs provide no reason to believe they could not anticipate the alleged discovery needs that they now assert. Plaintiffs certainly had ample time to consider their discovery needs: The December 31, 2017 fact discovery cut-off and January 30, 2018 expert witness designation deadline (and the subsequent rebuttal expert designation deadline and expert discovery cut-off) were set in a scheduling order that issued on November 3, 2016, nearly fourteen months before the fact discovery cut-off and fifteen months before the expert witness designation deadline. Plaintiffs foresaw the need for discovery insofar as they and Mr. Katzenbach did engage in substantial discovery long before the cut-off date. Plaintiffs also foresaw the alleged need for expert witness testimony in that they discussed retaining, and contacted, an expert witness in June 2016, more than eighteen months prior to that designation date. *See, e.g., Lawrence*, 2012 WL 12957105, at *5 (denying motion to reopen discovery where, *inter alia*, the need for the newly-sought discovery "to develop Plaintiff's case should have been apparent" during the discovery period); *Bleek v. Supervalu, Inc.*, 95 F. Supp. 2d 1118, 1121 (D. Mont.

2000) (denying motion to reopen discovery to add an expert witness where, *inter alia*, "it is reasonable that [the moving party] should have foreseen the necessity of identifying an appropriate expert witness to testify regarding the subject issue prior to the deadline.").

Moreover, Plaintiffs and Mr. Katzenbach had ample time in this case both to conduct discovery and to request an extension of the discovery cut-off if that was needed. The discovery period commenced with the Initial Case Management Conference on October 8, 2015, *see* Docket Nos. 30-31, and extended for more than twenty-six months thereafter. Indeed, it extended for nearly fourteen months after the November 3, 2016 scheduling order that established the discovery cut-off, so Plaintiffs and Mr. Katzenbach had both ample warning of the cut-off and ample time after that warning to finish taking discovery. The same is true of retaining an expert witness, as to which they were afforded even more time.

Fourth, Plaintiffs have failed to demonstrate the likelihood that discovery will lead to relevant evidence. Their Motion fails to discuss what evidence they seek or explain why that evidence is necessary. *See, e.g., Schumer*, 63 F.3d at 1526 (The moving party must do more than merely "'speculate[] as to what evidence, if any, further discovery would produce.'") (quoting *Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir.), *cert. denied*, 502 U.S. 856 (1990); substitution in original); *Rashdan*, 2012 WL 566379, at *3 (denying motion to reopen discovery where, *inter alia*, the moving party neglected "to specifically identify the documents she seeks or why those documents are necessary . . . .) (emphasis omitted). Thus, any arguments Plaintiffs could have made as to this *Schumer* factor are waived. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 994-95 (9th Cir. 2009).

Although Plaintiffs' Motion does not identify the discovery they seek—let alone explain why they need it—the Court may look to one of the attachments to Plaintiffs' Motion to find a list of discovery requests they previously sent to APA. *See* Exhibit A to the Declaration of Timothy McGonigle, Docket No. 155-2. Although Plaintiffs assert in their Motion that they seek only "limited additional discovery," Motion at ii:10, this exhibit reveals their plans to be anything but "limited":

///

Reopen discovery for a period of six months, including specifically to produce the following documents and conduct limited depositions:

a. An exchange of damage documents.

b. Pilot Seniority Lists for AA, AE, USA, and TWA - pre-merger and post-merger for each group for the period before, during, and after the period in question.

c. the Pilot Contracts with all side letters and agreements for each group for the period before, during, and after the period in question.

d. documents relating to the historical pay rates for AA, AE, USA, and TWA pilots for each group for the period before, during, and after the period in question.

e. documents relating to the monthly and system bid Awards for all aircraft, seats and bases held by any pilot involved in AA, TWA, USA, or AE for each group for the period before, during, and after the period in question.

f. documents relating to the base rosters that contain any pilots involved at AA, TWA, USA, or AE for each group for the period before, during, and after the period in question.

g. documents relating to the junior man-in-seat list for AA & AE for each group for the period before, during, and after the period in question.

h. documents relating to the pay records for each pilot involved at each airline for each group for the period before, during, and after the period in question.

i. documents relating to the payment records for each pilot who benefited from the *equity distribution* [footnote omitted];

j. documents relating to the longevity date used to calculate the *equity distribution* [footnote omitted] payout for each pilot;

k. documents relating to the Preferential Bidding System average hours flown for all aircraft, seats and bases held by any pilot involved AA, TWA, USA, or AE for each group for the period before, during, and after the period in question.

l. Depositions of the Defendant's persons most knowledgeable regarding Plaintiffs' claims including but not limited to the specific designees of Defendants regarding how decisions were made as to how flow-thru pilots seniority was determined, and regarding how it was decided that American Eagle flow thru pilots would not be included in the Letter G (restoration of two years longevity) negotiations.

m. Permit the Plaintiffs to obtain the Defendants' internal non-privileged documents relating to the arbitrations.

McGonigle Decl., Docket No. 155-2, Exh. A at 1-2.

Numerous issues emerge immediately from perusal of the foregoing laundry list, the most obvious of which was best expressed by the Northern District of California in *Nat'l Corp. Tax Credit Funds*, 2009 WL 4049396, at *3: "[It is] difficult to understand how such a broad and open-ended request can constitute 'limited discovery.'" Rather, the list calls for the production of documents that would likely run into thousands upon thousands of pages. Plaintiffs' list also appears nearly unlimited in temporal scope, covering the period "before, during, and after" an unspecified "period in question," which appears to date back to at least 2001 given the references to TWA (which ceased to exist in 2001). Moreover, the list is vague in various other ways, e.g., requesting unspecified depositions and "an exchange of [unspecified] damages documents." Plaintiffs provide no explanation of how these requests would produce relevant evidence (or why they are not substantially overbroad and would not produce largely irrelevant evidence), e.g., Items b, c, d, e, f, g, h, i, k, and l (as to how decisions were made regarding how Flow-Through Pilots seniority was determined). And further, the amount of discovery sought would not only place an enormous burden on APA, but also on non-parties to this litigation, specifically, American Airlines and American Eagle, because many of the documents sought by Plaintiffs are maintained by those companies. Indeed, Plaintiffs would apparently require American to reach into its archives to search for voluminous information from TWA, a company whose assets it acquired 18 years ago.

Fifth, Defendant APA, as the non-moving party, would be prejudiced by the reopening of the discovery and expert designation deadlines, as would the non-parties from which Plaintiffs would also demand discovery. The case law is clear that reopening fact or expert discovery is inherently prejudicial to the opposing party. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) ("'A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice'") (quoting *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir.1999)); *Bogutz v. Arizona*, 2007 WL 9723928, at *5 (D. Ariz. Dec. 11, 2007) (Motion to reopen discovery so that plaintiff can obtain a new fact witness's records and designate him as a witness is denied where, *inter alia*, "all the Defendants are prejudice[d] by delays in this case progressing and the associated litigation costs."); *Bleek*, 95 F. Supp. 2d at 1120 (Motion to reopen discovery to permit

plaintiff to designate an expert witness after the deadline for expert witness disclosure is denied because, *inter alia*, the defendant "will undoubtedly be prejudiced" by being put "in a position of having to conduct additional discovery relative to the new expert witness and [having to] incur the attendant expenditure of time and resources in doing so."). Here, granting the relief Plaintiffs seek would require APA to incur substantial costs in time and resources required, at the least, to respond to Plaintiffs' discovery requests; possibly to litigate the propriety of at least some of those requests; to prepare for and attend the depositions Plaintiffs intend to take; to analyze any documents or information obtained through Plaintiffs' discovery of non-parties; to conduct additional investigation to prepare to respond to and rebut any evidence that Plaintiffs obtain through additional discovery; to retain and work with expert witnesses to respond to whatever expert testimony Plaintiffs may proffer; and to conduct discovery of Plaintiffs' newly-proffered expert witnesses. Plaintiffs, on the other hand, cannot claim prejudice from denial of their request to reopen discovery because "'[a] party who fails to pursue discovery in the face of a court ordered cut-off cannot plead prejudice from his own inaction.'" *POGA*, 2014 WL 6893778, at *2 n.2 (quoting *Rosario v. Livaditis*, 963 F.3d 1013, 1019 (7th Cir. 1992)).

Further, in addition to the significant financial costs the APA would incur for participating in discovery a second time, the reopening of discovery would almost certainly require an extension of the trial date beyond the two-month delay that APA has proposed. As discussed below, this delay would also be prejudicial to APA.

5. For the same reasons set forth above, and due to the significant prejudice it would cause to APA, the Court should deny any continuance of the trial beyond the two months proposed by APA.

Plaintiffs' request to postpone the trial is also governed by Rule 16 because the trial date was set in a scheduling order issued under that rule. *See supra* at 1-3. Thus, for the same reasons set forth above – most importantly, Plaintiffs' lack of diligence – there is no basis for the Court to postpone the trial.

Nevertheless, APA has suggested a two-month delay so that Plaintiffs' new counsel can familiarize themselves with the particulars of the case and provided counsel with all discovery materials to facilitate the familiarization process. *See supra* at 1. But because Plaintiffs cannot satisfy the "good cause" test, the Court should decline to extend the deadline beyond that point. Further, an extended

delay would cause substantial prejudice to APA. This case has been pending for more than three-and-a-half years. *See* Complaint, Docket No. 1, filed July 6, 2015. Defendant APA requested that trial commence at the beginning of November 2018, but Plaintiffs requested to delay the trial until Spring 2019, to which the Court acceded. *See* Joint Case Management Statement and [Proposed] Order, Docket No. 144, at 2; Civil Minutes, Docket No. 145. In reliance on that already-delayed trial date, Defendant APA has conducted meetings with witnesses and trial consultants in February and March, for which it had to make travel and lodging arrangements. *See* Rosenthal Decl., filed herewith, ¶ 3. If the trial date is continued beyond the period the APA has suggested, much of the benefit of those meetings will be wasted and much of that preparation will have to be redone closer to the continued trial date.

CONCLUSION

For the reasons discussed above, the Court should deny Plaintiffs' Motion insofar as it seeks to reopen the fact and expert discovery cutoffs, and the expert designation deadlines, and to continue the trial date for more than two months.

Dated: March 14, 2019.

Respectfully submitted,

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NARI ELY
James & Hoffman, P.C.

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By: */s/ Jeffrey B. Demain*
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**Admitted pro hac vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:17-cv-01160-RS **DECLARATION OF DANIEL M. ROSENTHAL IN SUPPORT OF DEFENDANT ALLIED PILOTS ASSOCIATION'S OPPOSITION TO PLAINTIFFS' MOTION TO CONTINUE TRIAL DATE, DISCOVERY CUT-OFF AND EXPERT DEADLINES AND FOR AN ORDER REQUIRING MR. KATZENBACH TO TURNOVER [SIC] LITIGATION FILE** Date: N/A Time: N/A Courtroom: N/A Judge: Hon. Richard Seeborg

I, Daniel M. Rosenthal, hereby declare as follows:

1. I am one of the counsel of record for Defendant Allied Pilots Association ("APA") in the above-captioned case and a partner at James & Hoffman, P.C. I am a member in good standing of the New York State Bar and the D.C. Bar, and am admitted to practice *pro hac vice* in this case. I make this declaration in support of Defendant APA's Opposition to Plaintiffs' Motion to Continue Trial Date, Discovery Cut-Off and Expert Deadlines and for an Order Requiring Mr. Katzenbach to Turnover [sic] Litigation File, filed herewith.

2. The offices of James & Hoffman, P.C. sent by Federal Express electronic copies of all discovery exchanged between the parties—including initial disclosures, written discovery responses, and documents produced by the APA, the Plaintiffs, and American Airlines, as well as deposition transcripts—to the offices of Timothy D. McGonigle and Geroge G. Braunstein. These copies were delivered on February 26, 2019.

3. In reliance on the scheduled April 29, 2019 trial date, I and other counsel for APA met with potential witnesses and a jury consultant in Dallas, Texas on February 25, 2019 to prepare for trial, and carried out additional witness preparation meetings in Dallas on February 26-27, and March 4, 2019. APA incurred expenses for flights and hotels for these meetings.

4. Attached hereto as Exhibit A is a true and correct copy of a page from the website of Plaintiff American Airlines Flow-Thru Pilots Coalition, which I accessed on March 12, 2019 at https://www.aaflowthrupilots.org/contribute.html.

5. Attached hereto as Exhibit B is a true and correct copy of relevant excerpts from the reporter's transcript of the deposition of Gavin Hugh MacKenzie, taken in the above-captioned action on December 22, 2017.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 2019 in Washington, D.C.

By: */s/ Daniel M. Rosenthal*
Daniel M. Rosenthal

EXHIBIT A

AA Flow-Thru Pilots Coalition

AA Flow-Through Pilots shall be paid the same as all other AA pilots of equal status who have also transferred to AA from other airlines.

AA Flow-Thru Pilot Defense Fund

If the Flow-through pilots are to defend their rights, they need to have competent legal representation, and will need to collectively pay for that representation. In short, we need to show all concerned that the Flow-through pilots are ready, willing and able to defend their rights in and out of court, and that our positions on the AA seniority list will not be taken without a fight.

To that end the Flow-though Coalition has retained the Law Offices of Christopher Katzenbach to represent the Flow-through pilots' interests. Mr. Katzenbach is a highly respected and experienced attorney specializing in labor law and specifically in DFR issues.

Additionally, the coalition has established a bank account and is requesting and accepting donations through the AA Flow-through Pilots Legal Defense Fund to pay for these legal services.

We are looking for a $20 monthly contribution from every Flow-through pilot, which would pay for our projected legal fees for the rest of the year. Any larger amount or lump sum donation would of course be helpful.

Please note that each of the Flow-through Coalition directors and several other pilots have already donated over $1,000 each, several much more. Every Flow-through pilot should contribute, and those that choose not to are simply deriving the benefits of representation by free-loading off the others. In keeping with our desire to operate with complete transparency, a list of contributors and non-contributors will be published on the website.

How Can you Contribute

Contributions can be made by sending a check made out to:

AAFTPC
P.O. Box 466
Morro Bay, CA 93443
(Please put your AA Employee # on the Check)

Or you can make a contribution by PayPal or any major credit card by clicking the button below.

Please Type in your AA Employee Number

Donate

Contributions should be a tax deductible expense for most AA pilots.

These funds will be used solely for the purposes of legal defense of the AAFTPs as directed by the AA Flow-Thru Pilots Coalition.

If we deem that further legal expenses will not be required, any surplus funds will be returned to the donors proportionally based on initial contribution.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, et al.,	*	
Plaintiffs,	*	
VS.	*	CASE NO.: 3:15-cv-03125-RS
ALLIED PILOTS ASSOCIATION, et al.,	*	
Defendants.	*	

****

ORAL AND VIDEOTAPED DEPOSITION OF

GAVIN HUGH MACKENZIE

DECEMBER 22ND, 2017

****

ORAL AND VIDEOTAPED DEPOSITION OF GAVIN HUGH MACKENZIE, produced as a witness at the instance of the DEFENDANT, and duly sworn, was taken in the above-styled and numbered cause on the 22nd of December, 2017, from 10:02 a.m. to 1:38 p.m., before Tammy Staggs, CSR in and for the State of Texas, reported by machine shorthand, at the Residence Inn by Marriott, 2020 State Highway 26, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or

attached hereto. That the deposition shall be read and signed under penalties of perjury. That the deposition signature having been waived.

Job: 24281

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ALSO PRESENT:
Jeremy Gilliam - Videographer

INDEX

REQUESTED DOCUMENTS/INFORMATION

(None)

CERTIFIED QUESTIONS

(None)

DEFENDANTS EXHIBITS

PLAINTIFFS EXHIBITS

P R O C E E D I N G S

THE VIDEOGRAPHER: We are now going on the video record. Today is December 22nd, 2017. The time is approximately 10:02 a.m. The location is 2020 State Highway 26, Grapevine, Texas.

My name is Jeremy Gillman. I'm the video specialist representing HG Litigation Services.

The Civil Action Number is 3:15-cv-03125-RS in the matter of American Airlines Flow-Thru Pilots Coalition, et al. vs. Allied Pilots Association, et al. The deponent is Gavin Mackenzie. The video deposition is requested by the defense counsel Altshuler Berzon -- Berzon.

Will counsel please identify themselves for the record.

MR. KATZENBACH: Chris Katzenbach here for the Plaintiffs and for the witness.

MR. WEISSGLASS: Jonathan Weissglass from Altshuler Berzon for Defendant Allied Pilots Association.

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

GAVIN HUGH MACKENZIE,

Having been first duly sworn, testified as follows:

EXAMINATION

regarding these lawsuits, yes.

Q. And what did you discuss with Mr. Cordes?

A. Oh, we're on the phone, you know, two or three times a week regarding all sorts of issues: you know, updates. Finance. Legal fees. You know, what strategy we should adopt. If there's any stuff we should use for the pilots. What information we want to disseminate to the pilots.

Q. You discuss with him legal fees in this case?

A. With him do I discuss legal fees in this case? Yes, because they are important.

Q. Are you involved in funding this litigation?

A. Not directly, no.

Q. How -- are you involved indirectly?

A. Well, I -- I am -- the AAFTPC is a -- what's the word for it? I'll call it -- it's an organization to American Eagle Pilots Association. And I am the president of the American Eagle Pilots Association. So, indirectly, I'm involved because the AAFTCP [sic] is the Plaintiff in this case.

Q. Have you solicited funds for this case?

A. Personally?

Q. Yes.

A. No.

Q. Have you advised anyone on soliciting funds

A. Yes.
Q. Okay. What is your current job?
A. I'm retired.
Q. How long have you been retired?
A. My 65th birthday was March the 4th.
Q. Of 2017?
A. '17. That was my official date. But the last day I flew was January the 16th, I believe, because I had vacation. So...
Q. Who were you flying for when you retired?
A. At the time it was called Envoy, but it was the -- it really was American Eagle.
Q. Eagle at some point changed its names to Envoy Air; is that right?
A. That's correct.
Q. Okay. When did you start working for Eagle?
A. In July of 1988.
Q. What was your position when you first started working for Eagle?
A. I was a first officer at Wings West Airlines. That was American Eagle.
Q. When did you become a captain?
A. My best recollection is: it was about 1991.
Q. From 1988 through 2017, did you work for Eagle the entire time?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, et al.,	*	
Plaintiffs,	*	
VS.	*	CASE NO.: 3:15-cv-03125-RS
ALLIED PILOTS ASSOCIATION, et al.,	*	
Defendants.	*	

REPORTER'S CERTIFICATION

DEPOSITION OF GAVIN HUGH MACKENZIE

DECEMBER 22ND, 2017

I, Tammy Staggs, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, GAVIN HUGH MACKENZIE, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the original deposition was delivered to Mr. Jonathan Weissglass.

That a copy of this certificate was served on all parties and/or the witness shown herein on _____, 20____.

I further certify pursuant to FRCP Rule 30(f)(1) that the signature of the deponent:

__ was requested by the deponent or a party before the completion of the deposition and that the signature is to be before any notary public and returned within 30 days (or ____ days per agreement of counsel) from date of receipt of the transcript. If returned, the attached Changes and Signature Page contains any changes and the reasons therefore:

_X_ was not requested by the deponent or a party before the completion of the deposition.

That the amount of time used by each party at the deposition is as follows:

Mr. Christopher Katzenbach - (0:46)

Mr. Jonathan Weissglass - (2:24)

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

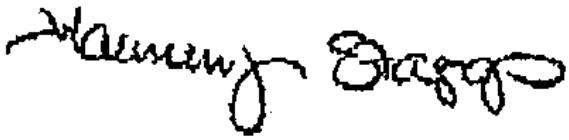
FOR THE PLAINTIFFS:
Christopher Katzenbach, Esq.

FOR THE DEFENDANTS:
Jonathan Weissglass, Esq.

That $_____ is the deposition officer's charges to the Defendant for preparing the original deposition transcript and any copies of exhibits;

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to to by me this 9th day of January, 2018.



Tammy Lea Staggs
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