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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, GREGORY R. CORDES, DRU MARQUARDT, DOUG POULTON, STEPHAN ROBSON and PHILIP VALENTE III, on behalf of themselves and all others similarly situated Plaintiffs, v. ALLIED PILOTS ASSOCIATION and AMERICAN AIRLINES, INC. Defendants.	Case No.: 3:15-cv-03125 RS PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO CONTINUE TRIAL DATE ETC. [Hearing vacated by Order Docket No. 157 unless otherwise ordered]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By Order dated March 8, 2019 (Dkt. No. 157) this Court determined that good cause existed to grant two categories of relief sought by Plaintiff's Motion, namely: (i) to vacate the trial date; and (ii), to order former class counsel Attorney Christopher Katzenbach to turn the litigation file over to new plaintiffs' counsel (which has yet to occur.) The APA nevertheless opposes Plaintiffs' Motion for relief from the other pre-trial deadlines, but succeeds only in demonstrating that good cause also exists to grant the remaining relief sought.

To be clear: nowhere in its opposition brief does the APA argue that Katzenbach has *not* abandoned Plaintiffs. Nor does the APA's brief argue that class members are not constitutionally entitled to adequate representation, or that Katzenbach's representation was "adequate." (Nor could it, given this Court's prior ruling.) Instead, the APA makes a more subtle, but equally implausible, argument: it asserts that the "extraordinary circumstances" the Ninth Circuit found sufficient in *Community Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002) to relieve a client from a final judgment caused by his attorney's gross negligence are something *less* than the "good cause" needed to modify a pre-trial scheduling order under Rule 16(b)(4). By the logic of the APA's Opposition, abandonment by counsel is not enough to justify modifying a scheduling order. But that proposition makes no sense on its face, and is contradicted by the APA's own authorities.

Further, the Opposition blatantly mischaracterizes the very basis of the Motion, with APA claiming that Plaintiff's Motion is merely seeking a "do-over" because "Plaintiffs and their new counsel wish to bring a new approach to this case different from Mr. Katzenbach's." Opp. at 1:17-18 & 1:22. To the contrary, the evidence filed in support of the Motion and the prior Motion to Stay established that the Motion was brought *not* because of some intentional

change of strategy but because Katzenbach's abandonment *forced* Plaintiffs to seek new counsel to (i) attempt to communicate with Katzenbach; (ii) to "step into the breach" by associating in as counsel of record, (iii) to seek a ruling on Katzenbach's adequacy; (iv) to seek relief from pre-trial order deadlines and trial date; and (v), to seek appointment as class counsel.

The law is clear that the relief sought via this Motion is both necessary and appropriate to protect the constitutionally-protected rights of the class. Plaintiffs recognize that, should the Motion be granted, a new scheduling order will promptly issue and they stand willing and able to comply with a tight schedule for completing discovery and preparing an expert report (e.g., 90 days) -- and have already retained an expert for such purposes. See Dkt. No. 152-5 ¶3.

(1) Good Cause Exists For The Scheduling Order to be Amended

The law is crystal clear in this circuit that abandonment/gross negligence of counsel -- even outside the class action context -- provides both the "extraordinary circumstances" for relief under Rule 60(b) (*Tani*, 282 F.3d at 1171) and the "good cause" required to amend a scheduling order. *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 674 (C.D. Cal. 2003) (if party's "lawyers were guilty of gross negligence or abandonment, then, applying *Johnson [v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992)] and *Tani*, **a finding of extraordinary circumstances or good cause, justifying a modification of the scheduling order, would be warranted**.")[1] (emphasis added.)

Here, Plaintiffs established both gross negligence and attorney abandonment which would constitute "good cause" for relief from the scheduling order even outside the context of a

[1] The APA's brief actually cites *Matrix* -- but ignores this language -- undoubtedly because it eviscerates the APA's argument that attorney abandonment doesn't constitute "good cause."

class action.[2] And, the constitutional requirement to protect the rights of absent class members from inadequate representation (which was already established) militates far more strongly in favor of relief in this context than in any individual action.[3]

(2) *Only* An Order Granting Relief From The Scheduling Order Will Protect the Class Members' Constitutional Right to Adequate Representation

None of the dozens of cases cited by the APA involved abandonment by *class* counsel. But, as pointed out in Plaintiffs' Motion at 5:10-15: (1) the Court has a continuing obligations to constantly supervise class counsel (*McNeil v. Guthrie* (10th Cir. 1991) 945 F.2d 1163, 1166-1167) (citations omitted) and, (2), adequate representation is *constitutionally* mandated. *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628, 642. Inadequate representation -- as found by this Court -- should not be permitted to prejudice the class, particularly where it can readily be avoided by modifying the scheduling order. The APA takes an ostrich-like approach to these critical threshold issues in the apparent hope that they will somehow be overlooked. But, by failing to address these constitutional issues, the APA effectively concedes them. *See, Ramirez v. GhilottiBros. Inc*., 941 F. Supp. 2d 1197, 1210 n.7 (N.D. Cal. 2013) (collecting cases holding that a party conceded an argument by failing to respond to it).

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[2] The APA's arguments that Katezenbach's abandonment does not rise to the level of "gross negligence" are: (a) incomprehensible; and (b), incompatible with this Court's finding of "good cause" sufficient to grant relief from the trial date.

[3] The APA ignores the finding of inadequate representation and tries to downplay Mr. Katzenbach's lapses by stating that he was only "'guilty' – at most – of failing to designate an expert witness, and perhaps failing to take particular discovery" (Opp. at 11:8-10), while overlooking the fact that he also mislead his clients prior to the expiration of the discovery cut off, and entirely abandoned them.

(3) But Even If This Were Only an Individual Action, The Public Policy Expressed In *Tani* Would Require That Relief Be Granted

Instead of addressing the constitutional issues raised in the Motion, the Opposition spends six pages attempting to distinguish the *Tani* decision, but does so to no avail. *See* Opp. at 6 -12. The primary thrust of the APA's argument is that "*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." Opp. at 7:3-4. Not so. First, of course, Rule 60(b) is not limited to relief from default judgments, as it also provides relief from *any* "final judgment, order, or proceeding." But, more importantly, the sound public policy behind *Tani* plainly applies to motions to modify scheduling orders -- as explained in *Matrix* -- in individual actions, but applies with even greater force in the context of class action litigation.

The main case that APA cites to support its specious argument is *Jules Jordan Video, Inc. v. Canadian Multimedia Entm't, Inc*., No. CV 05-0517 DT (JTLX), 2006 WL 8432060 (C.D. Cal. Oct. 16, 2006). There, the District Court applied *Tani* to grant relief from a default judgment where the Defendants' original counsel attempted to file an answer only to have it rejected because of a captioning error, leading to entry of a default several weeks later. As the District Court put it, "the Ninth Circuit has held that a client is not responsible for his counsel's gross negligence. [citing *Tani*, at 1168–69.] The [*Tani*] Court explained that '[w]hen an attorney is grossly negligent, ... the judicial system loses credibility as well as the appearance of fairness, if the result is that an innocent party is forced to suffer drastic consequences.'" *Id*., at *7 quoting *Tani* at 1170.

Defendants in *Jules Johnson* also sought relief from the discovery cut-off. The District Court denied that relief -- but *not* because the public policy behind *Tani* did not apply to such requests, as APA would have it -- but because "Defendants have had three months between obtaining new counsel in August and the discovery cut-off date of October 31, 2006 to conduct

discovery." *Id*. at *11. Thus, their new counsel had more than adequate time to conduct discovery making it impossible to show that "good cause" supported relief from the cut-off.

The present case could not be more different than *Jules Jordan*. Aside from the fact that this is a class action, the expert and discovery deadlines here lapsed long before Plaintiffs became aware of Katzenbach's lapses, which did not begin to manifest themselves until communications began breaking down in mid-2018, though he was still appearing on behalf of the named plaintiffs in the related case in December 2018, and remained as class counsel until relieved by Order dated February 13, 2019 (Dkt. No. 154). As a consequence, nothing in *Jules Jordan* supports the APA's attempt to cut off Plaintiff's ability to identify an expert and to conduct discovery through their new counsel following an abandonment by counsel. Nor, of course, does *Jules Jordan* address the unique situation of a class action or the constitutional requirements to protect the rights of absent class members.

APA's argument that the "good cause" standard required to obtain relief from scheduling deadlines under Rule 16(b) is somehow a *higher standard* than the "extraordinary circumstances" required for relief from judgments or orders under Rule 60(b)(6) belies all logic, and is directly contrary to the language of *Matrix Motor Co.*, as quoted above. (And, the actual holding in *Matrix Motor Co.* is plainly distinguishable. *See* APA's Opp. at 8:19-20, distinguishing the facts in *Matrix Motor Co.* "from the virtual abandonment found in *Tani*." Here, of course, there was far more than a "virtual abandonment" -- the attorney the APA itself recommended to serve as class counsel[4] *actually* abandoned the class.)

The APA's citation to *Plum Healthcare Group, LLC v. One Beacon Prof. Ins*., Case No.

[4] The APA now claims it "never 'recommended' that the Court appoint Mr. Katzenbach as class counsel." Opp. at 13:8. But by stating that this Court "**should appoint . . . Mr. Katzenbach as class counsel**" that's precisely what APA did, irrespective of its motivation in making that representation to the Court.

15-cv-2747-W-MDD, 2017 BL 134829, at *1-*4 (S.D. Cal. April 24, 2017) is also unhelpful. There, the District Court recognized that "[c]ourts must distinguish, however, between '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 circumstances of his attorney's extreme negligence or egregious conduct.'" (*Id*., citation omitted)). And in yet another case cited by APA (*Zone Sports Center, LLC v. Rodriguez, 2016 WL 224093* at *7-*8 (E.D. Cal. Jan. 19, 2016)), the court similarly recognized that "extraordinary circumstances" may constitute good cause for modifying a scheduling order. *Id*., at *6 ("In *Johnson* the court held Rule 16(b)'s reference to 'good cause' was 'a close correlate' of 'extraordinary circumstances,' suggesting extraordinary circumstances may be sufficient to establish good cause.") In *Zone Sports Center*, such circumstances were not found to exist where counsel had "made a deliberate decision not to designate an expert," that tactical decision did not amount to "gross negligence," and there was no indication that counsel had abandoned the client.

The APA's arguments here are pure semantics and are belied by the very cases that its Opposition relies upon. *Tani* teaches that abandonment/gross negligence is precisely the kind of conduct that breaks down the normal presumption that a principal (the client) is bound by his agent's (the lawyer's) mistakes. *See Zone Sports Center* at *7 (If "a party shows that its counsel was grossly negligent or constituted abandonment of the client, which amounts to extraordinary circumstances under *Tani*, there may be good cause to modify the scheduling order.") (citing *Matrix Motor Co., Inc.*, 218 F.R.D. at 674). Thus, whether the lawyer's extreme breach of duty is termed "abandonment," "extreme negligence," "egregious conduct," or "extraordinary circumstances" is entirely besides the point: it is the severity of the conduct that vitiates the agent/principal relationship and provides good cause for relief.

None of the cases cited by the APA's opposition in which the courts refused to modify

scheduling orders deal with similar facts to the present case and most certainly not in the context of a certified class action. Nor does APA even mention the Court's own fiduciary duty to class members, as recognized in one of the cases APA cites (*Armour v. Network Assocs., Inc*., 171 F. Supp. 2d 1044, 1050 (N.D. Cal. 2001)).

(4) "Diligence" Is A Red Herring Under These Circumstances -- But Plaintiffs Established Their Diligence In Any Event

As expected, the APA argues that Motion should be denied because Plaintiffs have not been sufficiently diligent, or because their diligence came too late. See Opp. at 4:3-7. Not so. In making that argument, the APA ignores the evidence that Plaintiffs justifiably relied on the word of their highly-qualified attorney that things were proceeding as expected. *Prior to the expiration of the expert discovery cut-off* Plaintiffs were lead to believe that Katzenbach had retained an expert and the case was "on track." See Dkt. No. 152-4 (Cordes Dec. at ¶8 ("We agreed [in June 2016] for Mr. Katzenbach to retain Kit Darby as our expert witness at that time"); ¶10 ("We met with Katzenbach on 10/23/2017 in San Francisco. We talked for hours about the case and he assured us that all was on track, but that he had been busy on other matters"); ¶17 ("I thought [Mr. Darby] had been retained and was working on the case."))[5]

Indeed, Katzenbach continued to litigate -- seemingly effectively -- on plaintiffs' behalf for a considerable period thereafter, appearing in December 2018 in the related case. Short of associating in new counsel before there were any overt signs that Katzenbach had abandoned their interests, there's nothing more the Plaintiffs could have reasonably been expected to have done to have avoided this situation. By arguing that they were not diligent, APA seeks to hold Plaintiffs to a ridiculous standard unsupported by any case authority. Moreover, the APA's

[5] The APA points out that Mr. Mackenzie is retired, and posit that he should have spent more time monitoring the case. Perhaps he would have, had he not been mislead by Katzenbach. But the named plaintiffs still spent many hours working on this case. See Dkt. No. 152-4.

argument that Plaintiffs should be bound to "notice of all facts, notice of which can be charged upon the attorney" (Opposition at 15:17-18, citation omitted) ignores the fact that the principal/agent relationship was severed by Katzenbach's gross negligence, as in *Tani*.

Indeed, the APA's argument about Plaintiffs' diligence is a red herring in the *context of an abandonment* in any event. The APA argues that "'gross negligence/abandonment' is not one of the *Schumer* factors." Opp. at 4:13. And that's a true statement, as far as it goes. But *Schumer*[6] didn't involve gross negligence or abandonment so there was no need to consider it. ***Tani,*** on the other hand, did, and plainly established that the Ninth Circuit refuses to punish innocent litigants for their lawyers' gross negligence. And, if anything, the public policy upon which *Tani* is based must take on an even greater importance in the context of a class action. (The remedy proposed by the APA's Opposition for the lack of adequate representation -- decertification -- would obviously prejudice the absent class members.)

(5) Plaintiffs Fulfilled *Their* Duty To The Class -- But Were Stymied By Mr. Katzenbach's Breaches of *His* Duty

Of course, the policies supporting class members' constitutionally-protected right to adequate representation apply with particular force in the context of a breach of duty by class counsel. *See, e.g., In re Nigeria Charter Flights Litig.*, No. CV 2004-0304 RJD MDG, 2013 WL 1788530, at *2 (E.D.N.Y. Apr. 26, 2013) ("Given the abandonment by original class counsel of their responsibilities in administering the settlement, the failure of class members to supplement their claims prior to the bar date is understandable.")

But, the APA would prefer to make the class suffer for Katzenbach's lapses, arguing that "[i]t was Plaintiffs, and only Plaintiffs, who carried the obligation to monitor their counsel's performance." Opp. at 14:16-17. And the APA, with the benefit of hindsight, asserts

[6] *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).

that class counsel should have been more closely monitored, notwithstanding the fact that Katzenbach had excellent credentials (as the APA concedes), it was Katzenbach's breach of *his* fiduciary duty to plaintiffs that caused the deadlines to be missed, and he mislead the plaintiffs about the status of his efforts along the way. But this argument stands the principles of class representation on their head and the three class action cases cited by the APA to justify such a collective punishment for class counsel's gross negligence do not support that result.

None of those class action cases (*Cohen v Beneficial Indus. Loan Corp*., 337 U.S. 541, 549 (1949); *Armour v. Network Associates, Inc*., 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001); nor *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) involve attorney negligence of any kind (gross or ordinary), misleading conduct by counsel, or even a request for relief from a scheduling order. All those cases establish is that a class action is a form of representative litigation in which there is a general duty of named plaintiffs to monitor class counsel and for "plaintiffs *and their counsel* [to] prosecute the action vigorously on behalf of the class." *Id*. (emphasis added). But a general duty to monitor counsel exists in every action -- since it is not disputed that a principal is normally liable for his agent's *ordinary* negligence. And there is evidence that Plaintiffs here diligently attempted to monitor the case, only to be mislead by Mr. Katzenbach and then stymied by his eventual refusal to communicate. Ultimately, Plaintiffs went so far as to retain independent counsel to attempt to communicate with Katzenbach, followed by further steps taken in an effort to protect the rights of the class members including, *inter alia*, bringing the present motion. Plaintiffs have tried to protect the interests of the class at every juncture. (Should the Court determine that more details of the Plaintiffs' efforts are required, Plaintiffs would be pleased testify regarding their efforts at a hearing on this Motion.)

The APA also cites the unpublished decision POGA MGMT PTNRS LLC v. Medfiler LLC, 2014 WL 6893778, at *1 (N.D. Cal. Dec. 5, 2014) for the proposition that plaintiffs

should be forced to suffer as a consequence of Katzenbach's abandonment. *POGA* does not materially support that argument -- unlike the present case, *POGA* was an individual action, and there was no claim of gross negligence to break the agency relationship, as in *Tani*.

The rest of the Opposition brief functions merely as an exercise in misdirection by placing exclusive reliance upon a host of inapposite authorities in which the APA has attempted to bury the real issues at stake here. As the APA has utterly failed to effectively distinguish *Community Dental Servs. v. Tani*, while simultaneously refusing to address the actual context of the present case (including the constitutional implications of adequate representation in the context of a class action), little time need be wasted on the APA's inapposite authorities.

II. CONCLUSION

For all of the above-stated reasons, it is respectfully requested that this Court grant the remaining relief requested by Plaintiffs' Motion.

DATED: March 22, 2019

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