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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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| <p>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,</p> <p>v.</p> <p>ALLIED PILOTS ASSOCIATION and AMERICAN AIRLINES, INC. Defendants.</p> | <p>Case No.: 3:15-cv-03125 RS</p> <p>PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO CONTINUE TRIAL DATE ETC.</p> <p>[Hearing vacated by Order Docket No. 157 unless otherwise ordered]</p> |
|--|---|

1 change of strategy but because Katzenbach's abandonment *forced* Plaintiffs to seek new
 2 counsel to (i) attempt to communicate with Katzenbach; (ii) to "step into the breach" by
 3 associating in as counsel of record, (iii) to seek a ruling on Katzenbach's adequacy; (iv) to seek
 4 relief from pre-trial order deadlines and trial date; and (v), to seek appointment as class
 5 counsel.
 6

7 The law is clear that the relief sought via this Motion is both necessary and appropriate
 8 to protect the constitutionally-protected rights of the class. Plaintiffs recognize that, should the
 9 Motion be granted, a new scheduling order will promptly issue and they stand willing and able
 10 to comply with a tight schedule for completing discovery and preparing an expert report (e.g.,
 11 90 days) -- and have already retained an expert for such purposes. See Dkt. No. 152-5 ¶3.
 12

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

14 The law is crystal clear in this circuit that abandonment/gross negligence of counsel --
 15 even outside the class action context -- provides both the "extraordinary circumstances" for
 16 relief under Rule 60(b) (*Tani*, 282 F.3d at 1171) and the "good cause" required to amend a
 17 scheduling order. *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 674
 18 (C.D. Cal. 2003) (if party's "lawyers were guilty of gross negligence or abandonment, then,
 19 applying *Johnson [v. Mammoth Recreations, Inc.]*, 975 F.2d 604 (9th Cir. 1992)] and *Tani*, a
 20 **finding of extraordinary circumstances or good cause, justifying a modification of the**
 21 **scheduling order, would be warranted."**)¹ (emphasis added.)
 22

23 Here, Plaintiffs established both gross negligence and attorney abandonment which
 24 would constitute "good cause" for relief from the scheduling order even outside the context of a
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 28 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."

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

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

6 *None* of the dozens of cases cited by the APA involved abandonment by *class* counsel.
 7 But, as pointed out in Plaintiffs' Motion at 5:10-15: (1) the Court has a continuing obligations
 8 to constantly supervise class counsel (*McNeil v. Guthrie* (10th Cir. 1991) 945 F.2d 1163, 1166-
 9 1167) (citations omitted) and, (2), adequate representation is *constitutionally* mandated.
 10 *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812, 105 S.Ct. 2965, 2974, 86 L.Ed.2d
 11 628, 642. Inadequate representation -- as found by this Court -- should not be permitted to
 12 prejudice the class, particularly where it can readily be avoided by modifying the scheduling
 13 order. The APA takes an ostrich-like approach to these critical threshold issues in the apparent
 14 hope that they will somehow be overlooked. But, by failing to address these constitutional
 15 issues, the APA effectively concedes them. *See, Ramirez v. GhilottiBros. Inc.*, 941 F. Supp. 2d
 16 1197, 1210 n.7 (N.D. Cal. 2013) (collecting cases holding that a party conceded an argument
 17 by failing to respond to it).
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23 _____
 24 ² The APA's arguments that Katzenbach's abandonment does not rise to the level of "gross
 25 negligence" are: (a) incomprehensible; and (b), incompatible with this Court's finding of "good
 cause" sufficient to grant relief from the trial date.

26 ³ The APA ignores the finding of inadequate representation and tries to downplay Mr.
 27 Katzenbach's lapses by stating that he was only "'guilty' – at most – of failing to designate an
 28 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.

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

3 Instead of addressing the constitutional issues raised in the Motion, the Opposition
4 spends six pages attempting to distinguish the *Tani* decision, but does so to no avail. *See* Opp.
5 at 6 -12. The primary thrust of the APA’s argument is that “*Tani* is peculiar to the Rule 60(b)
6 context because it is grounded in the policy, inapposite to the Rule 16 context, of avoiding
7 default judgments.” Opp. at 7:3-4. Not so. First, of course, Rule 60(b) is not limited to relief
8 from default judgments, as it also provides relief from *any* “final judgment, order, or
9 proceeding.” But, more importantly, the sound public policy behind *Tani* plainly applies to
10 motions to modify scheduling orders -- as explained in *Matrix* -- in individual actions, but
11 applies with even greater force in the context of class action litigation.
12

13 The main case that APA cites to support its specious argument is *Jules Jordan Video,*
14 *Inc. v. Canadian Multimedia Entm’t, Inc.*, No. CV 05-0517 DT (JTLX), 2006 WL 8432060
15 (C.D. Cal. Oct. 16, 2006). There, the District Court applied *Tani* to grant relief from a default
16 judgment where the Defendants’ original counsel attempted to file an answer only to have it
17 rejected because of a captioning error, leading to entry of a default several weeks later. As the
18 District Court put it, “the Ninth Circuit has held that a client is not responsible for his counsel’s
19 gross negligence. [citing *Tani*, at 1168–69.] The [*Tani*] Court explained that “[w]hen an
20 attorney is grossly negligent, ... the judicial system loses credibility as well as the appearance of
21 fairness, if the result is that an innocent party is forced to suffer drastic consequences.” *Id.*, at
22 *7 quoting *Tani* at 1170.
23

24 Defendants in *Jules Johnson* also sought relief from the discovery cut-off. The District
25 Court denied that relief -- but *not* because the public policy behind *Tani* did not apply to such
26 requests, as APA would have it -- but because “Defendants have had three months between
27 obtaining new counsel in August and the discovery cut-off date of October 31, 2006 to conduct
28

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

3 The present case could not be more different than *Jules Jordan*. Aside from the fact
4 that this is a class action, the expert and discovery deadlines here lapsed long before Plaintiffs
5 became aware of Katzenbach’s lapses, which did not begin to manifest themselves until
6 communications began breaking down in mid-2018, though he was still appearing on behalf of
7 the named plaintiffs in the related case in December 2018, and remained as class counsel until
8 relieved by Order dated February 13, 2019 (Dkt. No. 154). As a consequence, nothing in *Jules*
9 *Jordan* supports the APA’s attempt to cut off Plaintiff’s ability to identify an expert and to
10 conduct discovery through their new counsel following an abandonment by counsel. Nor, of
11 course, does *Jules Jordan* address the unique situation of a class action or the constitutional
12 requirements to protect the rights of absent class members.
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15 APA’s argument that the “good cause” standard required to obtain relief from
16 scheduling deadlines under Rule 16(b) is somehow a *higher standard* than the “extraordinary
17 circumstances” required for relief from judgments or orders under Rule 60(b)(6) belies all
18 logic, and is directly contrary to the language of *Matrix Motor Co.*, as quoted above. (And, the
19 actual holding in *Matrix Motor Co.* is plainly distinguishable. See APA’s Opp. at 8:19-20,
20 distinguishing the facts in *Matrix Motor Co.* “from the virtual abandonment found in *Tani.*”
21 Here, of course, there was far more than a “virtual abandonment” -- the attorney the APA itself
22 recommended to serve as class counsel⁴ *actually* abandoned the class.)
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24 The APA’s citation to *Plum Healthcare Group, LLC v. One Beacon Prof. Ins.*, Case No.

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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.

1 15-cv-2747-W-MDD, 2017 BL 134829, at *1-*4 (S.D. Cal. April 24, 2017) is also unhelpful.
2 There, the District Court recognized that “[c]ourts must distinguish, however, between ‘a
3 client’s accountability for his counsel’s neglectful or negligent acts—too often a normal part of
4 representation—and his responsibility for the more unusual circumstances of his attorney’s
5 extreme negligence or egregious conduct.’” (*Id.*, citation omitted)). And in yet another case
6 cited by APA (*Zone Sports Center, LLC v. Rodriguez*, 2016 WL 224093 at *7-*8 (E.D. Cal.
7 Jan. 19, 2016)), the court similarly recognized that “extraordinary circumstances” may
8 constitute good cause for modifying a scheduling order. *Id.*, at *6 (“In *Johnson* the court
9 held Rule 16(b)’s reference to ‘good cause’ was ‘a close correlate’ of ‘extraordinary
10 circumstances,’ suggesting extraordinary circumstances may be sufficient to establish good
11 cause.”) In *Zone Sports Center*, such circumstances were not found to exist where counsel had
12 “made a deliberate decision not to designate an expert,” that tactical decision did not amount to
13 “gross negligence,” and there was no indication that counsel had abandoned the client.
14

15
16 The APA’s arguments here are pure semantics and are belied by the very cases that its
17 Opposition relies upon. *Tani* teaches that abandonment/gross negligence is precisely the kind
18 of conduct that breaks down the normal presumption that a principal (the client) is bound by his
19 agent’s (the lawyer’s) mistakes. See *Zone Sports Center* at *7 (If “a party shows that its
20 counsel was grossly negligent or constituted abandonment of the client, which amounts to
21 extraordinary circumstances under *Tani*, there may be good cause to modify the scheduling
22 order.”) (citing *Matrix Motor Co., Inc.*, 218 F.R.D. at 674). Thus, whether the lawyer’s
23 extreme breach of duty is termed “abandonment,” “extreme negligence,” “egregious conduct,”
24 or “extraordinary circumstances” is entirely besides the point: it is the severity of the conduct
25 that vitiates the agent/principal relationship and provides good cause for relief.
26

27 None of the cases cited by the APA’s opposition in which the courts refused to modify
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1 scheduling orders deal with similar facts to the present case and most certainly not in the
 2 context of a certified class action. Nor does APA even mention the Court's own fiduciary duty
 3 to class members, as recognized in one of the cases APA cites (*Armour v. Network Assocs.,*
 4 *Inc.*, 171 F. Supp. 2d 1044, 1050 (N.D. Cal. 2001)).

5
 6 **(4) "Diligence" Is A Red Herring Under These Circumstances -- But Plaintiffs
 Established Their Diligence In Any Event**

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

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 19 Indeed, Katzenbach continued to litigate -- seemingly effectively -- on plaintiffs' behalf
 20 for a considerable period thereafter, appearing in December 2018 in the related case. Short of
 21 associating in new counsel before there were any overt signs that Katzenbach had abandoned
 22 their interests, there's nothing more the Plaintiffs could have reasonably been expected to have
 23 done to have avoided this situation. By arguing that they were not diligent, APA seeks to hold
 24 Plaintiffs to a ridiculous standard unsupported by any case authority. Moreover, the APA's
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 27 ⁵ The APA points out that Mr. Mackenzie is retired, and posit that he should have spent more
 28 time monitoring the case. Perhaps he would have, had he not been misled by Katzenbach. But
 the named plaintiffs still spent many hours working on this case. See Dkt. No. 152-4.

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

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

13
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15 **(5) Plaintiffs Fulfilled Their Duty To The Class -- But Were Stymied By Mr.
16 Katzenbach’s Breaches of His Duty**

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

23 But, the APA would prefer to make the class suffer for Katzenbach’s lapses, arguing
24 that “[i]t was Plaintiffs, and only Plaintiffs, who carried the obligation to monitor their
25 counsel’s performance.” Opp. at 14:16-17. And the APA, with the benefit of hindsight, asserts
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28 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).
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1 that class counsel should have been more closely monitored, notwithstanding the fact that
2 Katzenbach had excellent credentials (as the APA concedes), it was Katzenbach's breach of *his*
3 fiduciary duty to plaintiffs that caused the deadlines to be missed, and he misled the plaintiffs
4 about the status of his efforts along the way. But this argument stands the principles of class
5 representation on their head and the three class action cases cited by the APA to justify such a
6 collective punishment for class counsel's gross negligence do not support that result.
7

8 None of those class action cases (*Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541,
9 549 (1949); *Armour v. Network Associates, Inc.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001);
10 nor *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) involve attorney negligence of any
11 kind (gross or ordinary), misleading conduct by counsel, or even a request for relief from a
12 scheduling order. All those cases establish is that a class action is a form of representative
13 litigation in which there is a general duty of named plaintiffs to monitor class counsel and for
14 "plaintiffs *and their counsel* [to] prosecute the action vigorously on behalf of the class." *Id.*
15 (emphasis added). But a general duty to monitor counsel exists in every action -- since it is not
16 disputed that a principal is normally liable for his agent's *ordinary* negligence. And there is
17 evidence that Plaintiffs here diligently attempted to monitor the case, only to be misled by Mr.
18 Katzenbach and then stymied by his eventual refusal to communicate. Ultimately, Plaintiffs
19 went so far as to retain independent counsel to attempt to communicate with Katzenbach,
20 followed by further steps taken in an effort to protect the rights of the class members including,
21 *inter alia*, bringing the present motion. Plaintiffs have tried to protect the interests of the class
22 at every juncture. (Should the Court determine that more details of the Plaintiffs' efforts are
23 required, Plaintiffs would be pleased to testify regarding their efforts at a hearing on this Motion.)
24
25

26 The APA also cites the unpublished decision *POGA MGMT PTNRS LLC v. Medfiler*
27 *LLC*, 2014 WL 6893778, at *1 (N.D. Cal. Dec. 5, 2014) for the proposition that plaintiffs
28

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

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

11 II. CONCLUSION

12 For all of the above-stated reasons, it is respectfully requested that this Court grant the
 13 remaining relief requested by Plaintiffs' Motion.
 14

15 DATED: March 22, 2019

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