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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

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6 Attorneys for Defendants
7 CALIFORNIA INSTITUTE OF TECHNOLOGY,
8 GREGORY CHIN, CLARK A. BURGESS, AND
9 KEVIN KLENK

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES

12 DAVID COPPEDGE, an Individual,
13 Plaintiff,

CASE NO. BC435600

14 vs.

**DEFENDANTS' OPPOSITION TO
15 PLAINTIFF'S EX PARTE APPLICATION
16 TO CONTINUE TRIAL DATE**

17 JET PROPULSION LABORATORY,
18 form unknown; CALIFORNIA
19 INSTITUTE OF TECHNOLOGY, form
20 unknown; GREGORY CHIN, an
Individual; CLARK A. BURGESS, an
Individual; KEVIN KLENK, an Individual;
and DOES 1 through 25, inclusive,

Date: June 3, 2011
Time: 8:30 a.m.
Dept: 54

Trial Date: October 19, 2011

21 Defendants.

1 **I. INTRODUCTION**

2 Plaintiff David Coppedge ("Coppedge") filed this lawsuit well over a year ago, in
3 April 2010, and discovery is at an advanced stage. The case is ready for summary judgment
4 briefing to begin now, for summary judgment motions to be heard in September, and for trial to
5 proceed in October. But Coppedge now seeks to delay *everything*, due to his desire to complete a
6 few more depositions before the summary judgment filing deadline (even though there is no
7 indication he is filing one, and his oppositions are not due for months), and because of his
8 obligations in another case. These are not sufficient grounds to continue either the summary
9 judgment proceedings or trial.

10 The application should be denied outright because there is no emergency. The
11 application should also be denied because there is no merit: Coppedge cannot establish that there
12 is any reason to postpone the briefing or hearings on Caltech's Motions for Summary Judgment,
13 or that good cause exists to continue the trial. Finally, and significantly, Coppedge's request is
14 untimely. The core factual issue underlying his continuance request (his layoff) occurred prior to
15 the parties' February 2011 joint stipulation to continue the trial date, which the Court granted. If
16 Coppedge envisioned that he would need more time for discovery or trial preparation, he should
17 have proposed a longer continuance at that time. At minimum, Coppedge should have made this
18 request in April, when depositions stalled because of *his counsel's* schedule. This *ex parte*
19 application only seeks to exacerbate the delay his counsel has already caused.

20 Caltech respectfully requests that the Court deny Coppedge's *ex parte* application,
21 and maintain the current summary judgment and trial dates.

22 **II. STATEMENT OF RELEVANT FACTS**

23 Coppedge filed this lawsuit on April 14, 2010. The individual defendants' Motion
24 for Summary Judgment is set for hearing on September 7, 2011. Declaration of Cameron W. Fox
25 ("Fox Decl.") ¶ 3. Caltech's Motion for Summary Judgment is set for hearing on September 16,
26 2011. *Id.* ¶ 4. The moving papers are due on June 24, 2011 and July 1, 2011, respectively (*Id.* ¶¶
27 3-4); Coppedge's oppositions are not due until late August and early September. Trial is
28 currently set for October 19, 2011.

1 **A. Coppedge Was Already Aware Of New Allegations, And Discovery Needs, At**
2 **The Time Of The Prior Continuance.**

3 Trial was originally set for June 15, 2011. Following Coppedge's layoff from
4 Caltech on January 24, 2011, the parties submitted a joint stipulation to allow Coppedge to file a
5 Second Amended Complaint (to add allegations pertaining to the layoff) and to continue the trial
6 date. Fox Decl. ¶ 5; Declaration of William J. Becker, Jr. in support of Plaintiff's *Ex Parte*
7 Application To Continue Trial Date ("Becker Decl.") ¶¶ 7-8. The Court entered the parties'
8 stipulation on February 14, 2011, pursuant to which it set a Mandatory Status Conference for
9 September 16, 2011; the final status conference on October 7, 2011; and the trial on October 19,
10 2011. Fox Decl. ¶ 5; Becker Decl. ¶ 8.

11 **B. Discovery Is At Advanced Stage, And Will Be Completed Well Before**
12 **Coppedge's Summary Judgment Oppositions Are Due.**

13 As Coppedge's counsel acknowledges, the parties have already "engaged in
14 extensive discovery." Becker Decl. ¶ 11. This has encompassed three days of deposition of
15 Coppedge, as well as the depositions of seven Caltech witnesses (over nine days) and the
16 beginning of an eighth witness. Fox Decl. ¶¶ 6-7; Becker Decl. ¶ 11.

17 Both sides sought additional discovery in light of the amendments to Coppedge's
18 complaint. Caltech requires an extra day of deposition from Coppedge, and Coppedge has
19 requested four more depositions from Caltech. Fox Decl. ¶ 8; Becker Decl. ¶ 12.¹

20 Coppedge erroneously states that Caltech "contend[s] they cannot produce these
21 additional witnesses for deposition any sooner than July 16, 2011." Application at 2. The
22 parties' correspondence shows what actually occurred: Caltech made extensive efforts to
23 schedule the depositions, as early as April 2011. It was Coppedge's counsel who requested they
24 be scheduled in May 2011 or later – and then represented that he was unavailable for much of
25 June 2011, pushing the depositions into July 2011.

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28 ¹ Caltech needs to take a fourth day of deposition from Coppedge, to obtain testimony regarding
the new claims and allegations set forth in his Second Amended Complaint. Caltech has noticed
the deposition for June 10, 2011, and Plaintiff has agreed to this date. Fox Decl. ¶ 8.

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- “When we were together for Ms. Conner’s deposition on April 14, 2011, Mr. Zapp and I asked you and Mr. Coppedge in person for available dates in late April for Mr. Coppedge’s deposition. During our later meet and confer that day, you informed me that you needed to schedule all outstanding depositions . . . in the early weeks of May . . .” Fox Decl. ¶ 9, Ex. A (May 6, 2011 letter from C. Fox to W. Becker).
- “On April 26, 2011 I emailed you to ask your available dates in the first three weeks of May, and you responded that you were ‘booked solid until May 26.’” *Id.*
- Coppedge’s counsel had suggested setting all of the depositions for the third week of June 2011, because he was unavailable after that through the end of June, due to depositions in another case. *Id.* ¶ 10, Ex. B (May 20, 2011 email from C. Fox to W. Becker).
- It turned out that three of the four Caltech witnesses were unavailable during the third week of June, due to meetings out of the country and pre-paid vacations. *Id.*
- Coppedge’s counsel had expressed a desire to take two depositions per day. Caltech’s counsel had asked Coppedge’s counsel when he would be available if all four could not be scheduled that week, and he had indicated July 5. *Id.*

Regardless, all depositions should be completed by July, long before Coppedge’s summary judgment oppositions are due and three months before trial.

C. Coppedge Himself Has Made No Move Toward Summary Judgment.

To Caltech’s knowledge, Coppedge has taken no steps toward filing a Motion for Summary Judgment or Adjudication. Fox Decl. ¶ 11. He has reserved no hearing dates. He has identified no claims, and presented no theories, upon which he would move. Further, his *ex parte* application does not state that he will file a motion, but rather simply alleges that lack of a continuance would preclude the possibility.

D. Coppedge Misrepresents The Status Of Settlement Negotiations.

Coppedge’s claim that “settlement is now a realistic option” is an overstatement. Application at 4. Although the parties have discussed the possibility of private mediation, no mediation has been set, and there is serious doubt whether a mediation will take place.

Declaration of James A. Zapp (“Zapp Decl.”) ¶ 3.

This is so for two reasons. First, Coppedge’s claims are totally lacking in merit, as Caltech will establish in its Motions for Summary Judgment. Second, on June 2, 2011, counsel

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1 for Caltech informed Coppedge's counsel that Caltech is unwilling to agree to certain parameters
2 that Coppedge presented as conditions of any settlement. *Id.* Coppedge's counsel will be
3 discussing this with his client. *Id.*

4 Caltech is not foreclosing the possibility of settlement in the future, but at present,
5 this is no basis for delay.

6 **E. Limitations On Counsel Availability For Trial.**

7 Neither party's counsel has indicated they have any other trial in October 2011, the
8 month during which the trial is presently set.

9 Mr. Zapp, lead trial counsel for Defendants, has a trial beginning on November 1,
10 2011, which is expected to last through November 18, 2011. Zapp Decl. ¶¶ 4-5. Mr. Zapp and
11 his wife have planned a trip to Australia to celebrate their tenth wedding anniversary, scheduled
12 from November 28, 2011 through December 7, 2011. *Id.* ¶ 7. Mr. Zapp then has another trial
13 beginning on December 13, 2011, which is expected to last until just before Christmas. *Id.* ¶ 6.

14 Both parties' counsel are available for a January 2012 trial date. *Id.* ¶ 8; Becker
15 Decl. ¶ 20.

16 **III. THE COURT SHOULD DENY PLAINTIFF'S EX PARTE APPLICATION**

17 **A. Coppedge Cannot Make Any Showing of Exigent Circumstances To Justify**
18 **Ex Parte Relief.**

19 This application should be denied because there is no emergency here. Pursuant to
20 California Rule of Court 3.1202(c), an applicant for *ex parte* relief must make an affirmative
21 factual showing of "irreparable harm, immediate danger, or any other statutory basis for granting
22 relief *ex parte*." Cal. Rules Ct., Rule 3.1202(c). Coppedge's application is devoid of any
23 affirmative factual showing of any exigent circumstances that would justify *ex parte* relief.
24 Coppedge's summary judgment oppositions are not due until August and September 2011, and
25 the trial is not until October 2011. There is ample to time to bring a properly noticed motion, and
26 nothing to prevent Coppedge from preparing his oppositions and for trial in the meantime.
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1 **B. There Are No Grounds To Continue Either Summary Judgment Proceedings**
2 **Or The Trial.**

3 **1. There Is No Reason To Move The Summary Judgment Hearings, Or**
4 **To Provide Additional Time For Plaintiff's Opposition Briefs or**
5 **Hypothetical Motion.**

6 There is no basis to continue proceedings on Caltech's Motions for Summary
7 Judgment, or to provide Coppedge additional time for his own hypothetical Motion for Summary
8 Judgment or Adjudication.

9 First, with respect to Caltech's Motions, California Code of Civil Procedure
10 Section 437c(h) provides: "If it appears from the affidavits submitted in opposition to a motion
11 for summary judgment . . . that facts essential to justify opposition may exist but cannot, for
12 reasons stated, then be presented, the court shall deny the motion, or order a continuance to
13 permit affidavits to be obtained or discovery to be had or may make any other order as may be
14 just." *See also Scott v. CIBA Vision Corp.*, 38 Cal. App. 4th 307, 325-26 (1995) ("To be entitled
15 to a continuance, the party opposing the motion for summary judgment must show that its
16 proposed discovery would have led to facts essential to justify opposition."). These rules plainly
17 envision a party seeking a continuance because proposed discovery was not obtained. But here,
18 Coppedge will obtain the depositions he seeks *well before* he submits his summary judgment
19 oppositions. And if he does feel he is lacking needed discovery at that time, he can submit a
20 declaration under Section 437c(h). (The mere fact that he may have to wait a few more weeks to
21 obtain the discovery he seeks is no basis for a continuance.)

22 Second, while Coppedge contends that he "will . . . not be able to prepare motions
23 for summary judgment/adjudication unless the trial date is continued," Application at 3, he has
24 provided zero indication that he *will* move for summary judgment or adjudication. He has
25 reserved no hearing dates, he has proffered no theories, and even in his *ex parte* application, he
26 does not state that he will file a motion. Coppedge cannot use the mere prospect of a motion for
27 summary judgment to delay proceedings on Caltech's Motions, for which Caltech properly and
28 timely reserved hearing dates and upon which Caltech is diligently working.

1 **2. There Is No Reason To Move The Trial Date.**

2 California Rule of Court 3.1332(c) requires Coppedge to make an affirmative
3 showing of good cause in order to obtain a trial continuance. He cannot do so. No reason exists
4 to continue the trial at the present time, much less the requisite good cause.

5 Coppedge suggests that three of the circumstances identified in Rule 3.1332(c) as
6 indicating good cause apply here. In fact, none does.

- 7 • Although “unavailability of trial counsel” could be grounds for a continuance,
8 Coppedge’s counsel is not actually unavailable for the October 19, 2011 trial;
9 rather, he has simply indicated that he has a trial in *September*, which he
10 speculates would impair his preparation for trial and the status conferences.
11 Application at 7.
- 12 • Likewise, while a “party’s excused inability to obtain essential testimony . . .
13 despite diligent efforts” could be relevant, this factor is not invoked here:
14 Coppedge has not been *unable* to obtain the discovery he seeks, he has simply not
15 obtained it *yet* – mostly due to his own counsel’s schedule. And he is likely to
16 have it by July, long before his summary judgment oppositions are due and three
17 months prior to the current trial date. There is no need for him to have it before
18 the summary judgment filing deadline, because there is no indication he is actually
19 filing a summary judgment motion.
- 20 • There has not been a “significant, unanticipated change in the status of the case.”
21 Coppedge was laid off in January 2011 – prior to the *previous* trial continuance in
22 this case. There have been no changes in the status of the case since that time.

23
24 Further, the other factors identified by Rule 3.1332 as relevant to the continuation
25 determination actually weigh in Caltech’s favor. Rule 3.1332(d) provides:

26 In ruling on a motion or application for continuance, the court must
27 consider all the facts and circumstances that are relevant to the
28 determination. These may include: (2) Whether there was any
previous continuance, extension of time, or delay of trial due to
any party; . . . (5) The prejudice that parties or witnesses will

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1 suffer as a result of the continuance; . . . (9) Whether all parties
2 have stipulated to a continuance; . . . (10) Whether the interests of
3 justice are best served by a continuance, by the trial of the matter,
4 or by imposing conditions on the continuance . . .

5 Here, the Court has already continued the trial once, pursuant to a joint stipulation spurred by
6 Coppedge's layoff and subsequent desire to amend his complaint – the same nucleus of facts
7 upon which he seeks to base *this* continuance. Delay will prejudice Caltech, which has been
8 diligent in litigating this case, but will be forced to expend additional unnecessary time and
9 resources if the case continues to be delayed. Caltech is not stipulating to a continuance; it did so
10 once, in good faith, but it will not continue to accede to Coppedge's dilatory tactics. Most
11 important, the "interests of justice" will not be served by a continuance. Caltech has been diligent
12 in its efforts to bring this case to trial. In contrast, Coppedge's effort to delay proceedings is
13 either for no reason at all (as the current discovery issues will be resolved soon), or to give
14 himself time to handle obligations in another case. Neither of these provides good cause for a
15 continuance here.

16 **C. This Application Is Untimely.**

17 Coppedge's delay in seeking this continuance provides further grounds for
18 denying it. Rule 3.1332(b) requires that a party seeking a continuance do so "as soon as
19 reasonably practical once the necessity for the continuance is discovered." *See also Mahoney v.*
20 *Southland Mental Health Assoc. Med. Group*, 223 Cal. App. 3d 167, 172 (1990) ("It appears that
21 appellant's counsel failed promptly to request a continuance upon ascertaining the need therefor
22 and failed to meet the burden of establishing good cause for a continuance. In light of these
23 circumstances, the court did not abuse its discretion in denying appellant's request for a
24 continuance.").

25 Here, the factual issue underlying Coppedge's continuance request is his January
26 2011 layoff. However, this layoff occurred prior to, and was the basis for, the parties' February
27 2011 joint stipulation to permit Coppedge to file a Second Amended Complaint and to continue
28 the trial date, which the Court granted. If Coppedge envisioned that he would need more time for
discovery or trial preparation, he should have proposed a longer continuance at that time.

1 Even if Coppedge's counsel only later decided that he would need more time,
2 there is no excuse for his delay until June 2011, when it was evident as early as April 2011 that
3 his own schedule was going to delay his completion of the depositions he seeks.

4 **IV. IN THE EVENT THE COURT GRANTS A CONTINUANCE, THE TRIAL**
5 **SHOULD BE CONTINUED TO JANUARY 2012 AND CALTECH'S MOTIONS**
6 **FOR SUMMARY JUDGMENT SHOULD PROCEED AS SCHEDULED**

7 The Court should deny Coppedge's request for a continuance in its entirety. In the
8 event that the Court is inclined to grant a continuance, Caltech respectfully requests that the trial
9 be continued until January 16, 2012, and that the Court maintain the summary judgment hearing
10 dates and briefing schedule on Caltech's Motions for Summary Judgment.

11 With respect to the trial date, January 2012 is the first month after the present trial
12 date in which both parties' counsel are available, and the January 16 date is based on Mr. Zapp's
13 20 years' experience representing Caltech, in which he has observed that many Caltech
14 employees take vacation over the holidays and sometimes into the first week in January. Zapp
15 Decl. ¶ 8.

16 With respect to the summary judgment motions, Caltech has been working
17 diligently on these motions, and would be prejudiced by delay at this point. As for Coppedge, he
18 is likely to obtain the discovery he seeks by July 2011, well in advance of the due dates for the
19 summary judgment oppositions. There is no reason to delay summary judgment proceedings.

20 **V. CONCLUSION**

21 Based upon the foregoing, Caltech respectfully requests that the Court deny Plaintiff's *ex*
22 *parte* application and maintain the current summary judgment hearing dates, summary judgment
23 briefing schedule, and trial date.

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DATED: June __, 2011

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