Superior Court of the State of California
County of Orange

Tentative Rulings
Law and Motion Calendar
Department C23
Honorable David J. Hesseltine

Hearing Date and Time: May 3, 2024, at 1:30 p.m.

Court Reporters: Official court reporters (i.e., court reporters employed by the court) are **NOT** typically provided for law and motion matters in this department. If a party desires a record of a law and motion proceeding, it is that party's responsibility to provide a court reporter, unless the party has a fee waiver and timely requests a court reporter in advance of the hearing (see link at end of this paragraph for further information). Parties must comply with the Court's policy on the use of privately retained court reporters, which may be found at the following link: **Civil Court Reporter Pooling**. For additional information regarding court reporter availability, please visit the court's website at **Court Reporter Interpreter Services**.

Tentative Rulings: The court endeavors to post tentative rulings on the court's website no later than 12:00 noon on the date of the afternoon hearing. Tentative rulings will be posted case by case on a rolling basis as they become available. Jury trials and other ongoing proceedings, however, may prevent the timely posting of tentative rulings, and a tentative ruling may not be posted in every case. Please do not call the department for tentative rulings if one has not been posted in your case. **The court will not entertain a request to continue a hearing or any document filed after the court has posted a tentative ruling.**

Submitting on Tentative Rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the courtroom clerk or courtroom attendant by calling (657) 622-5223. Please do not call the department unless **ALL** parties submit on the tentative ruling. If all sides submit on the tentative ruling and advise the court, the tentative ruling shall become the court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the court's signature if appropriate under California Rules of Court, rule 3.1312.

Non-Appearances: If no one appears for the hearing and the court has not been notified that all parties submit on the tentative ruling, the court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. The court also may make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

Appearances: Department C23 conducts non-evidentiary proceedings, such as law and motion hearings, remotely by Zoom videoconference pursuant to Code of Civil Procedure section 367.75 and Orange County Local Rule 375. Any party or attorney, however, may appear in person by coming to Department C23 at the Central Justice Center, located at 700 Civic Center Drive West in Santa Ana, California. All counsel and self-represented parties appearing in-person must check in with the courtroom clerk or courtroom attendant before the designated hearing time.

All counsel and self-represented parties appearing remotely must check-in online through the court's civil video appearance website at

https://www.occourts.org/media-relations/civil.html before the designated hearing time. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room pending the start of their specific video hearing. Check-in instructions and instructional video are available at **https://www.occourts.org/media-relations/aci.html**. The Court's "Appearance Procedures and Information--Civil Unlimited and Complex" and "Guidelines for Remote Appearances" also are available at **https://www.occourts.org/media-relations/aci.html**. Those procedures and guidelines will be strictly enforced.

Public Access: The courtroom remains open for all evidentiary and non-evidentiary proceedings. Members of the media or public may obtain access to law and motion hearings in this department by either coming to the department at the designated hearing time or contacting the courtroom clerk at (657) 622-5223 to obtain login information. For remote appearances by the media or public, please contact the courtroom clerk 24 hours in advance so as not to interrupt the hearings.

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#	Case Name	Tentative
1.	Gupta v. Ng. M.D., et al.	Before the court is the continued hearing on (1) the motion of defendant Daniel Ng, M.D. (Ng) to dismiss the action for failure to bring the case to trial within five years of filing the complaint, and (2) the joinder of defendant Newport Irvine Surgical Specialists in Ng's motion to dismiss. A plaintiff is required to bring a case to trial within five years of its commencement or be subject to mandatory dismissal unless a statutory extension of the five-year period applied. (Code Civ. Proc., §§ 583.310, 583.360.) "The provisions of section 583, Code of Civil Procedure, which require an action to be dismissed for want of prosecution if not brought to trial within five years, are mandatory; and the trial court has no discretion but to grant the motion, except where the action has been continued by a written stipulation filed with the court, or where it is shown that the defendant has been absent from the state or concealed therein, or unless the operation of the statute has been tolled." (*Bosworth v. Superior Court* (1956) 143 Cal.App.2d 775, 778.) Here, plaintiff Anubhav Gupta (Plaintiff) commenced this case on June 21, 2018. Accordingly, the five-year period was set to expire on June 21, 2023. Pursuant to the six-month extension Emergency Rule 10 provided for all cases filed before April 6, 2020, based

		on the COVID pandemic, the five-year period for this case was extended to December 21, 2023. It is now May 2024, and this case has not gone to trial. The case therefore is subject to mandatory dismissal unless there is an additional basis for extending or tolling the five-year period. "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which. . . (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Code Civ. Proc., § 583.340.) The plaintiff bears the burden to establish the five-year period should be tolled based on impossibility, impracticability, or futility. (*Gaines v. Fidelity Nat'l Title Ins.* (2016) 62 Cal.4th 1081, 1100.) "Section 583.340 is construed liberally, consistent with the policy favoring trial on the merits. [Citation.] Because the purpose of the dismissal statute 'is to prevent avoidable delay, . . . [section 583.340, subdivision (c)] makes allowance for circumstances beyond the plaintiff's control, in which moving the case to trial is impracticable for all practical purposes.' [Citation.]" (*Tanguilig v. Neiman Marcus Group, Inc.* (2018) 22 Cal.App.5th 313, 323 (*Tanguilig*).) """[S]o long as the court may conclude that there was a period of impossibility, impracticability or futility, over which plaintiff had no control . . . , the court is required to toll that period even if there is ample time after said period of impracticability within which to go to trial.""" (*Id*. at p. 324.) "To avoid dismissal under the section 583.340, subdivision (c) exception, a plaintiff must prove (1) a circumstance establishing impossibility, impracticability, or futility, (2) a causal connection between the circumstance and the failure to move the case to trial within the five-year period, and (3) that she was reasonably diligent in prosecuting her case at all stages in the proceedings." (*Tanguilig*, *supra*, 22 Cal.App.5th at p. 323; *Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 326, 328 (*Tamburina*).) At the prior hearing on the motion to dismiss, the court granted Plaintiff's request to continue the hearing to allow a substantive opposition to the motion because of counsel's health. The court cited the foregoing three elements for the application of

		section 583.340, subdivision (c), and directed Plaintiff's counsel to address them. Unfortunately, Plaintiff has ignored the court's direction and failed to directly address the three elements. Moreover, Plaintiff failed to cite any authority regarding the five-year rule. Instead, Plaintiff cited three cases—*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389; *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242; and *Latina v. County of Orange* (2004) 120 Cal.App.4th 708—addressing motions to continue. As the court explained at the last hearing, good cause for a trial continuance does not establish the foregoing elements required for section 583.340, subdivision (c), to apply. Despite these failures by Plaintiff, the record regarding this motion contains sufficient information for the court to determine whether the necessary elements are satisfied. The first element is a circumstance establishing impossibility, impracticability, or futility. Here, Plaintiff presents evidence and argues his counsel's health prevented the case from going to trial within the five-year period. Impracticability within the meaning of section 583.340, subdivision (c), may be shown by the death, illness, or incapacity of Plaintiff or Plaintiff's counsel. (*Tamburina*, *supra*, 147 Cal.App.4th at p. 330; *Sierra Nevada Memorial-Miners Hosp., Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, 473.) There is no dispute Plaintiff's counsel has suffered several very serious health events. Plaintiff has submitted a declaration by counsel's doctor outlining the various conditions. The doctor explains these health events started in the last three to four months of 2022 and continued until the beginning of March 2024. (Fishman Dec. ¶ 17.) Plaintiff's counsel and other attorneys acting on his behalf have repeatedly informed defense counsel and the court, and made multiple requests to continue trial based on counsel's health. Counsel's doctor explained counsel was unable to practice law during this time period. The defense does not dispute counsel's health issues or that they prevented him from bring the case to trial during this period. Based on the undisputed evidence, the period of impracticability ran from September 2022, to the end of February 2024, or a period of 18 months. Accordingly, the first element has been satisfied. (See *Tamburina*, *supra*, 147 Cal.App.4th at pp. 328-333

		[finding 424-day period of impracticability based on health of plaintiff and plaintiff's counsel].) The second element requires Plaintiff to show a causal connection between the circumstances creating the impracticability and the failure to bring the case to trial within the five-year period. As the *Tamburina* court explained, "'A bare showing that a counsel was ill does not warrant the attribution of such causation. Two kinds of circumstance occur to us in which it may be appropriate to say that the illness o[f] counsel has caused the plaintiff to fail to bring the case to trial in compliance with the five-year requirement. The first is when an illness of counsel occurs at the end of the five-year period in circumstances in which it is likely that counsel, but for the illness, would have become aware of the impending deadline and taken the appropriate action to avert the transgression. The second is an unusually lengthy illness of sole counsel which deprives the plaintiff of a substantial portion of the five-year period for prosecution of the lawsuit, i.e., trial preparation and moving the case to trial.' [Citation.]" (*Tamburina*, *supra*, 147 Cal.App.4th at pp. 333-334.) Here, both these circumstances are present to establish the necessary causal connection. As stated above, the period of impracticability ran from approximately September 2022, to the end of February 2024, and the five-year period was set to expire on December 21, 2023. As such the circumstance existed for the last, approximately 15-16 months of the original five-year period. Moreover, the evidence establishes there has been an unusually long illness of sole counsel that deprived Plaintiff of a substantial portion of the five-year period. Accordingly, the second element has been satisfied. The final element is that Plaintiff was reasonably diligent in prosecuting the case. "This duty of diligence applies 'at all stages of the proceedings,' and the level of diligence required increases as the five-year deadline approaches." (*Tamburina*, *supra*, 147 Cal.App.4th at p. 336.) Plaintiff failed to squarely make an attempt to address this element through his arguments or evidence. Ng's evidence and the court's record, however, shows Plaintiff filed this case as a self-represented litigant in June 2018, and then hired his current counsel in or

around May 2019. Counsel immediately served written discovery and then proceeded to take several depositions between May 2019 and October 2020. According to Ng, Plaintiff has deposed the most key and critical witnesses. (Reply. at p. 5.) In July 2021, the parties stipulated to continue trial and conduct a private mediation. The original mediation had to be rescheduled, leading to another trial continuance and a trial date in August 2022. The August 2022 trial date was the first time Plaintiff's counsel failed to appear due to a health issue. Accordingly, during these time periods there were multiple trial continuance, but none of them were due to any lack of diligence by Plaintiff. It is important to note the question is whether Plaintiff exercised reasonable diligence in prosecuting the case during this period, not whether there were any circumstances constituting impossibility, impracticability, or futility. Based on the record before the court, the court finds this element has been satisfied as well.

Based on the foregoing, the court **DENIES** the motion to dismiss. The joinder in the motion is **GRANTED**, but the joinder results in a **DENIAL** of the request to dismiss for the reasons state above.

In reaching this ruling, the court has not considered the supplemental brief, or sur-reply, Plaintiff filed on April 23, 2024. In setting the briefing schedule for this continued hearing on the motion to dismiss, the court authorized an opposition and reply. The court did not authorize a sur-reply and no proper request for leave to file a sur-reply was made. Accordingly, the court exercises its discretion to refuse to consider the brief. Moreover, counsel is ordered not to file unauthorized briefs in the future.

In light of the foregoing, the parties are ordered to appear at the hearing prepared to discuss (1) what, if any, **specific** discovery remains to be completed, (2) the time needed to conduct any such discovery, and (3) specific trial dates. Plaintiff's counsel's doctor suggests six to nine months is necessary for counsel to be medically ready for the rigors of a trial. That would put us in the October timeframe given the doctor signed the declaration on April 12, 2024. Moreover, the court is inclined to set monthly status conferences in this action to ensure the case is

		proceeding to trial and to learn as earlier as possible about any future problems. Plaintiff is ordered to give notice.
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