NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 1.06.

Parties requesting services of a court reporter shall advise the court at the number stated above no later than 4:00 p.m. the court day before the hearing. Please be advised there is a $30.00 fee for court reporting services, which must be paid in Room 102 prior to the hearing unless otherwise ordered, for each civil proceeding lasting less than one hour. Govt. Code §68086(a)(1)(A).

The Court Reporter will not report any proceeding unless a request is made and the requisite fees are paid in advance of the hearing.

Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
David I. Brown, Judge
E. Brown, Clerk
C. Chambers/J. Green,, Bailiff

Tuesday, October 27, 2015, 2:00 PM

Item 1 **2011-00109003-CU-PO**

Debora Preston vs. Greyhound Lines, Inc.

Nature of Proceeding: Motion to Compel Production of Documents, Sets Two and Three

Filed By: Weltin, Daniel R.

This matter is continued on the court's own motion to 11/13/2015 at 02:00PM in this department.

Item 2 **2012-00120535-CU-CR**

Jacinto Velasquez vs. County of Sacramento

Nature of Proceeding: Hearing on Demurrer to the 2nd Amended Complaint

Filed By: Couchot, Chad C.

Defendants' Demurrer to Plaintiff's Second Amended Complaint is SUSTAINED, with leave to amend.

Plaintiffs' Second Amended Complaint ("SAC") sets forth six causes of action against defendants: the 1st for negligence, the 2nd for wrongful death, the 3rd for lack of informed consent, the 4th for negligent hiring, supervision, and retention, the 5th for negligence-violation of statute and the 6th for unfair business practices. The SAC alleges inadequate diagnosis and treatment of plaintiffs' decedent Gayro Velazquez, in Feb. and March of 2011, resulting in his death on March 15, 2011 from cysticercosis. The named defendants are Sutter Emergency Medical Associates ("SEMA"), the successor in interest to Sutter Medical Center, Sacramento, John Nations, M.D., an employee and shareholder of SEMA, Garry Grey, P.A. a licensed physician's assistant, John G. Moser, M.D.

Defendants demur only to the 4th, 5th and 6th causes of action, added by order granting motion to file SAC on August 7, 2015.

Demurrer to the 4th for negligent hiring, supervision, and retention, the 5th for negligence-violation of statute and the 6th for unfair business practices on the grounds that each is barred by the relevant statute of limitations is SUSTAINED, with leave to amend.

In plaintiffs' motion for leave to file the SAC, they conceded that each the limitations period for each of these causes of action had expired, but asserted that the allegations of the SAC would "relate back" to the filing of the original complaint on March 15, 2015.

C.C.P., sec. 340.5 provides for a limitations period of one year from the date the plaintiff discovers, or through the use of reasonable diligence should have discovered the injury, but in no event longer than three years, for the 4th cause of action for negligent hiring, supervision, and retention and the 5th for negligence, violation of a statute.

In this action, plaintiffs' decedent died on March 15, 2011, therefore the one year period expired on March 2012, while the three years expired in March 2014.

Bus. & Prof. Code, sec. 17208 provides for a four year limitations period for the 6th cause of action for unfair business practices which would have expired in March 2015.

An amended complaint relates back to the original complaint, and thus avoids the statute of limitations as a bar against named defendants, if it: (1) rests on the same general set of facts as the original complaint; and (2) refers to the same accident and same injuries as the original complaint. (*Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 151.) If the new cause of action involves separate and distinct "offending instrumentalities" and "accidents" it does not relate back to the original complaint. *Id.*

Moving parties assert that the three new causes of action do not relate back to the original complaint as they fail the "same instrumentality" requirement.

In *Barrington, supra,* plaintiff's original complaint was alleged against a physician and the Darvon manufacturer, for failure to warn of the dangers of taking Darvon. Later, the amended complaint alleged a different offending instrumentality, the Dalkon Shield, and its manufacturer, A.H. Robins Co. The Court found no relation back.

In *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342, the plaintiff's decedent died of electrocution. The original complaint named Sunbeam Corp. and their hair dryer for the electrocution, while the Doe amendment added Coronet, a different defendant and blamed its table lamp for the electrocution. The court found that the amended complaint did not relate back.

Here, in opposition, plaintiffs assert that the amended complaint relates back to the series of events occurring between Feb. 11, 2011 and the time Velasquez was pronounced dead on March 15, 2011. The plaintiffs contend that the same instrumentality is the policies and practices of defendants in providing medical care for Velazquez.

In the alternative, plaintiffs request leave to file a Third Amended Complaint to provide

more detail as to how the causes of action relate back, which is attached to the opposition papers.

The Court concurs that the SAC is deficiently pled. The Court will allow plaintiff an opportunity to file and serve a third Amended Complaint to set forth sufficient facts to state a claim for the 4th, 5th and 6th causes of action.

The Third Amended Complaint shall be field and served not later than Friday, Nov. 6, 2015. The responsive pleading shall be due filed and served 10 days later (15 days if service is by mail).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 3 **2013-00152599-CU-OR**

Frances Branch vs. Bank of America NA

Nature of Proceeding: Motion to File 2nd Amended Complaint

Filed By: Chernay, Andre M.

Plaintiff's Motion for Leave to File Second Amended Complaint is DENIED.

Plaintiff's motion fails to comply with California Rules of Court, Rule 3.1324(b) which requires that a motion to amend a pleading before trial must be accompanied by a separate declaration which must specify: (1) The effect of the amendment; (2) Why the amendment is necessary and proper; (3) When the facts giving rise to the amended allegations were discovered; and (4) The reasons why the request for amendment was not made earlier.

Although a proposed Second Amended Complaint has been attached and a declaration has been provided containing some of the elements, no explanation as to when the facts giving rise to the amended allegations were discovered is provided. In opposition, defendant asserts that these facts have been known since the inception of the action. As the both the motion and the declaration are defective, the motion is denied.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 4 **2015-00175327-CU-BT**

Altavion, Inc. vs. Millstone, Peterson, & Watts LLP

Nature of Proceeding: Motion for Admission Pro Hac Vice

Filed By: Sheldon, John M.

The Application for Permission to Appear as Counsel *pro hac vice* by John M. Sheldon is unopposed but is DENIED, without prejudice. C.R.C., Rule 9.40.

The Sheldon declaration fails to include "The title of court and cause in which the

applicant has filed an application to appear as counsel *pro hac vice* in this state in the preceding two years, the date of each application, and whether or not it was granted." Cal. Rules of Court, Rule 9.40(b)(5)

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 5 **2015-00177489-CU-PO**

Adelina Aguilar vs. Castillino Villas AFK LLC

Nature of Proceeding: Motion to Strike Portions of the 1st Amended Complaint

Filed By: Hay, Shirley

Defendant's Motion to Strike the Punitive Damages allegation from Plaintiff's First Amended Complaint is GRANTED, with leave to amend.

Although the Plaintiff's Opposition objects that she was denied adequate notice of the motion (the papers were served one day late) she also addresses the merits of the motion, thereby waiving that service objection. A party opposing a motion waives notice defects when he/she contests the motion on the merits. See, e.g. *Carlton v. Quint* (2000) 77 Cal. App. 4th 690, 697-698; *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288.

Plaintiff's First Amended Complaint sets forth causes of action for breach of contract, breach of the implied warranty of habit ability, premises liability, general negligence, violation of the unfair competition law, negligent infliction of emotional distress and conversion.

The negligence cause of action, alone, sets forth an allegation of entitlement to punitive damages.

Mere negligence, even gross negligence is not sufficient to justify an award of punitive damages. *Ebaugh v. Rabkin* (1972) 22 Cal. App. 3d 891, 894.

Allegations of ratification of negligence are insufficient to support punitive damages.

In opposition, plaintiff asserts that she has alleged intentional conduct, in the disposing of her clothes. (FAC para. 78)

Exemplary damages are properly awardable in an action for conversion, given the required showing of malice, fraud, or oppression. (*Ferraro v. Pacific Fin. Corp.* (1970) 8 Cal.App.3d 339, 351.) Here, however, plaintiff has requested punitive damages for negligence and not for conversion.

Plaintiff shall file and serve her Second Amended Complaint not later than Monday, November 9, 2015. The responsive pleading shall be due filed and served 10 days later (15 days if service is by mail).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 6 **2015-00179865-CU-BT**

M. Choudhry vs. Sacramento Independent Taxi Owners Assoc.

Nature of Proceeding: Motion to Strike

Filed By: Khan, Adam G.

Defendant Sacramento Independent Taxi Owners' Association's Motion to Strike the Plaintiff's Complaint is unopposed and is GRANTED, with leave to amend.

Plaintiff's failure to oppose is taken as a concession to the merits of the motion, on the grounds set forth in the moving papers.

Plaintiff may have leave to file and serve his First Amended Complaint not later than Monday, November 9, 2015. The responsive pleading shall be due 10 days thereafter (or 15 days, if service is by mail).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 7 **2015-00179865-CU-BT**

M. Choudhry vs. Sacramento Independent Taxi Owners Assoc.

Nature of Proceeding: Hearing on Demurrer

Filed By: Khan, Adam G.

Defendant Sacramento Independent Taxi Owners' Association's Demurrer to the Plaintiff's Complaint is unopposed and is SUSTAINED, with leave to amend.

Plaintiff's failure to oppose is taken as a concession to the merits of the demurrer, on the grounds set forth in the moving papers.

Plaintiff may have leave to file and serve his First Amended Complaint not later than Monday, November 9, 2015. The responsive pleading shall be due 10 days thereafter (or 15 days, if service is by mail).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 8 **2015-00181715-CU-CR**

Rodrigo Romo vs. Edmund G. Brown

Nature of Proceeding: Hearing on Demurrer

Filed By: Jacobs, Joel S.

Defendants' Demurrer to Plaintiffs' Complaint for Declaratory and Injunctive Relief is SUSTAINED, without leave to amend.

Plaintiffs' Complaint is for declaratory and injunctive relief.

Plaintiffs allege that defendants Governor Brown, Defendant Division of Oil, Gas, and Geothermal Resources (DOGGR) and its Supervisor Steven Bohlen, have violated the law by not adopting regulations requiring minimum setbacks between the use of well stimulation treatments on existing oil and gas wells, and public schools.

The action relates to "well stimulation treatments"' (WSTs) employed by private energy companies to increase oil and gas production. The oil and gas industry has used WSTs in California since 1947. (Compl., para. 58.) These techniques can improve energy production, but can also pose certain environmental risks. (Compl., paras 59-61.)

Governor Brown signed a recent law imposing special permitting requirements on WSTs, Senate Bill 4 ("SB 4"). The complaint alleges that interim and final well stimulation regulations recently adopted under SB 4, fail to protect thousands of students of color, including Latino students, who are exposed to an array of toxins from well stimulation. (Compl., para. 1)

The Complaint alleges that Governor Brown, Supervisor Bohlen and DOGGR are failing public school students of color, and our state as a whole, by adopting regulations that result in and fail to redress the racially disparate impact of well stimulations on students of color, including Latino students. And it is alleged, the majority of children attending schools near well stimulations are already exposed to the worst air pollution in the country, making their developing bodies even more susceptible to the negative health impacts from close proximity to oil and gas development. (Compl., paras. 2, 87.) The California Constitution guarantees these students a fundamental right to an education.

Demurring defendants assert that no statute mandates such regulations, and in the absence of such a mandate, an executive agency has broad discretion to decide what particular regulations are appropriate for a given subject matter.

Plaintiffs allege that defendants have a duty to more aggressively regulate WSTs than they already do. The law, however, is to the contrary. An agency's duty to promulgate regulations springs from the agency's governing statute. (*Tailfeather v. Board of Supervisors of Los Angeles County* (1996) 48 Cal.App.4th 1223, 1244 [A court is without power to interfere with purely legislative action, in the sense that it may not command or prohibit legislative acts. . . .' [Citations.] If the underlying act involves the exercise of discretionary legislative power, the courts will interfere by mandamus only if the action taken 'is "so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law."... Unless the governing statutes specifically call for formal regulation in a particular area, the decision of when or whether to undertake the promulgation of formal regulations is a discretionary one. ..."the decision to institute rulemaking is one that is largely committed to the discretion of the agency, and . . . the scope of review of such a determination must, of necessity, be very narrow." [citation omitted] It is said that an agency decision not to institute rulemaking should be overturned "only in the rarest and most compelling circumstances." [citation omitted] .) It bears noting that administrative agencies " 'may have executive, administrative, investigative, legislative or adjudicative powers.' " (*Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 799, fn. 3.)

Tailfeather is on all fours with the situation presented in this action. There, regulations designed to protect public health were enacted, but they did not protect certain groups *as effectively as the plaintiffs desired*. There, as here, the plaintiffs argued that the government had a legal duty to enact regulations beyond those already on the books.

In *Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, the court held that "It is the prerogative of the Legislature to prescribe the powers and authority of an executive agency created to deal with a specific public problem such as public health. The manner in which this authority is exercised is a matter of administrative discretion. The wisdom or effectiveness of the exercise of either legislative or administrative discretion is judged essentially by the political process." *Id.* at 662.

"In short, the judicial branch of government is not the overseer of the other two. A citizen's mere dissatisfaction with the performance of either the legislative or executive branches, or disagreement with their policies does not constitute a justiciable controversy." *Id.* Indeed, in actions raising questions within the scope of a regulatory agency's purview, the courts should defer to the agency's expertise. (*Pacific Bell v. Superior Court* (1986) 187 Cal. App. 3d 137, 140; *E.B. Ackerman Importing Co. v. City of Los Angeles* (1964) 61 Cal. 2d 595.)

Thus, in the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 413.) The agency's decision, which is legislative in character, comes to the court with a strong presumption of correctness, and the court must, as noted, defer to the agency's expertise unless its decision is arbitrary and capricious. (*Moore v. California State Bd. of Accountancy*, (1992) 2 Cal. 4th 999,1015; *Ford Dealers Assn. v. Department of Motor Vehicles*, (1982) 32 Cal. 3d 347, 355; see also *Alfaro v. Terhune*, (2002) 98 Cal. App. 4th 492, 504.)

Plaintiffs rely solely on the broad anti-discriminatory provisions of Govt. Code, sec. 11135 which provides in part that: "No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."

However, as the complaint alleges that plaintiffs and other children of color are *already* disproportionately impacted by the effects of the private entities which operate oil and gas wells nearby, the failure of the defendants to completely eliminate the existing disparate impact by enacting yet more regulations even more beneficial to the children of color, fails to state a cause of action against defendants.

The demurrer is sustained without leave to amend. "[L]eave to amend should not be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373-374.)

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.

Item 9 **98AS01833**

General Motors Acceptance Corp. vs. Stephen S. Molson

Nature of Proceeding: Motion to Set Aside Default and Default Judgment

Filed By: Molson, Stephen S.

Self-represented Defendant Stephen S. Molson's Motion to Quash Service of Process and to Set Aside Entry of Default is unopposed and is GRANTED. C.C.P., secs. 473. The Complaint against Defendant Stephen S. Molson is ordered DISMISSED. C.C.P., sec. 583.210(a).

Procedural History

In this action, plaintiff General Motors Acceptance Corp. filed its complaint for money (conversion) against moving party Stephen S. Molson and co-defendant Michelle Long Molson on April 8, 1998, in connection with the lease of a motor vehicle.

No proof of personal service of the summons and complaint on the moving defendant (or on the non-moving co-defendant) appears in the Court file.

Clerk's Default was entered against both defendants on July 20, 1998.

The Court file contains a form dated July 29, 1998, from the Clerk of Dept. 53, reflecting that "There is no proof of service in the court file. Although proof of service must have been submitted in order for a default to have been obtained the court does need to review the proof of service in order to ensure that service was proper before the court will sign a default judgment."

On Sept. 16, 1998 the Court entered a Default Judgment in favor of plaintiff and against both defendants. Again, no proof of personal service of process on either defendant appears in the Court file.

An Abstract of Judgment was filed on October 20, 1998 for the total amount of $31,344.64. A Writ of Execution for Money Judgment in the same amount was issued on the same date.

A Renewal of Judgment was filed October 18, 2007, reflecting additional interest and fees for a new total of $59,806.13.

It does not appear from any documents in the Court file that any monies have been collected from either defendant.

On July 21, 2015, a prior Motion to Set Aside Judgment was dropped from the Court's calendar by J. Rodda of this Court on the grounds that the proof of service was defective, as a party may not serve his own papers (C.C.P., sec. 1013a) and had failed to give sufficient notice of motion, as the papers were served on July 16, 2015 for hearing on July 21, 2015. (C.C.P., sec. 1005, 12c).

Motion to Set Aside & Dismiss

In this motion, self-represented defendant declares that he was incarcerated from the Dec. 1997 until July 22, 1998. (Molson Dec., paras. 11, 12.) In July 1998, he was remanded into federal custody and sentenced to 96 months in prison. He remained incarcerated until October 4, 2004. (Molson Dec., paras. 13-17.)

He declares that he never received the summons and complaint and had no knowledge of the lawsuit until June 2015. (Molson Dec., paras. 1, 3.)

After being released, defendant returned to prison on July 11, 2005, where he remained until he was recently released on May 13, 2015. (Molson Dec., para. 19)

As defendant was incarcerated, he was not avoiding service, and could have been personally served.

Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction. Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void. *Dill v. Berquist Construction Co.,* (1994) 24 Cal.App.4th 1426, 1444. Under section 473(d), the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service. *Brown v. Williams* (2000) 78 Cal.App.4th 182, 186-187, fn. 4; Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (TRG 2008) 5:485.

Further, a party may seek relief where he or she can show "that extrinsic fraud or mistake exists, such as a falsified proof of service, and such a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts." *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181. Thus, a trial court has an inherent equity power under which, apart from statutory authority, it may grant relief from a default judgment obtained through extrinsic fraud or mistake. (*Weitz v. Yankosky*, (1966) 63 Cal.2d 849). That equitable power may be invoked by the party seeking to set aside the default judgment either by the filing of a separate suit for the purpose or by a motion made in the action in which the default was taken. (*Olivera v. Grace*, (1942) 19 Cal. 2d 570; *Dei Tos v. Dei Tos*, (1951) 105 Cal.App.2d 81).

The motion to quash service of process and to set aside default at against defendant is granted. The Default, Default Judgment, Abstract of Judgment, Writ of Execution as against defendant Stephen Molson, only, are ordered VACATED.

Defendant moves to dismiss the action for failure to serve him within three years of the filing of the complaint. C.C.P., sec. 583.210(a)

As no opposition has been received by the Court, the motion shall be granted, and the Complaint as against Stephen Molson is dismissed. The Court does not address the allegations against co-defendant Michelle Long-Molson, who has not joined in this motion.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.

Item 10 **2015-00177813-CL-CL**

Bank of America NA vs. Curtis L. Masser

Nature of Proceeding: Motion to Deem Matters Admitted

Filed By: Zide, Flint C.

Plaintiff's Motion for Order that Requests for Admissions Be Deemed Admitted against Self-represented defendant Curtis Masser is unopposed and is GRANTED. Sanctions are neither requested nor imposed. Code of Civil Procedure section 2033.280.

The Court is required to make this order deeming the requests for admissions admitted, unless **Curtis Masser serves on counsel for plaintiff and files with the court, before the hearing on the motion, his verified responses to the requests for admission, without objections.**

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 11 **2015-00182275-CL-PA**

Louis White Law Corporation vs. Michael Struck

Nature of Proceeding: Petition to Confirm Attorney-Client Fee Arbitration Award

Filed By: White, Jamil L.

The Petition to Confirm the Arbitration Award is unopposed and is GRANTED. 9 U.S.C. section 9; Code Civil Procedure section 1285, et seq.

A Fee Arbitration Award made pursuant to the Mandatory Fee Arbitration law (Bus & Prof C. sections 6200 et seq.) may be confirmed in the same manner as arbitration awards generally, as provided for in Code of Civil Procedure sections 1285 - 1294.2. (See Bus & Prof Code section 6203(b).) Pursuant to B&P § 6203, an award becomes binding unless the losing party seeks a trial within 30 days of notice of the award.

The attorney-client fee dispute was arbitrated under Bus. & Prof. Code, sec. 6200-6206. The hearing was conducted on **October 2, 2014**. The arbitrator issued a written award on Oct. 29, 2014. The written award was mailed on Jan. 23, 2015. The award is binding. The award requires the client to pay the attorney the sum $4,800 in attorney's fees and $4,716.94 in costs for a total of $9,516.94. Interest on the fees and costs was not awarded.

Counsel shall submit a formal order and Judgment for the Court's signature.
