

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV052533

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: NACIO SYSTEMS, INC.

vs.

DEFENDANT: NACIO INVESTMENT
GROUP, LLC., ET AL

NATURE OF PROCEEDINGS: MOTION TO WITHDRAW AS ATTORNEY [PLTF] NACIO SYSTEMS, INC.

RULING

Attorney Paul J. Steiner and Law Offices of Paul J. Steiner's motion to withdraw as counsel for Plaintiff Nacio Systems, Inc. and Ensompass Holdings, Inc., with no opposition and good cause appearing, is granted.

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NOTICE TO THE COURT AND TO OPPOSING COUNSEL BY 4:00 P.M. TODAY.
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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV061492

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: JAMES M. TACHERRA

vs.

DEFENDANT: ERNEST J. TACHERRA

NATURE OF PROCEEDINGS: MOTION TO WITHDRAW AS ATTORNEY [DEFT]
ERNEST J. TACHERRA

RULING

Peter Brekhus, Elizabeth Brekhus, Brekhus Law Partners' motion to be relieved as counsel, with no opposition and good cause appearing, is granted.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV095757

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: ATHAN POULOS, ET AL

vs.

DEFENDANT: OCEANA MARIN
HOMEOWNERS ASSOCIATION, ET AL

NATURE OF PROCEEDINGS: MOTION – FOR JUDGMENT ON THE PLEADINGS
[PLTF] ATHAN POULOS [PLTF] DENISE POULOS

RULING

Matter continued to February 24, 2012 at 8:30 a.m. in Department E.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV1004183

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: ENVIRONMENTAL
RESEARCH CENTER

vs.

DEFENDANT: NEFFUL U.S.A., INC.

NATURE OF PROCEEDINGS: NOTICE OF MOTION – TO APPROVE PROPOSITION 65 SETTLEMENT AND FOR ENTRY OF CONSENT JUDGMENT [PLTF] ENVIRONMENTAL RESEARCH CENTER, A NON-PROFIT CALIF. CORP.

RULING

Plaintiff's motion to approve Proposition 36 Settlement and for entry of consent Judgment, with no opposition and good cause appearing, is granted.

The case management conference scheduled for February 3, 2012 is vacated.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV1004353

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: LEE HARRIS

vs.

DEFENDANT: STATE OF CALIFORNIA
DEPT. OF CORRECTIONS AND
REHABILITATION, ET AL

NATURE OF PROCEEDINGS: HEARING ON DEMURRER – TO PLAINTIFF’S ENTIRE AMENDED COMPLAINT [DEFT] STATE OF CALIF. DEPT. OF CORRECTIONS AND REHABILITATION

RULING

Defendant California Department of Corrections and Rehabilitation’s demurrer to Plaintiff’s September 8, 2011 amended complaint is sustained without leave to amend.

Plaintiff’s amended complaint fails to state facts sufficient to constitute a cause of action. Plaintiff alleges that defendants engaged in a battery of unlawful touching on July 1, 2009, at San Quentin State Prison, by ordering plaintiff to get nude and submit to a cavity search by the correctional officers who were in the “yard” searching for contraband. However, Plaintiff does not provide detailed facts including as to who was the person(s) who touched him; which body cavities were touched/search; number of persons involved in search of his body cavities; estimated time of day or night the search took place; the results of the search; whether other individuals were present and/or observing the search, and description of where in the yard did the event occur.

The court’s August 19, 2011 ruling regarding defendants’ demurrer to plaintiff’s entire complaint was sustained at that time with leave to amend. Also, the August ruling stated the complaint must

“allege compliance with, or a valid excuse from, the requirement of the Government Claims Act that a written claim must be presented to the Department of Corrections and Rehabilitation within six months of the date of the body-cavity search and prior to the filing of a lawsuit, and a civil suit against the Department must be filed within

six months of any rejection of the claim. Although defendant is incarcerated at San Quentin, he is still required to comply with the requirement of filing a claim.”

As the amended complaint does not allege compliance with, or a valid excuse from, the requirement of the Government Claims Act that a written claim must be presented to the Department of Corrections and Rehabilitation within six months of the date of the body-cavity search and prior to the filing of a lawsuit, plaintiff’s current action in this court cannot proceed as the claims requirement has not been met.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV1101967

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: MARY MORGAN

vs.

DEFENDANT: ACE LIGHTERS, ET AL

NATURE OF PROCEEDINGS: MOTION – TO STRIKE CLAIM FOR PUNITIVE DAMAGES [DEFT] ACE LIGHTERS [DEFT] ELITE BRANDS, USA

RULING

Defendants Ace Products USA, Inc.'s (improperly sued as Ace Lighters), and Doe Defendant Elite Brands, USA Corp.'s motion to strike the punitive damages allegation on the strict products liability cause of action is granted. (Code Civ. Proc. § 436.)

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pleaded by a plaintiff. [Citations.]" (*Clausen v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Plaintiff has failed to plead ultimate facts of "malice" or "fraud" to support a claim for punitive damages. (Civil Code § 3294(c)(1),(3).)

- 1. Plaintiff has alleged no facts to demonstrate either an intentional misrepresentation, or concealment of material facts, a requisite element of fraud. (Civil Code § 3294(c)(3).)**
- 2. Plaintiff has not pleaded ultimate facts of malice showing: how she used the lighter; in what way the lighter was defective or unsafe; how the defects caused her injuries; or the particular risk Defendants should have warned her about. Plaintiff has pleaded mere conclusions that Defendants knew the lighter was dangerous and unsafe, and it was likely to cause injury when used normally.**

Such conclusory allegations, without supporting factual allegations, are insufficient to plead malice. (Compare *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 32 [allegations of "wrongful, knowing and willful conduct is conclusory" and do not allege Defendant acted in conscious disregard of Plaintiffs' safety]; with *Magallanes v. Superior*

Court (1985) 167 C.A.3d 878, 882 – 883, fn. 1 [additional allegations showing the ways the drug was dangerous supported conclusory allegation of conscious disregard].)

Plaintiff is granted leave to amend within 20 days of this order.

The February 3, 2012 Case Management Conference is vacated and Case Management Conference shall be continued to March 16, 2012 at 8:30 a.m. in Department E.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV1103782

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: TERESA M. THOMPSON,
ET AL

vs.

DEFENDANT: BANYAN BOTANICALS,
ET AL

NATURE OF PROCEEDINGS: MOTION – TO STRIKE PORTIONS OF PLAINTIFF’S
COMPLAINT FOR DAMAGES [DEFT] ORGANIC INDIA USA, LLC

RULING

Defendants’ Motion to Strike Portions of Plaintiffs’ Complaint and Joinders are granted. The Thompsons’ conclusory allegations that defendants acted “willfully, knowingly, and with willful and conscious disregard for the health and safety of the public” (Complaint, ¶43) are not supported by the specific facts alleged which suggest, at best, that defendants failed to inform themselves of the harmful ingredients in their products through lack of testing, government approval or clinical studies. (See Complaint, ¶s 33-38.) While these facts may be sufficient to state a cause of action for strict liability based on a failure to warn, they do not demonstrate malice or fraud for purposes of punitive damages. (See CACI Civil Jury Instructions No. 1205; Civil Code §3294; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 32; cf *Toole v. Richardson-Merrell Inc.* (1967) 251 Cal.App.2d 689.)

As plaintiffs do not suggest any additional facts that would demonstrate defendants’ actual knowledge, intent to injure, willful and conscious disregard, or intentional concealment, the motion is granted without leave to amend at this time.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV1104671

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: ROBERT NOBILI

vs.

DEFENDANT: ASHLEIGH D. LINT, ET AL

NATURE OF PROCEEDINGS: MOTION TO VACATE – DEFAULT JUDGMENT [DEFT]
ASHLEIGH D. LINT [DEFT] SEAN COURTNEY

RULING

Defendants' October 27, 2011 motion to vacate the unlawful detainer judgment by default entered by the clerk on September 28, 2011, for possession only of the premises, with no opposition and good cause appearing, is hereby set aside.

The court sets a status conference for this case on Wednesday, February 22, 2012, 8:30 a.m., Department E.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 8:30 A.M. DEPT: E CASE NO: CV1105315

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PETITIONER: MARCEL ETCHEVERRY,
ET AL

and

RESPONDENT: ONE RALSTON LP, ET AL

NATURE OF PROCEEDINGS: WRIT – ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE [PETR] MARCEL ETCHEVERRY [PETR] JOERG WITTENBERG

RULING

I. HEARING ON PETITION.

Unless otherwise resolved, appearances are required on **Monday, February 6, 2012, 8:30 a.m. in Department E.**

II. ATTORNEY FEE DETERMINATION.

The attorney fee provision in the limited partnership agreement (§14.2) would allow a fee award in this writ proceeding. However, the court cannot rule on Petitioners' request for fees, since it was not made by noticed motion.

Petitioners incorrectly argue that a noticed motion is not required "under the independent statutory authority of CCP §1032(a)(4)," as the section has "no requirement of 'notice of motion'." (See Petitioners' memorandum, p.2, fn.3.) As their own brief makes clear, section 1032, subdivision (a)(4) must be read together with Code of Civil Procedure, section 1033.5, subd.(a)(10)(A). (See Petitioners' memorandum, p.2:6.) For fee requests under subdivision (a)(10)(A) without a default judgment, the statute specifically includes a noticed motion requirement. (See subd.(c)(5). See also Code Civ. Procedure, §1034, and California Rules of Court, Rule 3.1702.) Petitioners' position disregards not only the plain meaning of the applicable statutes and rules, but the substantial case law supporting a motion requirement. (See, e.g., *Chinn v. KMR Prop. Mgt.* (2008) 166 Cal.App.4th 175, 194, and *612 South LLC v. Laconiv Ltd. Partnership* (2010) 184 Cal.App.4th 1270, 1284-1285. See also, generally, Pearl, Cal. Attorney Fee Awards (3rd ed.2011), §11.29.)

Here, this would not merely be a technical requirement. At this point, the parties have presented no evidence, authority or argument as to whether the court should exercise its *discretion* to grant fees under section 1032, subdivision (a)(4). Petitioners seem to have dropped their position that section 1717 is the governing statute (see their memorandum, fn.3); in any event, their petition appears to seek enforcement of rights under the Corporations Code, rather than the narrower “Books and Records” provisions of the limited partnership agreement. (Compare Petition, ¶¶7-8, and Exh.B, with Petition, Exh.A, §§8.1-8.2.) Thus, it does not appear to be “on the contract.” The connection between the underlying contract and the substantive issues is much more tenuous than the connection in *Milman v. Shukhat* (1994) 22 Cal.App.4th 538. Further, if the court finds that this case is moot except for the cost determinations, the court’s final order could preclude a section 1717 award of fees. (See §1717, subd.(b)(2).) Under the separate provisions of section 1032, subdivision (a)(4), the parties must have the opportunity to address the various factors that would apply to the court’s discretionary determination. Such factors might include, e.g., Respondents’ degree of voluntary compliance, the sufficiency of Petitioners’ demand letter, and the results obtained on issues important to the parties. Petitioners’ brief simply asserted that they are “entitled” to costs, as though section 1717 applied. (See p.1:27-2:18.)

At least equally important is the need for the parties to address the number of hours reasonably expended and hourly rate component of Petitioners’ fee request, assuming the court finds an award of fees to be appropriate. At this point, Petitioners have not even set forth the amount of fees requested, much less evidence that would support such amount. Respondents clearly have not had sufficient notice to address the specifics of the fee claim.

Petitioners may file a motion for fees within the timelines of California Rules of Court, Rule 3.1702.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/03/12 TIME: 10:30 A.M. DEPT: E CASE NO: CV1102408

PRESIDING: HON. FAYE D'OPAL

REPORTER:

CLERK: P. OKUBO

PLAINTIFF: US BANK NATIONAL
ASSOCIATION

and

DEFENDANT: JOCELYN S. COOK

NATURE OF PROCEEDINGS: MOTION – TO ADDRESS DEFENDANT’S EX PARTE APPLICATION PURSUANT TO CCP SECTION 473 FOR AN ORDER QUASHING THE WRIT OF POSSESSION AND RESTORING POSSESSION OF PREMISES TO DEFENDANT AND GRANTING DEFENDANT PERMISSION TO FILE APPLICATION TO STAY

RULING

Defendant’s Code Civ. Proc. § 473(b) motion to quash/recall the Writ Of Possession, and to file a petition for a stay of judgment pending appeal (Code Civ. Proc. § 1176), is denied.

It is undisputed that the Writ Of Possession (Code Civ. Proc. § 715.010) was properly issued and executed in all particulars, and Defendant’s request to quash/recall the Writ is rejected. Rather, Defendant raises a slightly different issue under § 473(b); i.e., that defense counsel had a reasonable excuse (e.g., mistake of law) in not timely moving to stay the execution of the Writ Of Possession pending appeal, pursuant to Code Civ. Proc. § 1176.

1. Defendant’s reliance on the mandatory relief prong in § 473(b) for her counsel’s mistake in not filing a timely request for the stay before the Sheriff evicted Defendant, is misplaced.

The mandatory relief provision does not apply here. The mandatory provision applies only to vacating a default which will result in the entry of default judgments, and entered dismissals which are the procedural equivalents of defaults; i.e., those dismissals which occur because the plaintiff’s attorney has failed to oppose a dismissal motion. (See *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 618-619.) Section 473(b) “applies only to relief sought in response to defaults, default judgments or dismissals.”

(Vandermoon v. Sanwong (2006) 142 Cal.App.4th 315, 320.) Nor can Defendant's eviction be deemed analogous to a default, or the procedural equivalent of a default.

2. Also, this court does not find counsel's purported mistake of law in waiting to apply for the § 1176 stay, to be reasonable pursuant to the discretionary prong of § 473(b). Section 715.010 is clear and requires the Sheriff to remove the occupants if they have not vacated within 5 days after service of the Writ Of Possession. (Civil Code § 715.010 (b)(2).) There is nothing in the statute to suggest the Writ must be served a second time after a stay has expired. The § 918 stay, granted until October 20, 2011, simply postponed the eviction of Defendant pursuant to the properly served Writ while the stay was in effect. Counsel's contrary interpretation of the statute is not a reasonable construction.

Nor does counsel's reliance on *Bedi v. McMullan* (1984) 160 Cal.App.3d 272, support his interpretation. The *Bedi* case involved a forcible detainer pursuant to an invalid Writ Of Possession issued under an unenforceable Unlawful Detainer judgment. (*Id.* at p. 275.) There was never a discussion in that case about service of another valid Writ Of Possession following the expiration of a stay.

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