



1 Under Rule 60(b), a "court may relieve a party . . . from a final  
2 judgment, order, or proceeding for the following reasons: (1) mistake,  
3 inadvertence, surprise, or excusable neglect; . . . or (6) any other  
4 reason justifying relief from the operation of the judgment." Fed. R.  
5 Civ. P. 60(b). "[T]he words 'mistake' and 'inadvertence' . . . may  
6 include mistake and inadvertence by the judge." *Kingvision Pay-Per-*  
7 *View v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999).

8 Under Local Rule 7.16, a party may move for reconsideration based  
9 on "a manifest showing of a failure to consider material facts  
10 presented to the Court before such a decision."

## 11 **II. Analysis**

### 12 **A. Plaintiffs living outside the San Fernando Valley.**

13 Three of the Plaintiffs assert that the Court incorrectly imputed  
14 them with knowledge of the media coverage of the Rocketdyne  
15 facilities' contamination. Plaintiffs assert that the Court erred by  
16 failing to consider evidence that they did not live in Valley during  
17 the time period identified by the Court. The Court agrees.

#### 18 **1. Estate of Taaffe.**

19 In its Order, the Court concluded that the representative for the  
20 estate of Taaffe had presented "no evidence" that he "did not live in  
21 the San Fernando Valley from 1989 to 1992." See 92 F. Supp. 2d at  
22 1049-50.

23 Plaintiffs point out, however, that the representative for the  
24 estate of Taaffe has lived in Florida since 1983. (Sears Decl. Ex. 29  
25 at 5087.)<sup>2</sup> Defendants point out that the address chart appears to

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27 <sup>2</sup> The Court notes that it relied on this exhibit in its previous  
28 Order. Accordingly, any objections that Defendants may have lodged  
against it were OVERRULED. See 92 F. Supp. 2d at 1028 n.2.

1 list the decedent's address and not the representatives. However, the  
2 decedent died in August 1983. (Taaffe Decl. ¶ 5.) The chart listing  
3 the address indicates that it is the address of the individual from  
4 1984 to the present. (Sears Decl. Ex. 29 at 5087.) In light of those  
5 dates, it is reasonable to infer that the address refers to Mr.  
6 Taaffe, the representative, and not Ms. Taaffe, the decedent.  
7 Moreover, Mr. Taaffe signed his declaration in Florida. (Taaffe Decl.  
8 at 4.) Mr. Taaffe presents sufficient evidence to create a genuine  
9 issue of fact as to whether he lived in the Valley during the  
10 identified period of time.

11 Accordingly, the Court VACATES the summary judgment against the  
12 estate of Taaffe and DENIES Defendants' summary judgment as to the  
13 estate's wrongful death claim.

14 **2. Estate of Bernard Hudson.**

15 In its Order, the Court deemed Lila Hudson, the representative  
16 for the estate of Bernard Hudson, to be a subscriber of the *Daily*  
17 *News*. 92 F. Supp. 2d at 1045. Plaintiffs, however, presented  
18 evidence that Lila Hudson lived in Morongo Valley, outside the San  
19 Fernando Valley, during the applicable period of time. (Sears Decl.  
20 Ex. 29 at 5086.) This evidence creates a genuine issue of fact as to  
21 whether she could be deemed a reader of the *Daily News*. *Accord* 92 F.  
22 Supp. 2d at 1049 n.45.

23 Accordingly, the Court VACATES the summary judgment against the  
24 estate of Hudson and DENIES Defendants' summary judgment as to the  
25 estate's wrongful death claim.

26 **3. Cheryl Wernke.**

27 In its Order, the Court deemed Wernke to be a reader of the *Daily*  
28 *News* or one of the Valley Papers. 92 F. Supp. 2d at 1045.

1 Plaintiffs, however, presented evidence that Wernke lived in Nevada,  
2 outside the Valley during the applicable period of time. (Sears Decl.  
3 Ex. 29 at 5088.) This evidence creates a genuine issue of fact as to  
4 whether she could be deemed a reader of the *Daily News* or the Valley  
5 Papers. *Accord* 92 F. Supp. 2d at 1049, n.45.

6 Accordingly, the Court VACATES the summary judgment against  
7 Wernke and DENIES Defendants' summary judgment as to her personal  
8 injury claim.

9 **B. Plaintiffs Diagnosed Within One Year of Filing.**

10 Plaintiffs argue that the Court should amend its Order to allow  
11 two Plaintiffs, Hecker and Soifer, to sue for diseases diagnosed  
12 within the limitations period. Both of these Plaintiffs were earlier  
13 diagnosed with different diseases that Defendants' contamination  
14 allegedly caused outside the limitations period. Plaintiffs made the  
15 same argument on behalf of one Plaintiff, Hecker, in their summary  
16 judgment opposition and at the hearing. The Court, nevertheless, held  
17 that Hecker's claim was precluded because of her previous injury in  
18 1983. 92 F. Supp. 2d at 1038.

19 **1. Suitability of motion for reconsideration.**

20 Defendants assert that this Court should refuse to consider the  
21 argument on behalf of Hecker because Plaintiffs argued it in their  
22 summary judgment opposition and the Court considered it in its order.  
23 As to the argument on behalf of Soifer, Defendants contend that she  
24 fails to show why she did not raise this argument in the opposition to  
25 the summary judgment motion. However, the Court finds that this  
26 result inevitably flows from the way that the parties handled the  
27 summary judgment motion.

28 Although the Court took the time to consider the material

1 individual factors of each Plaintiff, both Defendants and Plaintiffs  
2 refused to do so. Defendants presented charts that summarized some  
3 factors concerning the Plaintiffs but lumped them together. Not  
4 surprisingly, they failed to address, in the summary judgment motion  
5 and reply or the opposition to the motion for reconsideration, the  
6 unique factual scenario of Hecker and Soifer.

7 Plaintiffs, at least on the surface, appear to focus on the  
8 different individual factors. Indeed, they argued in their opposition  
9 to the summary judgment motion that Plaintiffs' claims had to be  
10 considered on a "plaintiff by plaintiff basis." (Pls.' Opp. to Mot.  
11 for Summ. Judgment at 1.) Plaintiffs, however, failed to do so. The  
12 argument on behalf of Hecker consisted, in whole, of the following:

13 Given the requirement of potential knowledge in order to start  
14 the accrual clock running, it is instructive to break the  
15 Plaintiffs down into the following five groups . . . [:]

16 1. Plaintiffs who were diagnosed with an illness *inside*  
17 the statute of limitations: **2** (Noël Decl., ¶ 4); . . .  
18 Plaintiffs in Category 1 were diagnosed within one year of  
19 their respective filing dates and therefore should be excepted  
20 from this motion on that basis alone.

21 (*Id.* at 20-21. (emphasis in original).) The Court notes that  
22 Plaintiffs' opposition does not contain (1) a single express mention  
23 of Hecker; (2) any mention of the fact, pointed out by Defendants,  
24 that she had a previous injury allegedly caused by Defendants'  
25 contamination; or (3) any case citation or authority to address  
26 Hecker's individual circumstances.<sup>3</sup> Moreover, the Court's review of  
27 the Noël Declaration showed that the two persons in Category One were  
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25 <sup>3</sup> The Court notes that, at oral argument, Plaintiffs' counsel at  
26 least mentioned Hecker and noted that she had suffered prior injuries.  
27 Nevertheless, counsel's legal argument consisted of merely stating  
28 that the earlier illness "cannot connect to the type of cancer and the  
type of illness that she had within one year." (3/27/00 Hearing  
Transcript at 19-20.)

1 Hecker and Mary Hellerstein. Thus, although Plaintiffs submitted a  
2 declaration from Soifer stating that she suffered an injury within the  
3 limitations period, Plaintiffs failed to direct the Court to that  
4 information. Given the multitude of evidence presented by the  
5 parties, the Court is not surprised that it did not catch that  
6 information although it reviewed each of the Plaintiffs' declarations.

7 Plaintiffs' presentation, therefore, neglected to include  
8 specific and necessary information and had mistakes. Nevertheless,  
9 the Court finds that, under the circumstances, such neglect and  
10 mistakes were excusable. The Court finds that the motion for summary  
11 judgment was unique in that it sought to address class claims *and* the  
12 claims of more than 70 Plaintiffs. Moreover, the burden of showing  
13 that a claim fell outside the limitations period falls on Defendants.  
14 Thus, if the Court's ruling erroneously dismissed a claim that was not  
15 time-barred under the traditional statute of limitations, the Court  
16 can correct its error of law under Rule 60(b). *See Liberty Mutual*  
17 *Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982). Finally,  
18 Defendants do not challenge the timeliness of the motion.

19 Accordingly, the Court exercises its discretion to consider the  
20 merits of Plaintiffs' motion for reconsideration.<sup>4</sup>

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23 <sup>4</sup> Generally, a motion under Fed. R. Civ. P. 60(b) is not  
24 appropriate absent a final judgment or order. Although the order on  
25 the summary judgment motion, in this case, is technically not a final  
26 order, the Court notes that Plaintiffs have moved for a final order  
27 pursuant to Fed. R. Civ. P. 54(b). The Court, simultaneously with  
28 this Order, has granted that motion. Thus, the Court's review of  
Hecker and Soifer's motion can be viewed as the Court granting the  
Rule 54(b) motion in their favor and then reviewing their Rule 60(b)  
motion. Thus, the Court finds that review under Rule 60(b) is  
appropriate.

1           **2. Commencement of the Statute of Limitations.**

2           Under California law, a limitations "period cannot run before  
3 plaintiff possesses a true cause of action, by which we mean that  
4 events have developed to a point where plaintiff is entitled to a  
5 legal remedy, not merely a symbolic judgment such as an award of  
6 nominal damages." *Davies v. Krasna*, 14 Cal. 3d 502, 513 (1975).  
7 However, "although a right to recover nominal damages will not trigger  
8 the running of the period of limitation, the infliction of appreciable  
9 and actual harm, however uncertain in amount, will commence the  
10 statutory period." *Id.* at 514.

11           Although *Davies* provides that the limitations period does not  
12 begin to run when a plaintiff suffers nominal injury, the Court did  
13 not address the effect of the limitations period where two separate  
14 and distinct appreciable illnesses occur at different times. However,  
15 a California appellate court, in *Martinez-Ferrer v. Richardson-*  
16 *Merrell, Inc.*, 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980),  
17 wrestled with that question. *Martinez-Ferrer* first described the  
18 general rule:

19           As a general rule, where an injury, although slight, is sustained  
20 in consequences of the wrongful act of another, and the law  
21 affords a remedy therefor, the statute of limitations attaches at  
22 once. *It is not material that all the damages resulting from the*  
*act shall have been sustained at that time, and the running of*  
*the statute is not postponed by the fact that the actual or*  
*substantial damages did not occur until a later date.*

23 *Id.* at 323 (quoting from *Sonbergh v. MacQuarrie*, 112 Cal. App. 2d 771,  
24 773-774, 247 P.2d 133 (1952)) (emphasis added by *Martinez-Ferrer*).

25 The court then concluded that applying the general rule to the facts  
26 of *Martinez-Ferrer* would be unjust:

27           The sad fact is that [the plaintiff] would have been laughed out  
28 of court had he sued for his dermatitis and macula edema . . . in  
1962 and had he then attempted to be compensated for the

1 speculative possibility that his 1960 ingestion of [a drug  
2 manufactured by the defendant] might cause cataracts before that  
3 chance became a fact in 1976. . . . The simple fact is that rules  
4 developed against the relatively unsophisticated backdrops of  
5 barroom brawls, intersection collisions and slips and falls lose  
6 some of their relevance in these days of miracle drugs with their  
7 wondrous, unintended, unanticipated, and frequently long-delayed  
8 side effects.

9 *Id.* at 323-24. *Martinez-Ferrer* then held that the statute of  
10 limitations did not preclude a claim for the cataracts although the  
11 earlier injury, macula edema, had caused substantial harm. *Id.* at  
12 325-27.

13 Other California appellate courts have criticized *Martinez-*  
14 *Ferrer*. See *DeRose v. Carswell*, 196 Cal. App. 3d 1101, 242 Cal. Rptr.  
15 368 (1988). However, the criticism of *Martinez-Ferrer* has not come in  
16 cases reviewing a physical medical illness that is distinct and  
17 separate from an earlier injury. None of the cases have addressed the  
18 scenario where a disease first appeared *after* the limitations period  
19 had purportedly expired.

20 For instance, *DeRose* addressed the question of whether a person  
21 could sue for the psychological effects that she suffered from her  
22 stepfather's sexual abuse that occurred when she was a child. The  
23 plaintiff in that case sought to invoke *Martinez-Ferrer* on the basis  
24 that she did not become aware of the psychological effects of the  
25 sexual abuse until after the traditional limitations period had  
26 elapsed. *DeRose*, 196 Cal. App. 3d at 1017-18. The *DeRose* court noted  
27 that such unconsented sexual contact presents the type of case where  
28 "awareness of a wrongful act" carries with it "awareness of harm."  
*Id.* at 1018. Thus, *DeRose* did not involve an effort to recover for  
the physical manifestation of a disease caused by tortious conduct.  
*DeRose* also did not involve distinct and separate illnesses arising



1 from the same tortious conduct. See *id.* at 1017 (noting that  
2 plaintiff alleged that she had suffered great fear at time of abuse).  
3 Thus, *DeRose's* criticism at *Martinez-Ferrer* was wholly unnecessary to  
4 its holding.<sup>5</sup>

5 Moreover, although criticized by other appellate courts,  
6 *Martinez-Ferrer* has not been overruled by the California Supreme  
7 Court. In fact, the California Supreme Court has cited *Martinez-*  
8 *Ferrer* without leveling any criticism at it. See *Jolly v. Eli Lilly &*  
9 *Co.*, 44 Cal. 3d 1103, 1110 n.5 (1988). Thus, *Martinez-Ferrer* is still  
10 good law in California.<sup>6</sup>

### 11 **3. Kathy Hecker.**

12 Hecker presented evidence that she was diagnosed with thyroid  
13 cancer in June 1996. (Hecker Decl. ¶ 5.) She joined this lawsuit on  
14 March 10, 1997, within one year of her diagnosis. 92 F. Supp. 2d at  
15 1029. She, therefore, creates a genuine issue of fact as to whether  
16 her claim, to the extent that it is based on the thyroid cancer, is  
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18 <sup>5</sup> The Court also notes that the California legislature  
19 effectively overruled the holding in *DeRose* by tolling the limitations  
20 period in child sexual abuse cases until a plaintiff discovered or  
21 reasonably should have discovered that the psychological injury or  
22 illness was caused by the childhood sexual abuse. See *Ramona v.*  
*Superior Court*, 57 Cal. App. 4th 107, 112 n.6, 66 Cal. Rptr. 2d 766  
(1997); Cal. Civ. Proc. Code § 340.1.

23 <sup>6</sup> The Court further notes that *Martinez-Ferrer* is consistent  
24 with California's treatment of the illnesses caused by asbestos  
25 exposure. See *Hamilton v. Asbestos Corp., Ltd.*, 22 Cal. 4th 1127, 95  
26 Cal. Rptr. 2d 701 (2000) (allowing second lawsuit for illness  
27 resulting from asbestos exposure that had spawned earlier lawsuit for  
28 different illnesses). Although asbestos cases are subject to a  
special statute of limitations in California, see Cal. Civ. Proc. Code  
§ 340.2, California's treatment of the limitations period in asbestos  
injuries is instructive as to continued viability of *Martinez-Ferrer*  
in cases involving multiple latent illnesses caused by exposure to  
dangerous substances.

1 time-barred. *See Martinez-Ferrer*, 105 Cal. App. 3d at 325-27.  
2 However, she was also diagnosed with other illnesses outside of the  
3 limitations period. For the reasons stated in the Court's previous  
4 Order, her claim, to the extent that it is *not* based on the thyroid  
5 cancer, is time-barred. Accordingly, the Court VACATES the summary  
6 judgment against Hecker. The Court GRANTS partial summary judgment,  
7 as indicated herein, in favor of Defendants on the personal injury  
8 claim asserted by Hecker.

9 **4. Maralyn Soifer.**

10 Soifer presents evidence that she was diagnosed with lymphoma in  
11 July 1997. (Soifer Decl. ¶ 5.) She joined this lawsuit on December  
12 22, 1997, within one year of that diagnosis. 92 F. Supp. 2d at 1030.  
13 She, therefore, creates a genuine issue of fact as to whether her  
14 claim, to the extent that it is based on the lymphoma, is time-barred.  
15 *See Martinez-Ferrer*, 105 Cal. App. 3d at 325-27. At the same time,  
16 she was also diagnosed with another illness outside of the limitations  
17 period. For the reasons stated in the Court's previous Order, her  
18 claim, to the extent that it is *not* based on the lymphoma, is time-  
19 barred. Accordingly, the Court VACATES the summary judgment against  
20 Soifer. The Court GRANTS partial summary judgment, as indicated  
21 herein, in favor of Defendants on the personal injury claim asserted  
22 by Soifer.

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1 **III. Conclusion**

2 For the reasons articulated herein, the Court GRANTS Plaintiffs'  
3 motion. The Court's March 28, 2000 Order, 92 F. Supp. 2d 1026, is  
4 modified as indicated herein.

5  
6 **SO ORDERED.**

7 **DATED: June 8, 2000.**

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**AUDREY B. COLLINS**  
**UNITED STATES DISTRICT JUDGE**

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