UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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AARHUS MANSOURIAN; LAUREN MANCUSO; NANCY NIEN-LI CHIANG; CHRISTINE WING-SI NG; and all those similarly situated,

Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA at DAVIS; LAWRENCE "LARRY" VANDERHOEF; GREG WARZECKA; PAM GILL-FISHER; ROBERT FRANKS; and LAWRENCE SWANSON,

Defendants.

NO. CIV. S-03-2591 FCD/PAN

MEMORANDUM AND ORDER

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This matter is before the court on defendants' motion to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiffs Arezou Mansourian ("Mansourian"), Lauren Mancuso ("Mancuso"), Nancy Nien-Li Chiang ("Chiang"), and Christine Wing-Si Ng ("Ng") filed this action, on

[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. See E.D. Cal. Local Rule 78-230(h).

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behalf of themselves and an uncertified class, on December 18, 2003. They named as defendants the Regents of the University of California (erroneously sued as the "Board of Regents of the University of California at Davis") (the "University"); Lawrence Vanderhoef, Chancellor of the University; Robert Franks, Associate Vice Chancellor, Student Affairs; Greg Warzecka, University Athletic Director; and Pam Gill-Fisher and Lawrence Swanson, Associate Athletic Directors (collectively, "individual defendants").

Plaintiffs assert six claims for relief: (1) violation of Title IX by the University, only, for failure to provide female athletes with the same athletic opportunities as male athletes; (2) violation of Title IX by the University, only, for failure to provide female athletes with the same opportunities for financial assistance as male athletes; (3) retaliation in violation of Title IX and its interpretive regulation by the University, only; (4) violation of 42 U.S.C. § 1983 on an equal protection theory; said claim is asserted against the University for injunctive relief and against the individual defendants for damages; (5) violation of the California Unruh Civil Rights Act by all defendants; (6) violation of public policy based on various California statutes by all defendants.[2]

By this motion, defendants move to dismiss (1) plaintiffs' Title IX retaliation claim on the basis that there is no private

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[2] Plaintiffs Chiang and Ng assert each of these claims individually. Plaintiffs Mansourian and Mancuso assert said claims individually and as class representatives, except in regard to the retaliation claim. The Title IX retaliation claim is not asserted as a class claim.

right of action for retaliation under Title IX and (2) plaintiffs' Title IX, Section 1983, and Unruh Act claims on the basis of the statute of limitations.[3]

For the reasons set forth below, the court DENIES defendants' motion on all grounds.

BACKGROUND

Plaintiffs Mansourian, Mancuso, and Chiang[4] are female students at the University of California at Davis ("UCD"). They participated in high school wrestling and chose to attend UCD because it offered them the opportunity to participate in wrestling while in college. (Compl., ¶¶ 9-11, 24-51.) Plaintiff Ng also participated in high school wrestling and chose to attend UCD in order to wrestle; however, she is no longer a student at UCD. (Id. at ¶¶ 12, 52-58.) Plaintiffs allege that each of the defendants is responsible for the discriminatory actions and

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[3] Defendants also initially moved to dismiss (1) plaintiff Ng's claims for injunctive relief and (2) plaintiffs' Section 1983 claim for injunctive relief against the University and for damages against the individual defendants in their official capacities. As to plaintiff Ng's purported claims for injunctive relief, plaintiffs clarified in their opposition that since plaintiff Ng no longer is a student at the University, she seeks by this action only monetary damages for her lost athletic benefits, lost scholarship, and related damages. This basis for dismissal is therefore moot. As to plaintiffs' Section 1983 claim, the parties stipulated to the dismissal of the Section 1983 claim against the University in exchange for defendants' representation that the individual defendants have authority to provide the injunctive relief sought by plaintiffs. The parties further stipulated that under Section 1983, plaintiffs seek prospective injunctive relief against the individual defendants in their official capacities and monetary damages against the individual defendants in their personal capacities. (Stip. re Mot. to Dismiss, filed April 29, 2004.)

[4] Chiang is currently on leave from UCD but plans to return to school in the fall. (Pls.' Opp'n, filed April 16, 2004, at 1 n. 1.)

decisions set forth in the complaint. (Id. at ¶¶ 21-22.)

UCD has provided athletic participation opportunities in wrestling to male students for many years. In the early 1990's it began providing such opportunities to female students, including a women's division in the university's annual "Aggie Open" wrestling tournament. (Id. at ¶¶ 82-83.) Some of UCD's female wrestlers went on to national and international acclaim after having trained at and received the benefits of wrestling at UCD. (Id. at ¶¶ 85-87.)

Plaintiffs chose to attend UCD because of that history and because of the promise of opportunities to participate in wrestling at UCD. (Id. at ¶¶ 26-29, 37-40, 45-46, 55-56.) Plaintiffs Mansourian, Chiang, and Ng filled out the NCAA and UCD paperwork necessary for intercollegiate athletics, completed the weight certification requirements for intercollegiate wrestling, and participated in UCD's wrestling program for about 2 years. (Id. at ¶¶ 27-30, 46-50, 55-59.) As varsity wrestlers, plaintiffs received benefits such as medical and athletic training services, laundry services, academic tutoring services, strength and conditioning coaching, wrestling coaching, insurance, access to the weight room, and access to varsity facilities. (Id. at ¶¶ 33, 51, 58.)

Plaintiff Mancuso was recruited to wrestle for UCD. She was awarded an athletic scholarship to do so. She enrolled, filled out the necessary paperwork, and received the required certifications to participate in intercollegiate wrestling. (Id. at ¶¶ 40-42.) Shortly thereafter, however, defendants eliminated women from UCD's wrestling program and Mancuso was denied her

scholarship. (Id. at ¶¶ 59-60.)

During the 2000-2001 academic year, defendants eliminated wrestling athletic participation opportunities for female, but not male, students (the "No Females Directive"). (Id. at ¶¶ 60-62.) Plaintiffs and then-wrestling coach Michael Burch protested this decision. Plaintiffs met with and/or complained to defendants, asserting that the No Females Directive constituted illegal sex discrimination. Defendants ignored the complaints. (Id. at ¶¶ 63-69.) Plaintiffs filed a complaint with the Office for Civil Rights of the United States Department of Education ("OCR") in the Spring of 2001. (Id. at ¶ 67.) Defendants later agreed to rescind the "No Females Directive" and to allow women to participate in wrestling. (Id. at ¶ 70-74.)

Plaintiffs, including newcomer Mancuso, enrolled at UCD for the 2001-2002 academic year in reliance upon defendants' promised reinstatement of female wrestling participation opportunities. They filled out their NCAA and UCD eligibility paperwork, completed the weight certification requirements for varsity wrestling, and were deemed eligible. (Id. at ¶ 75.) Unfortunately, plaintiffs returned to a wrestling team with a new coach who did not support women wrestlers and failed to coach them or treat them like the male wrestlers. (Id. at ¶¶ 75-76.) Defendants informed plaintiffs that to participate in wrestling they would have to be part of a mixed gender team and would have to beat the men at their weight class under men's collegiate-style rules, even though the women had previously only participated as part of a women's wrestling program (not a mixed gender team) using international freestyle wrestling rules. (Id.

at ¶ 77.) Plaintiffs again complained, but defendants refused and continue to refuse to remedy the situation and to provide them with women's wrestling opportunities. (Id. at ¶¶ 75-79.) As a result, to date, no women are allowed to participate in UCD wrestling. (Id.)

As current UCD students who are currently being denied equal educational benefits, plaintiffs Mansourian, Mancuso, and Chiang seek an injunction requiring defendants to increase athletic participation and scholarship opportunities for female students, specifically in the sport of wrestling. (Id. at ¶¶ 32-33, 42, 51, 120-123.) Because UCD wrestling participates at the NCCA Division I level with nationwide recruitment and scholarships, plaintiffs allege that defendants could recruit and maintain a full women's wrestling team now and in the future. (Id. at ¶¶ 80-81, 125-135.) Plaintiffs, including plaintiff Ng, also seek monetary and punitive damages for defendants' denial of these educational benefits, lost scholarship money, and the humiliation, emotional distress and related harm caused by defendants' sex discrimination. (Id. at 55-56.)

STANDARD

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference

from facts properly alleged. See id.

Given that the complaint is construed favorably to the pleader, the court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957). In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201.[5] See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).

ANALYSIS

A. Title IX Retaliation Claim

The question of whether Title IX provides a private right of action for retaliation is an issue of first impression in the Ninth Circuit. However, on March 16, 2004, this court issued an order in the case of Burch, et al. v. Board of Regents of the

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[5] Rule 201 permits a court to take judicial notice of an adjudicative fact "not subject to reasonable dispute," in that the fact is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The court can take judicial notice of matters of public record, such as pleadings in another action and records and reports of administrative bodies. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir. 1988). Here, the existence of plaintiffs' OCR complaints may be judicially noticed by this court. See e.g., Pavone v. Citicorp Credit Services, 60 F. Supp. 2d 1040, 1045 (S.D. Cal. 1997). The truth of the allegations contained therein, however, is not subject to judicial notice. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 427 (3d Cir. 1999). Plaintiffs' objection to defendants' request for judicial notice is therefore OVERRULED, although reliance on said evidence is not necessary to the decision on the instant motion. (Pls.'s Opp'n to Jud. Not. Req., filed April 19, 2004.)

University of California at Davis, et al., Civ. No. S-04-0038 WBS/GGH, wherein Judge Shubb found that Title IX provides a private right of action for retaliation.[6] (Mem. & Order, filed March 16, 2004, denying defendants' motion to dismiss.) The court finds no basis to depart from that order herein; the issue before Judge Shubb was precisely the same as the issue in this case, and the court finds Judge Shubb's reasoning and analysis throuough and persuasive. (Id.) Accordingly, it does not repeat that analysis here but rather adopts the order in full, applying it to the instant case to deny defendants' motion to dismiss plaintiffs' Title IX retaliation claim.

As Judge Shubb made clear, while Alexander v. Sandoval, 532 U.S. 275 (2001) may inform this court's decision on the matter, it does not *require* a finding of no private right of action for retaliation. Alexander did not consider the question of whether retaliation was within the scope of Title IX's prohibition of intentional discrimination. In answering this question affirmatively, Judge Shubb correctly relied on the case of Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (finding a private right of action for retaliation under Title VI). This court agrees that the Fourth Circuit's opinion on this issue is more persuasive than the Eleventh Circuit's opinion in Jackson v.

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[6] The plaintiff in that case, Michael Burch, was the former UCD wrestling coach; Burch alleges he was terminated for supporting plaintiffs' desire to participate in varsity wrestling. Burch alleges violations of Title IX and the First Amendment. He sues the same defendants as plaintiffs herein. Although both cases raise a similar legal issue of retaliation under Title IX, due to the factual dissimilarities of the cases and the class action component of this case, this court declined to formally relate the cases under Local Rule 83-123. (Non-Related Case Order, filed Feb. 2, 2004.)

Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002), the only other circuit court to address the issue. The Eleventh Circuit did not adequately consider the possibility that the anti-retaliation regulation simply applies Title IX's statutory ban on intentional discrimination. Finally, in reaching the decision to apply Judge Shubb's order in Burch, the court finds particularly important Supreme Court decisions which have interpreted statutory prohibitions of discrimination to ban retaliation as well. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Perry v. Sindermann, 408 U.S. 593 (1972).

For all the reasons set forth above and in the Burch order, the court denies defendants' motion to dismiss plaintiffs' Title IX retaliation claim.

B. Statute of Limitations

1. Title IX

Defendants seek to dismiss plaintiffs' Title IX claims, including plaintiffs' Title IX retaliation claim, on the basis of the statute of limitations. Title IX, 20 U.S.C. § 1681 et seq., does not specify a limitations period. When Congress fails to specify a statute of limitations for a federal claim for relief, courts are to apply the most closely analogous statute of limitations under state law. Reed v. United Transp. Union, 488 U.S. 319, 323 (1989). The Ninth Circuit has not considered the issue under Title IX; however, the other federal appellate courts that have considered the issue are in accord that a Title IX claim is most closely analogous to a common law action for personal injury. Doe v. Howe Military School, 227 F.3d 981, 987 (7th Cir. 2000); M.H.D. v. Westminster Schools, 172 F.3d 797, 803

(11th Cir. 1999); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 729 (6th Cir. 1996); Egerdahl v. Hibbing Community College, 72 F.3d 615, 618 (8th Cir. 1995); Bougher v. University of Pittsburgh, 882 F.2d 74, 77-78 (3rd Cir. 1989). Moreover, in Taylor v. Regents of the University of California, 993 F.2d 710, 712 (9th Cir. 1993), the Ninth Circuit came to the same conclusion with respect to a Title VI claim. In light of this authority, and the fact that Title IX is to be construed consistently with Title VI,[7] the court applies California's statute of limitations for personal injury actions to plaintiffs' Title IX claims.[8]

In California, an aggrieved party must commence an action for personal injury caused by an alleged wrongful act or neglect within two years of the act. Cal. Code Civ. Proc. § 335.1. The two-year limitations period is a recent development. Before 2003, the limitations period for personal injury claims was one year. Cal. Code Civ. Proc. § 340(3), repealed. Section 335.1 became effective January 1, 2003. This recent amendment impacts this case, which was filed December 18, 2003.

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[7] Since Title IX has identical statutory language to Title VI, except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the Supreme Court has interpreted both statutes interchangeably. Cannon v. University of Chicago, 441 U.S. 677, 694-99 (1979).

[8] Plaintiffs' argument to the contrary, based on one Northern District of California decision, is unavailing. Kramer v. Regents of the University of California, 81 F. Supp. 2d 972 (N.D. Cal. 1999) (applying California's three-year statute of limitations for actions "upon a liability created by statute" to ADA and Rehabilitation Act claims). In the Title IX context, it is contrary to the weight of the authority described above, most particularly Taylor.

A legislative extension of the statute of limitations period will extend the limitations period of an actionable claim if the extension occurs *before* the claim for relief becomes time barred under the old limitations period. Douglas Aircraft Co. v. Cranston, 58 Cal. 2d 462, 465 (1962). On the other hand, once a claim is time barred it will not be revived by the extension to the applicable limitations period unless the legislature expressly declared that the amendment of the limitations period applied retroactively. Bartman v. Estate of Bartman, 83 Cal. App. 3d 780, 787-78 (1978). Such an expression of retroactivity was made here only for victims of the terrorist attacks of September 11. Cal. Code Civ. Proc. § 340.10(b).

Defendants argue that plaintiffs' Title IX claims are based on events beginning in the Fall of 2000, when the "No Females Directive" was issued and ending, at the latest, in the Fall of 2001, when after their initial OCR complaint was resolved, plaintiffs were placed back on the team but under different conditions--conditions that plaintiffs' allege prevented them from participating in wrestling.[9] The statute of limitations then in effect was one year, and defendants thus argue plaintiffs' claims were required to be filed no later than the Fall of 2002.

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[9] Specifically with respect to plaintiffs' retaliation claim, defendants contend plaintiffs have alleged four "retaliatory" acts, the last of which occurred in the Fall of 2001: (1) defendants instituted the "No Females Directive" in the Fall of 2000; (2) the University reneged on the promise to remedy the "No Females Directive" in the Fall of 2001; (3) the University allowed the female wrestlers a chance to wrestle against the male wrestlers for a position on the men's wrestling team in the Fall of 2001; and (4) the University did not renew Michael Burch's contract in mid-2001.

Defendants' argument ignores other allegations of plaintiffs' complaint. Plaintiffs Mansourian, Mancuso, and Chiang are current UCD students who are currently being subjected to defendants' allegedly sex discriminatory practices. (Compl., ¶¶ 9-11, 22, 85-86, 88, 89.) As UCD students, their claims accrue each and every day they are denied equal access to athletic participation and scholarship opportunities. (Id. at ¶¶ 22, 66, 88-89. 133, 159.) At the time plaintiffs' filed the instant complaint, plaintiffs allege they should have been wrestling for UCD and receiving all the varsity benefits and scholarships provided to male wrestlers but defendants refused, and continue to refuse, to date, to allow their participation.[10] (Id. at ¶¶ 9-12, 32, 42, 66, 88-89.) They have thus stated facts sufficient to withstand a motion to dismiss, regardless of what statute of limitations applies (one or two year).

As plaintiffs acknowledge, plaintiff Ng presents a slightly different situation since she is no longer a UCD student. Similar to plaintiffs Mansourian, Mancuso, and Chiang, plaintiff Ng alleges that each and every day she attended UCD she was entitled to the same access to athletic participation and scholarship opportunities in wrestling as the male students. Plaintiffs thus argue that the statute of limitations on Ng's claims did not begin to run until she left UCD. However, the complaint does not allege when she left UCD.

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[10] As to the retaliation claim in particular, plaintiffs allege defendants retaliated against them and continue to retaliate against them by, among the other things set forth in footnote 9, continuing to refuse and failing to treat female athletes, especially wrestlers, equitably. (Id. at ¶¶ 147-160.)

Failure to allege said date is not fatal to plaintiff Ng's claims. See Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (dismissal based upon statute of limitations proper only if complaint, read with the required liberality, makes it impossible for plaintiff to claim any set of facts that would make her claim timely). It is possible given the facts alleged in the complaint, that plaintiff Ng left UCD within the applicable statute of limitations. Because the court must accept the facts stated in the complaint as true, and must construe them in favor of Ng, the court must likewise deny the motion to dismiss as to her since there is a set of facts in which her claim would survive.[11] Certainly if it is later discovered during discovery that plaintiff Ng left UCD outside the statute of limitations period, defendants can seek dismissal by a motion for summary judgment.

With respect to the above findings, the court makes a final point of clarification in light of the briefing submitted on the motion. While the court finds that plaintiffs' Title IX claims survive a motion to dismiss under Rule 12(b)(6), the court does not determine herein whether any portion of said claims is otherwise barred by the applicable statute of limitations. See National Passenger Railroad Corp. v. Morgan, 536 U.S. 101 (2002) (defining the "continuing violations" doctrine under Title

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[11] Because the court reaches this finding, it does not consider plaintiffs' alternative argument regarding equitable tolling during the OCR investigation.

VII).[12] Under Morgan, defendants argue that certain discrete acts of discrimination and/or retaliation alleged by plaintiffs in the complaint are *not actionable* because they are barred by the statute of limitations; to the contrary, plaintiffs contend that Morgan is inapplicable to Title IX, and even if it did apply, the Court in Morgan specifically excepted from its analysis "policy and practice" cases such as this one. These arguments should be addressed on a motion for summary judgment. The court only notes herein that nothing in this order prevents defendants from raising these arguments in a motion for summary judgment.

2. Section 1983 & Unruh Act Claims

The parties do not dispute that the applicable statute of limitations for plaintiffs' Section 1983 claim is California's personal injury statute of limitations described above, albeit one-year before January 1, 2003, and two-years thereafter. Wilson v. Garcia, 471 U.S. 261 (1985). As to plaintiffs' Unruh Act claim, however, the parties dispute the applicable statute of limitations. The court applies California law and finds that California's personal injury statute of limitations likewise applies to plaintiffs' Unruh Act claims. Gatto v. County of

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[12] Morgan overruled previous Ninth Circuit authority holding that, if a discriminatory act took place within the limitations period and that act was "related and similar to" acts that took place outside the limitations period, all the related acts, including the earlier acts, were actionable as part of a continuing violation. In Morgan, the Court held to the contrary that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1061 (9th Cir. 2003) (quoting Morgan, 122 S. Ct. at 2072). Rather, the statute of limitations begins to run from each discrete act.

Sonoma, 98 Cal. App. 4th 744, 760 (2002) (acknowledging that all Unruh Act violations do not necessarily have the same limitations period, but finding that civil rights torts analogous to personal injury claims are governed by the then one-year personal injury limitations period); accord West Shield Investigations & Security Consultants v. Superior Court, 82 Cal. App. 4th 935, 951-52 (2000). The court recognizes that the Ninth Circuit has indicated in Olympic Club v. Those Interested Underwriters at Lloyd's London, 991 F.2d 497, 502 n. 11 (9th Cir. 1993) that California's three-year statute of limitations for actions "upon a liability created by statute" (Cal. Code Civ. Proc. § 338(a)) applies to Unruh Act claims; however, said finding was *dicta* and made in a footnote without analysis. Later state court decisions addressing the issue have expressly rejected Olympic Club and held that the limitations period is generally one year (now two years) for civil rights torts under the Unruh Act.[13] See Gatto, 98 Cal. App. 4th at 760. Moreover, the court notes, in light of its finding with respect to plaintiffs' Title IX claims, a consistent statute of limitations should apply to plaintiffs' Unruh Act claims since they are based on the same operable facts.

Thus, for the same reasons as set forth above, defendants' motion to dismiss plaintiffs' Section 1983 and Unruh Act claims is denied; plaintiffs' allegations, described above, sufficiently state facts within the applicable statute of limitations (one or

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[13] The court is not bound to follow other district court decisions which have cited Olympic Club and applied California's three-year statute of limitations to the Unruh Act. See Kramer, 81 F. Supp. 2d at 977-78; Ind. Housing Servs. v. Fillmore Center Assocs., 840 F. Supp. 1328, 1359 (N.D. Cal. 1993).

two years) to sustain claims under Section 1983 and the Unruh Act.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss plaintiffs' complaint is DENIED.

IT IS SO ORDERED.

DATED: May 5, 2004

FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

daw

United States District Court
for the
Eastern District of California
May 6, 2004

* * CERTIFICATE OF SERVICE * *

2:03-cv-02591

Mansourian

v.

Regents Davis

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 6, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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