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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

CECILIA FRAHER,)	1:06-CV-1120 AWI GSA
)	
v.)	ORDER ON FINDINGS AND
)	RECOMMENDATION
SURYDEVARA, et al.,)	
)	(Docs. 68, 86)
Defendants.)	

This is a civil rights action that was brought pursuant to 42 U.S.C. § 1983. Plaintiff is a state prisoner. On June 1, 2009, Plaintiff was appointed counsel to represent her in this proceeding. Prior to June 1, 2009, Defendant Dr. Ashraf filed a motion to strike the punitive damages claim against him. That matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636 and Local Rule 72-302.

On May 15, 2009, the Magistrate Judge filed Findings and Recommendations that recommended granting the motion to strike. The Findings and Recommendation conclude that insufficient factual allegations have been pled regarding punitive damages and that Plaintiff failed to file a motion under California Code of Civil Procedure § 425.13(a). These Findings and Recommendation were served on the parties and contained notice that any objections to the Findings and Recommendation were to be filed within thirty (30) days.

On July 15, 2009 (after receiving an extension in which to file objections), Plaintiff filed objections. Plaintiff does not challenge the reasoning of the Findings and Recommendation. Instead, Plaintiff states that she now has counsel and requests that she be granted leave to amend so that she may make improved allegations and comply with § 425.13.

1 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C) this court has conducted a
2 *de novo* review. See Holder v. Holder, 392 F.3d 1009, 1022 (9th Cir. 2004). Having reviewed
3 the entire file, the Court agrees with the outcome and analysis of the Findings and
4 Recommendation, with one minor disagreement. The motion to strike was based in part on the
5 sufficiency of the allegations. Where a motion to strike challenges the sufficiency of the factual
6 allegations, the proper medium is Rule 12(b)(6), not Rule 12(f). See Consumer Solutions Reo,
7 LLC v. Hillery, 2009 U.S. Dist. LEXIS 76244, *48-*49 (N.D. Cal. Aug. 26, 2009); Mat-Van,
8 Inc. v. Sheldon Good & Co. Auctions, LLC, 2007 U.S. Dist. LEXIS 54876, *23 n.11 (S.D. Cal.
9 July 27, 2007); Orlando v. Carolina Cas. Ins. Co., 2007 U.S. Dist. LEXIS 22672, *32 n.12 (E.D.
10 Cal. Mar. 13, 2007). Viewing this aspect of the motion as a Rule 12(b)(6), see Hillery, 2009 U.S.
11 Dist. LEXIS 76244 at *49; Parker v. Fidelity Security Life Ins. Co., 2006 U.S. Dist. LEXIS
12 56724, *18 (E.D. Cal. Aug. 1, 2006), the Findings and Recommendation analysis is correct.

13 With respect to allowing further amendment, Dr. Ashraf has not responded to Plaintiff's
14 request to comply with § 425.13(a). Since Plaintiff now has counsel, the Court will grant
15 Plaintiff leave to file a motion under § 425.13(a) with the Magistrate Judge.

16
17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. The Findings and Recommendation entered by the Magistrate Judge on May 15, 2009, are
19 ADOPTED consistent with this order;
- 20 2. Defendant Dr. Ashraf's motion to strike is GRANTED and Plaintiff's claim for punitive
21 damages against Defendant Ashraf in the Second Amended Complaint is STRICKEN
22 without prejudice; and
- 23 3. Plaintiff may file a California Code of Civil Procedure § 425.13(a) motion to amend with
24 the Magistrate Judge within thirty (30) days of service of this order.

25 IT IS SO ORDERED.

26 **Dated: September 3, 2009**

27 **/s/ Anthony W. Ishii**
CHIEF UNITED STATES DISTRICT JUDGE