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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEFF ELIAS,
Plaintiff,
vs.
VAZRICK NAVASARTIAN, et al.,
Defendants.

1:15-cv-01567-LJO-GSA-PC
FINDINGS AND RECOMMENDATION,
RECOMMENDING THAT DEFENDANT
DUBIEL’S RULE 12(b)(6) MOTION TO
DISMISS BE GRANTED IN PART AND
DENIED IN PART
(ECF No. 13.)
OBJECTIONS, IF ANY, DUE WITHIN 14
DAYS

I. BACKGROUND

Jeff Elias (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. This case proceeds with Plaintiff’s original complaint filed on October 14, 2015, against defendants Vazrick Navasartian (D.D.S.) and J. Dubiel (D.D.S.) on Plaintiff’s medical claims under the Eighth Amendment and related state law claims. (ECF No. 1.)

On May 5, 2016, defendant Dubiel (“Defendant”) filed a Rule 12(b)(6) motion to dismiss Plaintiff’s punitive damages claims. (ECF No. 13.) On May 25, 2016, Plaintiff filed

1 an opposition. (ECF No. 17.) On May 26, 2016, Defendant filed a reply. (ECF No. 18.)
2 Defendant Dubiel's motion to dismiss is now before the court.¹ Local Rule 230(I).

3 **II. SUMMARY OF PLAINTIFF'S ALLEGATIONS**

4 Plaintiff is currently incarcerated in the custody of the California Department of
5 Corrections and Rehabilitation at Pleasant Valley State Prison (PVSP) in Coalinga, California,
6 where the events at issue allegedly occurred. Defendants Navasartian and Dubiel were dentists
7 employed at PVSP during the relevant time. Plaintiff's allegations follow.

8 On May 26, 2015, Plaintiff had two teeth filled by defendant Navasartian. The fillings
9 were too high and left Plaintiff's gums exposed. Plaintiff suffered severe pain in his gums,
10 mouth, and head. Plaintiff submitted a written request for emergency treatment.

11 On June 1, 2015, Plaintiff was examined by defendant Dubiel, who said the fillings
12 were too high. Dubiel ground down the fillings and said they still needed to be fixed, but he
13 would not fix them. Plaintiff told Dubiel that his pain was sharp, pounding, shooting, and
14 throbbing, and that eating and flossing made it worse. Dubiel did not prescribe any pain
15 medication for Plaintiff.

16 That same day, Plaintiff submitted another request for dental care, alleging that he was
17 in extreme pain and had been suffering from a headache for over a week. The next day,
18 Plaintiff was seen by defendant Navasartian. Plaintiff told Navasartian about his extreme pain
19 and that eating and drinking made the pain worse. Navasartian did not prescribe any pain
20 medication for Plaintiff. The only treatment Navasartian provided was salt. Navasartian told
21 Plaintiff that the complications from his dental procedure were caused by Plaintiff's failure to
22 floss. Plaintiff said this could not be so because he has been flossing every day for years. In
23 Plaintiff's progress report following the visit, Navasartian wrote that the cause of Plaintiff's
24 complication was that Plaintiff aggressively used a toothpick on his teeth. Plaintiff has never
25 used toothpicks since being incarcerated. Navasartian authored a document falsely claiming
26 that Plaintiff refused dental treatment on that day.

27
28 ¹ Also pending is defendant Navasartian's motion for summary judgment filed on December 13,
2016, which shall be decided by separate order. (ECF No. 26.)

1 The next day, June 4, 2015, Ms. Lebo, a dental assistant, called Plaintiff to the medical
2 clinic and told him that neither Navasartian nor Dubiel wanted to see him, and therefore he
3 would have to wait at least a week to receive treatment from another dentist.

4 Eight days later, on June 12, 2015, Plaintiff submitted another request for dental care
5 stating, “It’s been over 2 weeks since I had my fillings done and having (*sic*) to deal with the
6 pain. Can I get some pain medication and have you help fix my teeth!” (ECF No. 1 at ¶35.)

7 **III. PLAINTIFF’S CLAIMS AND REQUEST FOR RELIEF**

8 On February 4, 2016, the court issued a screening order finding that Plaintiff stated an
9 Eighth Amendment deliberate indifference claim and a state law medical negligence claim
10 against defendants Navasartian and Dubiel. (ECF No. 7.)

11 **A. Eighth Amendment Medical Claim**

12 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
13 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d
14 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part
15 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
16 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant
17 injury or the unnecessary and wanton infliction of pain,’” and (2) “‘the defendant’s response to
18 the need was deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974
19 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller,
20 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations omitted)). Deliberate
21 indifference is shown by “a purposeful act or failure to respond to a prisoner’s pain or possible
22 medical need, and harm caused by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060).
23 Deliberate indifference may be manifested “when prison officials deny, delay or intentionally
24 interfere with medical treatment, or it may be shown by the way in which prison physicians
25 provide medical care.” Id. Where a prisoner is alleging a delay in receiving medical treatment,
26 the delay must have led to further harm in order for the prisoner to make a claim of deliberate
27 indifference to serious medical needs. McGuckin at 1060 (citing Shapely v. Nevada Bd. of
28 State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

1 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
2 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the
3 facts from which the inference could be drawn that a substantial risk of serious harm exists,’
4 but that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511
5 U.S. 825, 837 (1994)). “‘If a prison official should have been aware of the risk, but was not,
6 then the official has not violated the Eighth Amendment, no matter how severe the risk.’” Id.
7 (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). “A
8 showing of medical malpractice or negligence is insufficient to establish a constitutional
9 deprivation under the Eighth Amendment.” Id. at 1060. “[E]ven gross negligence is
10 insufficient to establish a constitutional violation.” Id. (citing Wood v. Housewright, 900 F.2d
11 1332, 1334 (9th Cir. 1990)).

12 **B. Medical Negligence**

13 “The elements of a medical negligence claim include: ‘(1) the duty of the professional
14 to use such skill, prudence, and diligence as other members of his profession commonly
15 possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the
16 negligent conduct and resulting injury; and (4) actual loss or damage resulting from the
17 professional’s negligence.’” Lambesis v. Abiario, No. 15CV1359-MMA (NLS), 2016 WL
18 1409555, at *2 (S.D. Cal. Apr. 11, 2016) (citing Avivi v. Centro Medico Urgente Medical
19 Center, 159 Cal.App.4th 463, 468, n.2 (2008) (internal quotations and citation omitted);
20 Johnson v. Superior Court, 143 Cal.App.4th 297, 305 (2006)).

21 **C. Plaintiff’s Request for Relief**

22 Plaintiff’s prayer for relief in the complaint states as follows:

23 “WHEREFORE, Elias prays judgment as follows:

- 24 1. For a declaration that the acts and omissions of Defendants
25 described herein violated Elias’s rights under the U.S. Constitution
26 and state law;
- 27 2. For nominal damages in the amount of \$100 from each Defendant;

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- 1 3. For compensatory damages from each Defendant n an amount to be
- 2 proven at trial;
- 3 4. For punitive damages from each Defendant in an amount to be
- 4 proven at trial;
- 5 5. For exemplary damages against each Defendant;
- 6 6. For costs of suit and fees, if any; and
- 7 7. For such other and further relief this Court deems just and
- 8 proper.”

9 (ECF No. 1 at 8.)

10 **IV. DEFENDANT DUBIEL’S MOTION TO DISMISS**

11 **A. Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim**

12 In considering a motion to dismiss, the court must accept all allegations of material fact
13 in the complaint as true. Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S.Ct. 2197, 167 L.Ed.2d
14 1081 (2007); Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740, 96 S.Ct. 1848, 48
15 L.Ed.2d 338 (1976). The court must also construe the alleged facts in the light most favorable
16 to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974),
17 overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139
18 (1984); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All ambiguities or
19 doubts must also be resolved in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411,
20 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). However, legally conclusory statements, not
21 supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662,
22 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009). In addition, pro se pleadings are held to a
23 less stringent standard than those drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520,
24 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). “The issue is not whether a plaintiff will ultimately
25 prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer,
26 416 U.S. at 236.

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1 **B. Parties' Positions**

2 Defendant Dubiel argues that in respect to Plaintiff's 42 U.S.C. § 1983 claim, his prayer
3 for punitive damages should be dismissed as Plaintiff's allegations are insufficient to support
4 them as a matter of law. Dubiel further argues that Plaintiff's request for punitive damages
5 with regard to his state law claim must be dismissed for failure to comply with the requirements
6 of California Code of Civil Procedure § 425.13.

7 Plaintiff argues that Defendant Dubiel misstates and/or ignores the allegations in the
8 complaint that Plaintiff was seen due to an emergency request, that Plaintiff was in terrible
9 pain, and that Defendants failed to prescribe any pain medication. Plaintiff asserts that he
10 specifically pled that Defendants acts were willful, intentional, malicious, wanton, and
11 despicable. Plaintiff argues that California Code of Civil Procedure § 425.13 does not apply in
12 federal court because it is in direct conflict with Rule 8(a)(3), which allows Plaintiff to request
13 all relief sought in his initial complaint.

14 **V. Discussion**

15 **A. Punitive Damages**

16 "Punitive damages may be assessed in § 1983 actions 'when the defendant's conduct is
17 shown to be motivated by evil motive or intent, or when it involves reckless or callous
18 indifference to the federally protected rights of others.'" Castro v. Cty. of Los Angeles, 797
19 F.3d 654, 669 (9th Cir. 2015), reh'g en banc granted, 809 F.3d 536 (9th Cir. 2015), and on
20 reh'g en banc, 833 F.3d 1060 (9th Cir. 2016), cert. denied sub nom Los Angeles Cty., Cal. v.
21 Castro, ___ S.Ct ___, No. 16-655, 2017 WL 276190 (Mem) (U.S. Jan. 23, 2017) (quoting
22 Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)). "[T]his threshold
23 applies even when the underlying standard of liability for compensatory damages is one of
24 recklessness,' because to award punitive damages, the jury must make both a factual
25 determination that the threshold was met and 'a moral judgment' that further punishment was
26 warranted." Id. (quoting Smith, 461 U.S. at 52–53, 56 (recognizing that where the underlying
27 standard of liability is recklessness, a tortfeasor may be subject to both compensatory and
28 punitive damages without any additional culpable conduct). The Ninth Circuit has held that the

1 decision to impose punitive damages is “within the exclusive province of the jury.” *Id.* at 670
2 (quoting *Runge v. Lee*, 441 F.2d 579, 584 (9th Cir. 1971). In this court, in prisoner civil rights
3 cases such as the present case, the decision whether to award damages is ordinarily made by the
4 jury at trial.

5 Recent court decisions have held that because a prayer for relief is a remedy and not a
6 claim, a Rule 12(b)(6) motion to dismiss for failure to state a claim is not a proper vehicle to
7 challenge a plaintiff’s prayer for punitive damages, because Rule 12(b)(6) only countenances
8 dismissal for failure to state a claim. Fed. R. Civ. P. 12(b)(6); *see, e.g., Jordan v. United States*,
9 No. 15-cv-1199 BEN (NLS), 2015 WL 5919945, at *2-3 (S.D. Cal. Oct. 8, 2015) (“A prayer
10 for damages constitutes a remedy, not a claim” within the meaning of Rules 8(a)(2) or 12(b)(6).
11 Thus, [a] prayer for relief does not provide any basis for dismissal under Rule 12.”) (quoting
12 *Oppenheimer v. Southwest Airlines Co.*, No. 13-CV-260-IEG (BGS), 2013 WL 3149483, at
13 *3-4 (S.D. Cal. June 17, 2013) (“[T]he availability of [a certain type of relief does not] control
14 or even pertain to the sufficiency of any claim.”); *accord Shimy v. Wright Med. Tech., Inc.*,
15 No. 2:14-cv-04541-CAS (RZx), 2014 WL 3694140, at *4 (C.D. Cal. July 23, 2014); *Monaco v.*
16 *Liberty Life Assur. Co.*, No. C06-07021 MJJ, 2007 WL 420139, at *6 (N.D. Cal. Feb. 6, 2007)
17 (“[A] complaint is not subject to a motion to dismiss for failure to state a *claim* under Rule
18 12(b)(6) because the prayer seeks relief that is not recoverable as a matter of law.” (emphasis in
19 original); *see Charles v. Front Royal Volunteer Fire & Rescue Dep’t, Inc.*, 21 F.Supp.3d 620,
20 629 (W.D. Va. 2014) (Rule 12(b)(6) does not provide a vehicle to dismiss a portion of relief
21 sought or a specific remedy, but only to dismiss a claim in its entirety); *also see Schmidt v.*
22 *C.R. Bard, Inc.*, No. 6:14-cv-62, 2014 WL 5149175, at *7–8 (S.D. Ga. Oct. 14, 2014) (noting
23 that a Rule 12(b)(6) motion is improper for dismissal of a prayer for relief, and disagreeing
24 with cases to the contrary); *Douglas v. Miller*, 864 F.Supp.2d 1205, 1220 (W.D. Okla. 2012)
25 (“With respect to the issue of punitive damages, whether such damages are recoverable is not a
26 proper subject for adjudication in a Rule 12(b)(6) motion, as the prayer for relief is not a part of
27 the cause of action.”); *Rathbone v. Haywood Cnty.*, No. 1:08cv117, 2008 WL 2789770, at *1
28 (W.D.N.C. July 17, 2008) (“punitive damages is not a ‘cause of action’ subject to dismissal

1 under Rule 12(b)(6).”); In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability
2 Litigations, 517 F.Supp.2d 662, 666 (S.D.N.Y. 2007) (“Punitive damages are not a claim and
3 thus it makes little sense for defendants to move to dismiss [] *claims* for punitive damages.”)
4 (emphasis in original); Benedetto v. Delta Air Lines, Inc., 917 F.Supp.2d 976, 984 (D.S.D. Jan.
5 7, 2013) (“punitive damages are a form of relief and not a ‘claim’ that is subject to a Rule
6 12(b)(6) motion to dismiss”); Security Nat. Bank of Sioux City, Iowa v. Abbott Labs., 2012
7 WL 327863, at *21 (N.D. Iowa Feb. 1, 2012) (“punitive damages are not a cause of action, and
8 as such . . . they are not subject to a motion to dismiss.”).

9 Federal Rule of Civil Procedure 54 underscores the impropriety of dismissing requests
10 for punitive damages under Rule 12(b)(6). Rule 54(c) states: “final judgment should grant the
11 relief to which each party is entitled, even if the party has not demanded that relief in its
12 pleadings.” Fed. R. Civ. P. 54(c). It thus makes little sense to require detailed factual
13 allegations to support a demand for certain damages when such damages may ultimately be
14 awarded even if they were never pled in the complaint. See Soltys v. Costello, 520 F.3d 737,
15 742 (7th Cir. 2008) (noting that “Rule 54(c) contemplates an award of punitive damages if the
16 party deserves such relief—whether or not a claim for punitive damages appears in the
17 complaint” and thus describing as a “fundamental legal error” “the assumption that a prayer for
18 punitive damages had to appear in the complaint in order to sustain an award of such
19 damages.”).

20 Accordingly, based on the foregoing, Plaintiff’s request for punitive damages in regard
21 to his 42 U.S.C. § 1983 claims cannot be dismissed under Rule 12(b)(6), and therefore
22 Defendant’s 12(b)(6) motion to dismiss should be denied.

23 **B. California Civil Procedure Code § 425.13**

24 Defendant Dubiel seeks to dismiss Plaintiff’s medical negligence claims for punitive
25 damages against him, on the ground that Plaintiff did not petition the court for punitive
26 damages against Defendant under California Civil Procedure Code § 425.13. Plaintiff argues
27 that § 425.13 “does not apply in federal court because it is in direct conflict with Fed. R. Civ. P.
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1 8(a)(3), which allows plaintiff to request all relief sought in his initial complaint.” (ECF No. 17
2 at 4:24-27.)

3 California Civil Procedure Code § 425.13 provides that:

4 In any action for damages arising out of the professional negligence of a health
5 care provider, no claim for punitive damages shall be included in a complaint or
6 other pleading unless the court enters an order allowing an amended pleading
7 that includes a claim for punitive damages to be filed.

8 Cal. Civ. Proc. Code § 425.13(a).

9 To obtain an order authorizing a request for punitive damages under § 425.13, the court
10 must determine on the plaintiff’s motion “that the plaintiff has established that there is a
11 substantial probability that the plaintiff will prevail on the claim.” Estate of Prasad ex rel.
12 Prasad v. Cty. of Sutter, 958 F. Supp. 2d 1101, 1118–21 (E.D. Cal. 2013) (quoting Jackson v.
13 E. Bay Hosp., 980 F.Supp. 1341, 1353 (N.D. Cal. 1997).

14 Within the Ninth Circuit, district courts have differed on whether the California statute
15 is applicable in federal court. Padilla v. Beard, No. 2:14-cv-01118-KJM, 2014 WL 6059218, at
16 *10–12 (E.D. Cal. Nov. 12, 2014) (citing see Estate of Prasad, 958 F.Supp.2d at 1119
17 (collecting cases)). The Ninth Circuit has not resolved the split among its district courts. Courts
18 applying the statute either have found it to be “intimately bound” to state substantive law and
19 therefore a substantive, rather than procedural rule, or have found the plaintiff’s punitive
20 damages claims largely arise under state law and the state law should therefore apply. Padilla,
21 2014 WL 6059218, at *11 (citing see e.g., Thomas v. Hickman, No. CV F 06–0215 AWI SMS,
22 2006 WL 2868967, at *41 (E.D. Cal. Oct. 6, 2006) (“The legislative intent behind Section
23 425.13 shows the rule to be intimately bound to the state substantive causes of action for
24 professional negligence.”); Rhodes v. Placer Cnty., No. 2:09–CV–00489 MCE KJN, 2011 WL
25 1302240, at *21 (E.D. Cal. Mar. 31, 2011), adopted, No. 2:09–CV–00489–MCE, 2011 WL
26 1739914 (E.D. Cal. May 4, 2011) (§ 425.13 applicable because plaintiff’s punitive damages
27 claims arise from state law claims). Cf. also Golder Associates, Inc. v. Edge Envntl., Inc., No.
28 06CV01260 WYD BNB, 2007 WL 987458, at *5 (D. Colo. Mar. 30, 2007) (giving effect to
similar Colorado statute; dismissing plaintiff’s request for punitive damages without prejudice).

1 Courts declining to apply § 425.13 find it is a procedural rule governing no substantive
2 rights and in direct conflict with a Federal Rule. Padilla, 2014 WL 6059218, at *11 (citing see
3 e.g., Jackson, 980 F.Supp. at 1352 (“The requirement is essentially a method of managing or
4 directing a plaintiff’s pleadings, rather than a determination of substantive rights.”)); Burrows
5 v. Redbud Cmty. Hosp. Dist., 188 F.R.D. 356, 361 (N.D. Cal. 1997) (“[S]ection 425.13 is a
6 procedural rule for managing and directing pleadings: it does not create substantive limits on
7 the damages a plaintiff may seek.”); see also Estate of Prasad, 958 F.Supp.2d at 1119.))

8 Plaintiff argues that § 425.13 is a state procedural rule that does not apply in federal
9 court. He asserts that the Federal Rules of Civil Procedure govern his state law claim for
10 punitive damages rather than § 425.13. Plaintiff claims that he is not required under § 425.13
11 to obtain permission from the court when requesting punitive damages for his state law claims
12 against defendants Navasartian and Dubiel. In support of his position, Plaintiff relies on
13 Jackson v. East Bay Hospital, 980 F. Supp. 1341 (N.D. Cal. 1997) and Burrows v. Redbus
14 Cmty Hosp. Dist., 188 F.R.D. 356 (N.D. Cal. 1997). In Jackson, the court held that “[S]ection
15 425.13’s requirement was procedural rather than substantive, and therefore under Erie, has no
16 effect in federal court.” Burrows, 188 F.R.D. at 361 (citing see Jackson, 980 F.Supp. at 1352).
17 “The [Jackson] court concluded that section 425.13 was essentially a method of managing or
18 directing a plaintiff’s pleadings rather than a determination of substantive rights.” Id. The
19 court rejected the argument that the procedural requirements of section 425.13 were not so
20 ‘intimately bound up’ with the state’s substantive law that it must be applied by a federal
21 court.” Id. (quoting Jackson at 1352). The Burrows court “agree[d] with the Jackson court’s
22 determination of § 425.13 as a procedural requirement” and did not apply that section.
23 Burrows, 188 F.R.D. at 361.

24 Defendant Dubiel requests the court to apply § 425.13 and dismiss the punitive damages
25 request attached to Plaintiff’s state law claim for professional negligence. He correctly points
26 out that Plaintiff failed to seek permission from the court in advance of filing his request for
27 punitive damages. Defendant cites Thomas v. Hickman, No. CV F 06-0215 AWI SMS, 2006
28 WL 2868967, at *41 (E.D. Cal. Oct. 6, 2006), which specifically dealt with § 425.13 and its

1 applicability to federal suits filed in this Eastern District of California, finding in favor of
2 applying that statute. In Thomas, the court found that “the legislative intent behind § 425.13
3 shows the rule to be intimately bound to the state substantive causes of action for professional
4 negligence, . . . [because t]he Legislature’s intent when enacting Section 425.13 was to protect
5 health care providers from frequently pleaded and frivolous, unsubstantiated, punitive damage
6 claims.” Id. at 41 (citing Cent Pathology Serv. Clinic, Inc. v. Superior Court, 3 Cal.4th 181,
7 190 (Cal. 1992); accord Allen v. Woodford, No. 1:05-CV-01104-OWW-LJO, 2006 WL
8 1748587, at *21 (E.D. Cal. June 26, 2006.) The court also found that “[t]he intent of the
9 Legislature was that any claim for punitive damages in an action against a health care provider
10 is subject to the statute if the injury that is the basis for the claim was caused by conduct
11 directly related to the rendition of professional services.” Id. (citing Cent. Pathology Serv.
12 Clinic, 3 Cal.4th at 192); Allen, 2006 WL 1748587, at *21. The Thomas court held that §
13 425.13 should be applied, requiring the plaintiff to gain permission of the court to seek punitive
14 damages for the professional negligence claim.

15 In the absence of direction from the Ninth Circuit, this court is persuaded by those of its
16 sister courts that have found § 425.13 applicable in federal court. This court agrees that a
17 state’s view of the measure of damages is inseparable from the substantive right of action. See
18 Allen v. Woodford, (Section 425.13 is “intimately bound up” with [plaintiff’s] professional
19 negligence claim, because the allegations that identify the nature and cause of plaintiff’s injury
20 must be examined.) Here, Plaintiff complains that the dental care provided by Defendants was
21 inadequate and harmful. An inquiry into Plaintiff’s claims against Defendant Dubiel cannot be
22 done without inquiring into the substantive law of the cause of action, the nature and extent of
23 the dental services, and the underlying injuries. Here, the court finds that § 425.13 is so
24 “intimately bound up” with Plaintiff’s substantive state law claims that, under the Erie
25 exception, it applies to bar these claims where there is no compliance to the rule. Plaintiff has
26 not requested nor obtained an order from the court allowing for recovery of punitive damages.
27 Therefore, the court should dismiss Plaintiff’s request for punitive damages against defendant
28 Dubiel for medical negligence.

1 In order for Plaintiff to be granted leave to amend the complaint to reinstate his request
2 for punitive damages for medical negligence, Plaintiff must first satisfy the requirements of
3 California Civil Procedure Code § 425.13. Accordingly, Plaintiff must file a motion to amend
4 his complaint to reinstate the request for punitive damages establishing in his motion, if he can,
5 that there is a substantial probability that Plaintiff will prevail on his request for punitive
6 damages pursuant to California Civil Code § 3294(a).

7 Based on the above, the court finds that defendant Dubiel's motion to dismiss punitive
8 damages pursuant to § 425.13 should be granted.

9 **VI. CONCLUSION AND RECOMMENDATION**

10 The court has found that defendant Dubiel's motion to dismiss under Rule 12(b)(6)
11 should be denied, and motion to dismiss under California Civil Procedure Code § 425.13,
12 should be granted.

13 Therefore, based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

- 14 1. Defendant Dubiel's motion to dismiss, filed on May 5, 2016, be GRANTED in
15 part and DENIED in part;
- 16 2. Defendant Dubiel's motion to dismiss Plaintiff's claims for punitive damages
17 under Rule 12(b)(6) be DENIED; and
- 18 3. Defendant Dubiel's motion to dismiss under California Civil Procedure Code §
19 425.13 be GRANTED and Plaintiff's medical negligence claim for punitive
20 damages against defendant Dubiel be DISMISSED.

21 These Findings and Recommendations will be submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
23 fourteen (14) days after being served with these Findings and Recommendations, any party
24 may file written objections with the court. The document should be captioned "Objections to
25 Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file
26 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
27 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
28 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: February 17, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE