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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
6

7 PAUL JORGENSEN,
8 Plaintiff,

9 v.

10 UNITED STATES OF AMERICA., et al.,
11 Defendants.
12

Case No. 1:17-cv-00817-LJO-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANT
HAAK'S PARTIAL MOTION TO DISMISS
BE DENIED

(ECF NO. 46)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS
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14

15 **I. BACKGROUND**

16 Paul Jorgenson ("Plaintiff") is a federal prisoner proceeding *pro se* and *in forma*
17 *pauperis* in this action. This case now proceeds on Plaintiff's Second Amended Complaint
18 ("SAC"), which was filed on July 12, 2018. (ECF No. 19.) This case is proceeding "on
19 Plaintiff's FTCA claim against the United States, his Eighth Amendment Bivens claim against
20 the four unknown correctional officers, and his state tort claims for medical negligence and
21 battery against Defendants Haak, Randhawa, and Emanuel Medical Center." (ECF No. 21, p.
22 2.)

23 On January 17, 2019, defendant Haak filed a partial motion to dismiss. (ECF No. 46.)
24 On February 7, 2019, Plaintiff filed his opposition to defendant Haak's motion to dismiss.
25 (ECF No. 57.) Defendant Haak filed his reply on February 12, 2019. (ECF No. 59.)

26 The issue of Plaintiff's consent to the medical procedures he underwent was converted
27 to a motion for summary judgment. (ECF Nos. 70 and 74.) On June 24, 2019, Plaintiff filed a
28 supplemental response, including evidence. (ECF No. 78.) On July 17, 2019, defendant Haak

1 filed his reply to Plaintiff's supplemental response. (ECF No. 81.)

2 For the reasons described below, the Court will recommend that defendant Haak's
3 partial motion to dismiss be denied. The Court will address the portion of the motion to
4 dismiss that was converted to a motion for summary judgment in a separate order.

5 **II. SUMMARY OF PLAINTIFF'S SECOND AMENDED COMPLAINT**

6 At approximately 8:00 a.m. on the morning of November 21, 2016, four U.S.P. Atwater
7 correctional officers arrived at Plaintiff's cell and informed him that he was going on a medical
8 trip. Plaintiff told the officer in charge that he had not requested any medical treatment either
9 verbally or in written form, and that he had a right to refuse non-emergency medical treatment.
10 Nevertheless, Plaintiff was placed in leg shackles, as well as hand-cuffs secured with a "black
11 box" and waist chain, and then taken to Emanuel Hospital Center. The restraints were never
12 completely removed during the course of Plaintiff's hospital stay.

13 These four unknown correctional officers were the staff that provided security at the
14 Emanuel Hospital Center, and were charged with guarding Plaintiff at Emanuel Medical Center
15 from November 21 to November 23, 2016. Plaintiff was kept chained hand and foot to the
16 hospital bed. The four officers also kept the television set at the highest volume during
17 Plaintiff's entire stay at the hospital. This high volume subjected Plaintiff to sleep deprivation.

18 After arriving at the Emanuel Medical Center on November 21, at approximately 10:00
19 a.m., Plaintiff was ordered to sign some "preliminary paperwork" by the guards and Emanuel
20 Medical Center staff. Plaintiff again advised the officer in charge that he had not requested any
21 medical treatment and also informed the Emanuel Medical Center staff that he had a right to
22 refuse non-emergency medical treatment.

23 Plaintiff was then placed supine in a CT scanner. After CT localization of a portion in
24 the right hepatic lobe of the liver for the biopsy was obtained, a lidocaine anesthetic was
25 administered and a 19-gauge guide needle was advanced into the right hepatic lobe. 20-gauge
26 lung core samples were obtained and placed in a preservative solution for later examination.
27 The procedure was negligently performed due to staff inattention and in wanton disregard of
28 Plaintiff's requests to refuse treatment. Plaintiff suffered an immediate pneumothorax collapse

1 of his right lung.

2 At the CT procedure, the attending physician was defendant Richard B. Haak, M.D.,
3 and defendant Jaspal Randhawa was the technologist. Other personnel were involved, but
4 Plaintiff does not know their names.

5 A right pleural chest tube was implanted and introduced into the right pleural cavity.
6 Plaintiff experienced immediate dizziness, nausea, and impaired breathing. He was admitted as
7 an “in patient” and placed in a bed in a secure ward. Plaintiff was chained to the bed for three
8 days. He was placed on an external suction machine as a means to inflate his right lung. He was
9 given pain medications, but they were ineffective and he continued to experience substantial
10 pain and anxiety during his stay.

11 By late afternoon of November 23, 2016, all medical intubations were removed and
12 Plaintiff was returned to the penitentiary. Plaintiff did not give his consent for a livery biopsy, a
13 collapsed lung, the intubation of the external suction machine, or being chained to the bed.

14 **III. DEFENDANT HAAK’S MOTION TO DISMISS**

15 a. Legal Standards for Motions to Dismiss

16 In considering a motion to dismiss, the Court must accept all allegations of material fact
17 in the complaint as true. Erickson v. Pardus, 551 U.S. 89, 93–94 (2007); Hosp. Bldg. Co. v.
18 Rex Hosp. Trustees, 425 U.S. 738, 740 (1976). The Court must also construe the alleged facts
19 in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
20 abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982); Barnett v. Centoni,
21 31 F.3d 813, 816 (9th Cir.1994) (per curiam). All ambiguities or doubts must also be resolved
22 in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). In addition, *pro se*
23 pleadings “must be held to less stringent standards than formal pleadings drafted by lawyers.”
24 Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that *pro se* complaints
25 should continue to be liberally construed after Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

26 A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the
27 complaint. See Iqbal, 556 U.S. at 679. Rule 8(a)(2) requires only “a short and plain statement
28 of the claim showing that the pleader is entitled to relief” in order to “give the defendant fair

1 notice of what the ... claim is and the grounds upon which it rests.” Bell Atlantic Corp. v.
2 Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). “The
3 issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to
4 offer evidence to support the claims.” Scheuer, 416 U.S. at 236 (1974).

5 In deciding a Rule 12(b)(6) motion, the Court generally may not consider materials
6 outside the complaint and pleadings. Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);
7 Gumataotao v. Dir. of Dep't of Revenue & Taxation, 236 F.3d 1077, 1083 (9th Cir. 2001).

8 b. Defendant Haak’s Position

9 Defendant Haak moves to “dismiss Plaintiff’s causes of action for failure to obtain
10 informed consent, battery, and claim for punitive damages....” (ECF No. 46 at 2.) The motion
11 is made on the grounds that:

- 12 1. Plaintiff failed to allege sufficient facts to support a cognizable
13 claim for lack of informed consent under California law;
- 14 2. Plaintiff failed to state a claim for battery under California law;
15 and
- 16 3. Plaintiff failed to comply with the statutory requirements of
17 California Code of Civil Procedure §425.13....

18 (Id.)

19 Defendant Haak argues that Plaintiff failed to state a claim for lack of informed consent
20 because, “[d]espite what is alleged in the SAC, plaintiff provided written consent to the
21 procedure performed by defendant on November 21, 2016.” (ECF No. 46-1 at 4.) Additionally,
22 Plaintiff failed to state a claim for lack of informed consent because “[t]here are no allegations
23 contained in the complaint stating that this defendant failed to provide plaintiff with the
24 information a skilled medical practitioner would have provided under the circumstances, and
25 plaintiff failed to allege the essential causal relationship between defendant's alleged failure to
26 inform and plaintiff s alleged injury.” (Id. at 5-6.)

27 As to Plaintiff’s claim for battery, defendant Haak argues that “plaintiff provided
28 written consent to the procedure, as well as ‘further procedures which in the opinion of the
supervising physician or surgeon may be indicated due to any emergency.’” (Id. at 6 (citation
omitted).) “Because plaintiff provided consent, there can be no battery.” (Id. at 7.)

1 Next, defendant Haak argues that “[b]ecause plaintiff violated California Code of Civil
2 Procedure section 425.13 by alleging a claim for punitive damages in his prayer for relief,
3 without first seeking a court order pursuant to the provisions of that statute, plaintiff’s punitive
4 damages claim should be dismissed against this defendant.” (Id. at 8.) Alternatively, defendant
5 Haak argues that Plaintiff’s punitive damages claim should be dismissed because “Plaintiff’s
6 factual allegations against this defendant fail to support a claim for punitive damages, as the
7 factual allegations fall short of the requirement that plaintiff allege facts establishing conduct
8 on the part of this defendant that amounts to oppression, fraud, or malice.” (Id. at 10.)

9 Finally, defendant Haak argues that leave to amend should be denied as to Plaintiff’s
10 claims for lack of informed consent and battery because “Plaintiff cannot cure the many
11 deficiencies contained in the SAC.” (Id. at 12.)

12 c. Plaintiff’s Position

13 Plaintiff argues that the motion to dismiss should be denied because it is “not well-
14 grounded as to the law and the facts.” (ECF No. 57 at 2.)

15 Plaintiff “opposes Haak’s request for judicial notice because the request is a pretext and
16 a means to avoid the requirements of F.R.Civ.Pro. 56. Because the defendants submitted
17 documents in support of their motion to dismiss that are not of record in this case, the defense
18 motions should be treated as summary judgment motions and be denied as no discovery has
19 taken place.” (Id.)¹

20 Plaintiff alleges that he “did not ever request to have an unnecessary and invasive liver
21 biopsy or the resulting pneumothorax that came with it, and never knowingly gave consent for
22 any such liver biopsy.” (Id. at 3.) Plaintiff argues that “[l]ogic dictates that no hospital staff
23 would subject a patient to contraindicated, and non-emergency invasive procedures over such a
24 patient’s express, verbal statements that authorization was not given at any time prior to being
25 taken out [of] U.S.P. Atwater.” (Id.)

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28 ¹ Given the documents submitted by the defendants in this action, the Court converted the issue of
Plaintiff’s consent to the medical procedures to a motion for summary judgment. (ECF Nos. 70 & 74.) The Court
also allowed discovery and supplemental submissions on the issue. (ECF No. 70 at 1-2.)

1 As to defendant Haak’s argument that Plaintiff never received permission to request
2 punitive damages, Plaintiff argues that the Court gave its permission for Plaintiff to include
3 punitive damages in the amended complaints. (Id. at 4.) Additionally, “Haak’s position assumes
4 intimate knowledge of California law on the part of a *pro se* prisoner litigant, but Jorgenson is
5 not a lawyer and cannot be held to the same standards as lawyers.” (Id. at 5.)

6 Plaintiff includes a sworn declaration with his opposition. (Id. at 6-7.)

7 d. Discussion

8 i. *Plaintiff’s Claim for Negligent Failure to Obtain Informed Consent*

9 This case is not proceeding against defendant Haak on a claim for negligent failure to
10 obtain informed consent. This case is only proceeding against defendant Haak on Plaintiff’s
11 “state tort claims for medical negligence and battery....” (ECF No. 21 at 2.) All other claims
12 against defendant Haak were dismissed. (Id.)² Accordingly, the Court will recommend that
13 defendant Haak’s request to dismiss Plaintiff’s claim for negligent failure to obtain informed
14 consent be denied.

15 ii. *Plaintiff’s Claim for Punitive Damages*

16 Defendant Haak first argues that Plaintiff’s claim for punitive damages should be
17 dismissed because Plaintiff failed to comply with California Code of Civil Procedure § 425.13.
18 However, as Chief Judge Lawrence J. O’Neill found in Scalia v. Cty. of Kern, 308 F. Supp. 3d
19 1064, 1091 (E.D. Cal. 2018), this rule does not apply in federal court.

20 Defendants argue that the prayer for punitive damages should be
21 dismissed with respect to Plaintiff’s medical negligence claim as
22 well, because California law requires that a plaintiff pursuing a
23 claim for punitive damages against a healthcare provider must
24 first obtain court approval under California Code of Civil
Procedure § 425.13, which provides in pertinent part that “[i]n
any action for damages arising out of the professional negligence

25 ² Plaintiff’s claim for negligent failure to obtain informed consent was appropriately dismissed at
26 screening because Plaintiff is claiming that he never provided informed consent for the procedures, which, under
27 California law, is a battery claim. “An action should be pleaded in negligence when the doctor performs an
28 operation to which plaintiff consents, but without disclosing sufficient information about the risks inherent in the
surgery. The battery theory should be reserved for those circumstances when a doctor performs an operation to
which the patient has not consented.” Saxena v. Goffney, 159 Cal. App. 4th 316, 324 (2008) (citations and internal
quotation marks omitted).

1 of a health care provider, no claim for punitive damages shall be
2 included in a complaint or other pleading unless the court enters
3 an order allowing an amended pleading that includes a claim for
4 punitive damages to be filed.” Cal. Civ. Proc. Code § 425.13(a).
5 It requires the party to establish a “substantial probability that the
6 plaintiff will prevail on the claim” before being permitted to
7 include a claim for punitive damages. *Id.* In opposition, Plaintiff
8 discussed only the availability of punitive damages with respect
9 to the § 1983 claim and failed to respond with respect to the
10 negligence claim. Nevertheless, the Court finds that Section
11 425.13 is inapplicable here.

12 California district courts have split on whether Section 425.13
13 applies in federal court, and the Ninth Circuit has not resolved the
14 split. *Elias*, 2017 WL 1013122, at *5. Most courts addressing the
15 issue have examined whether the rule is a procedural one that
16 would not apply in federal court, or a substantive one that it
17 would. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817,
18 82 L.Ed. 1188 (1938). In *Jackson v. E. Bay Hosp.*, the court held
19 that Section 425.13 “is essentially a method of managing or
20 directing a plaintiff’s pleadings, rather than a determination of
21 substantive rights” and declined to apply it, finding that the
22 procedural hoop was not “so intimately bound up” with the
23 substantive law that it must be applied in a diversity case. 980
24 F.Supp. 1341, 1352 (N.D. Cal. 1997). Relying on the California
25 Supreme Court’s explanation that the purpose of the rule was to
26 establish a pretrial mechanism to determine whether an action for
27 punitive damages would be allowed to proceed, the court
28 declined to graft this requirement onto federal litigation because
“federal courts readily accomplish the purposes contemplated by
section 425.13 through their case management procedures.
Section 425.13 does not supplant those.” *Id.* at 1353 (citing *Cent.
Pathology Serv. Med. Clinic, Inc. v. Superior Court*, 3 Cal. 4th
181, 189, 10 Cal.Rptr.2d 208, 832 P.2d 924 (1992)). *See also*
Burrows v. Redbud Cmty. Hosp. Dist., 188 F.R.D. 356, 361 (N.D.
Cal. 1997) (“[S]ection 425.13 is a procedural rule for managing
and directing pleadings: it does not create substantive limits on
the damages a plaintiff may seek.”). One district court found
Section 425.13 to be a procedural rule inapplicable in federal
court because it conflicts with Federal Rule of Civil Procedure
8(a)(3), which provides that “[a] pleading that states a claim for
relief must contain ... a demand for the relief sought, which may
include relief in the alternative or different types of relief.” Fed.
R. Civ. P. 8(a)(3). The court in *Estate of Prasad ex rel. Prasad v.
County of Sutter* held that “because Rule 8(a)(3) allows a plaintiff
to request in her initial complaint all the relief she seeks, it says

1 implicitly, but with unmistakable clarity[,] that a plaintiff is not
2 required to wait until a later stage of the litigation to include a
3 prayer for punitive damages, nor is she required to proffer
4 evidence or obtain leave of court before doing so.” 958
5 F.Supp.2d 1101, 1121 (E.D. Cal. 2013) (quoting *Cohen v. Office*
6 *Depot, Inc.*, 184 F.3d 1292, 1298 (11th Cir. 1999) (internal
7 quotation marks omitted) (construing similar state law requiring
8 leave of court to plead punitive damages claim), *opinion vacated*
9 *in part on other grounds on reh'g*, 204 F.3d 1069 (11th Cir.
10 2000)). The Court agrees with the logic of these cases and holds
11 that Section 425.13 does not affect the substance of the
12 negligence claim or burden of proof for punitive damages but
13 merely manages the pleadings by dictating how and when a
14 plaintiff may plead the request.

15 Scalia, 308 F. Supp. 3d at 1090–91 (alterations in original) (footnotes omitted).

16 Thus, defendant Haak’s argument that Plaintiff’s claim for punitive damages should be
17 dismissed because Plaintiff failed to comply with California Code of Civil Procedure § 425.13
18 fails.

19 As to defendant Haak’s argument that Plaintiff’s claim for punitive damages should be
20 dismissed because Plaintiff has not alleged sufficient facts to support his claim for punitive
21 damages, this argument fails as well. Rule 54(c) provides that a final judgment “should grant
22 the relief to which each party is entitled, even if the party has not demanded that relief in its
23 pleadings.” Fed. R. Civ. P. 54(c). “Citing this rule, the Ninth Circuit has found that a plaintiff
24 need not include in his complaint a ‘specific prayer for emotional distress or punitive damages’
25 in order to give the opposing party proper notice of the claim against him.” Preayer v. Ryan,
26 2017 WL 2351601, at *6 (D. Ariz. May 31, 2017) (quoting Cancellier v. Federated Dep't
27 Stores, 672 F.2d 1312, 1319 (9th Cir. 1982)). If a plaintiff need not even include a prayer for
28 punitive damages in his complaint to receive an award of punitive damages, this Court agrees
that it “makes little sense” to require detailed factual allegations to support a demand for
punitive damages. Elias v. Navasartian, 2017 WL 1013122, at *5 (citing Soltys v. Costello, 520
F.3d 737, 742 (7th Cir. 2008)).

Based on the foregoing, the Court will recommend that defendant Haak’s request to
dismiss Plaintiff’s request for punitive damages be denied.

