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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS SCHMITZ, et al.,
Plaintiffs,
v.
A. ASMAN, et al.,
Defendants.

No. 2:20-cv-00195-JAM-CKD PS
ORDER
(ECF No. 125)

The court is in receipt of plaintiffs’ January 4, 2021 motion for leave to include in their forthcoming Third Amended Complaint a claim for punitive damages against defendant Dr. Stephen DeNigris. (ECF No. 125.) This motion was timely filed in compliance with the instructions in the undersigned’s November 16, 2020 order dismissing this claim without prejudice for failure to first seek leave of court as required by California Civil Procedure Code § 425.13. (ECF No. 85 at 42, 45.) However, in part due to the court’s oversight regarding the mechanics of section 425.13, and because the motion must be properly noticed for hearing so that Dr. DeNigris has a full opportunity to respond, the court denies the instant motion without prejudice.

The court’s November 16, 2020 order permitted plaintiffs “to file documents attempting to make the ‘substantial probability’ showing” required under section 425.13 within 15 days of the district court’s order adopting the undersigned’s findings and recommendations on defendants’

1 motion to dismiss plaintiffs’ Second Amended Complaint.¹ (ECF No. 85 at 45.) That order also
2 made any Third Amended Complaint plaintiffs might choose to file due within 30 days of the
3 district court’s order. (*Id.*) On December 22, 2020, the district court adopted the findings and
4 recommendations in full. (ECF No. 124.) Accordingly, plaintiffs’ Third Amended Complaint is
5 currently due by January 21, 2021.

6 Plaintiffs’ instant motion complies with the court’s order “to file documents” to make the
7 required showing under section 425.13, but on further review, section 425.13 sets forth a
8 particular procedure for obtaining leave of court to include a punitive damages claim against a
9 health care provider. Specifically, “[t]he court may allow the filing of an amended pleading
10 claiming punitive damages on a motion by the party seeking the amended pleading and on the
11 basis of the supporting and opposing affidavits presented that the plaintiff has established that
12 there is a substantial probability that the plaintiff will prevail on the claim pursuant to
13 Section 3294 of the Civil Code.” Cal. Civ. Proc. Code § 425.13(a). In keeping with this statutory
14 text, California courts require plaintiffs to file a motion to amend the complaint to include a
15 punitive claim. See Coll. Hosp. Inc. v. Superior Court, 8 Cal. 4th 704, 717 (1994) (in bank) (“By
16 its own terms, section 425.13(a) requires the plaintiff to specially move to amend the
17 complaint”); Cooper v. Superior Court, 56 Cal. App. 4th 744, 746 (Ct. App. 1997) (“[A]fter
18 the complaint is filed, a plaintiff who wishes to seek punitive damages must make a motion for
19 leave to file an amended complaint advancing the punitive claim.”).

20 Therefore, it would be improper for the court to rule on the instant motion for an order to
21 allow punitive damages, which does not include a copy of the proposed amended complaint
22 containing the allegations supporting the punitive damages claim.² The absence of a proposed
23 amended complaint is more than a mere technical defect, as in order to assess the sufficiency of
24 plaintiffs’ section 425.13 evidentiary showing, the court must consider both (1) the factual

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26 ¹ Earlier in the decision, the court inadvertently stated a deadline of 30 days from the district
27 court’s order. (ECF No. 85 at 42.) The court appreciates plaintiffs’ choice to comply with the
intended shorter deadline and apologizes for any confusion.

28 ² Instead, plaintiffs state that their forthcoming TAC “will be amended to include allegations in
this motion.” (ECF No. 125 at 2.)

1 allegations contained in the proposed amended complaint and (2) the evidence provided in the
2 supporting and opposing affidavits. Coll. Hosp. Inc., 8 Cal. 4th at 719 (stating that the court must
3 deny the section 425.13(a) motion where (1) “the facts asserted in the proposed amended
4 complaint are legally insufficient to support a punitive damages claim” and (2) “where the
5 evidence provided in the ‘supporting and opposing affidavits’ either negates or fails to reveal the
6 actual existence of a triable claim”; “The section 425.13(a) motion may be granted only where the
7 plaintiff demonstrates that both requirements are met.”).

8 To accommodate the procedure required by section 425.13, the court finds it necessary to
9 postpone the issue of the punitive damages pleading until after the Third Amended Complaint has
10 been filed. **Any Third Amended Complaint plaintiffs wish to file remains due by**
11 **January 21, 2021.** However, such Third Amended Complaint shall not include a claim for
12 punitive damages against Dr. DeNigris, as no leave of court will yet have been granted. After
13 filing the Third Amended Complaint, plaintiffs may subsequently file a section 425.13 motion to
14 amend that complaint to add a claim for punitive damages against Dr. DeNigris and supporting
15 factual allegations. Plaintiffs shall notice any subsequent section 425.13 motion to amend for
16 hearing before the undersigned in conformance with the court’s local rules, see E.D. Cal. R. 230,
17 and shall attach to the motion a copy of the proposed Fourth Amended Complaint.³ Dr. DeNigris
18 will then have an opportunity to oppose the motion in due course.

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25 ³ Plaintiffs are further advised that a section 425.13 motion to amend is reviewed similarly to a
26 motion for summary judgment in that “the motion requires the plaintiff to demonstrate that he
27 possesses a legally sufficient claim which is ‘substantiated,’ that is, supported by competent,
28 admissible evidence.” Coll. Hosp. Inc., 8 Cal. 4th at 719. “[S]ubstantiation of a proposed
punitive damages claim occurs only where the factual recitals are made under penalty of perjury
and set forth competent admissible evidence within the personal knowledge of the declarant.” Id.
at 719-20.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for punitive damages (ECF No. 125) is DENIED without prejudice to its refiling as a motion to amend, after the forthcoming Third Amended Complaint has been filed; and
2. Any Third Amended Complaint plaintiffs wish to file remains due by January 21, 2021.

IT IS SO ORDERED.

Dated: January 7, 2021



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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