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Clerk
District Court

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For The Northern Mariana Islands
By _____ (Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

JUYEL AHMED, et al., Plaintiffs, v. ROBERT GOLDBERG, in his personal capacity, UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, and DOES 1-25 Defendants.	Civil Action No. 00-0005 (Consolidated cases) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT GOLDBERG'S MOTION TO DISMISS
RUI LIANG and LIAO DA NIAN, MOHAMMAD KAMAL HOSSAIN, and JANE ROE I, Plaintiffs, v. ROBERT GOLDBERG, in his personal capacity, UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, and DOES 1-25, Defendants.	Civil Case No. 99-0046

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This matter came before the Court on September 21, 2000, for hearing on Defendant Robert Goldberg's Motion to Dismiss the Second Amended Complaint ("SAC") in Liang v. Goldberg.[1] (The case was subsequently consolidated with Ahmed v. Goldberg, civil action 00-0005) Bruce L. Jorgensen appeared on behalf of plaintiffs. Rexford C. Kosack and Sean E. Frink appeared on behalf of defendant Goldberg. Gretchen M. Wolfinger and Gregory Baka appeared on behalf of defendant United States.

Upon consideration of the written and oral argument of counsel, the Court GRANTS in part and DENIES in part defendant's motion to dismiss as follows: the motion is granted as to counts 1, 3, 4, 5, 6, 11, 12, and 13 and those counts are dismissed with prejudice as to defendant Goldberg; the motion is granted as to counts 7, 8, 9, and 10 and those counts are dismissed with leave to amend; the motion is denied as to count 2 to the extent it is based on 42 U.S.C. § 1983 but granted with leave to amend to the extent it is based on 28 U.S.C. § 1350.

I. MOTION TO DISMISS STANDARD APPLICABLE

Defendant has attached documents to his motion to dismiss that are outside the pleadings.[2] The documents are court documents from the Commonwealth Superior Court and

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[1]On September 15, 2000, defendant Goldberg moved to strike plaintiffs' opposition to the motion to dismiss because it was not timely filed. On September 18, 2000 the Court granted defendant's motion. (Order Den. Pls.' Mot. to Continue the Sept. 21, 2000 Hr'g and Granting Def.'s Mot. to Strike) Also on September 18, 2000 after the Court had issued its order granting the motion to strike, plaintiffs filed a Cross-Motion for Extension of Time Nunc Pro Tunc to file their opposition to the motion to dismiss. Because the Court has already ruled on the motion to strike, plaintiffs' cross-motion is moot. The Court in its discretion permitted plaintiffs to orally oppose the motion to dismiss at the hearing.

[2] Defendant has attached the following exhibits to the motion: Warrant for Deportation, Entry Permit, Declaration and Order finding probable cause that Liang is a deportable alien, Order of Deportation, Default Judgment Order of Deportation, Bench Warrant, and Order on Bench Warrant.

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other documents that are matters of public record. Accordingly, the Court can take judicial notice of these documents without converting the motion into one for summary judgment. *See* Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995) (on a motion to dismiss civil rights action, the court took judicial notice of a court order dismissing plaintiff as a juror without converting the motion to one for summary judgment); *see also* MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986) (court took judicial notice of a motion to dismiss filed in a separate lawsuit noting that "[o]n a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings").

In ruling on a motion to dismiss, all allegations of material fact are to be construed as true and in the light most favorable to the nonmoving party. Gilligan v. Jamco Development Corp., 108 F.3d 246, 248 (9th Cir. 1997). The court should not dismiss a plaintiff's claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. Rule 8 of the Fed.R.Civ.P. requires only a short and plain statement of the claim showing that the pleader is entitled to relief and contains a powerful presumption against rejecting pleadings for failure to state a claim. *See* id. at 248-249. "The Supreme Court has explained that it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test. In reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. at 249 (internal quotation marks and citations omitted).

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II. DEFENDANT GOLDBERG'S MOTION TO DISMISS

A. Liang/Nian Unlawful Imprisonment (Count 1)

Plaintiffs Liang and Nian assert a claim for violation of liberty interests and violation of procedural and substantive due process rights because of arbitrary, indefinite and capricious imprisonment. Plaintiffs allege that the unlawful imprisonment was the direct result of CNMI and CNMI Department of Labor and Immigration ("DOLI") policy and that defendant Goldberg knew or should have known the policy violated liberty interests and due process rights. Plaintiffs allege that defendant Goldberg, acting under the color of state law, "initiated, perpetuated, supervised, and/or acquiesced to" plaintiffs' imprisonment. (SAC ¶ 77). Both plaintiffs were detained for six months pending deportation. Plaintiffs seek damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1350 and request punitive damages. Defendant argues plaintiffs Liang and Nian cannot state a claim for unlawful imprisonment because their arrest and imprisonment were pursuant to lawful court orders.

Defendant's argument fails to recognize that the nature of imprisonment, without regard to arrest, may constitute a violation of law. Plaintiffs' claims are based on the alleged arbitrary and indefinite nature of their detention and are not premised on false arrest. Thus, defendant's argument, while correct as a general statement of law, does not speak to the allegations in the count.[3]

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[3]The Restatement (Second) of Torts, which is applicable law in the CNMI pursuant to 7 CMC § 3401, provides "an act which makes the actor liable under this Section for a confinement otherwise than by arrest under a valid process is customarily called a false imprisonment." *See id.* at § 35, cmt. a. The Restatement also recognizes a claim for false imprisonment where a confinement results "from a refusal of the actor to perform a duty to release the other from an existing confinement." *Id.* at § 45. While the Restatement declines to address whether a claim such as plaintiffs' may

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Nonetheless, plaintiffs' claim fails because they allege the violation of their rights "was the direct and proximate result of the above-described CNMI/DOLI policy" (SAC ¶ 81) and do not allege that defendant Goldberg was the cause of their unlawful imprisonment. *See* Tahoe-Sierra Preservation Council v. Tahoe Regional Planing Agency, 216 F.3d 764, 783 (9th Cir. 2000) ("[i]n a section 1983 action, the plaintiff must demonstrate that the defendant's conduct was the actionable cause of the claimed injury"). Accordingly, this count is dismissed with prejudice.

B. Liang/Nian - Unlawful Policy/Practice (Count 2)

Plaintiffs Liang and Nian allege the CNMI/DOLI "policy, custom, pattern, and practice" relating to their imprisonment violated their due process rights and liberty interests. (SAC ¶ 89). Plaintiffs allege their arbitrary and indefinite detention was a result of those policies and that defendant Goldberg acting under the color of state law "made, developed, implemented, commanded and/or perpetuated" such policies (SAC ¶ 88) and knew that such policies violated due process rights. Plaintiffs seek damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1350 and also request punitive damages.

Defendant argues that because plaintiffs were detained pursuant to lawful court orders, plaintiffs cannot state a claim upon which relief can be granted. Defendant also argues he cannot set government policy in his personal capacity and he is not in a policy-creating position.

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subject an actor to liability, *see id.* at § 35 caveat ("[t]he Institute expresses no opinion as to whether the actor may not be subject to liability for conduct which involves an unreasonable risk of causing a confinement of such duration or character as to make the other's loss of freedom a matter of material value"), the CNMI Superior Court has recognized that such imprisonment may violate due process. *See* Superior Court for the CNMI's March 9, 2000 Order Granting Application for Writ of Habeas Corpus with Conditions in Ahmed v. CNMI, et al., Special Proceeding No. 00-0101A.

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As explained above, defendant's argument that plaintiffs are precluded from bringing an unlawful imprisonment claim because their arrests were valid fails to recognize that the nature of imprisonment without regard to arrest may be unlawful. The Superior Court for the CNMI has found that prolonged imprisonment such as that experienced by plaintiff Ahmed in the related action violated due process rights.[4] Accordingly, arrest pursuant to valid legal process does not nullify plaintiffs' claim for arbitrary and indefinite imprisonment in violation of due process rights.

Defendant also argues that in his personal capacity he cannot set government policy. This argument fails to recognize that a defendant may be held personally liable under § 1983 for acts performed in an official capacity. *See* Hafer v. Melo, 502 U.S. 21, 31, 112 S.Ct. 358, 365 (1991) (state officials performing acts in their official capacity may be held liable for such acts in their personal capacities under § 1983); *see also* DeNieva v. Reyes, Civ. No. 88-0017, 1989 WL 158912 (D. N.Mar.I. Oct. 19, 1989). "[T]o establish personal liability in a § 1983 action, it is enough to show that the official, acting under the color of state law, caused the deprivation of a federal right." Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985); *see also* Romano v. Bible, 169 F.3d 1182, 1185-1186 (9th Cir. 1999) ("[t]he Supreme Court has made it clear that a plaintiff can establish personal liability in a § 1983 action simply by showing that the official acted under the color of state law in deprivation of a federal right"). The complaint

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[4]*See* Superior Court for the CNMI March 9, 2000 Order Granting Application for Writ of Habeas Corpus with Conditions in Ahmed v. CNMI, et al., Special Proceeding No. 00-0101A at sec. IV, ¶ 12. (Attached as Ex. E-1 to SAC in Ahmed, et. al. v. Goldberg, et. al., Civ. No. 00-0005). Unlike plaintiff Ahmed's twenty month detention, however, the detention experienced by plaintiffs Liang and Nian has not as yet been determined to be in violation of their due process rights.

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sufficiently alleges that defendant Goldberg, acting under color of state law, "made, developed, implemented, commanded, and/or perpetuated" policies or practices which caused plaintiffs to be deprived of their liberty interests and due process rights. Accordingly, plaintiffs have alleged the necessary elements to state a § 1983 claim against Goldberg in his personal capacity.

As to defendant's claim that he is not in a policy-creating position, "policy" may be created where an authorized government decision-maker adopts a particular course of action even where the course of action is not intended to control decisions in later situations. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480-481, 106 S.Ct. 1292, 1298-1299 (1986) (discussing when "policy" created by an official is sufficient to also give rise to municipal liability). Because plaintiffs have sufficiently alleged Goldberg was acting under color of state law and that he made policy specifically relating to the imprisonment of plaintiffs (SAC ¶ 70), resulting in plaintiffs' constitutional deprivations, plaintiffs have stated a claim under § 1983.[5] Accordingly, the Court finds plaintiffs have stated a claim under § 1983 based on unlawful imprisonment.

Plaintiffs have not, however, sufficiently stated a claim for unlawful imprisonment with respect to 28 U.S.C. § 1350.[6] Plaintiffs have failed to allege a violation of the law of nations or a treaty of the United States ("U.S.") and have thus failed to state a claim under the Alien Tort Act.

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[5]Even if defendant Goldberg is not deemed to be a policymaker, plaintiffs' broadly worded count also alleges defendant "perpetuated" policy or practices which caused plaintiffs' deprivation of rights. Thus defendant Goldberg's alleged acts or omissions in perpetuating CNMI/DOLI policy and which resulted in plaintiffs' deprivation of rights could also serve as a basis for the § 1983 claim. However, this potential avenue of liability does not find support in any of the factual allegations in the complaint.

[6]"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

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Because plaintiffs' allegations of arbitrary and indefinite detention may constitute a violation of a U.S. treaty and/or international law,[7] plaintiffs may amend their complaint.

Accordingly, defendant's motion is denied to the extent the count is based on 42 U.S.C. § 1983. Defendant's motion is granted to the extent the count is based on 28 U.S.C. § 1350.

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[7]In Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998), the plaintiff asserted a claim under the Alien Tort Act for arbitrary arrest and detention in violation of international law. In affirming the district court's summary judgment in favor of the defendants, the Ninth Circuit observed "there is a clear international prohibition against arbitrary arrest and detention. That prohibition can be found in treaties, the law of nations, and court opinions." Id. at 1384. The court further noted "[d]etention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person'... [or] ... if 'it is not accompanied by a notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.'" Id. (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987).) Although Martinez' claim under the Alien Tort Act involved his arrest and detention in a criminal context, such a claim may be cognizable in the context of immigration law as it pertains to the detention of aliens who have already entered the United States. *See* Kim Ho Ma v. Janet Reno, 208 F.3d 815, 829-830 and n.28 (9th Cir. 2000) *cert granted by Zadvydas v. Underdown*, __ S.Ct. __, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 99-7791, 00-38) (in holding that Attorney General lacked statutory authority to detain alien indefinitely pending removal, the court interpreted the relevant statute in a manner consistent with the international prohibition against prolonged and arbitrary detention; the court noted that to supersede an earlier rule of international law Congress must clearly intend to supersede the earlier rule of international law and the statute and earlier provision of international law cannot be fairly reconciled); *but see* Barrera-Echavarria v.Rison, 44 F.3d 1441, 1451 (9th Cir. 1995), *cert. denied*, 516 U.S. 976 (1995) (court held that international law against prolonged arbitrary detention had been displaced by "a combination of 'controlling acts' of the legislative, executive, and judicial branches" which permitted the prolonged detention of excludable aliens where their deportation could not be effected within a reasonable time); *see also* Jean v. Nelson, 727 F.2d 957, 964 n.4 (11th Cir. 1984) ("amici have pointed to no evidence in the way of diplomatic protests, international arbitrations, or court decisions that suggest that it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law").

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Because it appears plaintiffs may be able to state a claim based on the Alien Tort Act, plaintiffs are granted leave to amend the count.[8]

C. Liang/Nian - Unlawful/Indefinite/Arbitrary Seizure (Count 3)

Plaintiffs Liang and Nian allege the arbitrary and indefinite nature of their imprisonment violated their right to be free from unreasonable seizure of their persons under the U.S. and CNMI Constitutions. Plaintiffs allege defendant Goldberg knew or should have known that the CNMI/DOLI policy and procedure would result in a violation of their Fourth Amendment rights. Plaintiffs allege they have suffered injuries and damages because of the violation and as a direct result of defendant Goldberg's actions and omissions. Plaintiffs seek damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1350 and also request punitive damages.

Defendant argues that because the arrests of plaintiffs Liang and Nian were pursuant to lawful court orders, there was no unlawful policy or practice resulting in the plaintiffs' imprisonment and, therefore, plaintiffs cannot state a claim upon which relief can be granted.

Under circumstances commensurate to those alleged by plaintiffs, the Supreme Court has indicated the protections afforded by the Fourth Amendment's prohibition against unreasonable seizures do not extend beyond the arrest. In Baker v. McCollan, a § 1983 civil rights action was brought against the county sheriff for false imprisonment. Id., 443 U.S. 137, 142, 99 S.Ct. 2689, 2693 (1979). McCollan was arrested and imprisoned pursuant to a valid warrant but proclaimed

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[8]In dismissing for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Cook, Perkiss & Liehe v. N. Cal. Collection Service, 911 F.2d 242, 247 (9th Cir.1990).

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his innocence of the offense. Id. at 143, 99 S.Ct. 2694. McCollan was released several days later when it was determined that McCollan's brother had committed the offense but provided the authorities with McCollan's name. Id. at 141, 99 S.Ct. 2693. While noting that the subsequent detention could have infringed upon McCollan's due process rights, the Court found the initial arrest and imprisonment did not violate the Fourth Amendment because the arrest warrant was valid.[9] Id. at 144-145, 99 S.Ct. 2694-2695.

Similarly, plaintiffs' initial arrest and imprisonment appears to have been valid; it is only the subsequent arbitrary and indefinite nature of their detention that is being challenged. Therefore, under the facts alleged, plaintiffs have not stated a claim for violation of their constitutional right to be free from unreasonable seizures. Accordingly, this count is dismissed with prejudice.

D. Asylum/Protection from Torture (Count 4)

Plaintiffs allege they have attempted to apply for asylum and have attempted to seek the protections provided by the Convention Against Torture.[10] Plaintiffs allege defendants U.S. and CNMI have failed and/or are unwilling to implement such asylum and torture protection

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[9]"Obviously, one in respondent's position could not be detained indefinitely, in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment. .... We may even assume, *arguendo*, that, depending on what procedures the State affords defendants, following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after a lapse of a certain amount of time deprive the accused of 'liberty without due process of law.'" Baker, 443 U.S. at 144-145, 99 S.Ct. 2694-2695.

[10]United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. (Signed by United States on April 18, 1988).

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procedures in the CNMI in contravention of their obligations under the Immigration and Naturalization Service's asylum and refugee standards, the United Nations refugee standards and torture protections, the 1967 Protocol Relating to the Status of Refugees[11] ("1967 Protocol"), the Convention Against Torture, and international law. Plaintiffs allege the failure of defendants to implement asylum and torture protection procedures in the CNMI violates the rights guaranteed to them by the Constitutions and laws of the U.S. and CNMI. Plaintiffs allege defendants are liable to plaintiffs for damages as a consequence of the aforesaid conduct.

Defendant notes that the count does not appear to be directed at him because it is focused on the conduct of defendants U.S. and CNMI only. Defendant argues that to the extent the claim may be directed against him, he in his personal capacity has no ability to offer torture protection or asylum procedures to plaintiffs.

The Court finds the count is directed only toward defendants United States and CNMI. Although the count makes a general reference to all defendants, plaintiffs specifically allege that it is the "failure and/or unwillingness of Defendant U.S. and Defendant CNMI" which gives rise to this claim. (SAC ¶¶ 101 and 102). Further, plaintiffs allege the obligation to implement such policies is with the United States and the CNMI (SAC ¶¶ 42-44) and make no such allegation as to defendant Goldberg.[12]

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[11]Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. (Signed by United States on Nov. 1, 1968).

[12]In the complaint's general allegations, plaintiffs allege defendant Goldberg is "tasked with primary responsibility for the administration, supervision, and enforcement of CNMI immigration laws" (SAC ¶ 62) and that he "creates, administers, supervises, and enforces DOLI policies and procedures, and makes policy decisions, including but not limited to policies and procedures relating to the applications for political asylum and requests for protection from torture." (SAC ¶ 65). These

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Accordingly, to the extent plaintiffs may have intended to allege a claim against this defendant the motion is granted and defendant Goldberg need not answer the count.

E. Injunctive Relief Re Violations: Art. 33 & Torture Convention (Count 5)

Plaintiffs allege, upon information and belief, that defendant CNMI is attempting to deport one or more of them. Plaintiffs allege that any attempt to deport or detain them or others similarly situated absent a determination of their pending asylum applications and requests for torture protection violates the 1951 Convention Relating to the Status of Refugees[13] and the 1984 Convention Against Torture (collectively "Conventions"). Plaintiffs allege the U.S., CNMI and defendant Goldberg are responsible for ensuring that persons seeking asylum within the CNMI are not subject to *refoulement* or detention in violation of the Conventions and that defendants have shirked that responsibility. Plaintiffs also allege that defendants have shirked their responsibility to provide asylum/refugee procedures and torture protection procedures to plaintiffs, as required by the Conventions, the 1967 Protocol, and international law.

Plaintiffs seek injunctive relief to restrain all defendants from subjecting them and others similarly situated to *refoulement*,[14] to restrain all defendants from arresting or imprisoning them

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allegations do not support an inference that defendant Goldberg had an obligation to institute asylum and torture protection policies and procedures in the CNMI. Furthermore, it is unclear from the allegations in the complaint whether plaintiffs attempted to seek asylum and torture protection from the CNMI government and/or its officials including defendant Goldberg. Plaintiffs only allege they sought such protections from U.S. officials (SAC ¶¶ 49-51) and sought information concerning CNMI policies from the CNMI Attorney General's Office (SAC ¶¶ 56-59).

[13]United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, reprinted in 19 U.S.T. at 6259. (Articles 2 through 34 of the Convention are incorporated by the 1967 Protocol which was signed by the United States on November 1, 1968).

[14]Plaintiffs seek injunctive relief on behalf of themselves and others similarly situated. Because this is not a class action the Court cannot provide relief to such unnamed plaintiffs. Fed.R.Civ.P.

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and others similarly situated, to preserve the status quo pending acceptance and processing of their requests for asylum and/or torture protection by either the U.S. or the United Nations, and to require defendants U.S. and CNMI to create a procedure for accepting and processing applications for asylum and requests for torture protection within the CNMI.

Defendant Goldberg argues the count should be dismissed because he has been sued in his personal capacity and has no ability to arrest, deport or imprison plaintiffs in that capacity.

Plaintiffs are requesting prospective injunctive relief which is available in the federal court against state officials sued in their official capacities. *See* Hafer v. Melo, 502 U.S. 21, 27, 112 S.Ct. 358, 362-363 (1991). Defendant Goldberg, however, was sued only in his personal capacity. Accordingly, the Court finds defendant Goldberg in his personal capacity is not an appropriate defendant against whom such injunctive relief may be sought and therefore dismisses the count with prejudice as to Goldberg.[15]

F. Open Government Act Defiance (Count 6)

Plaintiffs Liang and Nian seek the records they requested pursuant to the CNMI's Open Government Act. Defendant argues that the allegations are directed toward the CNMI Attorney General's Office and DOLI officials and that defendant Goldberg sued in his personal capacity has no obligation under the Open Government Act to produce the records.

10(a) requires the names of all parties to be included in the caption of the complaint. There is no jurisdiction over unnamed parties because a case has not been commenced with respect them. *See* National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989).

[15]It should also be noted that defendant Goldberg is no longer with the CNMI's Office of the Attorney General/DOLI, so this claim would be moot in any event.

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Plaintiffs allege the failure to produce the records "constitutes a violation of the CNMI's Open Government Act, for which Defendant CNMI is liable to Plaintiffs Liang and Nian." (SAC ¶ 125). Accordingly, the Court finds the count is not directed against defendant Goldberg and therefore grants defendant's motion to dismiss the count as to him.

G. Conspiracy (Count 7)

Plaintiffs allege a conspiracy by Goldberg and "others" to deprive aliens including plaintiffs of the due process and/or equal protection and immunities to which they are entitled. Plaintiffs allege "[d]efendant Goldberg committed overt acts which included but were not limited to initiating, devising, authorizing, instructing, commanding, ordering, ratifying, condoning and/or acquiescing in conduct and/or omissions, which conduct and omissions Defendant Goldberg knew or should have known would directly and/or indirectly deprive aliens, including plaintiffs, of due process and/or equal protection and immunities." (SAC ¶ 128). Plaintiffs allege additional overt acts by Goldberg including "subjecting Plaintiffs to cruel and unusual punishment, unlawful discrimination, arbitrary and capricious punishment, and other illegal conduct." (SAC ¶ 131).

In addition, plaintiffs allege defendant Goldberg committed overt acts in furtherance of the conspiracy specifically directed at plaintiffs Liang and Nian. Such overt acts "included but were not limited to subjecting [Liang and Nian] to indefinite, arbitrary, capricious, and unlawful imprisonment." (SAC ¶ 129). Plaintiffs are seeking damages against defendant Goldberg pursuant to 42 U.S.C. § 1985, 42 U.S.C. § 1983 and 28 U.S.C. § 1350.

Defendant points out that plaintiffs have failed to identify the specific provision of § 1985 upon which the claim is based. Defendant concludes from the allegations that the claim is based

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on § 1985(3) and contends plaintiffs have failed to state a claim because they have not alleged the required racial or class-based invidiously discriminatory animus. Defendant further argues that aliens as a class may be subject to different treatment from citizens, such as additional searches, securing of entry permits, and completion of paperwork, and that such different treatment is not afforded protection under §1985 and cannot serve as a basis for the § 1985 claim. Defendant also contends the conspiracy claim was not pled with sufficient specificity because plaintiffs failed to identify any other members of the conspiracy. Defendant concludes that "specificity" requires that all members of the conspiracy be identified.

Plaintiffs' count is too vague to provide defendant with sufficient notice of the claims asserted against him. Initially, it is unclear whether the claim is asserted on behalf of all plaintiffs or Liang and Nian only. The allegations refer generally to all plaintiffs and specifically to Liang and Nian, but plaintiffs conclude that "[d]efendant Goldberg is liable to each Plaintiffs [sic] Liang and Nian as a consequence of the previously-described conduct." (SAC ¶ 134). Also, as defendant points out, the claim does not specify upon which provision of 42 U.S.C. § 1985 the claim is based. While it appears plaintiffs are attempting to assert a claim for conspiracy based on § 1985(3), plaintiffs leave it to defendants to guess the basis of their claim.

Assuming the count is based on § 1985(3), plaintiffs must allege the following in order to state a claim: (1) a conspiracy, (2) for the purpose of directly or indirectly depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby the person is either injured in his person or property or deprived of any right or privilege of citizens of the United States. United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 829, 103 S.Ct. 3352, 3356

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(1983). The second element requires some showing of racial or an otherwise class-based invidiously discriminatory animus behind the conspirators' actions.[16] *See* Griffith v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971).

Plaintiffs' claim fails for several reasons. First, the count suffers because of its vague and conclusory allegations concerning the participation of "others" in the conspiracy. While plaintiffs need not identify all the participants in the conspiracy, plaintiffs may not rest on mere conclusory assertions. "A claim under [§1985] must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988).

Second, the count fails because plaintiffs have not sufficiently alleged racial or class-based[17] discriminatory animus on the part of Goldberg or the "other" participants in the conspiracy. Plaintiffs, identifying themselves as a class based on alienage, only assert a conclusory allegation that they were subject to "unlawful discrimination." This is insufficient to establish the second element of the claim. *See* Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir.

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[16]Allegations of discriminatory animus are also required to state a claim for conspiracy based on the second clause of §1985(2) which concerns access to state or territorial courts. *See* Portman v. Santa Clara, 995 F.2d 898, 909 (9th Cir. 1993). If plaintiffs were attempting to assert a claim under that provision, the claim would fail for lack of such allegations of discrimination.

[17]"Generally, our rule is that section 1985(3) is extended beyond race only when the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights. More specifically, we require either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection." Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citations and internal quotation marks omitted).

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1992) (conclusory allegations unsupported by facts need not be taken as true in considering the sufficiency of a claim).

Third, the count fails because the allegations of overt acts by defendant Goldberg are vague and conclusory. *See* Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982) ("[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss"). Plaintiffs' allegation of overt acts set forth in ¶ 128 of the complaint (set forth *supra*) are vague and conclusory with no supporting factual allegations. Plaintiffs' allegations of overt acts involving "cruel and unusual punishment, unlawful discrimination, arbitrary and capricious punishment and other illegal conduct" set forth in ¶ 131 are also conclusory.[18] Plaintiffs' allegation that Goldberg's overt acts included the indefinite and arbitrary imprisonment of plaintiffs Liang and Nian is the only factually sufficient allegation; however, it is not clear how this overt act was in furtherance of any conspiracy directed against the plaintiffs collectively. A conspiracy claim on behalf of Liang and Nian only would still fail for the other reasons set forth.

Lastly, the allegations concerning the injury or deprivation suffered by plaintiffs are vague and conclusory. The complaint fails to identify the nature of the due process or equal protection deprivation suffered by plaintiffs and thus fails to give defendant adequate notice of the claim against him. Accordingly, for all of the above reasons, plaintiffs' count fails to state a cause of action for conspiracy under § 1985(3).

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[18]Other than the allegation that plaintiffs Liang and Nian were subject to arbitrary and capricious imprisonment, there are no factual allegations in the complaint to support plaintiffs' recitation of overt acts in paragraph 131. It is not clear how this overt act advances a conspiracy theory on behalf of all the plaintiffs.

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Plaintiffs also base their conspiracy count on 42 U.S.C. § 1983 and 28 U.S.C. § 1350. Defendant has not specifically argued for dismissal based on these provisions but presumably contends that the count fails on these bases because of the lack of specificity with which the count is pled.

To establish a conspiracy under § 1983, plaintiffs must show "the defendant conspired with others to deprive him or her of a constitutional right; that at least one of the co-conspirators engaged in an overt act in furtherance of the conspiracy; and that the overt act injured plaintiff." Askew v. Millerd, 191 F.3d 953, 957 (8th Cir. 1999). As stated above, plaintiffs' allegations regarding the "others" participating in the conspiracy (and thus the existence of the conspiracy) are vague and conclusory. Plaintiffs' allegations concerning overt acts by defendant Goldberg are also conclusory and lacking in factual support. Plaintiffs' allegations concerning the injury suffered are also vague and conclusory. Accordingly, plaintiffs' count as pleaded fails to state a cause of action for conspiracy under § 1983.

Plaintiffs' conspiracy claim based on 28 U.S.C. §1350 also fails. Plaintiffs have not asserted that the purported conspiracy was in violation of the law of nations or a treaty of the United States and have thus failed to state a claim under the Alien Tort Act.

For the above reasons, this count fails to state a claim for conspiracy. However, taking all the factual allegations in the complaint as true, it appears plaintiffs may be able to articulate a cause of action for conspiracy upon one or more of the bases asserted if granted leave to amend. Accordingly, the count is dismissed with leave to amend in order to permit plaintiffs the opportunity to plead the count with greater specificity and clarity.

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H. Concealment: Concealed Knowledge or Information (Count 8)

Plaintiffs allege all defendants either intentionally or negligently concealed knowledge about the acceptance and processing of refugee/asylum applications and torture protection applications from CNMI-based applicants and also concealed information about the consequent unconstitutional and unlawful deprivations to which plaintiffs and others similarly situated were subjected. Plaintiffs allege they were misled by defendants because they were unaware of the concealed information and had relied on defendants to comply with their obligations to provide such information. Plaintiffs conclude they sustained injuries and damages as a result of the concealment. Defendant argues the count should be dismissed because there is no such cause of action recognized in the CNMI Code, the Restatement of the Law, or any other legal authority.

Contrary to defendant's argument, such a cause of action is set forth in the Restatement (Second) of Torts and is therefore cognizable in the Commonwealth pursuant to 7 CMC § 3401. The Restatement clearly sets out that concealment is a form of misrepresentation.[19] Nonetheless, plaintiffs' summarily pleaded claim is insufficient to state a claim against the defendant. The complaint adequately alleges the existence of concealed knowledge but the allegations that plaintiffs sustained injuries and damages as a result of the concealment are only conclusory and fail to shed any light on the nature of the injuries and damages. Because plaintiffs have failed to

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[19]Section 550 of the Restatement (Second) of Torts sets forth the claim for fraudulent concealment: "[o]ne party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he has stated the nonexistence of the matter that the other was thus prevented from discovering." Section 557A provides "[o]ne who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land or a chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other."

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adequately allege either the pecuniary loss or physical harm required to state a claim for concealment, plaintiffs' count fails. Accordingly, this count is dismissed and plaintiffs are granted leave to amend.

I. Emotional Distress (Count 9)

All plaintiffs allege the intentional and negligent infliction of severe emotional distress against all defendants and are seeking damages therefor, including punitive damages. Defendant argues that plaintiffs have not alleged the extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Defendant also argues that no claim for negligent infliction of emotional distress has been stated because there is no allegation of physical injury or knowledge by Goldberg that his conduct involved an unreasonable risk of causing distress. Further, defendant suggests the conduct allegedly causing the emotional distress was the imprisonment of plaintiffs Liang and Nian and argues that the claim will not lie because the imprisonment was pursuant to lawful court orders.

The count is unclear as to what actions by defendants are purported to have caused the emotional distress.[20] Plaintiffs have failed to identify the "outrageous conduct" required to state

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[20]If, as defendant suggests, plaintiffs' claim for emotional distress is based on the unlawful imprisonment of Liang and Nian, the fact that plaintiffs were detained pursuant to lawful court orders will not preclude a claim for emotional distress just as it does not preclude a claim for unlawful imprisonment. *See* Restatement (Second) of Torts § 46 cmt.e ("[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relationship with the other, or power to affect his interests.") Because the claim is asserted on behalf of all plaintiffs and against all defendants but only two plaintiffs were imprisoned and only two defendants allegedly participated in the imprisonment, it is uncertain if this is the basis for plaintiffs' claim.

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a claim for intentional infliction of emotional distress[21] and have also failed to allege bodily harm or illness, at least one of which is required to state a claim for negligent infliction of emotional distress.[22] Further, plaintiffs' allegation that they have each suffered severe emotional distress is conclusory and factually unsupported.

Because plaintiffs have failed to allege all the necessary elements to support a claim for emotional distress, this count fails to state a claim upon which relief can be granted. Accordingly, the count is dismissed and plaintiffs are granted leave to amend in order to assert sufficient factual allegations to support their claim that each plaintiff has suffered emotional distress.

J. Estoppel (Count 10)

Plaintiffs allege several incidents where an asylum process was made available to other CNMI-based aliens. Plaintiffs allege by effect of such occurrences, defendants have made promises, inducements and/or public representations to plaintiffs on which they have detrimentally relied. Plaintiffs assert they have suffered "damages including continued lack of

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[21]"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) Torts §46.

[22]"If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm." Restatement (Second) of Torts at §313. "If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is the legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person." Id. at §312.

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due process required for enforcement of lawful human rights within the CNMI." (SAC ¶ 154). Plaintiffs request that defendants be estopped from denying the substance and effect of such promises, inducements or representations.

Defendant argues that estoppel is an affirmative defense and not a cause of action and should therefore be dismissed. Defendant further states that plaintiffs appear to be seeking an order preventing their deportation due to the alleged acts establishing the estoppel and that under such circumstances defendant Goldberg is an inappropriate defendant because he has no ability to deport plaintiffs while acting in his personal capacity.

Although typically considered an affirmative defense, estoppel is a claim which plaintiffs may assert. "Estoppel is doctrine of law separate unto itself, and estoppel may be asserted if the facts and circumstances of a particular case warrant." In re Blankenship, 3 N. Mar. I. 209, 213 (1992); *see also* Aquino v. Tinian Cockfighting Board, 3 N.M.I. 284, 295 (1991) (plaintiffs may seek the benefit of estoppel, and even if not specifically pleaded, it may nonetheless be available to plaintiffs if established by the evidence); *see also* Office of Personnel Management v. Richmond, 496 U.S. 414, 422-423, 110 S.Ct. 2465, 2470-2471 (1990) (Court noted that based on its decisions "federal courts have continued to accept estoppel claims under a variety of rationales and analyses." The Court also noted that it had reversed every finding of estoppel against the government but declined to foreclose assertion of such claims.).

"The doctrine of estoppel requires the presence of four elements: '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the

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other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" In re Blankenship, 3 N. Mar. I. at 214.

It may be inferred from the allegations that defendants' conduct indicated to plaintiffs that asylum and torture protection procedures are available in the CNMI. However, the allegations do not suggest that defendants intended that their conduct be acted upon. Further, the allegations of detrimental reliance are vague because the manner in which plaintiffs relied on defendants' conduct is not clear and the nature of the injury suffered unclear. Accordingly, plaintiffs have failed to sufficiently plead their claim for estoppel and the count is dismissed with leave to amend.

K. Punitive Damages (Count 11)

Plaintiffs set forth their request for punitive damages as an independent claim. Defendant argues that "punitive damages" is not a cause of action and should therefore be dismissed.

Plaintiffs' request for punitive damages is a request for relief which plaintiffs are entitled to assert and the separate count serves to clearly put defendant on notice that punitive damages are sought. However, because punitive damages may only be available with respect to certain claims and against certain defendants, a request for punitive damages is more appropriately made in the appropriate substantive count and/or the prayer for relief. Further, because plaintiffs have requested punitive damages in other counts in the complaint, a separate count is redundant. Accordingly, the count for punitive damages is dismissed with prejudice. Plaintiffs' requests for punitive damages set forth in other counts, however, are not dismissed.

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L. Joint and Several Liability (Count 12)

Plaintiffs seek to hold the defendants jointly and severally liable. Defendant argues that joint and several liability is not a cause of action and should therefore be dismissed.

Plaintiffs' request that the defendants be held jointly and severally liable is a request for relief which plaintiffs are entitled to assert. However, defendant correctly states that joint and several liability is not a cause of action. Rather, such a request for relief should be made in the substantive counts and/or in the prayer for relief. Accordingly, the count is dismissed with prejudice.

M. Article X Section 9 Damage/Attorney Fee Award (Count 13)

Plaintiffs seek relief under Art. X, Sec. 9 of the Commonwealth Constitution for an award of compensation including attorneys' fees. Defendant argues this cause of action fails because plaintiffs are not alleged to be taxpayers,[23] because this action may only be asserted against the government or its instrumentalities, and because the lawsuit does not seek to enjoin the expenditure of public funds.

Article X Section 9 of the Commonwealth Constitution provides "[a] taxpayer may bring an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty. The court shall award costs and attorney fees to any person who prevails in such an action in a reasonable amount relative to the public benefit of the suit." The Court finds defendant Goldberg is an

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[23]The complaint does not allege that plaintiffs are taxpayers; however, it can be inferred from the allegations that plaintiffs Hossain and Jane Roe I are employed and are thus taxpayers. (SAC ¶¶ 4 and 25 and ex. 6). The complaint raises no such inferences as to plaintiffs Liang and Nian.

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inappropriate defendant with respect to this claim because he is neither the government nor one of its instrumentalities. Accordingly, the count is dismissed with prejudice as to defendant Goldberg.

III. CONCLUSION

For the above stated reasons, counts 1, 3, 4, 5, 6, 11, 12, and 13 are dismissed with prejudice as to defendant Goldberg. Counts 7, 8, 9, and 10 are dismissed with leave to amend. The motion is denied as to count 2 to the extent it is based on 42 U.S.C. § 1983 but granted with leave to amend to the extent it is based on 28 U.S.C. § 1350. Because defendant CNMI's motion to dismiss is still under advisement by the Court and because the United States has filed a motion to dismiss that is set for hearing on December 7, 2000, plaintiffs need not file their amended complaint until such time as the Court has ruled on the aforementioned motions and has set a date by which such amended complaint shall be filed.

IT IS SO ORDERED.

Dated this 14th day of November, 2000.

Alex R. Munson
Judge

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