

FILED
Clerk
District Court

NOV 14 2000

For The Northern Mariana Islands
By [Signature] (Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE COMMONWEALTH OF 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; GRANTING
DEFENDANT'S MOTION TO
STRIKE; DENYING PLAINTIFFS'
CROSS-MOTION

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

1 This matter came before the Court on September 21, 2000, for hearing on
2 Defendant Robert Goldberg's Motion to Dismiss the Second Amended Complaint ("SAC")
3 in Ahmed v. Goldberg.¹ Bruce L. Jorgensen appeared on behalf of the plaintiffs. Rexford
4 C. Kosack and Sean E. Frink appeared on behalf of defendant Goldberg. Gretchen M.
5 Wolfinger and Gregory Baka appeared on behalf of defendant United States.

6 Upon consideration of the written and oral argument of counsel, the Court
7 GRANTS in part and DENIES in part defendant's motion to dismiss as follows: the motion
8 is granted as to counts 1, 3, 5, 12, 13 and 14 and those counts are dismissed with prejudice
9 as to defendant Goldberg; the motion is denied as to count 2 to the extent it is based on 42
10 U.S.C. § 1983 but granted with leave to amend to the extent it is based on 28 U.S.C. §
11 1350; the motion is granted with leave to amend as to counts 8, 9, 10 and 11; the Court
12 does not find counts 4, 6 and 7 are directed against defendant Goldberg but to the extent
13 plaintiffs may have intended to assert a claim against Goldberg, the motion is granted and
14 defendant Goldberg need not answer those counts. Defendant's motion to strike plaintiffs'
15 opposition was granted at the outset of the hearing and plaintiffs' cross-motion for
16 extension of time to file their opposition nunc pro tunc was denied.

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19 **I. DEFENDANT GOLDBERG'S MOTION TO STRIKE; PLAINTIFFS'**
20 **CROSS-MOTION TO EXTEND TIME**

21 Pending before the Court were defendant Goldberg's motion to strike plaintiffs'
22 untimely opposition to his motion to dismiss and plaintiffs' cross-motion seeking an
23 extension of time nunc pro tunc to file their opposition, to extend the time for defendant to
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25 ¹Subsequent to the hearing on the motion, this matter was consolidated with Liang v.
26 Goldberg, et al, civil action no. 99-0046.

1 file a reply, and to extend the time for hearing on the motion. Pursuant to Local Rules 7.1.a
2 and 7.1.h.3(b) the Court deemed these motions appropriate for expedited ruling without
3 oral argument. Defendant's motion to strike was granted at the outset of the hearing
4 because the opposition was untimely filed with no good cause shown. However, the Court
5 in its discretion permitted plaintiffs' counsel to orally oppose the motion to dismiss.
6 Plaintiffs' cross-motion was denied.

7 **II. DEFENDANT GOLDBERG'S MOTION TO DISMISS**

8 **A. Motion to Dismiss Standard Applicable**

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10 Defendant has attached documents from the Superior Court for the Commonwealth
11 of the Northern Mariana Islands ("CNMI") to his motion to dismiss that are outside the
12 pleadings.² Because they are matters of public record, the Court may take judicial notice of
13 the documents without converting the motion into one for summary judgment. *See MGIC*
14 *Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we
15 may take judicial notice of matters of public record outside the pleadings."); *see also Shaw*
16 *v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995) (in a civil rights action, the court took
17 judicial notice of a court order dismissing plaintiff as a juror without converting the motion
18 to dismiss into one for summary judgment).

19
20 In ruling on a motion to dismiss, all allegations of material fact are to be construed
21 as true and in the light most favorable to the nonmoving party. *Gilligan v. Jamco*
22 *Development Corp.*, 108 F.3d 246, 248 (9th Cir. 1997). The court should not dismiss a
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26 ²Defendant has attached an Order of Deportation and Order Denying Preliminary Injunction
And Granting Stay Pending Appeal issued by the Superior Court for the CNMI.

1 plaintiff's claim "unless it appears beyond doubt that the plaintiff can prove no set of facts
2 in support of his claim which would entitle him to relief." Id. Rule 8 of the Fed.R.Civ.P.
3 requires only a short and plain statement of the claim showing that the pleader is entitled to
4 relief and contains a powerful presumption against rejecting pleadings for failure to state a
5 claim. *See id.* at 248-249. "The Supreme Court has explained that it may appear on the
6 face of the pleading that a recovery is very remote and unlikely but that is not the test. In
7 reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately
8 prevail but whether the claimant is entitled to offer evidence to support the claims." Id. at
9 249 (internal quotation marks and citations omitted).

11 **B. Ahmed's Unlawful Imprisonment By Goldberg (Count 1)**

12 Plaintiff Ahmed asserts a claim for violation of liberty interests and violation of
13 procedural and substantive due process rights because of arbitrary, indefinite and capricious
14 imprisonment. Plaintiff alleges that defendant Goldberg, acting under the color of state
15 law, "initiated, perpetuated, supervised, and/or acquiesced to" Ahmed's imprisonment.
16 (SAC ¶ 90). Plaintiff also alleges that his unlawful imprisonment was the direct result of
17 CNMI and CNMI Department of Labor and Immigration ("DOLI") policy and that
18 defendant Goldberg knew or should have known the policy violated liberty interests and
19 due process rights. Plaintiff seeks damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C.
20 § 1350 and requests punitive damages. Defendant argues plaintiff cannot state a claim for
21 unlawful imprisonment because plaintiff Ahmed's arrest and imprisonment were pursuant
22 to a lawful court order.

25 Defendant's argument fails to recognize that the nature of the imprisonment,
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1 without regard to arrest, may constitute a violation of law. Plaintiff's claim is based on the
2 alleged arbitrary and indefinite nature of his detention and is not premised on a false arrest.
3 Thus, defendant's argument, while correct as a general statement of law, does not speak to
4 the allegations in the count.³

5 Nonetheless, plaintiff's claim fails because he alleges the violation of his rights
6 "was the direct and proximate result of the above-described CNMI/DOLI policy" (SAC ¶
7 94) and does not allege that defendant Goldberg was the cause of his unlawful
8 imprisonment. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,
9 216 F.3d 764, 783 (9th Cir. 2000) ("[i]n a section 1983 action, the plaintiff must
10 demonstrate that the defendant's conduct was the actionable cause of the claimed injury").
11 Accordingly, this count is dismissed with prejudice.
12

13 **C. Goldberg's Unlawful Policy/Practice Re: Ahmed (Count 2)**

14 Plaintiff Ahmed alleges the CNMI/DOLI "policy, custom, pattern, and practice"
15 relating to his imprisonment violated his right to due process and his liberty interests.
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18 ³The Restatement (Second) of Torts, which is applicable law in the CNMI pursuant to 7
19 CMC § 3401, provides "an act which makes the actor liable under this Section for a
20 confinement otherwise than by arrest under a valid process is customarily called a false
21 imprisonment." *See id.* at § 35, cmt. a. The Restatement also recognizes a claim for false
22 imprisonment where a confinement results "from a refusal of the actor to perform a duty to
23 release the other from an existing confinement." *Id.* at § 45. While the Restatement declines
24 to address whether a claim such as plaintiff's may subject an actor to liability, *see id.* at § 35
25 caveat ("[t]he Institute expresses no opinion as to whether the actor may not be subject to
26 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 violates 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. (SAC, Ex. E-1).

1 (SAC ¶ 102). Plaintiff alleges his arbitrary and indefinite detention was a result of those
2 policies and that defendant Goldberg acting under the color of state law “made, developed,
3 implemented, commanded and/or perpetuated” such policies (SAC ¶ 101) and knew that
4 such policies violated due process rights. Plaintiff seeks damages pursuant to 42 U.S.C. §
5 1983 and 28 U.S.C. § 1350 and also requests punitive damages.

6 Defendant argues that because plaintiff was detained pursuant to a lawful court
7 order, plaintiff cannot state a claim upon which relief can be granted. Defendant also
8 argues he cannot set government policy in his personal capacity and he is not in a policy-
9 creating position.
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11 As explained above, defendant’s argument that plaintiff is precluded from bringing
12 an unlawful imprisonment claim because the arrest was valid fails to recognize that the
13 nature of imprisonment may be unlawful even when the arrest was valid. The Superior
14 Court for the CNMI has already found that the prolonged imprisonment experienced by
15 plaintiff violated his due process rights.⁴ That court stated plaintiff Ahmed’s “detention has
16 extended well beyond that necessary to effect removal and has become punitive
17 imprisonment without due process in contravention of [Ahmed’s] fundamental rights under
18 the Fifth Amendment and [the CNMI Constitution] Article I, § 5.” (SAC, Ex. E-1 at sec.
19 IV, ¶ 12). Accordingly, arrest pursuant to valid legal process does not nullify plaintiff’s
20 claim for arbitrary and indefinite imprisonment in violation of due process rights.
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23 Defendant also argues that in his personal capacity he cannot set government policy.
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25 ⁴Plaintiff incorporates into the complaint the March 9, 2000 Superior Court Order Granting
26 Application for Writ of Habeas Corpus with Conditions in Ahmed v. CNMI, et al., Special
Proceeding No. 00-0101A. (SAC, Ex. E-1).

1 This argument fails to recognize that a defendant may be held personally liable under §
2 1983 for acts performed in an official capacity. See Hafer v. Melo, 502 U.S. 21, 31, 112
3 S.Ct. 358, 365 (1991) (state officials performing acts in their official capacity may be held
4 liable for such acts in their personal capacities under § 1983); see also DeNueva v. Reyes,
5 Civ. No. 88-0017, 1989 WL 158912 (D. N.Mar.I. Oct. 19, 1989). “[T]o establish personal
6 liability in a § 1983 action, it is enough to show that the official, acting under the color of
7 state law, caused the deprivation of a federal right.” Kentucky v. Graham, 473 U.S. 159,
8 166, 105 S.Ct. 3099, 3105 (1985); see also Romano v. Bible, 169 F.3d 1182, 1185-1186
9 (9th Cir. 1999) (“[t]he Supreme Court has made it clear that a plaintiff can establish
10 personal liability in a § 1983 action simply by showing that the official acted under the
11 color of state law in deprivation of a federal right.”). The complaint sufficiently alleges that
12 defendant Goldberg, acting under the color of state law, “made, developed, implemented,
13 commanded, and/or perpetuated” policies or practices which caused plaintiff Ahmed to be
14 deprived of his liberty interests and due process rights. Accordingly, plaintiff Ahmed has
15 alleged the necessary elements to state a § 1983 claim against Goldberg in his personal
16 capacity.

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19 As to defendant’s claim that he is not in a policy-creating position, “policy” may be
20 created where an authorized government decision-maker adopts a particular course of
21 action even where the course of action is not intended to control decisions in later
22 situations. See Pembaur v. City of Cincinnati, 475 U.S. 469, 480-481, 106 S.Ct. 1292,
23 1298-1299 (1986) (discussing when “policy” created by an official is sufficient to also give
24 rise to municipal liability). Because plaintiff has sufficiently alleged Goldberg was acting
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1 under the color of state law and made policy specifically relating to the imprisonment of
2 Ahmed (SAC ¶ 83) and resulting in Ahmed's constitutional deprivations, plaintiff has
3 stated a claim under § 1983.

4 Even if defendant Goldberg is not deemed to be a policymaker, plaintiff's broadly
5 worded count also alleges defendant "perpetuated" policy or practices which caused
6 Ahmed's deprivation of rights. Thus defendant Goldberg's alleged acts or omissions in
7 perpetuating CNMI/DOLI policy and which resulted in plaintiff's deprivation of rights can
8 also serve as a basis for the § 1983 claim. This avenue of liability is supported by the fact
9 that the CNMI Superior Court found the policy regarding immigration detention pending
10 deportation lacked procedural safeguards. That court stated it "is troubled ... by the absence
11 of procedures or safeguards in place to ensure that DOLI will ever comply with the Court's
12 Deportation Order directing DOLI to place [Ahmed] on the first available airline flight to
13 the People's Republic of Bangladesh." (SAC, Ex. E-1 at sec. IV, ¶ 11). It could reasonably
14 be inferred from the complaint that defendant Goldberg perpetuated the procedurally
15 deficient policy by failing to do what the CNMI Superior Court ordered - place Ahmed on
16 the first available flight to Bangladesh. It could also be inferred that defendant Goldberg
17 perpetuated the procedurally deficient policy by "delaying for 20 months the retrieval of
18 travel documents, causing Plaintiff Ahmed to remain imprisoned throughout that 20 month
19 period." (SAC ¶ 160).⁵ Thus plaintiff has sufficiently alleged defendant Goldberg made or
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24 ⁵Plaintiff's allegation concerning the delay in retrieval of travel documents is not
25 incorporated by reference into his claim for unlawful imprisonment and thus cannot serve as
26 a basis for finding plaintiff's claim for unlawful imprisonment is sufficiently supported by
factual allegations. Nonetheless, plaintiffs' claim is sufficiently supported by other
allegations incorporated into the count.

1 perpetuated policy causing his unlawful detention and, accordingly, the Court finds plaintiff
2 has stated a claim under § 1983.

3 Plaintiff has not, however, sufficiently stated a claim for unlawful imprisonment
4 with respect to 28 U.S.C. § 1350.⁶ Plaintiff has failed to allege a violation of the law of
5 nations or a treaty of the United States (“U.S.”) and has thus failed to state a claim under
6 the Alien Tort Act. Because plaintiff’s allegations of arbitrary and indefinite detention may
7 constitute a violation of a U.S. treaty and/or international law⁷ plaintiff may amend the
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10 ⁶“The district courts shall have original jurisdiction of any civil action by an alien for a tort
11 only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C.
§ 1350.

12 ⁷In Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998), the plaintiff asserted a
13 claim under the Alien Tort Act for arbitrary arrest and detention in violation of international
14 law. In affirming the district court’s summary judgment in favor of the defendants, the Ninth
15 Circuit observed “there is a clear international prohibition against arbitrary arrest and
16 detention. That prohibition can be found in treaties, the law of nations, and court opinions.”
17 Id. at 1384. The court further noted “[d]etention is arbitrary ‘if it is not pursuant to law; it
18 may be arbitrary also if it is incompatible with the principles of justice or with the dignity of
19 the human person’ ... [or] ... if ‘it is not accompanied by a notice of charges; if the person
20 detained is not given early opportunity to communicate with family or to consult counsel; or
21 is not brought to trial within a reasonable time.’” Id. (citing Restatement (Third) of the
22 Foreign Relations Law of the United States § 702 cmt. h (1987).) Although Martinez’ claim
23 under the Alien Tort Act involved his arrest and detention in a criminal context, such a claim
24 may be cognizable in the context of immigration law as it pertains to the detention of aliens
25 who have already entered the United States. See Kim Ho Ma v. Janet Reno, 208 F.3d 815,
26 829-830 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

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. Because it appears plaintiff may be able to state a claim based on the Alien Tort Act, plaintiff is granted leave to amend the count.⁸

D. Ahmed's Unlawful/Indefinite/Arbitrary Seizure By Goldberg (Count 3)

Plaintiff Ahmed alleges the arbitrary and indefinite nature of his imprisonment violated his right to be free from unreasonable seizure of his person under the U.S. and CNMI Constitutions. Plaintiff alleges defendant Goldberg knew or should have known that the CNMI/DOLI policy and procedure would result in a violation of his Fourth Amendment rights. Plaintiff alleges he has suffered injuries and damages because of the violation and as a direct result of defendant Goldberg's actions and omissions. Plaintiff seeks damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1350 and also requests punitive damages.

Defendant argues that because Ahmed's arrest was pursuant to a lawful court order, there was no unlawful policy or practice which resulted in the plaintiff's imprisonment and, therefore, plaintiff cannot state a claim upon which relief can be granted.

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").

⁸In 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).

1 Under circumstances commensurate to those alleged by plaintiff Ahmed, the
2 Supreme Court has indicated the protections afforded by the Fourth Amendment's
3 prohibition against unreasonable seizures do not extend beyond the arrest. In Baker v.
4 McCullan, a § 1983 civil rights action was brought against the county sheriff for false
5 imprisonment. Id. 443 U.S. 137, 142, 99 S.Ct. 2689, 2693 (1979). McCullan was arrested
6 and imprisoned pursuant to a valid warrant but proclaimed his innocence of the offense. Id.
7 at 143, 99 S.Ct. 2694. McCullan was released several days later when it was determined
8 that McCullan's brother had committed the offense but provided the authorities with
9 McCullan's name. Id. at 141, 99 S.Ct. 2693. While noting that the subsequent detention
10 could have infringed on McCullan's due process rights, the Court found the initial arrest
11 and imprisonment did not violate the Fourth Amendment because the arrest warrant was
12 valid.⁹ Id. at 144-145, 99 S.Ct. 2694-2695.

14 Similarly, plaintiff Ahmed's initial arrest and imprisonment appears to be valid; it is
15 only the subsequent arbitrary and indefinite nature of the detention that is being challenged.
16 Therefore, under the facts alleged, plaintiff has not stated a claim for violation of his
17 constitutional right to be free from unreasonable seizure. Accordingly, this count is
18 dismissed with prejudice.
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23 ⁹"Obviously, one in respondent's position could not be detained indefinitely, in the face of
24 repeated protests of innocence even though the warrant under which he was arrested and
25 detained met the standards of the Fourth Amendment. We may even assume, *arguendo*,
26 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.

E. Asylum/Protection from Torture (Count 4)

1 Plaintiffs allege they have attempted to apply for asylum and have attempted to seek
2 the protections provided under the Convention Against Torture.¹⁰ Plaintiffs allege
3 defendants U.S. and CNMI have failed and/or are unwilling to implement such asylum and
4 torture protection procedures in the CNMI in contravention of their obligations under the
5 Immigration and Naturalization Service's asylum and refugee standards, the United Nations
6 refugee standards and torture protections, the 1967 Protocol Relating to the Status of
7 Refugees¹¹ ("1967 Protocol"), the Convention Against Torture, and international law.
8 Plaintiffs allege the failure of defendants to implement asylum and torture protection
9 procedures in the CNMI violates the rights guaranteed to them by the Constitutions and
10 laws of the U.S. and CNMI. Plaintiffs allege defendants are liable to plaintiffs for damages
11 as a consequence of the aforesaid conduct.
12

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14 Defendant notes that the count does not appear to be directed at him because it is
15 focused on the conduct of defendants U.S. and CNMI. Defendant argues that to the extent
16 the claim is directed against him, he in his personal capacity has no ability to offer torture
17 protection or asylum procedures to plaintiffs.
18

19 The Court finds the count is directed only toward defendants United States and
20 CNMI. Although the count makes a general reference to all defendants, plaintiffs
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23 ¹⁰United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or
24 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).

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

specifically allege that it is the “failure and/or unwillingness of Defendant U.S. and Defendant CNMI” which gives rise to this claim. (SAC ¶¶ 114 and 115). Further, plaintiffs allege the obligation to institute such policies is with the United States and the CNMI (SAC ¶¶ 56-58) and make no such allegation as to defendant Goldberg.¹²

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.

F. 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 the plaintiffs. 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 Refugees¹³ and the 1984 Convention Against Torture (collectively “Conventions”). Plaintiffs allege the U.S., CNMI and defendant Goldberg are responsible

¹²In 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 ¶ 76) 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 ¶ 79). These 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 if 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 ¶¶ 63-65) and sought information concerning CNMI policies from the CNMI Attorney General’s Office (SAC ¶¶ 70-73).

¹³United 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).

1 for ensuring that persons seeking asylum within the CNMI are not subject to *refoulement* or
2 detention in violation of the Conventions and that defendants have shirked that
3 responsibility. Plaintiffs also allege that defendants have shirked their responsibility to
4 provide asylum/refugee procedures and torture protection procedures to plaintiffs, as
5 required by the Conventions, the 1967 Protocol, and international law.

6 Plaintiffs seek injunctive relief to restrain all defendants from subjecting them and
7 others similarly situated to *refoulement*, to restrain all defendants from arresting or
8 imprisoning them and others similarly situated,¹⁴ to preserve the status quo pending
9 acceptance and processing of their requests for asylum and/or torture protection by either
10 the U.S. or the United Nations, and to require defendants U.S. and CNMI to create a
11 procedure for accepting and processing applications for asylum and requests for torture
12 protection within the CNMI.
13

14 Defendant Goldberg argues the count should be dismissed because he has been sued
15 in his personal capacity and has no ability to arrest, deport or imprison plaintiffs in that
16 capacity.
17

18 Plaintiffs are requesting prospective injunctive relief which is available in the
19 federal court against state officials sued in their official capacities. *See Hafer v. Melo*, 502
20 U.S. 21, 27, 112 S.Ct. 358, 362-363 (1991). Defendant Goldberg, however, was sued only
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22
23 ¹⁴Plaintiffs seek injunctive relief on behalf of themselves and others similarly situated.
24 Because this is not a class action the Court cannot provide relief to such unnamed plaintiffs.
25 Fed.R.Civ.P. 10(a) requires the names of all parties to be included in the caption of the
26 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).

1 in his personal capacity. Accordingly, the Court finds defendant Goldberg in his personal
2 capacity is not an appropriate defendant against whom such injunctive relief may be sought
3 and therefore dismisses this count with prejudice as to Goldberg.¹⁵

4 **G. Right to Counsel: Unconstitutional CNMI Pro Hac Vice**
5 **Restriction (Count 6)**

6 Plaintiff Ahmed seeks an order declaring General Order No. 99-900 issued on
7 August 23, 1999 by the CNMI Supreme Court to be unlawful and in violation of the
8 Commonwealth and U.S. constitutions. That order terminated all then-existing pro hac
9 vice admissions in the local courts, imposed a \$5,000 application fee for pro hac vice
10 admissions, and precluded any attorney who resides or maintains an office in the CNMI
11 from obtaining pro hac vice admission.
12

13 Defendant argues that the pro hac vice requirements for the local courts is an order
14 of the CNMI Supreme Court and Goldberg is not an appropriate defendant to provide
15 plaintiff relief.

16 The Court finds this count is not directed against defendant Goldberg, nor could
17 Goldberg provide the requested relief. Accordingly, the motion is granted and defendant
18 Goldberg need not answer the count.
19

20 **H. Open Government Act Defiance (Count 7)**

21 Plaintiffs seek the records they requested pursuant to the CNMI's Open Government
22 Act. Defendant argues that the allegations are directed toward the CNMI Attorney
23 General's Office and DOLI officials and that defendant Goldberg sued in his personal
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25 ¹⁵It should be also noted that defendant Goldberg is no longer with the CNMI's Office of the
26 Attorney General/DOLI, so this claim would be moot in any event.

capacity has no obligation under the Open Government Act to produce the records.

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.” (SAC ¶ 155). 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.

I. Conspiracy (Count 8)

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 ¶ 158).

Plaintiffs also allege defendant Goldberg committed overt acts specifically directed at plaintiff Ahmed in furtherance of the conspiracy. These included subjecting Ahmed to indefinite imprisonment, delaying retrieval of Ahmed’s travel documents, and subjecting Ahmed to cruel and unusual punishment, unlawful discrimination, and arbitrary and capricious punishment while imprisoned.¹⁶ (SAC ¶¶ 159 - 161). The plaintiffs are seeking

¹⁶Defendant Goldberg is alleged to have prevented Ahmed from communicating with others at the detention facility, ordering 24-hour lockdown and denying Ahmed the use of cigarettes, playing cards and newspapers. (SAC at Ex. B). Plaintiffs note the CNMI government did not refute these allegations when they were raised before Judge Bellas in the CNMI Superior Court. (SAC ¶ 161 and Ex. E-1 at sec. IV, ¶ 13).

1 damages against defendant Goldberg pursuant to 42 U.S.C. § 1985, 42 U.S.C. § 1983 and
2 28 U.S.C. § 1350.

3 Defendant points out that plaintiffs have failed to identify the specific provision of
4 § 1985 upon which the claim is based. Defendant concludes from the allegations, that the
5 claim is based on § 1985(3) and contends plaintiffs have failed to state a claim because they
6 have not alleged the required racial or class-based invidiously discriminatory animus.
7 Defendant further argues that aliens as a class may be subject to different treatment from
8 citizens, such as additional searches, securing of entry permits, and completion of
9 paperwork, and that such different treatment is not afforded protection under § 1985 and
10 cannot serve as a basis for the § 1985 claim. Defendant also contends the conspiracy claim
11 was not pled with sufficient specificity because plaintiffs failed to identify any other
12 members of the conspiracy. Defendant concludes that “specificity” requires that all
13 members of the conspiracy be identified.
14
15

16 As defendant points out, the claim does not specify upon which provision of 42
17 U.S.C. § 1985 the claim is based. Assuming plaintiffs are attempting to assert a claim
18 under § 1985(3), plaintiffs have failed to do so. In order to state a claim under § 1985(3)
19 plaintiffs must allege (1) a conspiracy, (2) for the purpose of directly or indirectly depriving
20 any person or class of persons of the equal protection of the laws or of equal privileges and
21 immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby the
22 person is either injured in his person or property or deprived of any right or privilege of
23 citizens of the United States. United Brotherhood of Carpenters v. Scott, 463 U.S. 825,
24 829, 103 S.Ct. 3352, 3356 (1983). The second element requires some showing of racial or
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1 an otherwise class-based invidiously discriminatory animus behind the conspirators'
2 actions.¹⁷ Griffith v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971).

3 Plaintiffs' claim for conspiracy based on § 1985(3) is deficient for several reasons.
4 First, the count suffers because of its vague and conclusory allegations concerning the
5 participation of "others" in the conspiracy. While plaintiffs need not identify all the
6 participants in the conspiracy, plaintiffs may not rest on mere conclusory assertions. "A
7 claim under [§1985] must allege facts to support the allegation that defendants conspired
8 together. A mere allegation of conspiracy without factual specificity is insufficient."
9 Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988).

10
11 Second, plaintiffs have not sufficiently alleged racial or class-based¹⁸ discriminatory
12 animus on the part of Goldberg or the "other" participants in the conspiracy. The plaintiffs
13 collectively identify themselves as a class based on alienage but do not allege they were
14 subject to discrimination. The complaint contains only a single reference to discrimination
15 by defendant Goldberg based on plaintiff Ahmed's religion. Because no discriminatory
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19 ¹⁷Allegations of discriminatory animus are also required to state a claim for conspiracy based
20 on the second clause of §1985(2) which concerns access to state or territorial courts. *See*
21 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 discriminatory
allegations.

22 ¹⁸"Generally, our rule is that section 1985(3) is extended beyond race only when the class
23 in question can show that there has been a governmental determination that its members
24 require and warrant special federal assistance in protecting their civil rights. More
25 specifically, we require either that the courts have designated the class in question a suspect
26 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).

1 animus is alleged on the part of the “other” participants in the conspiracy and no
2 discriminatory animus directed toward the other plaintiffs is alleged, plaintiffs have only
3 alleged a conspiracy of one against Ahmed.

4 Third, the count fails because the allegations set forth in ¶ 158 concerning overt acts
5 by defendant Goldberg with respect to the plaintiffs collectively are conclusory. See Ivey v.
6 Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (“[v]ague and conclusory allegations of
7 official participation in civil rights violations are not sufficient to withstand a motion to
8 dismiss”). Plaintiffs’ allegations of overt acts committed with respect to plaintiff Ahmed
9 are factually sufficient; however, it is not clear how these overt acts were in furtherance of
10 any conspiracy directed against the plaintiffs collectively. A separate conspiracy claim on
11 behalf of plaintiff Ahmed nonetheless fails for the other reasons set forth.¹⁹

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

19 Plaintiffs also base their conspiracy count on 42 U.S.C. § 1983 and 28 U.S.C. §
20 1350. Defendant has not specifically argued for dismissal based on these provisions but
21 presumably contends that the count fails on these bases because of the lack of specificity
22

24 ¹⁹It appears plaintiff Ahmed may be attempting to assert a separate claim for conspiracy on
25 the basis of his alleged arbitrary and indefinite detention or the alleged differential treatment
26 he received while imprisoned. However the nature of the conspiracy asserted by the plaintiffs
collectively is not clear.

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, as are the allegations concerning the injury suffered. Plaintiffs’ allegations concerning overt acts by defendant Goldberg are also conclusory and lacking in factual support. 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 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 an opportunity to plead the count with greater specificity and clarity.

J. Concealment: Concealed Knowledge or Information (Count 9)

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

1 the consequent unconstitutional and unlawful deprivations to which plaintiffs and others
2 similarly situated were subjected. Plaintiffs allege they were misled by defendants because
3 they were unaware of the concealed information and had relied on defendants to comply
4 with their obligations to provide such information. Plaintiffs conclude they sustained
5 injuries and damages as a result of the concealment. Defendant argues the count should be
6 dismissed because there is no such cause of action recognized in the CNMI Code, the
7 Restatement of the Law, or any other legal authority.

8
9 Contrary to defendant's argument, such a cause of action is set forth in the
10 Restatement (Second) of Torts and is therefore cognizable in the Commonwealth pursuant
11 to 7 CMC § 3401. The Restatement clearly sets out that concealment is a form of
12 misrepresentation.²⁰ Nonetheless, plaintiffs' summarily pleaded claim is insufficient to
13 state a claim against the defendant. The complaint adequately alleges the existence of
14 concealed knowledge but the allegations that plaintiffs sustained injuries and damages as a
15 result of the concealment are only conclusory and fail to shed any light on the nature of the
16 injuries and damages. Because plaintiffs have failed to adequately allege either the
17 pecuniary loss or physical harm required to state a claim for concealment, plaintiffs' count
18 fails. Accordingly, this count is dismissed and plaintiffs are granted leave to amend.
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22 ²⁰Section 550 of the Restatement (Second) of Torts sets forth the claim for fraudulent
23 concealment: "[o]ne party to a transaction who by concealment or other action intentionally
24 prevents the other from acquiring material information is subject to the same liability to the
25 other, for pecuniary loss as though he has stated the nonexistence of the matter that the other
26 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."

K. Emotional Distress (Count 10)

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 defendant 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 plaintiff Ahmed and argues that the claim will not lie because the imprisonment was pursuant to a lawful court order.

The count is unclear as to what actions by defendants are purported to have caused the emotional distress.²¹ Plaintiffs have failed to identify the “outrageous conduct” required to state a claim for intentional infliction of emotional distress²² and have also failed to allege bodily harm or illness, at least one of which is required to state a claim for negligent

²¹If, as defendant suggests, plaintiffs’ claim for emotional distress is based on the unlawful imprisonment of Ahmed, the fact that he was detained pursuant to a lawful court order 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 plaintiff Ahmed was imprisoned and only two defendants allegedly participated in the imprisonment, it is uncertain if this is the basis for plaintiffs’ claim.

²²“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.

1 infliction of emotional distress.²³ Further, plaintiffs' allegation that they have each suffered
2 severe emotional distress is conclusory and factually unsupported.

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

8
9 **L. Estoppel (Count 11)**

10 Plaintiffs allege several incidents where an asylum process was made available to
11 other CNMI-based aliens. Plaintiffs allege by effect of such occurrences, defendants have
12 made promises, inducements and/or public representations to plaintiffs on which they have
13 detrimentally relied. Plaintiffs assert they have suffered "damages including continued lack
14 of due process required for enforcement of lawful human rights within the CNMI." (SAC ¶
15 184). Plaintiffs request that the defendants be estopped from denying the substance and
16 effect of such promises, inducements or representations.

17
18 Defendant argues that estoppel is an affirmative defense and not a cause of action
19

20
21 ²³"If the actor intentionally and unreasonably subjects another to emotional distress which
22 he should recognize is likely to result in illness or other bodily harm, he is subject to liability
23 to the other for an illness or other bodily harm of which the distress is the legal cause, (a)
24 although the actor has no intention of inflicting such harm, and (b) irrespective of whether
25 the act is directed against the other or a third person." Restatement (Second) of Torts §312.
26 "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." *Id.* at §313.

1 and should therefore be dismissed. Defendant further states that plaintiffs appear to be
2 seeking an order preventing their deportation due to the alleged acts establishing the
3 estoppel and that under such circumstances defendant Goldberg is an inappropriate
4 defendant because he has no ability to deport plaintiffs while acting in his personal
5 capacity.

6 Although typically considered an affirmative defense, estoppel is a claim which
7 plaintiffs may assert. "Estoppel is doctrine of law separate unto itself, and estoppel may be
8 asserted if the facts and circumstances of a particular case warrant." In re Blankenship, 3
9 N. Mar. I. 209, 213 (1992); *see also* Aquino v. Tinian Cockfighting Board, 3 N.M.I. 284,
10 295 (1991) (plaintiffs may seek the benefit of estoppel, and even if not specifically pleaded,
11 it may nonetheless be available to plaintiffs if established by the evidence); *see also* Office
12 of Personnel Management v. Richmond, 496 U.S. 414, 422-423, 110 S.Ct. 2465, 2470-
13 2471 (1990) (Court noted that based on its decisions "federal courts have continued to
14 accept estoppel claims under a variety of rationales and analyses." The Court also noted
15 that it had reversed every finding of estoppel against the government but declined to
16 foreclose assertion of such claims.).

17 "The doctrine of estoppel requires the presence of four elements: '(1) the party to be
18 estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted
19 upon, or must so act that the party asserting the estoppel had a right to believe it was so
20 intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely
21 upon the conduct to his injury.'" In re Blankenship, 3 N. Mar. I. at 214.

22 It may be inferred from the allegations that defendants' conduct indicated to
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1 plaintiffs that asylum and torture protection procedures are available in the CNMI.

2 However, the allegations do not suggest that defendants intended that their conduct be acted
3 upon. Further, the allegations of detrimental reliance are vague because the manner in
4 which plaintiffs relied on defendants' conduct is not clear and the nature of the injury
5 suffered unclear. Accordingly, plaintiffs have failed to sufficiently plead their claim for
6 estoppel and the count is dismissed with leave to amend.

7 **M. Punitive Damages (Count 12)**

8 Plaintiffs set forth their request for punitive damages as an independent claim.
9 Defendant argues that "punitive damages" is not a cause of action and should therefore be
10 dismissed.
11

12 Plaintiffs' request for punitive damages is a request for relief which plaintiffs are
13 entitled to assert and the separate count serves to clearly put defendants on notice that
14 punitive damages are sought. However, because punitive damages may only be available
15 with respect to certain claims and against certain defendants, a request for punitive damages
16 is more appropriately made in the appropriate substantive count and/or the prayer for relief.
17 Further, because plaintiffs have requested punitive damages in other counts in the
18 complaint, a separate count is redundant. Accordingly, the count for punitive damages is
19 dismissed with prejudice. Plaintiffs' requests for punitive damages set forth in other
20 counts, however, are not dismissed.
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23 **N. Joint and Several Liability (Count 13)**

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

6 **O. Article X Section 9 Damage/Attorney Fee Award (Count 14)**

7 Plaintiffs seek relief under Art. X, Sec. 9 of the Commonwealth Constitution for an
8 award of compensation including attorneys' fees. Defendant argues this cause of action
9 fails because plaintiffs are not alleged to be taxpayers, because this action may only be
10 asserted against the government or its instrumentalities, and because the lawsuit does not
11 seek to enjoin the expenditure of public funds.
12

13 Article X Section 9 of the Commonwealth Constitution provides "[a] taxpayer may
14 bring an action against the government or one of its instrumentalities in order to enjoin the
15 expenditure of public funds for other than public purposes or for a breach of fiduciary duty.
16 The court shall award costs and attorney fees to any person who prevails in such an action
17 in a reasonable amount relative to the public benefit of the suit." The Court finds defendant
18 Goldberg is an inappropriate defendant with respect to this claim because he is neither the
19 government nor one of its instrumentalities. Accordingly, the count is dismissed with
20 prejudice as to defendant Goldberg.
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23 **III. CONCLUSION**

24 For the above stated reasons, counts 1, 3, 4, 5, 6, 7, 12, 13 and 14 are dismissed
25 with prejudice as to defendant Goldberg. Counts 8, 9, 10 and 11 are dismissed with leave
26

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

8 IT IS SO ORDERED.

9 DATED this 14th day of November, 2000.

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12 Alex R. Munson
13 District Judge
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