

1 JOHN MURCKO (SBN 47008)
Attorney at Law
2 2831 Telegraph Avenue
3 Oakland, California 94609
Telephone: (510) 465-2241

4
5 STEPHEN PERELSON (SBN 43032)
285 Miller Avenue
6 Mill Valley, California 94941
(415) 383-1070

7
8 WILLIAM M. SIMPICH (SBN 106672)
1736 Franklin Street, 10th Floor
9 Oakland, California 94612
(510) 444-0226

10
11 Attorneys for Plaintiffs

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13 **UNITED STATE DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DISTRICT**

16
17 **J. TONY SERRA, JEANINE SANTIAGO,**
18 **VICTOR J. CORDERO, and all other**
19 **similarly situated,**

20 **Plaintiffs,**

21 **vs.**

22 **HARLEY LAPPIN, Director of the Bureau**
of Prisons, BG COMPTON, Warden of
23 **Lompoc Prison, and ROBERT F.**
24 **McFADDEN, head of the Western Regional**
Office of the Bureau of Prisons,

25 **Defendants**
26
27
28

Case No. C-07-1589 MJJ

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

Date: February 26, 2008
Time: 9:30 a.m.
Courtroom: 11 (19th Floor)

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1 **I. INTRODUCTION**

2 This is an action by three prisoners or former prisoners of the United States prison
3 system, J. Tony Serra, Jeanine Santiago and Victor Cordero.

4 The United States prison system along with the state prison system in the U.S.A. is the
5 largest prison system in the world. The United States system has over two million prisoners in
6 the jails of its state and federal prisons. In the entire world there are eight million persons in
7 prisons. The United States has five percent of the worlds population (300,000,000 of six
8 billion) while it has 25% of the world prison population (2 million of 8 million). It is truly a
9 nation of prisons or as various political figures have pointed out the United States is a
10 verifiable prison house. Washington Post, December 1, 2006, page A03.

11 What is the purpose of all of these prisons and the larger prison population? Living in
12 an industrial society, it can only have one purpose. That is to increase the profits of the
13 corporations and the income of the government. By putting more and more citizens into state
14 and federal prisons, the United States and state government ensures a stable work force that
15 can be exploited to the highest degree by low wages. Prison Profiteers: Who Makes A Buck
16 From Mass Imprisonment, Paul Wright and Tara Geretel.

17 The defendants admit that in the federal system they can pay prisoners as low as \$0.23
18 per hour. See Bureau of Prison Program Statement, Section 120.02, 5.1 (7-15-1995) available
19 at www.bop.gov/policy/progstat/8120.002.pdf.

20 It all boils down to exploitations of the work force. Put the citizens in jails and you do
21 not have to pay union scale of \$25 per hour. Instead you can pay them \$0.08 or \$0.23 per hour.
22 The average worker at Ford Motor Company produces seventeen cars per year, but he is only
23 paid the equivalent of the value of one automobile each year. That same worker in the federal
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1 prison system would produce seventeen cars per year but would only be paid the equivalent
2 value of one one-thousandth (1/1000) of a car.

3 The level of pay to these federal prisoners is a violation of Constitutional Law and
4 International law.

5 The claims are all valid claims against defendant Robert McFadden, Harley Lappin and
6 B.G. Compton, all officials in the U.S. Prison System.

7 First, the claims against the defendants in the official capacity should be treated as
8 claims against the United States under Kentucky v. Graham 473 U.S. 159, 166 (1985). They
9 are not bound by the doctrine of sovereign immunity. The claims against these three malfeasors
10 are not subject to qualified immunity because the issue is a factual question to be submitted to
11 the jury. In the alternative the suits for individual capacity are based on a violation of federal
12 constitutional rights and that right was clearly established. Sheth v. Webster 145 F.3d 1231,
13 1238 (11th Cir. 1998).

14 Second, all plaintiffs have standing to sue for damages because their federal rights were
15 violated and they are entitled to compensation.

16 Plaintiff Sorano has standing to seek injunctions and declaratory relief against this
17 onerous exploitation and outrageous system of pay which is depriving prisoners of the labor
18 law powers and humanity.

19 **II. BACKGROUND**

20 **A. THE PURPOSE OF SENTENCES OF INCARCERATION**

21 The United States Guidelines for Sentencing Manual provides that judges in sentencing
22 citizens should recognize, “the need to provide the defendant with needed educational or
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1 vocational training, medical care or other corrective treatment in the most effective manner.”
2 S.D.I. 3(b).

3 The judge in the district court has broad discretion to set sentencing conditions. But
4 he/she is limited by the requirement that the term, “be primarily designed to meet the goals of
5 rehabilitation of the defendant and the protection of the public. . .” United States v. Blue
6 Mountain Bottling Company of Walla Walla, (9th Cir. 1991) 929 F.2d 526, 528. The federal
7 sentencing law must be geared toward the twin goals of rehabilitation and protection of the
8 public. Incarceration will provide [defendant] with needed educational and vocational training,
9 medical care, and other correctional treatments in the most effective manner. United States v.
10 Hawk, Wing 433 F.3d 622 (8th Cir. 2006). See also 18 U.S.C. 3583(a)(2)(D); Federal
11 Sentencing Guidelines, Third Edition, Vol. 7, page 712.

12 The defendant on the other hand claims that the purpose of incarceration is punishment
13 and hard labor. It is in violation of the sentencing guidelines. They cite Federal Prison
14 Industries as the first program created by President Franklin D. Roosevelt as a work system.

15 There are numerous investigations exposing UNICOR (UNICOR/Federal Prison
16 Industries CFPI) and BOP on its abuse and misuse of prisoners.

17 First the GSA investigation of UNICOR in 2000 concluded that “officials of FPI
18 [Federal Prison Industry] demonstrated a pattern of deceit with GSA officials. From
19 misrepresentation about the program and its purposes to lying to federal agents and property
20 official about the use and location of federal property, the investigation revealed an on-going
21 enterprise where FPI officials obtained federal property under false pretense and deposited the
22 proceeds into their own general treasury.” See Fraud Against The United States: Federal
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1 Prison Industries Case No. 1-00-0145, Office of Investigations, Office of Inspector General,
2 U.S. General Services 2-7-1922, page 31-33, Prison Legal News, Vol. 18, No. 3, March 2007.

3 The BOP investigation of toxic wastes at federal prisons in recycling of old computers
4 confirms toxic exposure of federal prisoners at three UNICOR-run facilities at federal prison
5 (Edinton, Ohio; Texarcana, Texas; and Atwater) and recommended disciplinary action against
6 UNICOR and BOP officials in five instances. See Federal Prison Admits Toxic Exposure of
7 Inmates and Staff: Discipline of Officials Promised, [http://www.peer.org/news/news_id](http://www.peer.org/news/news_id.php?row_id=580)
8 [php?row_id=580](http://www.peer.org/news/news_id.php?row_id=580).
9

10
11 In 2006, the House Judiciary Committee report on UNICOR stated that it “is aware of
12 recent reports concluding that employees as well as inmates in one or more of the recycling
13 factories operated by FPI were exposed to toxic or hazardous substances. House Report 109-
14 591 on The Federal Prison Industries Competition in Contracting Act of 2006 (HR2965) p. 45.

15
16 There are other investigations into the illegal activities of BPI and UNICOR. See
17 Aaron Shumon, “to get stuff and sell it for as much as we can get.” Federal Prison Industries
18 and Electric Recycling, Prison Legal News, Vol. 18, No. 3, March 2007, page 1-7.

19 These show that defendants are engaging in unlawful conduct of theft, conversion,
20 conspiracy to steal and abusing and endangering the lives of federal prisoners, staff and federal
21 prisons. They have unclean hands and should be denied relief.
22

23 **B. PLAINTIFFS’ ALLEGATIONS**

24 Plaintiffs filed the First Amended Complaint on July 15, 2007 and served it on
25 defendants in August, 2007.

26 Plaintiffs all allege that they were federal prisoners in the federal prison at Lompac and
27 in Dublin, California. Plaintiffs J. Tony Serra and Victor Cordero worked at the federal prison
28

1 at Lompac for slave wages. J. Tony Serra was paid \$19.50 per month while Victor Cordero
2 was paid \$145 per month. Cordero worked for Federal Prison Industries (hereinafter UNICOR)
3 while Serra worked in support of Federal Prison Industries doing yard work. (First Amended
4 Complaint [hereinafter FAC] pages 6-7). The prisoners at UNICOR make cable and dairy
5 products. The plaintiff Jeanine Santiago worked at Federal Corrections Institute, Camp Park in
6 Dublin making \$60.00 per month. She also worked at UNICOR. FAC, page 4.
7

8 The defendant Harley Lappin is the director of the Bureau of Prisons in Washington.
9 D.C. Robert McFadden is the Regional Director of the Western Region of Federal Prisons and
10 B.G. Compton was the director of Lompac Federal Camp in Lompac. All three are being sued
11 in their official and individual capacity. (If not stated it was in error and complaint should be
12 allowed to be amended.)
13

14 The three plaintiffs allege violation of their Constitutional rights under the United
15 States Constitution Fifth and Thirteenth Amendments, the United Nations International
16 Covenant on Civil and Political Rights and the United Nations Covenant on Prisoners Rights,
17 and the Sherman Act, 15 U.S.C. 1, FAC, page 11-12.
18

19 Plaintiffs seek damages for violation of the law and injunctive and declaratory relief.
20 Under the Federal Tort Claims Act, the government can be held liable for violations under the
21 Constitution, statute or treaty.
22

23 A government that engages in intentionally tortious activity including assault, battery,
24 false imprisonment, abuse of process, or malicious prosecution is liable under the FTCA.

25 Prison employees are law enforcement offices covered by the exception to the FTCA.
26 Carlson v. Green 446 U.S. 14, 20 (1980); United States v. Bein 214 F.3d 408, 415 (3rd Cir.
27 2000) cert. denied 534 U.S. 943 (2001); and 28 U.S.C.A. 2671, 2680, 1346(h).
28

1 In this case the three plaintiffs action against defendants Harley Lappin, Robert
2 McFadden and B.C. Compton are in their official and unofficial capacity for violation of
3 plaintiff's constitutional and international civil rights.

4
5 The suit should be considered a suit in their official capacity as an action against the
6 United States under Balser v. Dept. of Justice 327 F.3d 903, 908 (9th Cir. 2003). Plaintiffs
7 request the court grant leave to amend the complaint to assert this theory.

8 The action against Lappin and McFadden is allowed under 28 USC 2680(h) because
9 prison officials are treated as law enforcement officials under Carlson v. Green, supra. The
10 activities amount to false imprisonment under 28 U.S.C. 2680(h) because they are being forced
11 to work for low wages instead of attending educational and vocational courses.

12
13 The court should allow plaintiffs to amend their complaint to allege a violation of 28
14 U.S.C 2680(h).

15
16 **C. DEFENDANTS McFADDEN, COMPTON AND LAPPIN ARE LIABLE**
IN THEIR INDIVIDUAL CAPACITIES UNDER BIVENS.

17 The federal law does not preclude civil actions against federal employees in their
18 individual capacities for civil rights infractions brought in violation of the Constitution. Bivens
19 v. Six Unknown Agents of The Federal Bureau of Narcotics 403 U.S. 388 (1971); 28 U.S.C.
20 2674.

21
22 This Act allows a plaintiff to sue the United States and its employees as potential
23 defendants when the employee is alleged to have committed a Constitutional tort. Sterling v.
24 United States 85 F.3d 1225 (7th Cir. 1996).

25
26 Plaintiffs Serra, Santiago and Cordero all filed claims against the defendants. See
27 Complaint, page 3, paragraph 8. Therefore they fulfill the requirement under 28 U.S.C. 2675
28

1 and McNeil v. United States 508 U.S. 106, 113 (1993). Exhaustion is completed for these
2 plaintiffs and there is no argument of lack of exhaustion of administrative remedies.

3 These constitutional claims against McFadden and Lappin and B.G. Compton are
4 brought under Bivens v. Six Unknown Agents of The Federal Bureau of Narcotics 403 U.S.
5 388 (1971). In Holloman v. Watt 708 F.2d 1399, 1402 (9th Cir. 1983) the court held that a
6 Bivens suit can be brought against the employees of the United States in their individual
7 capacity. If paragraph 8 is not sufficient, plaintiffs request leave to amend.
8

9
10 **III. ARGUMENT**

11 **A. PLAINTIFF'S DAMAGE CLAIMS ARE VALID.**

12 Plaintiffs seek both money damages and equitable relief in their complaint against the
13 prison officials. They seek damages against the officials in their individual and in their official
14 capacity.

15 **1. PLAINTIFFS SEEK DAMAGES AGAINST THE UNITED STATES ALSO.**

16 An action against an official in the United States government acting in his/her official
17 capacity may be treated as a suit against the government. Kentucky v. Graham 473 U.S. 159,
18 166 (1985). Any lawsuit against an officer of the United States in his/her official capacity may
19 be treated as a suit against the United States. Balser v. Department of Justice 327 F.3d 903, 908
20 (9th Cir. 2003)
21

22 Under 28 U.S.C. 2680(h), Congress has waived sovereign immunity for law
23 enforcement officers or investigative officers of the United States in certain instances.
24

25 Also in Butz v. Economu 438 U.S. 478, 504.6 (1971) the United States Supreme Court
26 held that a citizen who suffered an injury to a constitutionally protected interest could obtain
27 damages against the responsible federal employee in the United States District Courts.
28

1 Executive Officers do not have absolute immunity for violations of their duties that violate the
2 United States Constitution or clearly established Constitutional rules. Id., at 507.

3 The Supreme Court recognizes that federal officials have a qualified immunity for
4 violation of constitutional violations. Schuer v. Rhodes 416 U.S. 232, 239-240 (1973); Pierson
5 v. Ray 386 U.S. 547 (1967).
6

7 2. THE CLAIMS AGAINST THE THREE DEFENDANTS ARE VALID IN
8 THEIR INDIVIDUAL CAPACITY.

9 All three defendants are being sued in their official and unofficial capacities. If the
10 complaint does not allege that, plaintiff requests leave to file a second amended complaint to
11 allege that McFadden, Compton and Lappin were all acting in their official and their individual
12 capacities.
13

14 The defendants then argue that they are entitled to qualified immunity and cite the
15 twofold test of Saucier v. Katz 533 U.S. 194, 200-201 (2001). The twofold test is:

- 16 1. Whether a federal constitutional right would have been violated under the facts alleged,
17 and:
18 2. Whether the constitutional right was clearly established?
19

20 However, Saucier v. Katz, supra. involves excessive use of force. It is not applicable in
21 a case involving deprivation of entitlement rights, property rights and illegal punishment cases.

22 The Saucier case is precedent for decisions based on excessive use of force and the
23 twofold test of qualified immunity should not apply here. The United States Supreme Court in
24 Graham v. Cohen 490 U.S. 386, 395 (1989) held that all claims that law enforcement officials
25 have used excessive force should be analyzed under the Fourth Amendment reasonableness
26 standard. The inquiry of qualified immunity for use of excessive force is the same as the
27
28

1 inquiry as to the merits of the claim for use of excessive force. Acosta v. City of San Francisco
2 83 F.3d 1143, 1147 (9th Cir. 1996) cert. denied, 519 U.S. 1009 (1996).

3 Since this present case does not involved the use of excessive force, the Saucier v. Katz
4 test does not apply.

5
6 The issue of fact as to whether a Constitutional violation occurred and whether there is
7 qualified immunity (good faith) defense to the claim is a factual question for the jury to
8 determine. Sheth v. Webster 145 F.3d 1231, 1238 (11th Cir. 1998).

9 Thus, the court should deny the argument that defendants are entitled to qualified
10 immunity as a matter of law because it is a factual question for the jury under Sheth v.
11 Webster, supra.

12
13 Next, even applying the Saucer v. Katz twofold test of qualified immunity, there is a
14 basis for liability.

15 First, there was a violation of a constitutionally protected right here. The Supreme
16 Court and other federal courts recognized that there is a constitutionally protected right on
17 entitlement to welfare, Maine v. Thibbold 448 U.S. 1 (1980); public assistance, Like v. Carter
18 448 F.2d 798 (8th Cir. 1971), cert. denied, 405 U.S. 1095, 42 U.S.C. 1983; food stamps, Velez
19 v. Color 767 F.Supp. 253, affd, 978 F.2d 647 (M.D. Fla 1991); housing, Chavez v. City of
20 Santa Fe Housing Authority 606 F.2d 282 (10th Cir. 1979); genuine entitlement in leasehold
21 interest, Thorpe v. Housing Authority of City of Durham 393 U.S. 268 (1969); tenancy rights,
22 Walton v. Darry Town Houses 395 F. Supp. 553 (E.D. Pa 1923).

23
24
25 Prison officials are not entitled to qualified immunity for unconstitutional conditions
26 of confinement. Alberti v. Sheriff of Harris County, Texas 406 F. Supp. 649 (So. Texas 1925);
27 Johnson v. Avery 393 U.S. 483 (1968).
28

1 Thus, in this case the plaintiffs are entitled to repayment for this work performed under
2 federal regulations. However, the amount of that payment is so low as to amount to deprivation
3 of property without due process of law. This is similar to the Thibbold, Chavez, and Thorpe
4 cases.
5

6 The first prong has been satisfied. There was a violation of the constitutional right.

7 Second, the right was clearly established. In the case of Cleavinger v. Saxner 474 U.S.
8 193 (1985), the court said that the prison officials were not entitled to absolute immunity and
9 could be held liable for rules violations.
10

11 A damage action under 42 U.S.C. 1983 is available against prison officials who deprive
12 inmates of good – time credits in violation of their due process right by holding hearings
13 without notice of the changes and written statements with reasons for any discipline imposed.
14 Wolff v. McDonnell 418 U.S. 539, 556.

15 Also, in Wilwording v. Swenson 404 U.S. 249 (1971), the Supreme Court held that a
16 prison inmate could recover on a Civil Rights Act claim when he alleges that living conditions
17 and disciplinary conditions at the State Penitentiary violated his civil rights and due process
18 rights.
19

20 Also, the Supreme Court in Haines v. Kerner 404 U.S. 519 (1972) allowed a state
21 prisoner to proceed on a claim under the Civil Rights Act of 1871 for damages for deprivation
22 of civil rights including denial of due process for being sent to solitary confinement and
23 suffered physical injuries while in solitary confinement.
24

25 Although these cases are not identical to the current case, they stand for the proposition
26 that where constitutional violations are obvious there can be an absence of factually similar
27 cases. Smith v. Mattox 127 F.3d 1416, 1419 (11th Cir. 1997). “But general statements of the
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1 law are not inherently incapable of giving fair and clear warning and in other instances, a
2 general constitutional rule already identified in the decisional law may apply with obvious
3 clarity to the specific conduct in questions, even though, 'The very action is questions has [not]
4 previously been held unlawful.'" United States v. Lahier 520 U.S. 259, 271 (1997).

5
6 Qualified Immunity is not available even if there is not a closely analogous case where
7 the constitutional violation is obvious. Gray v. Bostic 458 F.3d 1295, 1306 (11th Cir. 2006);
8 United States v. Lahier 520 U.S. 259, 271 (1997).

9
10 **B. EQUITABLE TOLLING APPLIES TO THE CLAIMS BY PLAINTIFF**
CORDERO.

11 California law allows equitable tolling of the statute of limitations when a plaintiff
12 posses several legal remedies pursues one to lessen the extent of his injuries and damages in
13 good faith and reasonably. Davidton v. Columbia/MCA Healthcare Corp. 241 F.3d 1131, 1137
14 (9th Cir. 2001), en banc.

15
16 "A plaintiff whose ignorance of a statutory period is excusable may file a lawsuit
17 outside that period as long as he causes no prejudice to the defendant by doing so." Guerrero v.
18 Gates 442 F.3d 697, 706 (9th Cir. 2006) (claims for wrongful arrest by L.A. Police pursuant to
19 42 U.S.C. 1983.

20
21 Equitable tolling may apply if a plaintiff is unable to obtain vital information bearing
22 on the existence of the claim. Holmberg v. Armbrecht 327 U.S. 392 (1946). Equitable tolling
23 will extend the statute of limitation until the plaintiff can gather the information needed to file
24 the suit. Thelen v. Marcs Big Boy Corp. 64 F.3d 264, 268 (7th Cir. 1995).

25
26 In this case the plaintiff Cordero is entitled to equitable tolling from 2004 to 2007. He
27 needed to obtain information to show that the wages paid to him were illegal violations of the
28

1 law and constitution. This was not completed until early in 2007 when he was able to obtain
2 this information based on the action and claims of J. Tony Serra.

3
4 There is no harm to defendant in tolling this statute because the other two plaintiffs are
5 not prohibited under statute and for this defense alone the action would not cease.

6 **C. THE EQUITABLE SUIT FOR INJUNCTION AND DECLARATORY**
7 **RELIEF MUST CONTINUE.**

8 The defendant then raises the argument that Serra and Cordero do not have any
9 standing for equitable relief for obtaining an injunction to change the method of compensation
10 for prisoners.

11 However, the plaintiff Jeanine Santiago is still a prisoner at the Federal Prison Camp at
12 Dublin, California. She has standing to contest this illegal wage payment by UNICOR and to
13 seek a class action to stop its implementation.
14

15 The injunctive relief will continue.

16 **D. PLAINTIFFS' CLAIMS ARE ALL VALID.**

17 1. CONSTITUTIONAL CLAIMS

18 The plaintiffs' first cause of action is for a violation of the Fifth and Thirteenth
19 Amendments under Bivens v. Six Unknown Agents of The Federal Bureau of Narcotics, supra.
20 See FAC page 7, paragraph 16.

21 The argument that the defendants make is that the plaintiff was making a claim under
22 the Thirteenth Amendment. See Motion to Dismiss, pages 14-15.

23 The three defendants violated the constitutionally protected right here. The Supreme
24 Court and other federal courts recognized that there is a constitutionally protected right on
25 entitlement to welfare, Maine v. Thibbold 448 U.S. 1 (1980); public assistance, Like v. Carter
26 (8th Cir. 1971) 448 F.2d 798, cert. denied, 405 U.S. 1095; 42 U.S.C 1983; food stamps, Velez
27
28

1 v. Carter 767 F.Supp 253, affd, 978 F.2d 647 (M.D. Fla 1991); housing, Chavez v. City of
2 Santas Housing Authority (10th Cir. 1979) 606 F.2d 282; genuine entitlement in leasehold
3 interest, Thorpe v. Housing Authority of City of Durham 393 U.S. 268 (1969); tenancy rights.
4 Walton v. Darry Town Houses 395 F. Supp. 553 (E.D. Pa 1923).

6 Prison officials are not entitled to qualified immunity for violation of constitutional
7 rights of prisoners. Johnson v. Avery 393 U.S. 483 (1968).

8 Thus, in this case the plaintiffs are entitled to repayment for this work performed under
9 federal regulations. However, the amount of that repayment is so low as to amount to
10 deprivation of property without due process of law. This is similar to the Thibbold, Chavez,
11 and Thorpe cases.

13 The Supreme Court has repeatedly held that the Due Process Clause protects prisoners.
14 In Cleavinger v. Saxner 474 U.S. 193 (1985), the court said that the prison officials could be
15 liable for rules violations.

17 A damage action under 42 U.S.C. 1983 is available against prison officials who deprive
18 inmates of good – time credits in violation of their due process right by holding hearings
19 without notice of the changes and written statements with reasons for any discipline imposed.
20 Wolff v. McDonnell 418 U.S. 539, 556.

22 Also, in Wilwording v. Swenson 404 U.S. 249 (1971), the Supreme Court held that a
23 prison inmate could recover on a Civil Rights Act claim when he alleges that living conditions
24 and disciplinary conditions at the State Penitentiary violated his civil rights and due process
25 rights.

27 Also, the Supreme Court in Haines v. Kerner 404 U.S. 519 (1972) allowed a state
28 prisoner to proceed on a claim under the Civil Rights Act of 1871 for damages for deprivation

1 of civil rights including denial of due process for being sent to solitary confinement and
2 physical injuries while in solitary confinement.

3 In this case the plaintiffs all suffered violations of their Fifth Amendment rights to due
4 process. It is clear that they were deprived of the entitlement to wages that were compensation
5 for the work that was performed.
6

7 They are all being deprived of the right to rehabilitation education and vocational
8 training as required by 18 U.S.C. 3583 and federal case law previously cited. By forcing them
9 to work for low wages they are being deprived of due process rights.
10

11 2. INTERNATIONAL CLAIMS

12 The second cause of action is for violation of the United Nations International
13 Covenant on Civil and Political Rights (ICCPR) and the United Nations Covenant on Prisoners
14 Rights.

15 Article 7 of ICCPR states that “No one shall be subjected to torture or to cruel, inhuman
16 or degrading treatment. . . “
17

18 Article 8 of ICCPR states that “No one shall be required to perform forced or
19 compulsory labor.” (exception for lawful order of court.)
20

21 Article 9 of ICCPR states that, “Everyone has the right to liberty and security of
22 person.”

23 The United Nations Covenant on Prisoners Rights, paragraph 76, “There shall be a
24 system of equitable remuneration of the work of persons.” [http://www.unchr.](http://www.unchr.ch/html/memo3/b/n/comp.34.html)
25 [ch/html/memo3/b/n/comp.34.html](http://www.unchr.ch/html/memo3/b/n/comp.34.html).
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1 These covenants apply to the plaintiffs by reason of the fact that the United States has
2 ratified these treaties. Breard v. Greene 523 U.S. 371, 376 (1998), United States v. Baldwin
3 120 U.S. 678 (1887).

4 Defendants cite Sosa v. Alvarez-Machain 542 U.S. 692 (2004) for the proposition that
5 the substantive provisions of the United Nations International Covenant are not self exacting.
6 See Motion to Dismiss, page 17.

7
8 However, the statement in Sosa is not the law. It is dicta. The issue decided in Sosa was
9 whether the doctrine of limited immunity applied to an illegal abduction by federal officials.
10 The issues were whether the facts show a valid constitutional claim and whether the precedent
11 for the claim is clear or the constitutional injury is obvious.

12
13 Any reference to the United Nations International Covenant on Civil and Political
14 Rights was only dictum.

15 The U.S. Supreme Court in Central Virginia Community College v. Katy 546 U.S. 356,
16 363 (2006) said that dicta was not binding on the court.

17
18 "It is a maxim not to be disregarded, that general expositions, in every opinion, are to
19 be taken in connection with the case in which those expressions are used. If they go beyond the
20 case, they may be respected, but ought not to control the judgment in a subsequent suit when
21 the very point is presented for decision." Central Virginia Community College, supra at 363.

22 The case of Sosa is not controlling.

23
24 The plaintiffs state a valid claim under the United Nations International Covenant on
25 Civil and Political Rights.

26 The United Nations International Covenant on Civil and Political Rights (hereafter
27 ICCPR) became the law of the United State on September 8, 1992. See ICCPR, December 19,
28

1 1996, 999 U.N.T.S. 171. It applies to all people in the United States. ICCRP, Article 2. The
2 ICCPR is an international obligation of the United States and constitutes the law of the land.

3 Article 7 of the ICCPR provides that “no one shall be subjected to. . . cruel, inhuman or
4 degrading treatment. . .” See also Article 3 of The European Convention on the Protection of
5 Human Rights and Fundamental Freedoms which is nearly identical to Article 7 of the ICCPR.
6 Xuncax v. Gramajo 886 F.Supp. 162, 188 (D. Mass. 1995).

7
8 Customary international law is comprised of the customs and usages of the nation of
9 the world and is part of the law of the United States. The Paquete Habana 175 U.S. 677, 700
10 (1900). The United States does apply the international customary law of human rights.
11 Filartiga v. Pena Irala 630 F.2d 876, 887 (2nd Cir. 1980).

12
13 In Kim Ho Ma v. Ashcroft 257 F.3d 1095, 1114 (9th Cir. 2001), the court held that there
14 is a clear international prohibition against prolonged and arbitrary detention. Furthermore,
15 Article 9 of the ICCPR which the United States has ratified (See 188 Cong. Rec. 84781-84
16 (April 2, 1992)) provides that “no one shall be subjected to arbitrary arrest and detention. . .”
17 The detention of a resident alien in excess of the six-months limit was a violation of federal
18 statute as construed in conjunction with international law. The court held that there was no
19 reasonable likelihood that INS could be able to remove Kim Ho Ma to Cambodia in the
20 reasonably foreseeable future, and he would have to be released.

21
22 Cruel, inhuman and degrading treatment is a violation of international law under Article
23 7 of the ICCPR.

24
25 Universal Declaration Article 5 is also a separate ground for liability under the Alien
26 Tort Claim Act (ACTA) (28 U.S.C. 1350). This conduct also violates the law of nations if it
27 contravenes well-established universally recognized norms of international law. Kadic v.
28

1 Karadzic 70 F.3d 232, 246 (2nd Cir. 1995), cert. denied 518 U.S. 105 (1996); Mehinovic v.
2 Vuckovic 198 F.Supp.2d 1322, 1348 (N.D. Ga 2002). The court in Mehinovic held subjecting
3 a prisoner to degrading acts (shouting anti-Muslim epithets, hittings, and playing horsey) was a
4 violation of international law and the plaintiff had a valid cause of action under ATCA. See
5 Mehinovic, supra at 198 F.Supp.2d 1348.
6

7 Federal law (ATCA) establishes a federal forum for federal court to provide a private
8 course of action for aliens who allege a violation of international law. The courts may fashion
9 “domestic common law remedies to give effect to violations of customary international law.”
10 Abebe-Jira v. Negewo, supra.
11

12 International law provides substantive rights to individuals and places limits on a state’s
13 treatment of its citizens. Abebe-Jira v. Negewo 72 F 3d 844, 847 (11th Cir. 1996).

14 The plain language of the statute implies that a tort committed in violation of the law of
15 nations would be sufficient to give rise to a cause of action. Forti v. Suarez-Mason 672
16 F.Supp. 1531, 1539 (N.D. Cal 1987), on reconsideration on other grounds 694 F.Supp. 707
17 (N.D. Cal 1988).

18 In United States v. Bakeas 987 F.Supp. 44 (D. Mass. 1997) the court held that the
19 Bureau of Prison’s policy regarding ineligibility for community confinement based on status as
20 an alien “may. . . violate this nations commitment under the United Nations International
21 Covenant on Civil and Political Rights.” Bakeas, supra, 987 F.Supp. 44, 46, ff. 4.
22

23 The Oregon Supreme Court in Sterling v. Ohio 290 Or. 611 (1981) held that it was an
24 violation of Oregon law and ICCPR Article 7 and 10.1 to allow a female guard to search a
25 male prisoner.
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1 In this case, the plaintiffs' alleged in the First Amended Complaint that their rights
2 were violated under Articles 7, 8 and 9 of the ICCPR. Article 7 prohibits degrading treatment
3 of prisoners; Article 8 prohibits compulsory labor; and Article 9 provides the security of the
4 person. The United States has ratified the ICCPR, and it is a treaty and is the law of the land.
5 Breard v. Greene 523 U.S. 371 (1998), Kim Ho Ma v. Ashcroft 257 F.3d 1095 (9th Cir. 2001).
6 1114.
7

8 Under these cases, a prisoner of the United States has a valid course of action under the
9 Fifth Amendment of the Constitution and Federal Tort Claims Act for protection of his
10 international civil right against arbitrary and degrading imprisonment.
11

12 The payment to these three plaintiffs by defendants of such low wages of nineteen cents
13 per hour is a violation of ICCPR Article 7, 8 and 9.

14 The court should deny the Motion to Dismiss.

15 Also the United Nations Covenant of Prisoners Rights was adopted by the United
16 Nations Congress on the Punishment of Crime and Treatment of Offenders. Adopted on
17 August 30, 1955 UNDOC. A.CONF/611 – annex I; E.S.C. res 663c. University of Minnesota
18 website Human Rights Library. It requires a system of equitable remuneration of the work of
19 prisoners.
20

21 This law of the United States is part of the customary international law that is
22 comprised of the customs and usages of the law of nations. Paquete Habana 175 U.S. 677
23 (1900); Filartgu v. Pena Irala, 630 F.2d 876 (2nd Cir. 1980). Under this doctrine, plaintiffs
24 have a valid course of action for equitable remuneration for their labor in federal prison. The
25 jury in this case should determine what is an equitable remuneration pursuant to customary
26 international law.
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IV. CONCLUSION

The court should deny the defendants' Motion to Dismiss based on the foregoing reasons. In the alternative, the Court should allow plaintiffs to amend the Complaint.

Dated: January 21, 2008



JOHN MURCKO, ESQ.
Attorney for Plaintiffs

PROOF OF SERVICE

Re: Serra, Santiago, Cordero, et al v. Lappin, Compton, McFadden, et al.
U.S. District Court, Northern District of California Case No. C-07-1589

I am a citizen of the United States and am employed in the County of Alameda, State of California. I am over the age of 18 and am not a party to the above-entitled action. On the date listed below, I served the following document(s).

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

By transmitting a true copy thereof addressed as follows:

Robert Katenberg, Esq.
U.S. Department of Justice
robertkatenberg@usdoj.gov

BY EMAIL: By sending true copies thereof by email transmission to the parties and/or counsel of record.

BY MAIL: I caused such envelope with postage thereon fully prepaid to be place in the U.S. mail at Orinda, California.

BY FACSIMILE TRANSMISSION: By sending true copies thereof by facsimile transmission to the parties and/or counsel of record.


BY UPS OVERNIGHT MAIL: I caused such envelope marked for next day delivery with postage thereon fully prepaid to be placed in the UPS overnight mail box in Orinda, California.

BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the offices of the addressee as indicated above.

BY CERTIFIED MAIL: I caused such envelope with certified postage and return receipt thereon fully prepaid to be placed in the U.S. mail at Orinda, California.

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct; that I am readily familiar with the business practices for collection and processing of documents for mailing with the U.S. Postal Service and with the UPS services at our office in Oakland, California, and that this declaration is executed at Oakland, California.

DATED: January 22, 2008



John Mureko