PETER D. KEISLER
Assistant Attorney General
SCOTT N. SCHOOLS
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
ROBERT J. KATERBERG (D.C. Bar No. 466325)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20530
Telephone: (202) 616-8298
Facsimile: (202) 616-8460
Email: Robert.Katerberg@usdoj.gov
Attorneys for Defendants
Harley Lappin and Robert E. McFadden

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

J. TONY SERRA, et al., Plaintiffs, v. HARLEY LAPPIN, Director of the Bureau of Prisons, et al., Defendants.	No. C 07-1589 MJJ **MEMORANDUM IN SUPPORT OF MOVING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM** Date: Tuesday, November 20, 2007 Time: 9:30 a.m. Courtroom: 11, 19th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

OTHER MATERIALS

INTRODUCTION

Defendants Harley Lappin, in his official capacity as Director of the United States Bureau of Prisons, and Robert E. McFadden in both his official capacity as Western Regional Director of the Bureau of Prisons and in his individual capacity (collectively "Moving Defendants") respectfully submit this memorandum of points in authorities in support of their motion to dismiss this action under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, and under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

Plaintiffs are one current and two former federal prisoners who challenge the level of pay provided to federal inmates for their work in federal prisons while incarcerated pursuant to criminal sentences. Perhaps in recognition of the fact that the Fair Labor Standards Act does not apply in these circumstances as a matter of law, see Hale v. Arizona, 993 F.2d 1387, 1393-95 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993), plaintiffs studiously avoid reliance on wage and hour laws, and instead concoct novel theories of liability under the Thirteenth and Fifth Amendments to the United States Constitution, international law, and the Sherman Act. Under well-established Supreme Court and Ninth Circuit precedent, all of their claims must be dismissed for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted.

First, insofar as they seek damages, plaintiffs' claims against the Moving Defendants in their official capacities (which must be treated as claims against the United States) are barred by the doctrine of sovereign immunity, and their claims against defendant McFadden in his individual capacity are barred in part by the Westfall Act and otherwise by qualified immunity.

Second, the two former-prisoner plaintiffs lack standing to seek equitable relief because they are no longer in federal prison, are not affected by the wage rates paid to prisoners, and would not benefit from any forward-looking relief.

The only claims remaining are those brought by the current-prisoner plaintiff for equitable relief, but each of those claims is totally foreclosed by binding, directly applicable precedent. The text of the Thirteenth Amendment and Supreme Court and Ninth Circuit precedent all clearly state that the Thirteenth Amendment does not apply to prison labor by

convicted inmates. See U.S. Const. amend. XIII; United States v. Reynolds, 235 U.S. 133, 149 (1914); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963). Plaintiffs' international law claims rest on alleged violations of a treaty that the Supreme Court has recognized is "not self-executing and so did not itself create obligations enforceable in the federal courts," Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004), and on hortatory United Nations recommendations that by their own terms lack any binding effect. In any event, the Bureau of Prisons' inmate pay practices are consistent with both of those materials. Finally, plaintiffs' Sherman Act claims overlook that the United States and its agencies and officers are not subject to antitrust liability. See United States Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 744-45, 748 (2004). Even if the defendants here were not the United States and its agencies and officers and could be proper antitrust defendants, the complaint does not allege any conduct that would be unlawful under the antitrust laws. Further, the application of the general antitrust laws to the matters alleged in the complaint would be precluded because Congress specifically established the prison work program at issue here and enacted a comprehensive statute to govern its administration, and application of the general antitrust laws here was not contemplated by Congress and would conflict with this specialized, independent statutory scheme. See 18 U.S.C. §§ 4121-4129. Therefore, to the extent they are not otherwise barred by immunities or for lack of subject matter jurisdiction, plaintiffs' claims should be dismissed with prejudice for failure to state a claim.

BACKGROUND

A. STATUTORY AND REGULATORY AUTHORITIES GOVERNING INMATE WORK PROGRAMS AT UNITED STATES PRISONS

"It is the policy of the Federal Government that convicted inmates confined in Federal prisons, jails, and other detention facilities shall work," subject to security, health-related, and other limited exceptions. Crime Control Act of 1990, Pub. L. No. 101-647, § 2905, 104 Stat. 4789, 4914 (reprinted at 18 U.S.C. § 4121 note). To this end, "[s]uch forms of employment shall be provided as will give the inmates of all Federal penal and correctional institutions a maximum opportunity to acquire a knowledge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release." 18 U.S.C. § 4123. In general, there are two

distinct programs, governed by different authorities, under which United States inmates work: (1) Federal Prison Industries; and (2) institutional assignments.

1. Federal Prison Industries.

In 1934, Congress authorized, and President Franklin D. Roosevelt created by executive order, Federal Prison Industries (sometimes known by its trade name "UNICOR"), a government corporation now administered by a board of six directors appointed by the President. See Act of June 23, 1934, ch. 736, 48 Stat. 1211 (codified as amended at 18 U.S.C. §§ 4121-4129); Exec. Order 6,917 (Dec. 11, 1934). Federal Prison Industries conducts and oversees industrial operations in federal penal and correctional institutions for the production of commodities for consumption in the institutions or sales to other departments or agencies of the United States government, and is directed to provide employment for as many inmates who are eligible to work as is reasonably possible. 18 U.S.C. § 4122(a), (b). Proceeds from the sale of products manufactured by Federal Prison Industries go into a Prison Industries Fund, out of which the corporation is authorized, inter alia, to "pay[], under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry." 18 U.S.C. § 4126(c)(4).

Pursuant to a delegation of authority from the Attorney General, 28 C.F.R. § 0.99, Federal Prison Industries has promulgated regulations governing inmate work programs. See 28 C.F.R. Part 345. Under these regulations, pay rates for inmate work are set by the Board of Directors of Federal Prison Industries. See 28 C.F.R. § 345.10 ("All pay rates under this part are established at the discretion of Federal Prison Industries, Inc. Any alteration or termination of the rates shall require the approval of the Federal Prison Industries' Board of Directors.").[1] The current rates are between $0.23 and $1.15 per hour, depending on grade. See Bureau of Prisons Program

---

1 The en banc Ninth Circuit and other courts that have considered the issue have held that pay rates for inmate work in prison industries are not subject to the minimum-wage and other provisions of the Fair Labor Standards Act because prisoners are not "employees" within the meaning of that Act. See Hale, 993 F.2d at 1393-95; Danneskjold v. Hausrath, 82 F.3d 37, 43 (2d Cir. 1996) ("[N]o Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying the minimum wage.").

Statement 8120.02, at 5-1 (7/15/99), available at www.bop.gov/policy/progstat/8120_002.pdf. Wardens and other local and regional officials have no authority to change the pay system. See 28 C.F.R. § 345.10 ("While the Warden is responsible for the local administration of Inmate Industrial Payroll regulations, no pay system is initiated or changed without the prior approval of the Assistant Director, Industries, Education and Vocational Training."). In addition to basic hourly pay, inmates may receive premium pay, special piecework rates, overtime compensation, longevity pay, vacation pay, administrative pay, holiday pay, and training pay. See 28 C.F.R. §§ 345.52 to 345.60. Inmates can also receive "incentive awards" for "special achievements in their work, scholarship, suggestions, for inventions which improve industry processes or safety or which conserve energy or materials consumed in FPI operations, and for outstanding levels of self-development." 28 C.F.R. § 345.70. Inmates receive monthly earnings statements reporting their earnings from Federal Prison Industries. See 28 C.F.R. § 345.61.

2. Institutional Assignments.

Outside of the auspices of Federal Prison Industries, some inmates work in work assignments that help to maintain the "day-to-day operation of the institution," e.g., food service, carpentry, plumbing, groundskeeping, under a program known as "Performance Pay." See 28 C.F.R. § 545.20. This type of employment is authorized by 18 U.S.C. § 4125(d), which authorizes the Attorney General, "[a]s part of the expense of operating such camps[,] . . . to provide for the payment to the inmates or their dependents such pecuniary earnings as he may deem proper, under such rules and regulations as he may prescribe." The Bureau of Prisons has promulgated regulations governing the Inmate Work and Performance Pay Program, which are published at 28 C.F.R. §§ 545.20 to 545.31. Under the Performance Pay program, hourly pay rates are determined by the Assistant Director, Correctional Programs. See Bureau of Prisons Program Statement 5251.05, at ¶ 12 (12/31/98), available at www.bop.gov/policy/progstat/5251_005.pdf. "An inmate is eligible for performance pay from the date of work or program assignment," and "for each month that the inmate's performance justifies such payment." 28 C.F.R. § 545.25(b). Inmates may receive bonus pay "[w]hen the supervisor of an inmate worker or program participant believes the inmate has made exceptional

accomplishments or appreciably contributed to the work assignment," 28 C.F.R. § 545.26(f), and "special bonus pay" for "exceptional work in a temporary job assignment" previously identified "as critical to the institution," 28 C.F.R. § 545.26(g). "An inmate's performance pay, once earned, becomes vested." 28 C.F.R. § 545.26(h). Inmates receive notification of monthly earnings. 28 C.F.R. § 545.26(i).

B. PLAINTIFFS' ALLEGATIONS

Plaintiffs filed their original Complaint on March 20, 2007, but never served it. Plaintiffs filed a First Amended Complaint on July 15, 2007, and effected service on the Moving Defendants on or about August 15, 2007.

In the First Amended Complaint, plaintiffs allege that two of them (Serra and Cordero) were former federal prisoners and one of them (Santiago) is currently a federal prisoner. See First Am. Compl. ¶¶ 5-7. Plaintiff Cordero alleges that he worked, and plaintiff Santiago alleges that she currently works, for UNICOR, i.e., Federal Prison Industries. See First Am. Compl. ¶¶ 6, 7. In contrast, plaintiff Serra appears to allege, albeit somewhat obliquely, worked in an institutional assignment in the Performance Pay program, rather than for Federal Prison Industries. See First Am. Compl. ¶ 5 ("Plaintiff Serra works [sic] on the camp grounds as a camp waterer and in effort [sic] supports the work at Federal Prison Industries UNICOR) [sic] making cable and also making dairy products.").

Plaintiffs name three defendants: Harley Lappin, Director of the Bureau of Prisons; B.G. Compton, former Warden of Lompoc Prison;[2] and Robert E. McFadden, Regional Director of the Bureau of Prisons' Western Regional Office.[3] The complaint states that Director Lappin "is being sued in his official capacity," but is silent on the capacity in which Regional Director McFadden is sued. Compare First Am. Compl. ¶ 10, with First Am. Compl. ¶ 12. In an

---

2 The complaint describes Mr. Compton as Warden of Lompoc Prison. However, Compton retired from government service and ceased to be Warden on February 28, 2007, before the Complaint was filed. On information and belief, defendant Compton has not been served. This motion is not filed on his behalf.

3 Mr. McFadden's middle initial is wrongly given as "F." in the caption but is correctly reflected in ¶ 12 of the First Amended Complaint.

abundance of caution, Moving Defendants are treating the complaint as seeking to allege both official-capacity and individual-capacity claims against defendant McFadden, and accordingly are moving to dismiss any and all claims.

Plaintiffs challenge the level of compensation that the federal government pays prisoners for their labor, which plaintiffs argue is so low as to violate the Fifth and Thirteenth Amendments to the United States Constitution, the United Nations International Covenant on Civil and Political Rights and "Covenant on Prisoners Rights," and the Sherman Act, 15 U.S.C. §§ 1, 2. Plaintiffs seek certification of the case as a class action. For relief, plaintiffs seek declaratory and injunctive relief, compensatory and punitive damages for "only the named plaintiff [sic]," and "damages as a result of the defendants [sic] violation of the anti-trust laws" for the three named plaintiffs and "each other member of the class." First Am. Compl. at 11-12.

ARGUMENT

I. PLAINTIFFS' DAMAGES CLAIMS MUST BE DISMISSED

Plaintiffs purport to seek money damages for alleged violations of the Constitution, international law, and antitrust laws. Since plaintiffs mix official-capacity and individual-capacity claims in the complaint, it is unclear against whom that award of damages is sought. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) (action against a government official acting in his or her official capacity is, "in all respects other than name, to be treated as a suit against the [governmental] entity"); Kreines v. United States, 33 F.3d 1105, 1107 (9th Cir. 1994) (explaining distinction between individual and official capacity suits). Under any construction, however, any damages claims herein are barred. To the extent that plaintiffs seek a judgment of damages against the Moving Defendants in their official capacities, i.e., an award of damages against and payable by the United States, such claims are barred by sovereign immunity. These claims must be dismissed for lack of subject matter jurisdiction. See, e.g., Orff v. United States, 358 F.3d 1137, 1142 (9th Cir. 2004), aff'd, 545 U.S. 596 (2005). To the extent that plaintiffs seek a judgment of damages against defendant McFadden in his individual capacity, their international claims are barred by the Westfall Act, 28 U.S.C. § 2679, and the remainder of their claims are barred by qualified immunity. Also, plaintiff Cordero's claims are time-barred because he does

not allege that he has been in prison since 2004. These claims must be dismissed for failure to state a claim. See Butler v. San Diego Dist. Atty.'s Office, 370 F.3d 956, 964 (9th Cir. 2004) ("'Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal [pursuant to Rule 12(b)(6)] before the commencement of discovery.'") (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original)); Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (dismissal appropriate where running of statute of limitations apparent from face of complaint).

A. To the Extent Plaintiffs Seek a Damages Judgment Against the United States, Such Claims Are Barred by Sovereign Immunity

Even though the complaint does not name the United States as a defendant eo nomine, "[i]n sovereign immunity analysis, any lawsuit . . . against an officer of the United States in his or her official capacity is considered an action against the United States." Balser v. Dep't of Justice, Office of U.S. Trustee, 327 F.3d 903, 907 (9th Cir. 2003); see also Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982) (holding that claims against "the individual defendants, to the extent they were sued in their official capacities . . . were barred by the doctrine of sovereign immunity"). The United States is immune from suit save as it consents to be sued. See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980); see also Sierra Club v. Whitman, 268 F.3d 898, 901 (9th Cir. 2001) ("suits against officials of the United States . . . in their official capacity are barred if there has been no waiver [of sovereign immunity"). A court lacks subject matter jurisdiction over a claim against the United States or its officials in their official capacities if it has not consented to suit on that claim. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989).

The complaint fails to identify any waiver of sovereign immunity permitting a damages claim against the United States, and none of the sources of law relied upon by plaintiffs -- the Constitution, international law, and the Sherman Act -- contains any such waiver. While the Complaint refers to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), that case provides only for a right of money damages against federal officers or employees in their individual capacities. There is no such thing as a Bivens claim against the

United States, or against federal officials in their official capacities. See Balser, 327 F.3d at 909 (Bivens suit is, by definition, "against a federal employee in his individual rather than official capacity," and therefore "does not state a viable cause of action against [a] United States [official] acting in his official capacity); Nurse v. United States, 226 F.3d 996, 1004 (9th Cir. 2000) ("official capacity claims are not cognizable as Bivens claims"); Daly-Murphy v. Winston, 837 F.2d 348, 356 (9th Cir. 1987) ("absent a waiver of sovereign immunity, an individual may not maintain a Bivens action for monetary damages against the United States"); Holloman v. Watt, 708 F.2d 1399, 1402 (9th Cir. 1983) (holding that a Bivens "suit is against the employee in his individual rather than official capacity," and "[s]ince appellees' suit is against the individual defendants as officials of the United States and not as individuals, reliance on Bivens is misplaced"). Because plaintiffs have not identified and cannot identify any applicable waiver of sovereign immunity permitting an award of damages against the United States for the claims they allege, their claims against the Moving Defendants in their official capacities for damages must be dismissed.[4]

---

4 While the Administrative Procedure Act provides a general waiver of sovereign immunity for claims against agencies, officers, or employees of the United States, its waiver extends only to claims for equitable relief, i.e., "relief other than money damages," 5 U.S.C. § 702, and therefore does not waive sovereign immunity as to plaintiffs' damages claims. See Gilbert v. DaGrossa, 756 F.2d 1455, 1459 n.3 (9th Cir. 1984). While the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., and Little Tucker Act, 28 U.S.C. § 1346(a)(2), each waive the United States' sovereign immunity for certain categories of claims for money damages, plaintiffs do not purport to sue under either of those statutes and, in any event, would not satisfy the jurisdictional prerequisites for such a suit. See, e.g., 28 U.S.C. § 1346(a)(2) (limiting jurisdiction of the federal district courts under Little Tucker Act to claims for $10,000 or less); Leveris v. England, 249 F. Supp. 2d 1, 4 (D. Me. 2003) (Little Tucker Act jurisdiction available only if plaintiff "waives all claims to any amount that he may recover over $10,000, or specifically asks for less"); 28 U.S.C. § 2675 (requiring prior administrative presentment of tort claim to agency for disposition); Hutchinson, 677 F.2d at 1327 (addressing inapplicability of Federal Tort Claims Act); see also Moose v. United States, 674 F.2d 1277, 1280 (9th Cir. 1982) (holding that Little Tucker Act waives sovereign immunity only to the extent that some other "'federal statute can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained'" (quoting United States v. Testan, 424 U.S. 392, 400 (1976))); Taylor v. United States, 248 F.3d 736, 738 (8th Cir. 2001) ("Where there is no substantive right to recover damages from the federal government, § 1346(a)(2) does not act as a waiver of the sovereign immunity of the (continued...)

B. To the Extent Plaintiffs Sue Defendant McFadden in His Individual Capacity, Their Claims Are Barred in Part by the Westfall Act and in Part by Qualified Immunity

1. As to Plaintiffs' International-Law Claims Against Defendant McFadden, the Westfall Act Compels Substitution of the United States, And Dismissal for Failure to Exhaust Administrative Remedies

The Westfall Act, 28 U.S.C. § 2679, generally precludes civil actions against individual federal employees for wrongful acts or omissions while acting within the scope of their office or employment, except where the civil action is brought for a violation of the Constitution, or a violation of a United States statute authorizing such an action against an individual. See 28 U.S.C. § 2679(b)(1), (2). The remedy against the United States provided by the Federal Tort Claims Act is the exclusive form of redress in situations where the Westfall Act precludes individual claims. See id.; Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993), cert. denied, 513 U.S. 809 (1994). If the Attorney General or his designee certifies that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, the claim shall be deemed to be one against the United States under the Federal Tort Claims Act, and the United States is substituted as the party defendant. See 28 U.S.C. § 2679(d)(1), (4); Green, 8 F.3d at 698. The Federal Tort Claims Act requires claimants to present an administrative claim to the responsible federal agency prior to filing suit, and failure to exhaust administrative remedies in this manner is a jurisdictional bar. See 28 U.S.C. § 2675(a); McNeil v. United States, 508 U.S. 106, 113 (1993); McLachlan v. Bell, 261 F.3d 908, 912 (9th Cir. 2001). Where the exhaustion requirement has not been satisfied, subject matter jurisdiction is lacking and the claims in question must be dismissed, without prejudice, for failure to exhaust administrative remedies. See, e.g., Gayton v. United States, No. C 05-4621 MHP, 2006 WL 408562, *8 (N.D. Cal. Feb. 17, 2006).

Here, the international-law claims specified in Count II of the Complaint fall under the

---

4(...continued)
United States"). Finally, while plaintiffs cite 28 U.S.C. §§ 1331 and 1343 (First Am. Compl. ¶ 2), neither of those provisions waives the sovereign immunity of the United States. See Gilbert, 756 F.2d at 1458-59 (§ 1331); Royer v. INS, 730 F. Supp. 588, 590 (S.D.N.Y. 1990) (§ 1343).

Westfall Act because they are not claims brought for a violation of the Constitution or for a violation of a United States statute. See Alvarez-Machain v. United States, 331 F.3d 604, 631-32 (9th Cir. 2003) (holding that international-law claims against individual federal employees did not fall under the Westfall exception, and that such claims therefore were subject to substitution of the United States as the party defendant), rev'd on other grounds, 542 U.S. 692 (2004); Harbury v. Hayden, 444 F. Supp. 2d 19, 37-38 (D.D.C. 2006) (holding that international-law claims are subject to Westfall substitution), appeal docketed, No. 06-5282 (D.C. Cir. Sept. 26, 2006). Moreover, defendant McFadden's scope of office has been duly certified. See Declaration of Robert J. Katerberg, Ex. A (certification by Department of Justice, Civil Division, Torts Branch Director Timothy Garren pursuant to delegated authority). Thus, plaintiffs' claims against defendant McFadden in his individual capacity for alleged violations of international law must be deemed claims against the United States, with the United States substituted as the party defendant by operation of law. Because plaintiffs have not complied with the jurisdictional prerequisites under the Federal Tort Claims Act, these claims must be dismissed for lack of subject matter jurisdiction.

2. Defendant McFadden Enjoys Qualified Immunity From Plaintiffs' Constitutional and Statutory Claims

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity analysis is a two-step process. First, the court must determine "the existence or nonexistence of a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id. Second, if a violation could be made out, the court must ask whether the right was "clearly established." Id. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in

the situation he confronted." Id. at 202.

Here, the alleged constitutional and statutory rights plaintiffs seek to vindicate do not exist, let alone are "clearly established." As demonstrated in Section III below, plaintiffs' Thirteenth Amendment claim defies express language in the text of that Amendment, as well as well-established Supreme Court and Ninth Circuit precedent directly on point. Similarly, plaintiffs' Sherman Act claim is precluded by Supreme Court precedent holding that the United States and its agencies and officials are not subject to Sherman Act liability, as well as other reasons. In light of this authority, it would be ludicrous to contend that "it would be clear to a reasonable officer," Saucier, 533 U.S. at 201, that prisoner pay systems expressly authorized by Congress, in place for many decades, and upheld by every court to consider them violate constitutional or statutory law.

Any individual-capacity claim that plaintiffs intend against defendant McFadden also fails because the complaint alleges no specific wrongful acts or omissions on his part and because, by statute and regulation, he has no involvement in or authority over the Federal Prison Industries or Performance Pay hourly rates of which plaintiffs complain. See, e.g., Bibeau v. Pacific Northwest Research Found., Inc., 188 F.3d 1105, 1113-14 (9th Cir. 1999) (rejecting Bivens liability where plaintiff failed to show personal participation or that the defendants were more than "peripherally connected" to the matters complained of), amended on other grounds, 208 F.3d 831 (9th Cir. 2000); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("Liability under section 1983 arises only upon a showing of personal participation by the defendant."). Federal Prison Industries pays inmates directly out of the Prison Industries Fund, and its pay rates for inmates are set directly by its Board of Directors; the wardens of individual institutions and other local and regional officials have no authority to alter the pay system. See 18 U.S.C. § 4126(c)(4); 28 C.F.R. § 345.10. With respect to the Bureau of Prisons' separate Performance Pay program, the Assistant Director, Correctional Programs Division in Washington, D.C. is responsible for determining hourly rates. See Bureau of Prisons Program Statement 5251.05, at ¶ 12 (12/31/98), available at www.bop.gov/policy/progstat/5251_005.pdf. It would be unconscionable to make a Regional Director answer in his individual capacity for a longstanding

official pay system and pay rates over which he has no authority, even if there were a genuine question about the legality of that system and those rates, which there is not.

C. Any and All Claims by Plaintiff Cordero Are Barred by the Statute of Limitations

In addition to the above reasons for dismissal, all claims by plaintiff Cordero are time-barred.[5] The complaint alleges that Cordero was "incarcerated at the Federal Prison Camp at Lompoc for two years in 2003-2004," during which he "worked for UNICOR for $145/month and objects to this method as in violation of UN Covenants, U.S. Constitution and federal law and The Sherman Act." First Am. Compl. ¶ 6. The complaint in this case was not filed until 2007, more than two years after the end of the time Cordero alleges he last worked for UNICOR under allegedly illegal conditions. The statute of limitations on a Bivens claim in California is two years. See Pesnell v. Arsenault, 490 F.3d 1158, 1163 (9th Cir. 2007); McAuliffe v. U.S. Dep't of Veterans Affairs, No. C 06-7353 WHA, 2007 WL 2123690, * 4 (N.D. Cal. July 23, 2007). Likewise, the statute of limitations on a tort claim against the United States is two years. 28 U.S.C. § 2401(b); Erlin v. United States, 364 F.3d 1127, 1130 n.6 (9th Cir. 2003); see supra Section I.B.1 (explaining that plaintiffs' international-law claims against defendant McFadden are subject to Westfall substitution of a tort claim against the United States). Plaintiff Cordero's claim could not have accrued later than 2004, yet he did not file suit until 2007. Therefore, it is plain on the face of the complaint that any claim by Cordero arising out of his experience working for Federal Prison Industries in 2003 and 2004 is barred by the applicable statute of limitations. As discussed below, see infra Section II, the fact that Cordero is no longer subject to the conditions he seeks to challenge also deprives him of standing to make any claim for equitable relief.

II. PLAINTIFFS SERRA AND CORDERO LACK STANDING TO PURSUE EQUITABLE RELIEF

With damages claims removed from the picture, the only claims remaining in this case

---

5 Of course, to the extent the Court finds the damages claims of all plaintiffs dismissable on the grounds of sovereign immunity and qualified immunity discussed above, there is no need to reach this issue.

are for declaratory and injunctive relief requiring the Moving Defendants in their official capacities (i.e., the Bureau of Prisons) to change the practices regarding compensation of prisoners for labor. Plaintiffs Serra and Cordero lack standing to bring these claims because they are not presently, and were not at the time of the filing of the complaint, incarcerated in federal prison.[6] See First Am. Compl. ¶¶ 5 (Serra was incarcerated from May 15, 2006 to February 12, 2007), 6 (Cordero was incarcerated "for two years in 2003-2004"). Because they are not currently incarcerated in federal prison, they are not working in any prison industries, are not affected by its system for compensating prison labor, and will not be so affected in the future unless they again violate the law, are convicted, and return to federal prison. Thus, they do not stand to benefit from any injunctive relief that could be awarded in this case and have no live "case or controversy" with the Moving Defendants. See City of Los Angeles v. Lyons, 461 U.S. 95, 103 (1983) (holding that a plaintiff claiming a past injury had no standing to seek declaratory relief because "assertion that he may again be subject to an illegal chokehold" was too speculative to "create the actual controversy that must exist for a declaratory judgment to be entered"); O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (rejecting theory of standing that "rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to" the bond-setting and sentencing practices they were challenging).[7]

---

6 Moreover, plaintiff Serra would have lacked standing to challenge Federal Prison Industries' pay rates even while he was still incarcerated, because he does not allege that he ever worked for or was paid by Federal Prison Industries. See First Am. Compl. ¶ 5 ("Plaintiff Serra works [sic] on the camp grounds as a camp waterer and in effort [sic] supports the work at Federal Prison Industries UNICOR) [sic] making cable and also making dairy products.").

7 See also, e.g., Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (where inmate transferred to different facility "demonstrated no reasonable expectation of returning to CBCC, his claims for injunctive relief relating to CBCC's policies are moot"); Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986) (same); Weaver v. Wilcox, 650 F.2d 22, 27 & n.13 (3d Cir. 1981) ("the courts have held that a prisoner lacks standing to seek injunctive relief if he is no longer subject to the alleged conditions he attempts to challenge"); Holland v. Purdy, 457 F.2d 802, 803 (5th Cir. 1972) ("Since Holland was no longer subjected to the complained-of conditions at the time this litigation was instituted, nor is he at the present time, the petition should have been

(continued...)

III. ON THE MERITS, PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW UNDER WELL-ESTABLISHED PRECEDENT

To the extent that any of the plaintiffs' claims is not otherwise barred for the above reasons, the claims all fail to state a claim upon which relief can be granted. Plaintiffs assert three categories of claims: constitutional claims, international-law claims, and Sherman Act claims. In each case, the claims cannot survive application of well-established Supreme Court and Ninth Circuit precedent.[8]

A. Constitutional Claims

Plaintiffs' first claim -- that the amount of compensation given to prisoners for their labor in United States prisons violates the Thirteenth Amendment to the United States Constitution -- is defeated by the very text of the Thirteenth Amendment, controlling Ninth Circuit precedent, and the uniform decisions of other courts. The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII (emphasis added). By its terms, the Amendment excludes the situation of prison labor by convicted inmates from its scope. See United States v. Reynolds, 235 U.S. 133, 149 (1914) ("There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the 13th Amendment, and such punishment expressly excepted from its terms.").

Over forty years ago, the Ninth Circuit held that the Thirteenth Amendment has no

---

7(...continued)
dismissed on the ground of mootness.")

8 In addition to the grounds for dismissal urged herein, it does not appear that plaintiffs have exhausted their administrative remedies for these claims as required by the Prison Litigation Reform Act. See 42 U.S.C. § 1997e(a). Because this defense would require reference to factual matters outside the complaint in a way not possible on a Rule 12(b)(6) motion, defendants are not raising exhaustion at this time, but reserve the right to do so by answer or by future motion as appropriate. Of course, "[i]n the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies." 42 U.S.C. § 1997e(c)(2).

application to prison labor and does not bar even unpaid prison labor. Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963). The Court explained:

> There is no federally protected right of a state prisoner not to work while imprisoned after conviction . . . . Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights. . . . Where a person is duly tried, convicted, sentenced, and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises. The Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute. It follows, therefore, that . . . [plaintiff] may be required to work in accordance with institution rules.

Id. (citations and paragraph breaks omitted). The Ninth Circuit has reaffirmed this proposition more recently. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994) (rejecting Thirteenth Amendment claim because "the Thirteenth Amendment does not apply where prisoners are required to work in accordance with prison rules").

Other courts have uniformly agreed, even calling similar claims "frivolous." See, e.g., McMaster v. Minnesota, 819 F. Supp. 1429, 1441-42 (D. Minn. 1993) (rejecting prisoners' Thirteenth Amendment claim against state prison program for "failing to pay them minimum or prevailing wages for their work" in prison industries; "Because the prohibition on involuntary servitude does not extend to those who have been convicted of crimes, compelling prison inmates to work does not violate the the Thirteenth Amendment."), aff'd, 30 F.3d 976 (8th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); Emory v. United States, 2 Cl. Ct. 579, 580 (rejecting claim that prison labor under Federal Prison Industries program at allegedly inadequate compensation rate constitutes "slave labor" in violation of Thirteenth Amendment), aff'd mem., 727 F.2d 1119 (Fed. Cir. 1983); Fallis v. U.S. Bureau of Prisons, 263 F. Supp. 780, 783 (M.D. Pa. 1967) (rejecting Thirteenth Amendment challenge to Federal Prison Industries program as "completely frivolous" because "[t]here is no question but that federal prisoners may be required to work in accordance with institution rules"); see also Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968) (commenting that "[t]here exists no constitutional right" of prisoner to payment for labor "and it is readily apparent that such compensation is by the grace of the state"); United States v. Edmonds, 870 F. Supp. 1140, 1142 n.2 (D.D.C. 1994) (rejecting Thirteenth Amendment claim that Federal Prison Industries engaged in system of "slave labor" as "frivolous,

unsubstantiated, and wholly without merit").

If the Thirteenth Amendment does not forbid requiring inmates to work for no wages at all, it certainly does not regulate the amount of wages if the government chooses in its discretion to pay them something. Thus, plaintiffs' Thirteenth Amendment claim fails as a matter of law.[9]

B. International-Law Claims

In their second claim, plaintiffs allege that the system for compensating prisoner labor violates "the United Nations Covenant of Political and Civil Rights, Articles 7, 8, and 10 and the United Nations Covenant on Prisoners Rights, paragraph 76." First Am. Compl. ¶ 21. The Moving Defendants are unaware of any treaties by those names, but will assume that plaintiffs intended to refer to the International Covenant on Civil and Political Rights ("ICCPR"),[10] and the Standard Minimum Rules for the Treatment of Prisoners adopted by the Economic and Social Council of the United Nations ("Standard Minimum Rules").[11]

"For any treaty to be susceptible to judicial enforcement it must both confer individual rights and be self-executing." Cornejo v. County of San Diego, No. 05-56202, --- F.3d ---, 2007 WL 2756964, *2 (9th Cir. Sept. 24, 2007). If a treaty's provisions are not self-executing, they can be enforced only pursuant to legislation to carry them into effect. See Whitney v. Robertson, 124 U.S. 190, 194 (1888); Head Money Cases, 112 U.S. 580, 598 (1884) ("[a] treaty is primarily

---

9 The First Amended Complaint also refers in passing to the Fifteenth Amendment (¶ 1) and Fifth Amendment (¶¶ 13.f, 16). The Fifteenth Amendment pertains to the right to vote and has nothing to do with anything in the complaint. Likewise, the complaint fails altogether to elucidate the nature of any Fifth Amendment claim. To the extent plaintiffs mean to allege a claim under the Due Process Clause of the Fifth Amendment, such a claim would be wholly without merit because (a) they received "due process of law" when they were tried, convicted, and sentenced; and (b) they do not possess any protectable "liberty" or "property" interest in the receipt of compensation for labor performed as a prisoner. See McMaster, 819 F. Supp. at 1442 (rejecting procedural due process and/or takings claims regarding allegedly inadequate compensation for labor performed in prison industries).

10 999 U.N.T.S. 171, 6 I.L.M. 368 (Dec. 16, 1966).

11 E.S.C. Res. 663C, Annex I, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957), amended by E.S.C. Res. 2076, at 35, U.N. ESCOR, 32nd Sess., Supp. No. 1, U.N. Doc. E/5988 (May 13, 1977), available at http://www.ohchr.org/english/law/treatmentprisoners.htm.

a compact between independent nations" which "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it"); Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985) (explaining that a non-self-executing treaty is merely an agreement between nations with no effect on domestic law absent additional governmental action). Even if a treaty is self-executing, it does not necessarily "create private rights and remedies enforceable in American courts" unless Congress's ratification of the treaty reveals an intent to do so. See Cornejo, 2007 WL 2756964, at *3.

Plaintiffs' ICCPR claim is fatally flawed because the ICCPR is not self-executing and does not create private rights and remedies enforceable in United States courts. The United States Senate ratified the ICCPR with the express declaration that it is not self-executing. See 138 Cong. Rec. S4781 (Apr. 2, 1992). Thus, in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Supreme Court observed that "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing." Id. at 728 (emphasis added); see also id. at 735 ("although the [ICCPR] does bind the United States as a matter of international law, the United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts"). Accordingly, courts routinely dismiss ICCPR claims, particularly after Sosa.[12]

---

12 See, e.g., Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 137 (2d Cir. 2005); Iguarta-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc), cert. denied, 547 U.S. 1035 (2006); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005); Rotar v. Placer County Superior Court, No. Civ. S-07-0044 DFL EFB PS, 2007 WL 1140682, *1 (E.D. Cal. Apr. 17, 2007) ("The [ICCPR] does not give rise to a private cause of action because it is not self-executing, nor has Congress passed appropriate enabling legislation." (internal quotation marks omitted)); White v. Paulsen, 997 F. Supp. 1380, 1386 (E.D. Wash. 1998) (dismissing state prisoner claims under ICCPR because "no court that has considered either of these treaties has found them to be self-executing"); see also Padilla-Padilla v. Gonzales, 463 F.3d 972, 979-80 (9th Cir. 2006) (rejecting claims under unspecified "various treaties, declarations, and customary international law norms" and citing Sosa for the proposition that "the Universal Declaration of (continued...)

In any event, even if it could be enforced through private litigation, the ICCPR expressly permits governments to require persons convicted of crimes to work. While Article 8(3)(a) of the ICCPR provides that "[n]o one shall be required to perform forced or compulsory labour," a later provision in the same article makes clear that "[f]or the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) any work or service, not referred to in subparagraph (b),[13] normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention . . . ." ICCPR Article 8(3)(c). Moreover, nothing in the ICCPR purports to regulate the wages, if any, paid for prisoner labor.[14] Here, plaintiff Santiago is, and plaintiffs Serra and Cordero were, indisputably under detention in consequence of lawful orders of courts convicting them of federal crimes. Thus, their labor under in prison industries or institutional assignments simply does not implicate any issue under Article 8 of the ICCPR, even if that treaty provided judicially enforceable rights, which it does not.

Plaintiffs' purported claims under the Standard Minimum Rules are even more devoid of merit. The Standard Minimum Rules are not a treaty, but mere United Nations-drafted advisory guidelines that were never intended to have any binding legal effect, let alone create a private right of action in domestic courts. The resolution of the U.N. Economic and Social Council ("ECOSOC") approving them merely "[d]raws the attention of governments to [them] and

---

12(...continued)
Human Rights and [ICCPR] do not impose obligations on the United States because neither is self-executing").

13 Subparagraph (b) creates a separate exception that expressly permits the imposition of "hard labour" as a punishment for a crime.

14 In addition to Article 8 of the ICCPR, plaintiffs cite Articles 7 and 10. Article 7 simply provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." Article 10 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human being" and also addresses segregation of convicted from unconvicted persons and of juveniles from adults. Plainly, neither of these articles are relevant to the issues raised in the Complaint.

recommends . . . [t]hat favourable consideration be given to their adoption and application." E.S.C. Res. 663 C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) (emphasis in original).[15] While United States courts have occasionally looked to the Standard Minimum Rules as indicia of exemplary practices in correctional institutions, they have never treated those Rules as legally binding or actionable. See, e.g., Estelle v. Gamble, 429 U.S. 97, 103-04 n.8 (1976) (including the Standard Minimum Rules as one item in a laundry list of "[m]odel correctional legislation and proposed minimum standards" (emphasis added) supporting the proposition that failure to provide medical care to prisoners violated "contemporary standards of decency" relevant to Eighth Amendment analysis).

In any event, the compensation practices challenged herein are in no way inconsistent with Standard Minimum Rules, which merely require "a system of equitable remuneration of the work of prisoners." Standard Minimum Rule 76(1). As discussed above, there is highly developed and fair system in place that provides equitable remuneration of the work of prisoners, even going so far as to provide, among other things, vacation pay, holiday pay, longevity pay, and incentive awards.[16] See supra at pp. 2-5. Thus, even if a claim for a violation of the Standard Minimum Rules could theoretically be pursued in federal court, which it cannot, it would avail plaintiffs nothing in this case.

C. Sherman Act Claims

Plaintiffs' third and final claim is under the Sherman Act, 15 U.S.C. §§ 1, 2. These

---

15 See also Working Paper Prepared by the Secretariat, United Nations, The Standard Minimum Rules for the Treatment of Prisoners In the Light of Recent Developments in the Correctional Field, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.43/3, at 13 (1970) (noting that "acceptance by the United Nations and approval by the Economic and Social Council . . . are still not sufficient to invest the Standard Minimum Rules with the force of international law" and that "[a]s guidelines, the Rules depend for their effect upon their adoption by local, that is national or municipal, law"); Note, Standard Minimum Rules for the Treatment of Prisoners, 2 N.Y.U. J. Int'l L. & Pol. 314, 325 (1969) ("The Rules are not binding upon nations. Their implementation is an act of administrative generosity." (internal quotation marks omitted)).

16 "Equitable remuneration," of course, does not mean that prisoners have to be paid above the minimum wage or at levels prevailing in the outside economy.

claims must be dismissed for three reasons. First, the United States and its agencies and officials are not subject to antitrust liability under the Sherman Act. Second, the allegations in the complaint would not make out a viable Sherman Act claim even against private defendants subject to the antitrust laws. Third, application of the Sherman Act here is precluded because the Federal Prison Industries program is specifically established by a federal statute that authorizes the conduct challenged, and application of the general antitrust laws was not contemplated by Congress and would conflict with this separate statutory regime.

First, the United States government and its agencies and officials are simply not subject to liability under the antitrust laws. See United States Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 744-45, 748 (2004) (holding that "the United States is not an antitrust 'person,' in particular not a person who can be an antitrust defendant"; and that the Postal Service, being "part of the Government of the United States," is "not controlled by the antitrust laws" and could not be liable for an antitrust claim for allegedly suppressing competition in mail sack production); Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 246 (D.C. Cir. 1981) (Ruth Bader Ginsburg, J.) (holding that "the United States, its agencies and officials, remain outside the reach of the Sherman Act" and therefore Alaska Railroad, an entity wholly owned and operated by the United States, could not be sued for money damages and injunctive relief under the Sherman Act), cert. denied, 455 U.S. 919 (1982). Indeed, the Ninth Circuit foreshadowed the Supreme Court's holding in Flamingo Industries almost twenty years earlier, calling the argument that the federal Bonneville Power Administration's inter-tie access policy violated the antitrust laws by displacing competition "frivolous" because "the antitrust laws do not apply to the federal government." Dep't of Water & Power of City of Los Angeles v. Bonneville Power Adm'n, 759 F.2d 684, 693 n.12 (9th Cir. 1985); see also Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288-89 (9th Cir. 1985) (holding that government of Guam was not subject to the antitrust laws because it "is an instrumentality of the federal government over which the federal government exercises plenary control"), cert. denied, 475 U.S. 1081 (1986). On this ground alone, the antitrust claims must be dismissed for failure to state a claim.

Moreover, even if the allegations in the complaint were made against private-sector

defendants, they would fail to state a claim under the Sherman Act. See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965-66 (2007) (holding that claim under Sherman Act must contain sufficiently specific facts to establish plausible entitlement to relief, and "bare assertion of conspiracy" does not suffice). Charitably construed, the gist of the allegations at paragraphs 26-32 of the complaint is that, by paying inmates at low rates to produce commodities for internal consumption within the prison system, defendants are able to produce those commodities so inexpensively that it is infeasible for outside, private vendors to compete to sell the same commodities to the prisons. Nothing in these allegations describes any conduct that would violate any antitrust law if performed by a private party. A claim under § 1 of the Sherman Act, 15 U.S.C. § 1, requires a conspiracy or agreement, and plaintiffs allege no conspiracy or agreement other than one among the defendants, who are all officials of the Bureau of Prisons. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984) (holding that Section 1 requires an agreement between two or more independent economic actors, and does not reach unilateral conduct). Sherman Act § 2, 15 U.S.C. § 2, reaches the unilateral conduct of monopolization or attempted monopolization, that is, "the willful acquisition or maintenance of [monopoly] power" through "anticompetitive conduct." Verizon Commn's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis in original). But the mere act of producing needed commodities internally, rather than procuring them at higher cost from an outside vendor, is hardly "anticompetitive conduct" constituting illegal monopolization, even if done by a party who, unlike the United States and its officers, is actually subject to the Sherman Act.[17]

---

17 To the extent that defendants might be deemed to have a "monopoly" over federal prisoners' labor, that monopoly is a necessary incident of the fact that they are incarcerated and therefore "do not have the right freely to sell their labor" to any employer, Hale, 993 F.2d at 1394. Similarly, to the extent Federal Prison Industries might be considered as having a "monopoly" over sales of commodities to federal prisons for internal consumption, that control is directly established by statute, see 18 U.S.C. § 4122(a) ("Federal Prison Industries shall determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions . . . ."). Neither of these "monopolies" are any concern of the antitrust laws.

Finally, when regulatory statutes do not explicitly state whether they preclude application of the antitrust laws, courts must "determine whether, and in what respects, they implicitly preclude application of the antitrust laws." CreditSuisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383, 2389 (2007). Application of the antitrust laws is implicitly precluded "'only if necessary to make [the other statute] work,'" and "'only to the minimum extent necessary.'" Id. at 2390 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)). Here, such preclusion would be necessary to make the Federal Prison Industries statute work because that statute itself directly authorizes the conduct challenged by plaintiffs' antitrust claims. See CreditSuisse, 127 S. Ct. at 2390; cf. Emory, 2 Cl. Ct. at 580 ("[E]ven if the general language in the Fair Labor Standards Act of 1938 might otherwise be construed as covering federal prisoners, the specific language on the employment of federal prisoners found in 18 U.S.C. §§ 4121-4128 would preclude application to them of the general language found in the Fair Labor Standards Act of 1938."). The Federal Prison Industries enabling statute vests in that entity the responsibility to "determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions" and to "provide employment for the greatest number of those inmates in the United States penal and correctional institutions who are eligible to work as is reasonably possible." 18 U.S.C. § 4122(a), (b); see supra pp. 2-5 (describing statutory and regulatory scheme, including exclusive authority to establish pay rates). This grant of authority plainly does not contemplate a competitive marketplace within prison industries, either in the market for the labor of prisoners, or in the market for the purchase and sale of the goods and services they produce for internal consumption. Thus, plaintiffs' antitrust claims fail as a matter of law on this ground as well.

CONCLUSION

For the foregoing reasons, this Court should grant the Moving Defendants' motion to dismiss. Plaintiffs' claims for damages against the Moving Defendants in their official capacities, and the claims of plaintiffs Serra and Cordero for equitable relief, should be dismissed for lack of subject matter jurisdiction. With respect to plaintiffs' international-law claims against

defendant McFadden, the United States should be substituted as defendant and those claims should then be dismissed for lack of subject matter jurisdiction due to plaintiffs' failure to exhaust administrative remedies. All other claims against the Moving Defendants should be dismissed for failure to state a claim upon which relief may be granted.

Dated: October 15, 2007

Respectfully Submitted,

PETER D. KEISLER
Assistant Attorney General

SCOTT N. SCHOOLS
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director

/s/ Robert J. Katerberg
ROBERT J. KATERBERG (D.C. Bar No. 466325)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20530
(202) 616-8298 (telephone)
(202) 616-8460 (fax)

Attorneys for Defendants
Harley Lappin and Robert E. McFadden