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Robin F. Baker
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Immigration and Customs Enforcement
880 Front Street, Suite 2232
San Diego, CA 92101
(619) 557-6343

Re: Abusive Shackling of Immigration Detainees at the San Diego Correctional Facility

Dear Mr. Struck, Ms. Love and Field Office Director Baker:

We write to you about a serious problem that we have observed over the past several years at the San Diego Correctional Facility (SDCF), in the hope that the problem might be fixed without additional litigation. The problem is that the Corrections Corporation of America (CCA) applies restraints to immigration detainees in the segregation unit at SDCF in an abusive manner that causes needless pain, injury and suffering. This violates Immigration and Customs Enforcement detention standards as well as state and federal law. Detainees have made numerous complaints to CCA and ICE regarding their restraints-related injuries. Yet they continue to be restrained in the same abusive manner. There is simply no justification for the ongoing harm being done to these individuals, many of whom are in segregation for their own protection. Failure to cure the unlawful practices identified in this letter may lead to class action litigation resulting in liability to CCA and its employees for compensatory and/or punitive damages, injunctive relief, and/or attorneys' fees.

I. Examples of Unnecessarily Injurious Shackling at SDCF

We have observed a variety of injuries caused by CCA's application of restraints against segregated detainees. CCA's use of hard handcuffs and leg irons routinely restricts circulation, causes intense pain, and eventually leads to bruising, bleeding and permanent scarring. In addition, there have been instances of excessive use of force while applying or removing restraints, with resulting injury to detainees' appendages.

Detainees in the segregation unit, including those in administrative segregation who are there for their own protection or for non-violent rule-breaking, are restrained with hard handcuffs and leg irons whenever they are moved around the facility. In several known cases, the leg irons chewed through the soft tissue of detainees' ankles, causing nearly constant bleeding. Some segregated detainees stopped using their recreation time because even wearing two pairs of socks failed to alleviate the pain and injury caused by the leg irons. The injurious application of leg irons to these detainees continued long after they began to complain informally and formally of their pain and injuries. CCA's use of leg irons has left lasting scars on the ankles of several detainees.

CCA employees have also used excessive force while applying or removing restraints, resulting in pain to detainees' wrists and lasting injuries. Some instances of excessive force violated known medical orders that particular detainees not be restrained in a way that would aggravate their pre-existing medical conditions.

II. The Application of Restraints at SDCF Violates the ICE Detention Standard on Use of Force and Restraints

As an initial matter, the policy and practice of applying restraints to the entire segregated population at SDCF violates the ICE Detention Standard on the Use of Force or Restraints (Detention Standard), available at http://www.ice.gov/doclib/PBNDS/pdf/use_of_force_and_restraints.pdf.[1] The Detention Standard allows detainees to be placed in physical restraints *only* in response to specific instances where such restraints become necessary, such as to prevent escape during inter-facility transfer or as part of the use of force to prevent injury or property damage. *See* Detention Standard at 1 ("Instruments of restraint shall be used only as a precaution against escape during transfer; for medical reasons, when directed of the medical officer [sic]; or to prevent self-injury, injury to others, or property damage. Restraints should be applied for the least amount of time necessary to achieve the desired behavioral objectives."); *id.* ("Staff may immediately use restraints, if warranted, to prevent a detainee from harming self or others or from causing serious property damage").

Restraints fall within the spectrum of physical force that may be used to control a detainee where strictly necessary. *Id* ("Use of force may involve physical control and placement

[1] The ICE detention standard on restraints applies to contract detention facilities such as SDCF. Detention Standard at 1.

of a detainee in secure housing and/or the application of various types and degrees of restraint devices."). That being the case, the detention standard clearly prohibits the use of force generally and without provocation against a detained population, such as those in segregation at SDCF. *Id.* at 2-3 ("Use of force in detention facilities is never used as a punishment, is minimized by staff attempts to first gain a detainee's cooperation, is executed only through approved techniques and devices, and involves only the degree necessary and reasonable to gain control of a detainee."). Restraints are an exceptional measure where their use must be documented under special procedures. *Id.* at 12 ("Once a detainee has been placed in ambulatory restraints, the shift supervisor is required to conduct a physical check of the detainee once every two hours to determine if the detainee has stopped the behavior which required the restraints and thus restraints are no longer necessary. Once a positive behavior change has been achieved, a decision to remove the restraints or place the detainee in less restrictive restraints shall be made. If this has not been achieved, the shift supervisor shall document the reason for continuance of the ambulatory restraints."); *id.* at 3 ("Facility administrator approval is required for continued use of restraints, if they are considered necessary, after a detainee is under control."); *id.* at 14 ("Staff shall [] document the use of restraints on a detainee who becomes violent or displays signs of imminent violence.").

The manner in which detainees are restrained likewise violates the Detention Standard. SDCF uses hard metal restraints as a matter of course. But the Detention Standard requires that soft restraints be used first. *Id.* at 4. Such soft restraints may be made of nylon or leather with soft arm and leg cuffs. *Id.* at 12. Hard restraints (such as steel handcuffs or leg irons) may only be used when the soft restraints have proven ineffective. *Id.* at 4. Unnecessarily tight restraints are prohibited. *Id.* at 3-4.

Further, no restraint should be applied without first determining if medical issues require specific precautions. *Id.* at 4 ("Calculated use of force requires supervisor pre-authorization and consultation with medical staff to determine if the detainee has medical issues requiring specific precautions."). Failure to follow this rule can result in detainees being subjected to unnecessary pain and suffering.

III. The Application of Restraints at SDCF is Tortious Under California Law

CCA employees are liable for battery, assault, negligence and intentional infliction of emotional distress under California tort law because of the injurious way they apply restraints to detainees. CCA is vicariously if not directly liable for the acts of its employees.

CCA employees have committed and continue to commit battery by applying restraints in a way that injures detainees. A battery is any intentional, unlawful and harmful contact by one person with the person of another. *Piedra v. Dugan*, 123 Cal. App. 4th 1483, 1495 (2004). Whether or not an officer at SDCF intends to injure a detainee is immaterial. The only intent required is intent to cause the unlawful, harmful contact – in this case the intent to apply the shackles. *Ashcraft v. King*, 228 Cal. App. 3d 604, 611 (1991). That contact is "unlawful" if unreasonable force was used. *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-73 (1998). This standard tracks Fourth Amendment excessive force doctrine, where the Ninth Circuit has

repeatedly determined that the application of overly-tight restraints constitutes constitutionally excessive force. *Wall v. County of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004); *LaLonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989). Segregated detainees at SDCF have accordingly been subjected to unreasonable force. More force than necessary was used to restrain them. Accordingly, the "unlawful" element of battery is met. The "harmful contact" element is met by the fact that the application of restraints has caused detainees at SDCF harm, including pain and injury.

CCA employees likewise have committed and continue to commit assault. Assault is an act committed with unlawful intent by one person to inflict immediate injury on another person who is thereby put in fear of personal harm. *Lowry v. Standard Oil of Cal.*, 63 Cal. App. 2d 1, 6-7 (1944). The "intent" element of assault is met by a willful disregard of an individual's rights. Intent to cause actual injury is not necessary. *Lopez v. Surchia*, 112 Cal. App. 2d 314 (1952); *Singer v. Marx*, 144 Cal. App. 2d 637 (1956). While there is no question that such willful disregard is exhibited in the way detainees at SDCF are shackled, the intent element of assault is also met when there is a completed battery. *Fraguglia v. Sala*, 17 Cal. App. 2d (1936); *McChristian v. Popkin*, 75 Cal. App. 2d 249 (1946). As discussed above, the manner in which detainees at SDCF are restrained constitutes a completed battery. Detainees at SDCF have a demonstrated fear of the harm to which they are subjected by way of injurious restraints. *Kisesky v. Carpenters' Trust for S. Cal.*, 144 Cal. App. 3d 222, 232 (1983) ("The tort of assault is compete when the anticipation of harm occurs.").

CCA employees have also exhibited and continue to exhibit negligence and possibly gross negligence by their manner of causing ongoing restraint-related injury. Prison officials are held to a heightened duty of care that requires them to protect a prisoner from foreseeable harm. *Giraldo v. California Dep't of Corrections and Rehabilitation*, 168 Cal. App. 4th 231 (2008). This affirmative duty arises from the fact that the state "has taken a person into its custody and has deprived the individual of the ability to care for himself." *Zelig v. County of Los Angeles*, 27 Cal. 4th 1112, 1148 (2002). As the Ninth Circuit has admonished CCA: "[T]he greatest care must be observed in not treating the innocent like a dangerous criminal. Is there any warrant for shackling the feet and binding the chest of an innocent detainee?" *Agyemen v. Corrections Corp. of America*, 390 F.3d 1101, 1104 (9th Cir. 2004). The heightened duty of care applicable to CCA employees makes the fact that those very same personnel staff personally and directly caused the harm all the more egregious.

CCA employees clearly breached their heightened duty of care towards the detainees in their custody by subjecting them to needlessly harmful methods of restraint. The fact that the methods of shackling used at SDCF violate the Detention Standard is evidence of a breach of the duty of care. *Lutgu v. California Highway Patrol*, 26 Cal. 4th 703, 720 (2001). So too is the fact that those methods of shackling violate applicable rules on restraints that California agencies must follow. 15 Cal. Code Regs. § 3268.2. Further, the injuries sustained by the detainees were and continue to be – especially in light of detainee complaints – foreseeable, which is further evidence that SDCF personnel breached their duty of care. It is clear that such breach was and continues to be the direct and proximate cause of the detainees' various injuries.

Finally, CCA employees have intentionally inflicted emotional distress on the affected detainees and continue to do so. Intentional infliction of emotional distress requires extreme and outrageous conduct intended to cause emotional distress, where the victim actually suffers severe emotional distress and the perpetrator's conduct was a substantial factor in causing that distress. *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991). CCA employees behave outrageously by abusing their position of power to harm the detainees. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155 (1987). Their intent to cause emotional distress – or, at the very least, their reckless disregard – can be inferred from the continued practice of injurious shackling despite numerous formal and informal complaints. *KOVR-TV v. Superior Court*, 31 Cal. App. 4th 1023, 1031 (1995) (intent element sufficiently shown by defendant's devotion of little or no thought to the probable consequences of his conduct). Detainees at SDCF have clearly suffered severe emotional distress because they have felt fear, anger and anxiety regarding the pain and injury that comes with shackling. *Fletcher v. Western Nat. Life Ins. Co.*, 10 Cal. App. 3d 376, 397 (1970) (severe emotional distress "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry").

Liability for these torts would run upstream to CCA as an entity and to local and national CCA managers. CCA would be vicariously liable for any of its employees' restraints-related torts – even if they are willful, malicious or criminal – because the tortious act of using restraints in a harmful way is inherent in the working environment of a detention center, typical of CCA's business of detaining individuals, and generally foreseeable. *Yamaguchi v. Harnsmut*, 106 Cal. App. 4th 472, 481-82 (2003). Local and national CCA managers could also be directly liable if they ordered, ratified, or condoned the injurious restraint practices. Cal. Civ. Code § 2339. CCA and its managers may also be held directly liable for negligent hiring, retention, or supervision of CCA employees. Direct liability seems likely given that CCA managers were put on notice of the restraints-related harm by the complaints filed by affected detainees. *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377, 395 (2000).

A lawsuit for abusive shackling of detainees might well qualify as a class action, for damages and/or injunctive relief.

Finally, CCA should consider the exposure to punitive damages for itself or its employees under Civil Code § 3294 and attorney fees and expenses under Code Civ. Proc. § 1021.5 and any other applicable law.

IV. The Application of Restraints at SDCF Violates the United States Constitution

While the Supreme Court foreclosed *Bivens* actions for damages against private entities such as CCA, it expressly left the door open to equitable relief against private entities that act under federal law to violate the United States Constitution. *Corrections Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *Agyeman*, 390 F.3d at 1103. CCA's unreasonable application

of restraints in a manner that unnecessarily causes detainees pain violates the federal constitution, providing independent grounds for an action to obtain equitable relief.

Civil detainees, such as the detainees at SDCF, have a substantive due process right to be free from unreasonable bodily restraints. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). They "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-22. "The use of bodily restraints constitutes punishment in the constitutional sense if their use is not rationally related to a legitimate non-punitive government purpose or they appear excessive in relation to the purpose they serve." *May v. Sheahan*, 226 F.3d 876, 884 (7th Cir. 2000); *see also Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (citing the "excessive in relation to the alternative [non-punitive] purpose" standard to determine whether restrictions under confinement violate substantive due process). The application of restraints in a manner that unnecessarily causes pain and injury is certainly excessive in relation to whatever purpose shackling might generally serve.

The detainees at SDCF also have a Fourth Amendment right to be free from unreasonable and excessive use of force. *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (Fourth Amendment sets the applicable constitutional limitations for force used during pretrial detention). "The 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). It is clearly objectively unreasonable to apply restraints in a manner that causes unnecessary pain and injury. *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1209 (10th Cir. 2008) ("[T]he right to be free from unduly tight handcuffing was 'clearly established' – as were the contours of the right."); *Wall*, 364 F.3d at 1112; *LaLonde*, 204 F.3d at 960; *Palmer*, 9 F.3d at 1436; *Hansen*, 885 F.2d at 645.

V. Requested CCA and ICE Action

The foregoing is not a complete recitation of the facts or law in this matter. All claims, rights and remedies are fully and expressly reserved.

The ACLU Foundation of San Diego & Imperial Counties requests that CCA and ICE take the following actions to ensure that detainees at SDCF are no longer subjected to needless pain and injury:

- Consistent with the ICE Detention Standard, eliminate the blanket policy of shackling all detainees in segregation. Instead shackle an individual only when there is a particular reason to do so, such as when there is a particularized finding that an individual is dangerous or when restraints may reasonably be applied to control a suddenly violent individual.

- Consistent with the ICE Detention Standard, if restraints must be applied, use soft restraints rather than mechanical restraints such as hard handcuffs and leg irons, until or unless soft restraints prove ineffective.

- Conduct periodic trainings for CCA staff at SDCF on humane methods of restraint that avoid causing pain and injury.

- Answer complaints regarding shackling and use of restraints filed by SDCF detainees in a timely manner and discipline CCA staff members who unreasonably injure detainees.

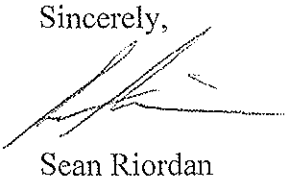
- Conduct a high-level ICE review – at the field office director level or higher – of complaints regarding use of restraints filed by SDCF detainees over the past five years in order to determine if other corrective action is warranted.

- Produce for the ACLU of San Diego & Imperial Counties any formal or informal written CCA or ICE policy that is used, applied or in force at SDCF and concerns the use of restraints in any way.

Should CCA and ICE take these steps, the ACLU Foundation of San Diego & Imperial Counties is optimistic that further action to protect the civil detainees at SDCF against the abusive application of restraints will be unnecessary. However, the ACLU Foundation of San Diego & Imperial Counties reserves the right to sue to enforce the rights of detainees at SDCF who are harmed by the application of restraints.

Please feel free to contact me at (619) 232-2121 ext. 30 if you have any questions.

Sincerely,



Sean Riordan
Staff Attorney