IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Joleen K. Youngers,
as the Personal Representative of the
Wrongful Death Estate of Roxsana
Hernandez,

Plaintiff,

Civil Action No. 20-cv-00465-JAP-JHR

v.

Management & Training Corporation,
LaSalle Corrections Transport LLC,
LaSalle Corrections West LLC,
LaSalle Management Company LLC,
Global Precision Systems LLC,
TransCor America LLC, and
CoreCivic, Inc.,

Defendants.

MOTION FOR RECONSIDERATION OF APRIL 19, 2021 COURT ORDER AND FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND TO JOIN DEFENDANT UNITED STATES TO ACTION

Plaintiff Joleen K. Youngers ("Plaintiff"), by and through her counsel of record, respectfully requests this Court to: (1) reconsider its order entered on April 19, 2021 (Doc. 59, the "Order") dismissing certain claims with prejudice and, instead, dismiss those claims *without* prejudice; (2) grant Plaintiff leave to file a Second Amended Complaint ("SAC") pursuant to Federal Rules of Civil Procedure 15(a) and 21; and (3) permit Plaintiff to add the United States as a Defendant to this action. In support of this Motion for Reconsideration and for Leave to File Second Amended Complaint (the "Motion"), Plaintiff states as follows:

RELEVANT PROCEDURAL HISTORY

On May 13, 2020, Plaintiff filed a complaint in this action ("Original Complaint") asserting various claims related to the in-custody death of Roxsana Hernandez ("Roxsana"), a 33-year-old

transgender woman who was detained by the United States after she presented herself for asylum at the San Ysidro Port-of-Entry on May 9, 2018. The Original Complaint asserted various claims against Defendants TransCor America, LLC ("TransCor"), CoreCivic, Inc. ("CoreCivic," and together with TransCor, the "NM Defendants"), Management & Training Corporation ("MTC"), LaSalle Corrections West, LLC ("LaSalle West"), LaSalle Corrections Transport, LLC ("LaSalle Transport"), LaSalle Management Company, LLC ("LaSalle Management," and collectively with LaSalle Transport and LaSalle West, "LaSalle"), and Global Precision Systems, LLC ("GPS") (collectively, the "Contractor Defendants"). All Contractor Defendants are private contractors hired by the United States of America ("U.S.") as part of its federal Streamlined Transfer Process ("STP") which detains and transports, among others, asylum seekers.

On August 13, 2020, Plaintiff filed a First Amended Complaint ("FAC") as a matter of right, pursuant to Fed. R. Civ. P. 15(a). (*See* Doc. 9). On October 23, 2020, the NM Defendants filed a Motion For Partial Dismissal (Doc. 32) ("Defendants' Motion") seeking to dismiss several counts of the FAC pursuant to Fed. R. Civ. P. 12(b)(6), including: Count I (Section 504 of the Rehabilitation Act), Count II (negligence per se), Count XIV (negligent hiring, retention, training, and supervision against TransCor), and Count XVI (negligent hiring, retention, training, and supervision against CoreCivic). On December 7, 2020, Plaintiff filed an Opposition to the Defendants' Motion ("Opposition to Motion"). (Doc. 48). On January 22, 2021, the NM Defendants filed a reply in further support of Defendants' Motion (the "Reply"). (Doc. 53).

On April 19, 2021, this Court entered judgment granting in part the Defendants' Motion, dismissing with prejudice FAC Count I (Section 504 of the Rehabilitation Act claim as asserted against the NM Defendants), Count II (negligence per se as asserted against the NM Defendants), and Count XVI (negligent hiring, retention, training, and supervision as asserted against Defendant

CoreCivic). (*See* Order at 22-23). With respect to FAC Count XIV as asserted against Defendant TransCor, the Court dismissed Plaintiff's negligent hiring and retention claims with prejudice, but denied dismissal of Plaintiff's negligent training and supervision claims as asserted against TransCor. (Order at 23). As to the counts of the FAC dismissed with prejudice, the Court dismissed these claims with prejudice based on Plaintiff's failure to include a specific request in the Opposition to Motion for leave to amend the FAC should Defendants' Motion be granted. (Order at 11).

Plaintiff's Motion seeks to remedy certain deficiencies outlined in the Court's Order. The proposed SAC, which is annexed as **Attachment A** hereto, seeks to address and cure the pleading concerns raised in the Order regarding Counts I and XVI. Plaintiff does not seek reconsideration of the Court's dismissal of Count II (negligence per se) or the partial dismissal of Count XIV (dismissing the negligent retention and hiring claims against TransCor, but allowing the negligent training and supervision claims to proceed).

Plaintiff also seeks leave to amend to add an additional Defendant to the SAC—the U.S. The U.S. contracted with all Contractor Defendants for secure custody and transportation of Roxsana as part of the U.S.'s STP program to facilitate Roxsana's access to the USCIS fear-based interview program and EOIR adjudicative program that she was legally entitled to. The U.S. was not previously named as a party to this action as the statute of limitations applicable to the claims against the Contractor Defendants would have expired before Plaintiff would have been able to exhaust the administrative remedies required for her Federal Tort Claims Act ("FTCA") claims to proceed against the U.S. The proposed SAC seeks to assert the following claims against the U.S. via the FTCA for the wrongful death of Roxsana: Negligence, False Imprisonment, Intentional Infliction of Emotional Distress, Negligent Hiring, Retention, Training, and Supervision, and state

law claims under the California Constitution, Art. 1, § 1, the California Civil Rights Acts, Cal. Civil Code §43, Cal. Civil Code §51 (the Unruh Civil Rights Act), Cal. Civil Code § 52.1 (the Bane Civil Rights Act), and Cal. Gov. Code Section 845.6.

ARGUMENT

I. PLAINTIFF'S MOTION FOR RECONSIDERATION SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE

A. STANDARD OF REVIEW FOR A MOTION FOR RECONSIDERATION

A court order resolving fewer than all of the claims against all of the parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). The Tenth Circuit has held that trial courts have discretion to reconsider interlocutory orders and are not bound by the stricter standards found in Fed. R. Civ. P. 59(e) or 60(b). *Trujillo v. Bd. of Educ. of Albuquerque Public Schools*, 212 F. App'x 760 (10th Cir. 2007); *see also Trujillo v. Bd. of Educ. of the Albuquerque Public Schools*, 470 F. Supp. 2d 1270, 1275 (D.N.M. 2005), *aff'd and remanded on other grounds*, 212 F. App'x 760 (10th Cir. 2007).

B. THE ORDER SHOULD BE RECONSIDERED SO THAT COUNTS I AND XVI ARE DISMISSED WITHOUT PREJUDICE AND MAY BE RE-PLED

Plaintiff's Motion seeks reconsideration of the Court's dismissal of Counts I and XVI (as to negligent supervision and training only against CoreCivic) with prejudice to instead be dismissed *without* prejudice. The Court dismissed Count I and Count XVI with prejudice solely based on Plaintiff's failure to request leave to amend in Plaintiff's Opposition Motion in the event that Defendants' Motion was granted. (Order at 11). The Court did not reach the issue of whether these claims could be cured by amendment of Plaintiff's FAC. Weighing the gravity of the dismissal of Plaintiff's claims with the prejudice caused by Plaintiff's inadvertent failure to plead the right to amend, Plaintiff respectfully submits that reconsideration is warranted here. Plaintiff's

failure to seek leave to amend in the event that the Court granted Defendants' Motion was inadvertent, not substantive in nature, and did not pertain to the merits of the case. Additionally, Plaintiff has collected additional facts to support Count I and Count XVI (only as it relates to negligent training and supervision by CoreCivic), which are further detailed *infra,* in Section II.B.2. Plaintiff believes these additional facts cure the deficiencies noted by this Court in its Order as related to these Counts. *See Forman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a [party] may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006) (Rule 15 was promulgated to provide "the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.") (citation omitted). For the foregoing reasons, Plaintiff respectfully requests that this Court reconsider its Order and dismiss Count I and Count XVI (only as it relates to negligent training and supervision of CoreCivic) *without* prejudice so that Plaintiff may re-plead those counts in an effort to cure the deficiencies noted in the Order.

II. PLAINTIFF'S MOTION TO AMEND SHOULD BE GRANTED AS AMENDMENT IS NOT FUTILE AND DOES NOT PREJUDICE THE DEFENDANTS

A. STANDARD OF REVIEW FOR MOTION TO AMEND

Federal Rule of Civil Procedure 15(a) instructs a court to "freely give leave when justice so requires." Fed. R. Civ. P. 15(a). "[D]istrict courts may withhold leave to amend only for reasons such as 'undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment.'" *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 588 F.3d 1161, 1166 (10th Cir. 2009); *see also Gray v. Geo Grp., Inc.*, 727 F. App'x 940, 948 (10th Cir. 2018). When a claim is dismissed under Fed. R. Civ. P. 12(b)(6), the court should grant leave to amend freely "if it appears at all possible that the

plaintiff can correct the defect." *Triplett v. LeFlore County, Okla.*, 712 F.2d 444, 446 (10th Cir. 1983) (citation omitted).

As to the addition of the U.S. as a defendant, Federal Rule of Civil Procedure 21 provides, in relevant part, that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. "A motion to add a party is governed by Fed. R. Civ. P. 15(a)." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) ("To the extent that Plaintiff's motion to supplement sought the addition of a party, it is controlled by Rule 15(a) because it is actually a motion to amend."); *Vincoy by & through Vincoy v. U.S.*, No. CIV 97-0296 JC/RLP, 1998 WL 36030929, at *1 (D.N.M. Jan. 8, 1998) (applying Rule 15(a) standard "[b]ecause there has not been a showing of undue delay, bad faith, dilatory motive, undue prejudice or futility of amendment" and thus Plaintiff is entitled to amend the complaint to add a new party defendant); *see also Hayes v. SmithKline Beecham Corp.*, 2008 WL 5003567, at *2 (N.D. Okla. Nov. 20, 2008) (applying the undue delay, bad faith, futility, and undue prejudice factors to a motion to amend to add a party).

B. GRANTING LEAVE TO AMEND COUNT I AND COUNT XVI IS NOT FUTILE

Plaintiff's Motion to Amend the FAC should be granted, as the proposed amendment of Count I and Count XVI (only as related to negligent training and supervision by CoreCivic) is not futile. Plaintiff has collected additional facts that Plaintiff believes will cure the pleading deficiencies identified by this Court in its prior Order.

The proposed SAC alleges the following additional facts in support of Counts I and XVI to render those claims sufficiently pled pursuant to the standards articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A court is empowered to reconsider its prior rulings when new facts are available. *See Trujillo*, 212 F. App'x at 766 (finding that the District Court's reconsideration of its prior grant of summary judgment

was not an abuse of discretion because it was based on additional facts and therefore the law of the case doctrine was inapplicable); *see also Major v. Benton*, 647 F.2d 110, 111-12 (10th Cir. 1981).

1. Count I – Section 504 of the Rehabilitation Act

This Court's Order held that Plaintiff failed to assert a plausible Rehabilitation Act claim against the NM Defendants because the allegations in the complaint "do not establish that it was plausible that the NM Defendants received a subsidy to transport and house Hernandez." (Order at 6). Plaintiff seeks leave to amend to add additional facts and an alternative legal basis in the SAC that support finding that all Contractor Defendants, including the NM Defendants, both carried out federally conducted activities and also received federal financial assistance in the form of a subsidy from the federal government, all of which support invocation of the protections afforded by Section 504 of the Rehabilitation Act.[1] *See, e.g.*, SAC at ¶¶ 27, 31, 37, 39, 43, 47, 51, 55-65, 67, 114, 124, 132, 157, 166, 202, 230, 232-247.

First, the SAC further alleges that Contractor Defendants received federal subsidies for participating in the STP program and were responsible for administering a federal program of which the detention and transportation of Roxsana was a part, thus not relying on their receipt of federal funds under their contracts for services with the U.S. *See, e.g.*, *id.* Further, ICE makes clear its intent to subsidize the Contractor Defendants by way of its waiver program, which permits

[1] Section 504 of the Rehabilitation Act protects people with disabilities from discrimination in (1) federally assisted or (2) federally conducted programs: "No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ***or under any program or activity conducted by any Executive agency*** . . . ." 29 U.S.C. § 794 (emphasis added). In order to determine the applicability of Section 504 within the Tenth Circuit, courts principally look at "the government's intention" to provide a subsidy. *See DeVargas v. Mason & Hangar-Silas Mason Co*, 911 F2d 1377 (10th 1990).

its contractors to seek waivers of compliance with the PBNDS and other applicable standards, and also from the terms of their contracts with ICE which incorporate those standards. *See* SAC ¶ 236.[2] ICE frequently grants such waivers when compliance with standards would cause its private contractors to incur costs which in turn diminish their profits.[3] Thus, the U.S.'s waiver program evidences ICE's intent to subsidize its contractors within the meaning of Section 504—it allows U.S. contractors to waive requirements with ICE standards and contract terms where compliance would be, among other things, too costly for the contractors, thereby resulting in a subsidy to those contractors, including to the Contractor Defendants, and provides a back door for providing federal financial assistance beyond ICE's procurement contracts. SAC ¶ 236.[4]

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[2] *See* OIG, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, at 9-10 (Jan. 29, 2018), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf (finding that ICE's waiver program permits its contractors to indefinitely fail to comply with the PBNDS and other applicable standards as required by law and their contracts, including those applicable to healthcare and safety, noting that within the two-year period reviewed by OIG, ICE granted 96 percent of requested waivers and, out of 65 requests, only three had set expiration dates) (last visited May 6, 2021); *see also* OIG, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, p. 11-14 (Jun. 26, 2018), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf (reporting ICE's grant of waivers to its contractors leads to contractors' chronic lack of compliance with mandatory standards as required by their contracts and insufficient corrective measures) (last visited May 6, 2021).

[3] *See, e.g.,* National Immigrant Justice Center, *The Dark Money Trail Behind Private Detention: Immigration Centers of America-Farmville* (Oct. 2019), *available at* https://immigrantjustice.org/research-items/policy-brief-dark-money-trail-behind-private-detention-immigration-centers-america (last visited May 6, 2021) (reporting that, since 2013, an ICE contractor has been granted a waiver of the PBNDS requirement that detention facilities provide, at a minimum, one toilet for every 12 male detainees or one for every 8 female detainees where compliance would require the expenditure of $400,000 and 30 days to complete).

[4] ICE has granted such waivers to at least CoreCivic, LaSalle, and GPS, waiving their compliance with ICE standards in effect during May 2018 at Cibola, San Luis Regional Detention Center, and El Paso Service Processing Center ("SPC"), respectively, when Roxsana was in the care and custody of these Contractor Defendants. *See ERO Custody Management Division Inspection Waiver Master File*, U.S. Immigration and Customs Enforcement Facility Inspections (2019), https://www.ice.gov/doclib/facilityInspections/2019waivers.xlsx (last accessed May 11, 2021).

Second, the SAC alleges that the U.S. was directly involved in and intricately intertwined with the Contractor Defendants in conducting the federal STP of Roxsana to such an extent that the Contractor Defendants were sufficiently interconnected with the U.S. to be engaged in a federally conducted program or activity, which is an alternate basis for enforcement of Section 504 against them. *See, e.g.*, SAC at ¶¶ 27, 31, 37, 39, 43, 47, 51, 55-65, 67, 114, 124, 132, 157, 166, 202, 230, 232-247. The federal STP program in which the Contractor Defendants participated with ICE was a "program or activity conducted by any Executive agency" under the plain language of Section 504. 29 U.S.C. § 794.[5] The very nature of the STP program inextricably intertwined the Contractor Defendants with ICE in such a way that all were involved in carrying out this federally-conducted program to transport Roxsana from the California Port-of-Entry to Cibola. *See, e.g.*, SAC at ¶¶ 41, 60-64, 93-94, 96, 158, 234-236, 426-427. ICE employees were directly involved with Roxsana's STP, working alongside and with employees of the Contractor Defendants at various points of the journey. SAC at ¶¶ 41, 60-64, 96, 125, 133, 138, 158, 235-236. ICE ERO officers took custody of Roxsana at the airport in Mesa, Arizona and during the plane ride on May 15, 2018 to El Paso, Texas. SAC at ¶¶ 125, 133. Similarly, El Paso SPC is an ICE facility and Defendant GPS stopped at the ICE Criminal Alien Program ("CAP") facility in Albuquerque for a "meet and greet" to pick up additional people to be transported during the STP. SAC at ¶¶ 41,

(last visited May 11, 2021). Furthermore, GPS is a minority-owned business pursuant to 13 C.F.R. Part 124 *et. seq.*, which entitles GPS to various benefits, including federal financial assistance. *See* SAC ¶ 236; *see* GLOBAL PRECISION SYSTEMS, https://sites.beringstraits.com/gps/13 CFR §120.375 (last visited May 6, 2021). As such, these Defendants received federal financial assistance from ICE.

[5] *See* Margo Schlanger, *Narrowing The Remedial Gap: Damages For Disability Discrimination In Outsourced Federal Programs,* The University Of Chicago Law Review Online (2021) https://Lawreviewblog.Uchicago.Edu/2021/03/05/Schlanger-Detention/ (last visited May 6, 2021) (arguing that Section 504 provides an alternative and underutilized theory of liability against private contractors of the federal government under Section 504 by way of their participation in federally-conducted activity).

138, 154, 159, 235-236. Further, and notably, all the activities by the Contractor Defendants described in the SAC were completely regulated by federal policies, standards, and regulations. Thus, both the U.S. and the Contractor Defendants were inextricably involved in the STP of Roxsana, a federal program and/or activity. SAC at ¶¶ 41, 60-64, 96, 125, 133, 138, 158, 235-236. Given these facts, Section 504 applies to the conduct of the Contractor Defendants.

Finally, Plaintiff also seeks leave to amend to assert the additional facts that all Contractor Defendants not only discriminated against Roxsana in violation of Section 504 of the Rehabilitation Act based on Roxsana's known disability (positive HIV status), but also that Roxsana was discriminated against based upon Defendants' employees' perception of Roxsana as having a disability because she was transgender. *See, e.g.*, SAC at ¶¶ 7, 68, 102, 115, 125, 133, 158, 166, 202, 233-257. This issue was not addressed in the Court's Order. Pursuant to 42 U.S.C.S. § 12102(1)(c), the term "disability" (for purposes of the Rehabilitation Act) includes not only discrimination based upon a known disability, but also discrimination based on the perception (or misperception) of having a disability. *See id.* at ¶ 240. The SAC newly asserts that all Contractor Defendants perceived Roxsana as having a disability because she was transgender and/or on the basis of some other perceived disability related to her transgender status and discriminated against her on these bases. *See e.g.*, SAC at ¶¶ 7, 67, 70, 114, 124, 132, 157, 166, 202, 233-247. The SAC also restates a fact previously provided in the FAC that because Roxsana was transgender, she was specifically sent—via the STP—to Cibola County Correctional Center ("Cibola"), which is owned and operated by CoreCivic, because Cibola had a specific transgender housing unit. *See id.* at ¶ 64. These newly pleaded facts and legal theories adequately support Plaintiff's claim that Roxsana was discriminated against on account of her actual or perceived disability in violation of Section 504 of the Rehabilitation Act. Thus, amendment of Count I of the FAC would not be futile.

2. Count XVI – Negligent Training and Supervision Against Defendant CoreCivic

The Order also held that the Plaintiff failed to allege a plausible negligent hiring, retention, training, and supervision claim against CoreCivic. Order pp. 20, 21-22. Plaintiff seeks to include additional facts that establish CoreCivic's negligence in supervising and training its employees (but not as to negligent hiring or retention). The additional facts asserted in the SAC that support this claim include:

- CoreCivic employees unreasonably, unlawfully, and, in violation of applicable standards of care, kept Roxsana shackled to her hospital bed by her wrists and/or ankles throughout her entire eight-day hospitalization (with brief exception for the momentary removal of her shackles to administer medical care at the request of medical personnel), despite the fact that Roxsana was not a flight or security risk. This was in violation of the federal Performance Based National Detention Standards ("PBNDS") and prevailing medical standards of care. These acts also resulted in the obstruction and delay of Roxsana's emergency and life-saving medical care and caused injuries to Roxsana's wrists and other parts of her body (*see* SAC at ¶¶193-194, 196-198, 200-201, 380-385);
- The provisions of the PBNDS that prohibited CoreCivic's employees' use of restraints on Roxsana, including Standard 2.15 *Use of Force and Restraints*[6] and the applicable sections of Standard 4.3 *Medical Care*,[7] address use of restraints for

[6] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *Performance Based National Standards 2011*, at 2.15(b)(1) p. 202, https://www.ice.gov/doclib/detention-standards/2011/2-15.pdf (last visited April 26, 2021).

[7] *Id.* at § B(4) p. 202.

medical purposes and establish that CoreCivic violated its duty of care owed to Roxsana (*see* SAC at ¶¶ 380-385);

- CoreCivic employees maintained the restraints on Roxsana despite her treating physician explicitly requesting that CoreCivic employees remove them due to Roxsana's extreme discomfort and because she was clearly not a flight or security risk, as she had been medically paralyzed, had undergone a cardiac event and resuscitation, and was not only guarded by an armed CoreCivic officer but also by up to eight medical personnel while in critical condition (*see* SAC at ¶¶ 197, 383, 394). CoreCivic employees kept Roxsana restrained by handcuffs for over four hours while she was in this critical medical state, and only removed her restraints three hours before she was pronounced dead after yet another request by treating medical staff for her restraints to be removed to administer emergency medical treatment (*see* SAC at ¶¶ 197, 380, 383, 394);
- CoreCivic further delayed and obstructed Roxsana's receipt of life-saving medical procedures and treatment by requiring CoreCivic employees to take the time to call "central" to receive prior approval each time medical personnel requested that Roxsana's restraints be removed to administer emergency medical treatment (*see* SAC at ¶¶ 196, 201, 394, 407). This practice—which was well documented by CoreCivic's own employees—was consistently carried out by CoreCivic's employees who also physically guarded Roxsana around the clock from May 17, 2018 until the time of her death on May 25, 2018, establishing that CoreCivic managers not only supervised this practice, but authorized or condoned it (*see* SAC at ¶¶ 196-201, 394); and

- Facts evidencing that CoreCivic was aware of the need for additional and/or better training and supervision of its employees regarding their obligations pursuant to the PBNDS, including documentation by the federal government of the chronic and pervasive deficiencies of medical care provided by CoreCivic for other people detained at Cibola both prior to and after Roxsana in violation of the PBNDS (*see* SAC at ¶¶ 397, 403).

The foregoing additional facts establish a *prima facie* claim for negligent training and supervision of CoreCivic employees. The proposed amendments in the SAC are therefore not futile. As such, Plaintiff respectfully requests that the Court reconsider its dismissal of the negligent training and supervision claim against Defendant CoreCivic in Count XVI and grant leave to include the proposed facts in the proposed SAC.

C. PLAINTIFF SHOULD BE PERMITTED TO ADD THE U.S. AS A DEFENDANT TO PROMOTE THE INTERESTS OF JUDICIAL ECONOMY AND THE EFFICIENT LITIGATION OF ALL CLAIMS

Plaintiff also seeks leave to amend the FAC to add the U.S. as a defendant to this action. When determining whether to allow amendment, it is proper for the Court to consider judicial economy and the most expeditious way to dispose of the merits of the litigation. *Pabst Brewing Co. v. Corrao,* 176 F.R.D. 552 (E.D. Wis. 1997), *aff'd*, 161 F.3d 434 (7th Cir. 1998).

Plaintiff seeks leave to amend the FAC to add the U.S. as a defendant to this action to promote judicial economy and efficient litigation of all claims. At the time that this action was initiated, Plaintiff was unable to name the U.S. as a defendant in the Original Complaint or the FAC due to administrative exhaustion requirements under the FTCA, the timing of which conflicted with the statute of limitations applicable to the claims asserted in the instant lawsuit against the Contractor Defendants, which statutory period would have expired had Plaintiff waited for the FTCA claims against the U.S. to become ripe. Plaintiff thus initiated this action against the

Contractor Defendants (without naming the U.S. as a party) to avoid the running of the limitations period for those claims, while Plaintiff awaited a final determination of her administrative FTCA claims against the U.S.

The FTCA requires that a claimant first present her claims to the appropriate federal agency before filing in federal district court. 28 USCS § 2675(a). Pursuant to this exhaustion requirement, on November 22, 2019, Plaintiff submitted an administrative complaint stating her claims for wrongful death, negligence, negligent hiring, retention, training, and supervision, intentional infliction of emotional distress, and failure to render medical care to the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE"). *See* **Exhibit A**. On May 9, 2020, Plaintiff filed a supplemental administrative complaint to the same agencies adding claims for loss of chance of survival and false imprisonment, as well as additional facts that its employees exhibited animus towards Roxsana. *See* **Exhibit B**. On January 8, 2021, ICE denied Plaintiff's claims. *See* **Exhibit C**. Thus, all administrative exhaustion requirements were satisfied only as of January 8, 2021, at which time Plaintiff was properly positioned to assert her FTCA claims against the U.S. Because, Plaintiff's claims against the U.S. were not administratively exhausted when the instant case against the Contractor Defendants was initiated on May 13, 2020 (Original Complaint) or on August 13, 2020 (when the FAC was filed) (Doc. Nos. 1, 9), Plaintiff was not able to include the U.S. as a Defendant to this action at those times.[8]

[8] Furthermore, at the time Plaintiff filed the Original Complaint and the subsequent FAC, Plaintiff was also awaiting key documents from ICE and DHS pursuant to a related Freedom of Information Act ("FOIA") request and subsequent litigation in the Northern District of California. *See Transgender Law Center. v. U.S. Immigr. & Customs Enf't*, C.A. No. 3:19-cv-03032-SK, 2020 WL 7382113, at *8 (N.D. Cal. Nov. 24, 2019) (the "FOIA Action"). Documents sought in the FOIA Action are material to the events at issue in the instant action. However, due to the government agencies' repeated delays complying with the timing requirements of the FOIA,

Granting leave to amend the FAC to include the U.S. as a defendant would promote judicial economy and efficient litigation of this action. Plaintiff is within the statutory limitation period to file a separate FTCA action, but instead seeks to add the U.S. as a party to the instant action. This is due to the relatedness of the claims asserted against all parties, as the Contractor Defendants were retained by the U.S. to participate in the federal STP program for the detention and transportation of Roxsana. If Plaintiff's motion to amend to add the U.S. as a party to this action is denied, Plaintiff will be required to file a separate, but related, complaint to assert her claims against the U.S. In lieu of filing another action (and a potential subsequent motion to consolidate), Plaintiff believes that it would be in the best interest of the Court and all parties to add the U.S. as a defendant to this action via the SAC, as it would be the most efficient use of judicial resources.

D. GRANTING PLAINTIFF LEAVE TO AMEND THE FAC WOULD NOT UNDULY PREJUDICE DEFENDANTS OR THE U.S.

"In the absence of a specific factor, such as flagrant abuse, bad faith, futility of amendment, or truly inordinate and unexplained delay, prejudice to the opposing party is the key factor to be evaluated in deciding motion to amend." *Taylor as next friend of J.T. v. Johnson*, 2000 WL 36739863, at *1 (D.N.M. Apr. 10, 2000) (citations omitted). Prejudice is typically found only where the amendment unfairly affects the defendants "in terms of preparing their defense to the amendment." *Minter*, 451 F.3d at 1208. This often occurs "when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." *Id*. "Any amendment invariably causes some 'practical prejudice,' but leave to amend is

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Plaintiff's receipt of these critical documents was delayed. *Id.* at *7-8 (granting declaratory judgment to requester plaintiffs finding that "Defendants' delay here . . . abused the FOIA process[]" and violated the timing requirements under the FOIA). To date, Plaintiff still lacks requested documents and has appealed to the Ninth Circuit to obtain them. *See Transgender Law Center et al. v. Immigration and Customs Enforcement, et al.*, Case No. 20-17416 (9th Cir. 2021).

not denied unless the amendment would work an injustice to the defendants." *Koch v. Koch Indus.*, 127 F.R.D. 206, 210 (D. Kan. 1989) (citing *Patton v. Guyer*, 443 F.2d 79, 89 (10th Cir. 1971).

The Contractor Defendants will not be unduly prejudiced if Plaintiff is granted leave to amend. The SAC adds additional facts and alternative legal theories related to Count I (Section 504 of the Rehabilitation Act) and Count XVI (negligent training and supervision as related to CoreCivic), which are directly related to facts and legal theories that were already asserted in the FAC. *See Gillette v. Tansy,* 17 F.3d 308, 313 (10th Cir. 1994) (finding no evidence of prejudice when the "Petitioner's [amended] claims track the factual situations set forth in his [original] claims"); *R.E.B., Inc. v. Ralston Purina Co.,* 525 F.2d 749, 751–52 (10th Cir.1975) (finding no prejudice when "[t]he amendments did not propose substantially different issues"). Thus, all Contractor Defendants, including the NM Defendants, are fully apprised of these claims and the underlying facts that support them and do not have to prepare to defend any new claims. Moreover, CoreCivic would not be prejudiced by the assertion of the additional facts in support of Count XVI, as not only are these facts directly related to facts previously alleged in the FAC, but also because most of these news facts are gathered from CoreCivic's own documents.

The Contractor Defendants are also not prejudiced by the addition of the U.S. as a defendant to this action. To the contrary, having all claims against all parties involved in the transportation and detention of Roxsana before the same Court would promote judicial economy and efficient resolution of Plaintiff's claims. The Contractor Defendants all transported and/or detained Roxsana by way of their contracts with the U.S., and each was inextricably intertwined with the U.S. in the STP process to detain and transport Roxsana. Granting Plaintiff leave to amend the FAC would thus be advantageous to both the U.S. and the Contractor Defendants because they would receive the same discovery, be privy to the same facts, and have the opportunity to bring

any cross claims that may have arisen from the same series of events at issue. Although not a party to this action, the U.S. was also already placed on notice that it would be added as a defendant in this action through the related FTCA administrative complaint. The U.S. thus has familiarity with the facts of this case and should have known that it would likely be named as a party to this action. Additionally, since this case is still in its infancy (discovery has not yet begun and the Rule 16 Scheduling Conference was only recently set for June 28, 2021), the U.S. has ample time to prepare for this litigation. Thus, neither the Contractor Defendants, including the NM Defendants, nor the U.S. will suffer undue prejudice if leave to amend is granted.

E. PLAINTIFF'S REQUEST FOR LEAVE TO AMEND THE FAC IS TIMELY AND WOULD NOT CAUSE UNDUE DELAY TO THIS LITIGATION

Plaintiff filed the Original Complaint less than a year ago, amended the Original Complaint only once as of right, and promptly filed this Motion for leave to amend within 23 days after receipt of the Court's dismissal Order. *Compare with A.E. v. Mitchell*, 724 F.2d 864, 38 Fed. R. Serv. 2d (Callaghan) 425, 1983 U.S. App. LEXIS 14134 (10th Cir. 1983) (holding the lower court did not abuse its discretion in denying the plaintiff's motion to amend where it had already granted leave to do so three times, the fourth request was not made for nearly a year later, and the proposed amendment would have created a new cause of action with new parties). Plaintiff promptly filed this motion in good faith to cure the pleading deficiencies identified in the Order. Granting leave would not cause undue delay to the litigation, as proceedings are still in the early stages and discovery has not yet commenced. The deadline for parties to "meet and confer" to formulate a provisional discovery plan is not until June 7, 2021, and a Rule 16 conference is not scheduled until June 28, 2021. (Doc. 59).

Plaintiff's attorneys have contacted the attorneys for all Contractor Defendants about this Motion and were informed that GPS, TransCor and CoreCivic oppose the Motion to Reconsider

and to Amend, MTC takes no position as to Plaintiff's Motion for Reconsideration but opposes the filing of a Second Amended Complaint, and LaSalle takes no position as to Plaintiff's Motion for Reconsideration and to Amend in part because they did not have time to more thoroughly review the proposed SAC.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff's Motion for Reconsideration and to Amend, allowing amendments to Counts I and XVI of the FAC and granting Plaintiff's motion for leave to add the U.S. as a party to this action.

May 12, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on May 12, 2021, I filed the foregoing electronically through the CM/ECF system, which caused all Defendants' counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Daniel Yohalem
Daniel Yohalem