IN THE 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,

vs. Cause No. 1:20-cv-00465-WJ-JHR

LaSalle Corrections Transport LLC,
LaSalle Corrections West LLC,
LaSalle Management Company LLC,
Global Precision Systems LLC,
TransCor America LLC,
CoreCivic, Inc., and
United States of America,

Defendants.

**DEFENDANTS LASALLE CORRECTIONS TRANSPORT LLC,
LASALLE CORRECTIONS WEST LLC, and
LASALLE MANAGEMENT COMPANY LLC'S
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT (*DOC. 111*)
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
PURSUANT TO FRCP RULE 12(b)(6)
AND MEMORANDUM IN SUPPORT**

COME NOW, the Defendants, LASALLE CORRECTIONS TRANSPORT LLC, LASALLE CORRECTIONS WEST LLC, and LASALLE MANAGEMENT COMPANY LLC, (LaSalle Defendants) by and through their attorney of record, ADAM D. RAFKIN, P.C. (Adam Daniel Rafkin, Esq.), and hereby submit their Motion to Dismiss Plaintiff's Second Amended Complaint (*Doc. 111*) for Failure to State a Claim Upon Which Relief can be Granted Pursuant to

FRCP Rule 12(b)(6), and Memorandum in Support, and in support thereof, would show the following:

Standard For Dismissal Under FRCP Rule 12(b)(6)

In the context of a motion to dismiss for failure to state a claim upon which relief can be granted, the trial court must take as true the well-pleaded factual allegations as set forth in the complaint. See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1940–41, 173 L. Ed. 2d 868 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

Law Of The Case Doctrine

Initially, in the context of the LaSalle Defendants' Motion to Dismiss the First Amended Complaint *(Docs. 23* and *9* respectively), Judge Parker made certain rulings which establish the "law of the case". For instance, Judge Parker found that New Mexico procedural rules (such as the statute of limitations) applies (as opposed to Arizona procedural rules), and these Defendants do not challenge that ruling here.

Judge Parker also found that the LaSalle Defendants were correct in that Arizona substantive law applied to the claims against them and those rulings apply here as well. (*Memorandum Opinion and Order, Doc. 57, p. 11*).

"[T]he law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031 (10th Cir. 2000).

However, to err on the side of caution, the LaSalle Defendants will assert those issues in this Motion to Dismiss, albeit in truncated form.

New Mexico Law Requires Application of The Doctrine of Lex Loci Delicti (Place-of-the-Wrong), Which Means the State Where the Last Acts or Omissions of the LaSalle Defendants Which Could Render Them Liable Occurred, Which is Arizona

In the context of the LaSalle Defendants' previous Motion to Dismiss and the briefing regarding same, Defendants agreed with Plaintiff that New Mexico's law with respect to choice-of-law controls. However, that does not mean, *ipso facto*, that New Mexico law regarding the statute of limitations applies, only that New Mexico law applies in the sense that it determines whether New Mexico or Arizona law should apply to Plaintiff's tort claims.

Plaintiff previously cited the New Mexico case of *Nez v. Forney*, 1989-NMSC-074, 109 NM 161 (NM 1989) (*Doc. 45, pg. 6*) for the proposition that New Mexico law should be applied to her tort claims for statute of limitations analysis. However, there are several subsequent federal New Mexico district court cases dealing with precisely this issue and which hold that New Mexico choice-of-law rules require that the Court apply the doctrine of lex loci delicti (the place-of-the-wrong).

In *Valencia v. Colorado Cas. Ins. Co.*, 560 F. Supp. 2d 1080 (D.N.M. 2007), Judge Browning discussed at length the law in New Mexico regarding choice-of-laws. In so doing, he noted that the law which applies in choice-of-law cases focuses on where the "place of the wrong" occurred. Judge Browning stated "In determining which jurisdiction's law should apply to a tort action, New Mexico courts follow the doctrine of *lex loci delicti commissi* - that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred." *Id*. at 1085.

Judge Browning went on to observe that New Mexico has a "strong presumption" in favor of the doctrine of "place of the wrong", stating "The New Mexico Court of Appeals has explained that New Mexico courts "begin with a strong presumption in favor of application of the place-of-the-wrong rule, but we will not close our eyes to compelling policy arguments for departure from the general rule in specific circumstances." *Gilmore v. Gilmore (In re Estate of Gilmore)*, 1997–NMCA–103, ¶ 21, 946 P.2d at 1136. *See Tuato v. Brown*, 85 Fed.Appx. 674, 676 (10th Cir.2003) (observing that New Mexico caselaw "confirms the strong presumption that New Mexico courts apply lex loci in tort cases")." *Id*. at 1085.

In concluding that Colorado law applied, and not New Mexico law, Judge Browning reiterated again New Mexico's "strong presumption in favor of the application of lex loci delicti": "Finally, the Court notes that, although New Mexico courts have acknowledged the policy exception to the general *lex loci delicti* rule, both the New Mexico courts and the United States Court of Appeals for the Tenth Circuit have acknowledged that New Mexico courts begin with a strong presumption in favor of application of the place-of-the-wrong rule." *Id*. at 1089 [internal quotation marks omitted].

In another choice-of-law case, Judge Browning observed that in torts cases, the "place-of-the-wrong" is where the last act or omission which would make the defendant in question liable occurred. In *Guidance Endodontics, LLC v. Dentsply Int'l, Inc*., 749 F. Supp. 2d 1235 (D.N.M. 2010), Judge Browning stated "On the other hand, if the underlying claim is categorized as a tort, "New Mexico courts follow the doctrine of *lex loci delicti commissi*—that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred." *Terrazas v. Garland & Loman, Inc*., 140 N.M. at 296, 142 P.3d at 377. *The lex loci delicti rule defines the state where*

the wrong occurred as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Zamora v. Smalley, 68 N.M. 45, 47, 358 P.2d 362, 363 (1961*); see Restatement (First) Conflicts of Law* § 377 & cmt. a (1934)." *Id*. at 1258 [emphasis added].

In light of the above, in the event this Court concludes that Judge Parker's previous ruling (*Doc. 57*) that Arizona substantive law (and not New Mexico substantive law) applying to the LaSalle Defendants, does not represent the law of the case, Defendants would argue that under the caselaw cited above, Arizona substantive law would apply. That is because [aside from the three counts in the Second Amended Complaint now brought under California law related to the short bus ride from San Ysidro, California to San Luis in Arizona (*Doc. 111, Count 2 p. 52; Count 17 p. 104; Count 18, p. 108)]*, all of the acts and omissions alleged to constitute Negligence, Negligent Trainings and Supervision, and Intentional Infliction of Emotional Distress (*Doc. 111, Count 3 pg 53, Count 4 pg 56, Count 5 pg 59*), are alleged to have occurred squarely within the borders of the State of Arizona. Thus, Arizona substantive law applies to the claims against the LaSalle Defendants.

Counts 1, 3, 4, and 5 of the Second Amended Complaint (*Doc. 111, pgs. 46, 53 56, 59*) are alleged to have occurred almost exclusively in Arizona [aside from a roughly 2 hour drive with Roxsana from San Ysidro, California to the San Luis Regional Detention Center (SLRDC)]. At SLRDC, Roxsana was housed for a few hours until she was transported to the Mesa, Arizona airport and custody was then assumed by the airline. It was based on these facts that the LaSalle Defendants filed their previous Motion to Dismiss (*Doc. 23*), seeking in part a dismissal of these

causes of action, because in their view, Arizona substantive and procedural law applied and under Arizona statute of limitations, the claims were time-barred.

Judge Parker granted this aspect of the motion in part and denied it in part (*Doc. 57*). Those rulings now represent the law of the case. *McIlravy, supra.* Thus, in undersigned counsel's view, in accordance with Judge Parker's ruling, Arizona's substantive law applies as to the claims against the LaSalle Defendants, and New Mexico procedural law applies as to the claims against the LaSalle Defendants, thus rendering the claims not time-barred under New Mexico's more generous statute of limitations.[1]

However, in the event that this Court does not agree that Judge Parker's ruling on this issue has established the law of the case, the LaSalle Defendants would move this Court to dismiss the Negligence, Negligent Training and Supervision and Intentional Infliction of Emotional Distress (IIED) claims against them on the basis of Arizona's two-year statute of limitations (*Doc. 111, Counts 3, 4, and 5, pgs. 53, 56, 59*).

Also, Arizona's caselaw and survival statute (as to which claims survive the death of Roxsana), apply as well, as they constitute substantive law of the State of Arizona. Arizona's survival statute does not permit recovery for "pain and suffering" or similar non-economic damages. In *Quintero v. Rogers*, the Court of Appeals stated:

> "The Legislature apparently contemplated that once an injured person is dead he cannot benefit from an award for his pain and suffering."
>
> *Quintero v. Rogers*, 221 Ariz. 536, ¶6, 212 P.3d 874 (Ct. App. 2009) [internal citation and quotation marks omitted].

[1] The claims asserted against the LaSalle Defendants under California law case (based on the short drive from San Ysidro, CA. to San Luis, AZ (*Doc. 111, Counts 2, 17 & 18*) were not before the Court when Judge Parker was assigned to this case.

This principle was reaffirmed just last year in *Martin v. Staheli*:

> "The parties agree that the Survival Statute does not apply to Martin's widow or children because they allege claims based on their damages. They also agree that Martin's non-economic claims are no longer viable due to his death."
>
> *Martin v. Staheli*, 248 Ariz. 87, ¶15, 457 P.3d 53 (Ct. App. 2019).

In light of the above, Plaintiff's claims as set forth in Counts 1, 3, 4 and 5, for pain and suffering and emotional distress should be dismissed with prejudice as per Arizona's survival statute and caselaw.

Count 1: Section 504 of the Rehabilitation Act Claims (*Doc 111, pg 46*):

Plaintiff has plead no plausible allegations which if, true, would establish that the LaSalle Defendants receive subsidies or financial assistance, thereby subjecting them to the Rehabilitation Act (as opposed to simply being paid a per diem rate for housing detainees and an hourly rate for guards who serve as transportation officers).

The LaSalle Defendants did not raise this issue with respect to the Rehabilitation Act claim in the context of their original Motion to Dismiss, only challenging the punitive damages claim related to the act.

However, co-Defendants Transcor and CoreCivic (Transcor) did raise this issue (*Doc. 32, pg. 4*) and Judge Parker agreed with its position (*Doc. 58*); hence, the LaSalle Defendants now challenge the applicability of Section 504 of the Rehabilitation Act herein.

The relevant portion of Section 504 of the Rehabilitation Act states:

> "No otherwise qualified individual with a disability ... shall, solely by reason of her or his 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(a) [emphasis added].

It is well-established that mere payment of compensation for services rendered do not constitute a subsidy for purposes of implicating the Rehabilitation Act.

> "[c]ourts interpreting [section] 504 of the Rehabilitation Act have consistently construed 'Federal financial assistance' to mean the federal government's provision of a subsidy to an entity, not the federal government's compensation of an entity for services provided."
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> *Abdus-Sabur v. Hope Village, Inc.*, 221 F. Supp. 3d 3, 9–11 (D. D.C. 2016).

Even closer to the facts of this case is *Lee v. Corr.Corp. of Am./Corr.Treatment Facility*, in which the Court addressed a defendant similarly situated to the LaSalle Defendants here:

> "Although defendant receives federal funding through its contracts with the Bureau of Prisons and U.S. Marshals Service, it does not receive "Federal financial assistance" within the meaning of the Rehabilitation Act. Courts interpreting § 504 of the Rehabilitation Act have consistently construed "Federal financial assistance" to mean the federal government's provision of a subsidy to an entity, not the federal government's compensation of an entity for services provided."
>
> *Lee v. Corr. Corp. of Am./Corr. Treatment Facility*, 61 F. Supp. 3d 139, 144 (D.D.C. 2014).

In this matter, Plaintiff has alleged no *plausible* facts which if, true, would form a basis for relief under the Rehabilitation Act, given the heightened pleading standard requirement of *Iqbal*:

The Tenth Circuit has held:

> "…only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal,* 129 S.Ct. at 1950. In other words, a plaintiff must offer sufficient factual allegations to "raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 129 S.Ct. at 1950, 129 S.Ct. 1937. Thus, in ruling on a motion to dismiss, a court should

> disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable."
>
> *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

The Court went on to state:

> "With these principles in mind, and consistent with our holdings in *Robbins,* 519 F.3d at 1247, 1253 and *Smith,* 561 F.3d at 1098, plaintiffs must offer enough specific factual allegations to "nudge[ ] their claims across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955.
>
> *Id*. at 1219.

And finally, the *Kansas Penn Gaming* Court stated:

> "As we discussed above, after *Twombly* and *Iqbal,* it is insufficient to simply allege that other, unidentified properties have "comparable" or "similar" conditions—the claim must be supported by specific facts plausibly suggesting the conditions on the properties and the properties themselves are similar in all material respects."
>
> *Id.* at 1220.

For instance, in ¶ 27 of the Second Amended Compliant (*Doc. 111 ¶ 27*), Plaintiff alleges that LaSalle Corrections West received compensation from the federal government but that it also "received federal subsidies". In ¶ 33 of the Second Amended Complaint (*Doc. 111, ¶ 33*), Plaintiff merely alleges that LaSalle Transport "also received federal subsidies".

Similarly, in ¶ 35, Plaintiff alleges that LaSalle Management "also received federal subsidies" (*Doc. 111 ¶ 35*).

Tellingly, all of the above allegations are made "Upon information and belief". Nowhere in the Second Amended Complaint does Plaintiff state:

a. what kind of federal subsidies the LaSalle Defendants purportedly received;
b. what the subsidies were for; or

c. how she even knows that they received subsidies at all from the federal government, as opposed to simply receiving "compensation".

This is clearly not the sort of details required to be plead with enough specific factual allegations to "nudge [ ] their claims across the line from conceivable to plausible." *Id*. at 1219. Thus, the Rehabilitation Act claim against the LaSalle Defendants should be dismissed.

Punitive Damages:

Should this Court disagree with Judge Parker's previous ruling regarding Defendant Transcor's Motion to Dismiss the Rehabilitation Act claim (*Docs. 32 and 58, respectively*) (and hence disagree with the LaSalle Defendants' request to dismiss that claim herein), the punitive damages claim asserted under the Rehabilitation Act must be dismissed.

In paragraph 251 of her Second Amended Complaint (*Doc. 111 ¶ 251*), Plaintiff alleges entitlement to punitive damages under the Rehabilitation Act. However, punitive damages are not permitted under the caselaw interpreting Section 504 of the Rehabilitation Act. In *Barnes v. Gorman*, the United States Supreme Court stated:

> "Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act."
>
> *Barnes v. Gorman*, 536 U.S. 181, 189, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230 (2002).

In the context of Plaintiff's Response to the LaSalle Defendant's Motion to Dismiss filed in response to Plaintiff's First Amended Complaint (*Doc. 9*), Plaintiff conceded that the Rehabilitation Act does not permit punitive damages (*Doc. 45, pg 18 fn 14*). Thus, Judge Parker dismissed that element of Plaintiff's Rehabilitation Act claim. (*Doc 57, pgs. 10-11*). Presumably, the Second Amended Complaint's continued assertion of the entitlement to punitive damages

under Section 504 of the Rehabilitation Act is simply a scrivener's error but regardless, punitive damages are not permitted under the Act and this claim should be dismissed.

Count 2: Failure to Summon Medical Care for Prisoners Cal. Gov. Code Sec. 845.6

This newly added claim seeks to impose liability on the LaSalle Defendants for failure to seek medical aid for Roxsana during the short drive from the San Ysidro facility to San Luis Regional Detention Facility, just outside of Yuma, Arizona.

However, the statute in question, Sec. 845.6, appears to apply solely to public entities and employees. It states in full:

> "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state from liability for injury proximately caused by malpractice or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay under subdivision (d) of Section 844.6."
>
> *Cal. Gov. Code Sec. 845.6.*

The California Code defines "public entity" or "public employee" in the following way:

> "Public entity" includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State."
>
> *Cal. Gov. Code Sec. 811.2.*

In *Johnson v. Cty Los Angeles*, the Court stated:

> "Section 845.6 creates "a newly-defined duty not applicable to private persons, created by the Legislature as a special burden to be borne by public entities under limited circumstances."
>
> *Johnson v. Cty. of Los Angeles*, 143 Cal. App. 3d 298, 316–17, 191 Cal. Rptr. 704, 717 (Ct. App. 1983).

It is undisputed that the LaSalle Defendants, all limited liability companies (per Plaintiff's caption of the case), are not public employees or public entities under California law and hence, are not subject to liability for failure to summon medical aid under Section 845.6 and this count of the Second Amended Complaint should be dismissed with prejudice.

Count 2: Failure to Summon Medical Care Under Cal. Gov. Code 846.2
Count 3: Negligence
Count 4: Negligent Training, Hiring and Training
Count 5: Intentional Infliction of Emotional Distress
Count 17: Violation of the Bane Act, Cal. Civ. Code Sec. 52.1
Count 18: Violation of The Unruh Act, Cal. Civ. Code Sec. 41 and Sec. 53

It appears from various references in the Second Amended Complaint that Plaintiff is seeking compensation for mental anguish and pain and suffering (eg., references to Roxsana's "severe and foreseeable physical and emotional pain and suffering", *Doc. 111, ¶ 266*).

However, under Arizona's survival statute, claims for pain and suffering and emotional distress do not survive; only her economic damages, if any, survive.

In *Quintero v. Rogers*, the Court of Appeals stated:

> "In enacting § 14–3110, the Arizona Legislature extended the right of a decedent's personal representative to pursue the decedent's personal injury claim against a tortfeasor, but it did not extend that right to include damages that would compensate the decedent for his "pain and suffering." Harrington v. Flanders, 2 Ariz.App. 265, 267, 407 P.2d 946, 948 (1965) ("The Legislature apparently contemplated that once

> an injured person is dead he cannot benefit from an award for his pain and suffering.”).”
>
> *Quintero v. Rogers*, 221 Ariz. 536, ¶6, 212 P.3d 874 (Ct. App. 2009).

Recently, this principle was reaffirmed in *Martin v. Staheli*, in which the Arizona Court of Appeals held that in a survival action, while economic damages survive the death of the victim of negligence, the non-economic damages do not. The *Martin* Court stated:

> “Generally, a cause of action for economic harm can be pursued post-mortem. See, e.g., Barragan v. Superior Court, 12 Ariz. App. 402, 404, 470 P.2d 722, 724 (1970) (“In general, a survival statute provides for recovery of damages sustained by the deceased party from the time of accident until his death. Such damages include expenses incurred, necessitated by the injuries, in the nature of hospital and medical expenses.”). The parties agree that the Survival Statute does not apply to Martin's widow or children because they allege claims based on their damages. They also agree that Martin's non-economic claims are no longer viable due to his death.”
>
> *Martin v. Staheli*, 248 Ariz. 87, ¶15, 457 P.3d 53 (Ct. App. 2019)

In *Girouard v. Skyline Steel, Inc.*, the Arizona Court of Appeals observed:

> “Indeed, since the Legislature has explicitly precluded a decedent's estate from recovering damages for his own pain and suffering, A.R.S. section 14–3110 (2005), we think judicial creation of a wrongful death claim to allow a survivor to recover damages arising from such pain and suffering would be imprudent.[5] Any policy decision to fill the gap precluding recovery for a decedent's pain and suffering under either cause of action, is best left to the sound discretion of the Legislature. See Jeter v. Mayo Clinic of Arizona, 211 Ariz. 386, 399, ¶ 54, 121 P.3d 1256, 1269 (App.2005) (expansion of definition of viability for wrongful death claim involves policy determinations best left to Legislature). Thus, evidence of a decedent's conscious pain and suffering before his death is not relevant to a survivor's damages in a wrongful death claim.”
>
> *Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, ¶19, 158 P.3d 255 (Ct. App. 2007).

Thus, the LaSalle Defendants would request this Court dismiss any claims for non-economic damages asserted in regard to Counts 3, 4 and 5 of the Second Amended Complaint, with prejudice.

In regard to the three counts asserted by Plaintiff under California law (Counts 2, 17 and 18), California's law at the time similarly prohibited recovery for pain and suffering:

California's survival statute at the time stated:[2]

> "(a) In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement."
>
> *Cal. Code of Civ. Procedure 377.34.*

Thus, Plaintiff's claims for pain and suffering and emotional distress (Counts 2, 17 and 18), under the California statues she has sued under, should be dismissed with prejudice.

Count 17: Violation of the Bane Act (Cal. Civ. Code 52.1) and Cal. Gov Code 845.6 (Failure to Obtain Medical care For Prisoners)[3]

The Tom Bane Act (Cal. Civ. Code 52.1) is a civil rights statute that was apparently passed with the intent to provide redress for people who have had their civil or constitutional rights violated by a private person or entity (i.e., not under color of law).

The pertinent portion of the Bane Act states:

> "(a) This section shall be known, and may be cited, as the Tom Bane Civil Rights Act.
>
> (b) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or

[2] The statute in question was modified as of January 1, 2022 to allow for recovery of pain and suffering.

[3] The reference to Cal. Gov. Code 845.6 appears to be a duplicate claim, as that claim is already asserted in Count 2 of Plaintiff's Second Amended Complaint and previously addressed herein starting at page 11.

> coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured…"
>
> *Cal. Civ. Code 52.1*.

The Bane Act component of Count 17 should be dismissed. Plaintiff's Second Amended Complaint does not appear to allege that the LaSalle Defendants "interfere[d] by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights.

In *Simmons v. Superior Ct.*, the Court of Appeals stated:

> "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B*., at p.883, 57 Cal.Rptr.3d 454.)"
>
> *Simmons v. Superior Ct*., 7 Cal. App. 5th 1113, 1125, 212 Cal. Rptr. 3d 884, 893 (2016).

After noting that the Legislature "enacted [Civil Code] section 52.1 to stem a tide of hate crimes", the Court of Appeals in *Austin B. v. Escondido Union Sch. Dist*., set forth the elements required to prove a Bane Act violation:

> "Civil Code section 52.1 requires an attempted or completed act of interference with a legal right, accompanied by a form of coercion. To obtain relief under Civil Code section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion."
>
> *Austin B. v. Escondido Union Sch. Dist*., 149 Cal. App. 4th 860, 882, 57 Cal. Rptr. 3d 454, 472 (2007) [internal citations and quotation marks omitted].

Count 17 of the Second Amended Complaint also refers to the California Constitution (Art. 1, Sec. 7), the pertinent part of which states:

> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution."
>
> *California Constitution Article 1 Section 7.*

Article 1, Section 1 of the State Constitution, also referenced by Plaintiff states in full:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."
>
> *California Constitution Article 1 Section 1.*

Plaintiff's the Second Amended Complaint does not appear to identify (other than by a passing reference to "equal protection") how the LaSalle Defendants transporting Roxsana to San Luis, Arizona (as required by their contract with the federal government), violated Roxsana's state

constitutional rights because they did not seek medical care for her between San Ysidro, California and the Arizona state line.[4]

It is unclear if Plaintiff is truly asserting a violation of the state constitution of California in Count 17 of her Second Amended Complaint. Although she refers to the state constitution's equal protection clause (*Doc. 111, ¶ 465*), the text of Count 17 of the Second Amended Complaint does not appear to allege the LaSalle Defendants are somehow governmental entities, which appears to be the only way they would be liable under California law for a constitutional violation (with the exception to a claim for violation of a right to privacy, which California courts have held applies to governmental and nongovernmental entities alike).[5]

In her Second Amended Complaint, Plaintiff alleges:

> "Defendant U.S. and the LaSalle Defendants violated Roxsana's rights under the California Constitution, Article 1, §§ 1 and 7, and Cal. Civil Code § 52.1 (the Bane Civil Rights Act). Roxsana's rights to protection from bodily restraint, harm, and insult, freedom from discrimination on account of her national origin, immigration status, gender identity and/or expression, actual and/or perceived disabilities, and medical condition, freedom from unlawful detention, provision of all accommodations and services appropriate to her national origin, immigration status, race, gender identity and/or expression, disabilities, and medical condition, and the provision of necessary medical care were clearly delineated and plainly applicable under the circumstances."
>
> *Doc. 111, ¶ 462.*

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[4] Plaintiff's references to Roxsana's "constitutional rights" appears to refer to her purported rights under the California state constitution. (*Doc. 111, ¶ 462, ¶ 468*).

[5] Meaning, that there appears to be no cause of action against a nongovernmental entity (unless an invasion of privacy is alleged) to be held liable under California's state constitution. However, the Bane Act does appear to provide an avenue for liability if the plaintiff proves even a nongovernmental entity used threats, intimidation or coercion to deprive her of a state constitutional right.

However, Plaintiff's Second Amended Complaint does not plausibly allege an equal protection violation. While the Second Amended Complaint includes plenty of inflammatory language purportedly attributed to the transportation officers (all of which is disputed), it does not contain any real detail as to how non-transgender detainees would have been, or are, treated.

In other words, the Second Amended Complaint alleges unpleasant comments by the transportation officers, but it does not allege factual detail so as to satisfy the plausibility requirement of *Iqbal*, as to how Plaintiff knows that Roxsana was treated differently, as a member of a transgender group, than would be any other non-transgender detainee.

Further, as stated above, the Bane Act requires that a plaintiff demonstrate that the defendant "interfere[d] by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state…" *Cal. Civ. Code 52.1*.

Plaintiff does not appear to argue that somehow it was illegal for Roxsana to be in custody or to be transported. Nor does she allege that somehow the LaSalle Defendants were at liberty to simply ignore the federal government's directive to transport her or that the LaSalle officers should have had the medical foundation to ignore Roxsana's clearance to travel given after she was seen by a doctor.

There is, in fact, no plausible allegation in the Second Amended Complaint that during the drive to the Arizona border (i.e., the portion of the drive that occurred in California), the LaSalle Defendants "by threat, intimidation or coercion", interfered with Roxsana's rights.

As stated earlier herein, under the standard of *Iqbal* and its progeny, determining whether a plaintiff has met the heightened pleading standard involves "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Kansas Penn Gaming, LLC*, supra, at. 1214.

Here, the Second Amended Complaint does not establish an equal protection violation nor does it allege specific facts that LaSalle staff, during the van ride to Arizona, somehow threatened, intimidated or coerced Roxsana in order to prevent her from exercising her rights under the California state constitution. Thus, this claim should be dismissed.

<u>Count 18: Violation of Cal. Civil Code Section 43 and Cal. Civil Code Section 51 (Unruh)</u>

California Civil Code Sec. 43 states: "Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations." *Cal. Civ. Code. Sec. 43*.

Even taking all of Plaintiff's allegations in the Second Amended Complaint as being true, Plaintiff's allegations do not establish a violation of Section 43 which was enacted to provide civil liability for "false imprisonment, assault, battery, invasion of privacy" and other wrongs not at issue here.

In *Gabrielle A. v. Cty. of Orange,* the California Court of Appeals stated:

> "Plaintiffs have no better luck with their arguments under state civil rights statutes. Section 43 codifies causes of action for false imprisonment, assault, battery, invasion of privacy, and a number of business torts. Plaintiffs argued below that

> this section creates a separate cause of action for "personal insult" or "injury to his personal relations," but they cite no authority that supports this contention."
>
> *Gabrielle A. v. Cty. of Orange,* 10 Cal. App. 5th 1268, 1289, 217 Cal. Rptr. 3d 275, 293 (2017), as modified (Apr. 18, 2017) [internal citation omitted].

Plaintiff does not make any plausible allegation that Roxsana was assaulted or battered by LaSalle transportation staff during the portion of the drive to the Arizona border. Certainly, Roxsana was not entitled to be free from "bodily restraint" under Section 43, as she was in the lawful custody of LaSalle. Further, the politically incorrect language Plaintiff attributes to the transport officers (and which is denied, but which Defendants understand must be taken as true for the purposes of this Motion) is not actionable, either under Section 43 or the Bane Act.

> " "Speech alone is not sufficient to support an action ..., except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (§ 52.1, subd. (j).)".
>
> *Id*. at 1290.

Lastly, Plaintiff alleges no defamatory statements made by the transportation officers and published to a third party, nor does she state any factual allegations showing that Roxsana's "personal relations" were interfered with during the short drive to Arizona.

Cal. Civ Code Section 51 (the Unruh Civil Rights Act), under which Plaintiff also sues in Count 18 of her Second Amended Complaint, states in pertinent part:

> "(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
>
> (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status *are entitled to the full and equal*

> *accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."*
>
> Cal. Civ. Code Sec. 51 [emphasis added].

Although undersigned counsel was unable to locate a California case addressing whether a correctional facility or its means of transportation fell within the ambit of *Unruh*, the case of *Curran v. Mount Diablo Council of the Boy Scouts*, is instructive. In *Curran,* the California Supreme Court held that the Unruh Act was meant to embrace only entities which were "the functional equivalent of a classic place of public accommodation or amusement".

> "As plaintiff correctly points out, of course, this court's decision in *Isbister, supra,* 40 Cal.3d 72, 219 Cal.Rptr. 150, 707 P.2d 212, concluded that in light of the legislative history demonstrating that the Unruh Civil Rights Act was intended *to extend* the reach of California's prior public accommodation statute, the very broad "business establishments" language of the Act reasonably must be interpreted to apply to the membership policies of an entity—even a charitable organization that lacks a significant business-related purpose—if the entity's attributes and activities demonstrate that it is the functional equivalent of a classic "place of public accommodation or amusement."
>
> *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal. 4th 670, 697, 952 P.2d 218, 236 (1998) [internal quotation marks omitted].

The *Curran* Court went on to find that the Boy Scouts chapter at issue was not the "functional equivalent of a place of public accommodation or amusement":

> "Unlike membership in the Boys' Club of Santa Cruz, Inc., membership in the Boy Scouts is *698 not simply a ticket of admission to a recreational facility that is open to a large segment of the public and has all the attributes of a place of public amusement. Scouts meet regularly in small groups (often in private homes) that are intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes."
>
> *Id.* at 697–98.

The *Curran* Court reached its conclusion at least in part, by relying on the legislative history of the Act, stating:

> "As plaintiff correctly points out, of course, this court's decision in *Isbister, supra,* 40 Cal.3d 72, 219 Cal.Rptr. 150, 707 P.2d 212, concluded that in light of the legislative history demonstrating that the Unruh Civil Rights Act was intended *to extend* the reach of California's prior public accommodation statute…"
>
> *Id.* at 697 [emphasis in original].

Here, a jail, prison or other law enforcement transportation vehicle clearly is not a "public accommodation" (and likely not a place of "amusement" either). Members of the public cannot ride in the van. The only people allowed in the van (aside from transport officers) are those who are in custody. It cannot seriously be contended that the Legislature in California, in enacting the Unruh Civil Rights Act in order to "extend the reach of California's prior public accommodation statute", was concerned that people of different genders, sexual orientation, race, etc., did not have access to jail, prison and other law enforcement-related entities' transportation vans. In light of the above, Count 18 should be dismissed with prejudice as to the LaSalle Defendants.

WHEREFORE, the Defendants, LASALLE CORRECTIONS TRANSPORT LLC, LASALLE CORRECTIONS WEST LLC, and LASALLE MANAGEMENT COMPANY LLC, pray this Court grant their Motion to Dismiss Plaintiff's Second Amended Complaint (*Doc. 111*) for Failure to State a Claim Upon Which Relief Can be Granted Pursuant to FRCP Rule 12(b)(6), and for such other and further relief as the Court deems just and proper.

Respectfully Submitted:

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Certificate of Service

I HEREBY CERTIFY THAT on the 31st day of January, 2022, I filed the foregoing electronically through the CM/ECF system, which caused the following parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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