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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ESTATE OF GERARDO CRUZ-
SANCHEZ, by and through his successor-
in-interest Paula Garcia Rivera, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

Case No.: 17-cv-569-AJB-NLS

ORDER GRANTING THE UNITED STATES' MOTION TO DISMISS

(Doc. No. 43)

Pending before the Court is Defendant the United States of America's ("the Government") motion to dismiss or in the alternative motion for summary judgment. (Doc. No. 43-1.) Plaintiffs Paula Garcia Rivera, individually and in her capacity as successor-in-interest and the Estate of Gerardo Cruz-Sanchez by and through his successor-in-interest Paula Garcia Rivera (collectively referred to as "Rivera") opposes the motion. (Doc. No. 45.) Pursuant to Civil Local Rule 7.1.d.1, the Court finds the matter suitable for determination on the papers and without oral argument. As will be explained in greater detail below, the Court **GRANTS** the Government's motion.

BACKGROUND

The following facts are taken from Rivera's second amended complaint ("SAC")

1 and are construed as true for the limited purpose of resolving the instant motion. *See Brown*
2 *v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

3 The instant matter revolves around the arrest, incarceration, and eventual death of
4 Gerardo Cruz-Sanchez. (*See generally* Doc. No. 41.) Sanchez was a resident of Mexico at
5 the time of his death. (*Id.* ¶ 6.) Sanchez’s wife, Rivera, at all times relevant to this lawsuit,
6 is a resident of Mexico and is the duly appointed successor-in-interest to the Estate of
7 Sanchez. (*Id.*)

8 At the time of Sanchez’s arrest, he had agreed to work with the Government and
9 testify as a witness to the crime of alien smuggling.¹ (*Id.* ¶¶ 1, 6.) However, as Sanchez
10 could not post bail he was admitted to CoreCivic’s Otay Mesa Detention Center on
11 February 11, 2016. (*Id.* ¶¶ 1, 14.) Defendant CoreCivic is a for-profit Maryland corporation
12 that owns and operates jails, prisons, and other correctional facilities throughout the United
13 States under contract with various government entities. (*Id.* ¶ 8.)

14 After entering the facility, a U.S. Public Health Service (“USPHS”) nurse performed
15 an initial assessment on Sanchez where he informed the nurse that he had no complaints
16 and did not require any medications. (*Id.* ¶¶ 15, 16.) A few days after being admitted,
17 Sanchez developed flu like symptoms, including a headache, sore throat, painful burning
18 sensations, a persistent cough, nasal congestion, fatigue, and loss of appetite. (*Id.* ¶ 24.)

19 On February 14, 2016, Sanchez was seen by USPHS Nurse J. Alix. (*Id.* ¶ 26.)
20 Sanchez explained his symptoms, which had persisted over two days, and Nurse Alix noted
21 that Sanchez’s appointment was due to an upper respiratory infection. (*Id.* ¶¶ 27, 28.)
22 However, Nurse Alix did not order a chest x-ray or refer Sanchez to a licensed physician.
23 (*Id.* ¶¶ 29, 30.) Instead, Sanchez was given Ibuprofen and sent back to his cell. (*Id.* ¶ 31.)

24 Over the next few days, Sanchez’s symptoms worsened. (*Id.* ¶ 32.) As a result,
25 Sanchez submitted another sick call request and was seen by USPHS Nurse Harris on
26

27 ¹ Sanchez was to be a material witness in Case No. 16cr405-BAS, United States v. Ortega-
28 Gonzalez. (Doc. No. 41 ¶ 6.)

1 February 16, 2016. (*Id.* ¶ 33.) During this visit, Sanchez described his pain as a 9 out of 10
2 and informed Nurse Harris that he had been suffering from a cough, body aches, and sore
3 throat for about a week. (*Id.* ¶¶ 34, 35.) Nurse Harris did not order a chest x-ray and did
4 not refer Sanchez to a licensed physician. (*Id.* ¶¶ 36, 37.) Sanchez was then again given
5 Ibuprofen and sent back to his cell. (*Id.* ¶ 38.)

6 On February 17, 2016, Sanchez submitted another sick call request and this time was
7 seen by USPHS physician’s assistant J. Avalos. (*Id.* ¶ 39.) After explaining his symptoms
8 again, Avalos noted in his chart that Sanchez had a “viral etiology vs. bacterial or allergy.”
9 (*Id.* ¶ 43.) Unfortunately, like the previous medical professionals, Avalos did not order a
10 chest x-ray, and he did not check Sanchez’s oxygen levels or order a blood culture. (*Id.* ¶¶
11 44–46.) Sanchez was then sent back to his cell with another dose of Ibuprofen and
12 Promethazine—an allergy medication. (*Id.* ¶ 48.) On February 21, 2016, the same sequence
13 of events occurred again, but this time Sanchez was seen by USPHS nurse Byington. (*Id.*
14 ¶¶ 49–52.)

15 By February 22, 2016, as a result of Defendants’ supposed inactions, Sanchez’s
16 health continued to deteriorate to a point that he was coughing up blood that saturated his
17 clothes and bed sheets. (*Id.* ¶¶ 53, 89.) Between February 22 and February 26, despite
18 Sanchez and his cellmate Alejandro Chavez’s requests that he receive urgent medical
19 treatment, Sanchez received no medical care. (*Id.* ¶¶ 54–56.) Specifically, Defendant C.O.
20 Landin refused to assist Sanchez in submitting additional sick call requests. (*Id.* ¶ 68.)

21 On February 26, 2016, a medical emergency was called by CoreCivic staff and
22 Sanchez was brought to the medical facility and was examined by Dr. Propst. (*Id.* ¶ 73.)
23 After examining him, Dr. Propst diagnosed Sanchez with “acute respiratory distress
24 w/burning chest pain, cough, subcut emphysema, hypoxemia, tachypnea, [and]
25 tachycardia[.]” (*Id.* ¶ 76.) 911 was then called and Sanchez was transported by ambulance
26 to the emergency room at Scripps Mercy Hospital in Chula Vista, California. (*Id.* ¶ 77.)

27 According to post-mortem records, “at the emergency room, the medical staff
28 intubated [Sanchez] and placed him on mechanical ventilation. His examination and

1 laboratory test results showed him with diagnoses of pneumomediastinum with extensive
2 subcutaneous emphysema, hypoxemia, acute kidney injury, healthcare associated
3 pneumonia, new onset of diabetes and hypokalemia.” (*Id.* ¶ 78.) On February 29, 2016,
4 eighteen days after Sanchez was admitted to the Otay Mesa Detention Center, he was
5 pronounced dead. (*Id.* ¶ 80.) His health diagnoses were: (1) Aystyolic cardiac arrest
6 secondary to metabolic acidosis; (2) Multifocal pneumonia with acute respiratory distress
7 syndrome; (3) Hypoxic respiratory failure secondary to multifocal pneumonia and acute
8 respiratory syndrome; (4) Acute kidney injury secondary to acute tubular necrosis; (5)
9 Hyperkalemia secondary to acute kidney injury; and (6) Pneumomediastinum and
10 subcutaneous emphysema. (*Id.*)

11 In sum, Rivera asserts that Sanchez’s death could have been prevented if Defendants
12 did not deliberately, oppressively, and maliciously ignore his medical crisis. (*Id.* ¶ 82.)
13 Moreover, Rivera contends that CoreCivic has a widespread practice and policy of
14 tolerating and encouraging deliberate indifference to known serious medical needs by
15 refusing to provide higher level care and refusing to transfer inmates to the hospital in cases
16 of life threatening medical needs. (*Id.* ¶ 106.) Thus, as a result of CoreCivic’s disregard for
17 its non-delegable duty to ensure the health and safety of Sanchez, an individual in the
18 custody of its Otay Mesa Detention Center, it is liable for Sanchez’s death. (*Id.* ¶ 115.)

19 On April 1, 2016, thirty-two days after his death, Sanchez’s body was delivered to
20 Rivera in a gray steel box. (*Id.* ¶¶ 84, 85.) When Rivera viewed her husband’s body, his
21 face was bruised, his wrists had deep red marks and bruises, and his ears were swollen and
22 distended. (*Id.* ¶ 86.) As a result of the way in which Sanchez’s body was purportedly
23 mistreated, Rivera experienced shock and trauma. (*Id.* ¶ 87.)

24 Rivera filed her complaint on March 22, 2017. (Doc. No. 1.) On May 3, 2017, Rivera
25 filed an amended complaint. (Doc. No. 5.) Rivera was then granted leave to amend her
26 complaint on October 4, 2017. (Doc. No. 40.) Rivera’s second amended complaint was
27 filed on October 5, 2017. (Doc. No. 41.) Shortly thereafter, the Government filed the instant
28 motion, its motion to dismiss or motion for summary judgment. (Doc. No. 43.) On April

1 17, 2018, the Honorable Judge Roger T. Benitez recused himself from the instant case.
2 (Doc. No. 65.)

3 LEGAL STANDARD

4 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff's
5 complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "[A] court may dismiss
6 a complaint as a matter of law for (1) lack of a cognizable legal theory or (2) insufficient
7 facts under a cognizable legal claim." *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*,
8 88 F.3d 780, 783 (9th Cir. 1996) (citation and internal quotation marks omitted). However,
9 a complaint will survive a motion to dismiss if it contains "enough facts to state a claim to
10 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
11 In making this determination, a court reviews the contents of the complaint, accepting all
12 factual allegations as true and drawing all reasonable inferences in favor of the non-moving
13 party. *See Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972,
14 975 (9th Cir. 2007).

15 Notwithstanding this deference, the reviewing court need not accept legal
16 conclusions as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for
17 a court to assume "the [plaintiff] can prove facts that [he or she] has not alleged"
18 *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519,
19 526 (1983). However, "[w]hen there are well-pleaded factual allegations, a court should
20 assume their veracity and then determine whether they plausibly give rise to an entitlement
21 to relief." *Iqbal*, 556 U.S. at 679.

22 DISCUSSION²

23 A. Judicial Notice

24 The Government requests judicial notice of the Performance-Based National
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26 ² The Court will analyze the Government's motion under the lens of Federal Rule of Civil
27 Procedure 12(b)(6). Though this case was first filed in early 2017, the Court finds that it is
28 still at the early stages of litigation and the pleadings are still not established.

1 Detention Standards (“PBNDS”) and the underlying contract between it and CoreCivic.
2 (Doc. No. 43-1 at 11.) Rivera does not oppose the request. (*See generally* Doc. No. 45.)

3 Federal Rule of Evidence 201 states that a “court may judicially notice a fact that is
4 not subject to reasonable dispute because it: (1) is generally known within the trial court’s
5 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
6 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Here, the Government
7 argues that judicial notice is appropriate as Rivera’s operative complaint references both
8 of the above-mentioned documents and because they are both public records. (Doc. No.
9 43-1 at 11.) The Court agrees.

10 Presently, Rivera’s complaint explicitly references the PBNDS and how these
11 standards applied to the care Sanchez received and should have received. (Doc. No. 41 ¶
12 93.) Additionally, the complaint specifically mentions and even quotes from the contract
13 between the Government and CoreCivic. (*Id.* ¶ 101.) Thus, both documents are
14 incorporated by reference. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)
15 (“A court may, however, consider certain materials . . . documents incorporated by
16 reference . . . without converting the motion to dismiss into a motion for summary
17 judgment.”). Moreover, courts routinely take judicial notice of “[p]ublic records and
18 government documents available from reliable sources on the Internet[.]” *Gerritsen v.*
19 *Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015).

20 Based on the foregoing, the Government’s request for judicial notice is **GRANTED**.

21 B. FTCA Claims

22 In general, the Government seeks to dismiss each of Rivera’s FTCA causes of action.
23 (*See generally* Doc. No. 43-1.) In a brief five-page opposition, Rivera challenges each of
24 the Government’s contentions. (*See generally* Doc. No. 45.)

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1 *i. Sovereign Immunity*³

2 The Government’s sovereign immunity assertions focus solely on arguing that it
3 cannot be held liable for the alleged inactions of CoreCivic employees. (Doc. No. 43-1 at
4 11.) Specifically, the Government argues that “to the extent that [Rivera] would have this
5 Court hold [it] liable for the alleged actions or inactions of CoreCivic employees” it cannot
6 be held liable for torts committed by its contractors. (*Id.* at 11–12.)

7 “Absent a waiver of sovereign immunity, a wrongful death suit against the United
8 States would be barred under the sovereign immunity doctrine.” *Schwarder v. United*
9 *States*, 974 F.2d 1118, 1121 (9th Cir. 1992); *see also United States v. Mitchell*, 445 U.S.
10 535, 538 (1980) (holding that as a general matter, the United States, as sovereign, is
11 immune from suit unless it consents to be sued). However, the FTCA permits parties to
12 assert tort claims against the United States under particular circumstances, and thus effects
13 a limited waiver of sovereign immunity. *See* 28 U.S.C. § 1346. Specifically, this waiver
14 extends only to “the negligent or wrongful act or omission of any employee of the
15 Government” *Id.* at (b)(1).

16 Under the FTCA’s definition of an “employee of the government,” employees
17 include officers or employees of any federal agency, as well as members of the military or
18 naval forces. 28 U.S.C. § 2671. It also includes “persons acting on behalf of a federal
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20 ³ Though not completely clear, the Court notes that the Government seems to concede that
21 the SAC has adequately pled its liability for the actions of the USPHS commissioned corps
22 officers, who provided health care and medical case management to Sanchez while he was
23 housed at the Otay Mesa Detention Facility. The complaint clearly alleges that the USPHS
24 employees are federal agency employees under the U.S. Immigration and Customs
25 Enforcement Health Service Corps. (Doc. No. 41 ¶¶ 12, 15, 26, 39.) Thus, the Court finds
26 that to the extent the Government sought to dismiss any claims against it in relation to the
27 medical professionals working at CoreCivic, that motion would have been denied by the
28 Court. *See Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005) (“Under the FTCA’s
limited waiver of sovereign immunity, the United States is liable to the same extent as a
private party for certain torts of federal employees acting within the scope of their
employment”) (citing 28 U.S.C. § 1346 (b)(1)).

1 agency” *Id.* The statute expressly excludes from the definition of “federal agency,”
2 however, “any contractor with the United States.” *Id.* Thus, the FTCA does not waive the
3 United States’ immunity from liability for the negligent or wrongful acts or omissions of
4 independent contractors. *See United States v. Orleans*, 425 U.S. 807, 814 (1976) (“Since
5 the United States can be sued only to the extent that it has waived its immunity, due regard
6 must be given to the exceptions, including the independent contractor exception, to such
7 waiver[.]”). This independent contractor exception, however, has its limitations. The
8 United States can be subjected to liability for acts of its contractors if the plaintiff shows
9 that the government controlled and supervised the “detailed physical performance” and
10 “day to day operations” of the contractor. *Autery*, 424 F.3d at 956 (citation omitted).

11 Presently, based off of the contract incorporated by reference, it is unquestionable
12 that CoreCivic employees are contractors employed by the Government. (Doc. No. 43-2 at
13 3–6.) Through this contract, Rivera then attempts to allege that USPHS and CoreCivic were
14 required to ensure that all employees were provided pre-service and annual training. (*Id.* ¶
15 101.) Additionally, Rivera contends that the Government through its agents the U.S.
16 Immigration and Customs Enforcement and USPHS, is required to provide direct patient
17 care to the federal detainees at CoreCivic’s Otay Mesa Detention Center. (*Id.* ¶ 90.)
18 Furthermore, Rivera asserts that CoreCivic is responsible for the implementation of
19 policies, procedures, acts, and omissions of its employees and agents. (*Id.* ¶ 115.)

20 Regrettably, under the standard delineated above, these general and broad
21 allegations fail to adequately demonstrate that the independent contractor exception does
22 not apply to the Government under the circumstances of this case. For instance, Rivera’s
23 complaint does not allege that the Government directed the performance of CoreCivic
24 employees or that the Government supervised or directed (or negligently supervised or
25 directed) the day-to-day operations of CoreCivic’s Otay Mesa Detention Center. Without
26 more, the complaint fails to adequately allege that CoreCivic contractors can be considered
27 employees of the Government. *See Johnson v. United States*, 132 F. App’x 715, 716 (9th
28 Cir. 2005) (finding that the independent contractor exception to the FTCA did not apply as

1 the evidence indicated that the United States Postal Service “dictated every aspect” of the
2 employee’s daily employment activities including how many times to turn a mop over as
3 well as when and how to place safety signs).

4 Accordingly, as the SAC does not sufficiently allege that the Government controlled
5 or supervised its CoreCivic contractors or correctional officers, the Government has not
6 waived sovereign immunity for the liability of the alleged inactions or actions of CoreCivic
7 employees. *See Valadez-Lopez v. Chertoff*, 656 F.3d 851, 858 (9th Cir. 2011) (“The
8 government may be sued under the [FTCA] ‘for the actions of a government contractor
9 and its employees’ only if the contractor is acting as an agent of the government, i.e. ‘if the
10 government has the authority to control the detailed physical performance of the contractor
11 and supervise its day-to-day operations.’”) (citation and internal quotation marks omitted);
12 *see also Laurence v. Dep’t of Navy*, 59 F.3d 112, 114 (9th Cir. 1995) (finding that the
13 independent contractor exception applied based on the government’s failure to “exercise[]
14 the requisite ‘substantial supervision’ by controlling the detailed physical performance and
15 day-to-day work of [the contractor].”); *Letnes v. United States*, 820 F.2d 1517, 1519 (9th
16 Cir. 1987) (“There must be substantial supervision over the day-to-day operations of the
17 contractor in order to find that the individual was acting as a government employee.”)
18 (emphasis added).

19 ***ii. Negligent Training and Supervision***

20 The Government claims that Rivera’s cause of action for negligent training and
21 supervision is barred by the discretionary function exception. (Doc. No. 43-1 at 15–17.)
22 Rivera argues that USPHS contravened its own policy and thus the discretionary function
23 does not apply. (Doc. No. 45 at 4.)

24 The discretionary function exception precludes claims against the United States
25 which are “based upon the exercise or performance or the failure to exercise or perform a
26 discretionary function or duty on the part of a federal agency or an employee of the
27 Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). In
28 order to determine whether the discretionary function exception applies, a court must

1 engage in a two-step inquiry: (1) the court must determine whether the challenged conduct
2 involves an element of judgment or choice, *see Berkovitz v. United States*, 486 U.S. 531,
3 536 (1988); and (2) if the conduct involves some element of choice, the court must
4 determine whether the conduct implements social, economic, or political policy
5 considerations, *see Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994).

6 It is not quite clear how Rivera seeks to adequately plead this cause of action. As
7 currently pled, the complaint only asserts that the medical professionals that saw Sanchez
8 did not order a chest x-ray for him or refer him to a licensed physician. (Doc. No. 41 ¶¶ 29,
9 30, 36, 45, 51, 67.) Rivera then states that ICE detention facilities are required to follow
10 the PBNDS, that the Government had a duty to properly train and supervise its employees,
11 and that the Government breached its duty. (*Id.* ¶¶ 93, 127, 128.) Unfortunately, as a whole,
12 these allegations are simply unavailing legal conclusions that fail to identify any specific
13 requirement in a statute, regulation, or policy that prevents the Government from exercising
14 discretion in training and supervising its employees.

15 Moreover, allegedly negligent and reckless employment, supervision, and training
16 of medical professionals falls squarely within the discretionary function exception. *See*
17 *Gager v. United States*, 149 F.3d 918, 920–22 (9th Cir. 1988) (holding that the
18 government’s decision to forego employee training in mail bomb detections was a
19 discretionary one); *see also Gourgue v. United States*, No. 12CV-1490-LAB, 2013 WL
20 1797099, at *2 (S.D. Cal. Apr. 29, 2013) (“[T]he Government’s decision of how to train
21 and supervise its employees is the kind of decision that the discretionary function was
22 designed to protect because it is susceptible to a policy analysis.”).

23 Rivera argues that the discretionary function exception does not apply to instances
24 when United States actors do not follow their own self-imposed policy. (Doc. No. 45 at 4
25 (citing *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989).) In
26 *Kennewick*, the court illuminated that “the discretionary function will not apply when a
27 federal statute, regulation, or policy specifically prescribes a course of action for an
28 employee to follow because then the employee has no rightful option but to adhere to the

1 directive.” *Id.* at 1026 (citation and internal quotation marks omitted). The Court notes that
2 though Rivera correctly cites to the holding in *Kennewick*, the complaint still fails to allege
3 a federal policy that the Government failed to follow in relation to the hiring and
4 supervision of its employees. As such, the Government’s motion to dismiss this cause of
5 action is **GRANTED**.

6 *iii. Negligent Infliction of Emotional Distress*

7 California law recognizes that “there is no independent tort of negligent infliction of
8 emotional distress” in that “[t]he tort is negligence, a cause of action in which a duty to the
9 plaintiff is an essential element.” *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965,
10 984 (1993). The existence of a duty is a question of law. *Marlene F. v. Affiliated Psychiatric*
11 *Med. Clinic, Inc.*, 48 Cal. 3d 583, 588 (1989). Moreover, there are two variants to the theory
12 of negligent infliction of emotional distress (“NIED”)—bystander and direct victim cases.
13 *See Hillblom v. Cty. of Fresno*, 539 F. Supp. 2d 1192, 1209 (E.D. Cal. 2008) (citing
14 *Wooden v. Raveling*, 61 Cal. App. 4th 1035, 1037 (1998)).

15 This matter presents a bystander case as Rivera was not physically impacted or
16 injured, but instead allegedly witnessed the injury of someone else due to a defendant’s
17 negligence. *See Hillblom*, 539 F. Supp. 2d at 1209 (citation omitted); *see also Burgess v.*
18 *Superior Court*, 2 Cal. 4th 1064, 1072–73 (1992) (explaining that a bystander case arises
19 in the context “of physical injury or emotional distress caused by the negligent conduct of
20 a defendant with whom the plaintiff had no preexisting relationship, and to whom the
21 defendant had not previously assumed a duty of care beyond that owed to the public in
22 general.”). In the absence of physical injury or impact to Rivera, damages for emotional
23 distress in a bystander case should only be recoverable if Rivera: “(1) is closely related to
24 the injury victim, (2) is present at the scene of the injury-producing event at the time it
25 occurs and is then aware that it is causing injury to the victim and, [sic] (3) as a result
26 suffers emotional distress beyond that which would be anticipated in a disinterested
27 witness.” *Fife v. Astenius*, 232 Cal. App. 3d 1090, 1092 (1991) (citation omitted).

28 Here, it is unquestionable that the complaint adequately pleads the first criteria as

1 Rivera is the victim’s wife. (Doc. No. 41 ¶ 6.) However, the remainder of the elements are
2 clearly not met. For instance, even though Sanchez’s body was delivered to Rivera
3 purportedly bruised and battered, and the Court does not deny that the state of Sanchez’s
4 remains as alleged would shock his loved ones, Rivera fails to assert that she was present
5 at the scene where the injury took place. Accordingly, this cause of action, as currently
6 pled, does not suffice under California law and is **DISMISSED**.⁴ *See Wilks v. Hom*, 2 Cal.
7 App. 4th 1264, 1271 (1992) (explaining that the plaintiff must be at the scene and be
8 sensorially aware of the accident and the necessarily inflicted injury); *see also Ortiz v.*
9 *HPM Corp.*, 234 Cal. App. 3d 178, 185–86 (1991) (finding NIED properly pled as the wife
10 in the case saw her husband being crushed in a machine).


11 **CONCLUSION**

12 The events of the SAC as pled are both disheartening and frightening. Regrettably,
13 as a whole, Rivera’s FTCA causes of action against the Government are not adequately
14 pled. Accordingly, the Court **GRANTS** the Government’s motion to dismiss. Finding that
15 amendment would not be futile, the Court **GRANTS** Rivera **twenty-one (21) days** from
16 the date of this Order to file an amended complaint curing the deficiencies noted herein.
17 Failure to file an amended complaint will result in dismissal of this case.

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19 **IT IS SO ORDERED.**

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24 ⁴ Rivera cites to *Christensen v. Superior Court*, 54 Cal. 3d 868 (1991), to support her claim
25 of NIED upon seeing Sanchez’s remains. (Doc. No. 45 at 3.) However, the court in
26 *Christensen* was analyzing a situation where human remains were mistreated by a
27 crematorium. *Id.* at 899. In this specific type of case, the court concluded that where a
28 defendant has undertaken to provide a service, “the very purpose of which is to alleviate
existing and avoid future emotional distress arising from the death[.]” a plaintiff may seek
relief based on the breach of a duty owed directly to the plaintiff. *Id.* at 899–90. It is clear
that the facts in *Christensen* are completely inapplicable to the present matter.

1 Dated: July 2, 2018


Hon. Anthony J. Battaglia
United States District Judge

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