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3 adjacent to the Federico Degetau Federal Building, on land owned by the United States of  
4 America (“United States”) in San Juan, Puerto Rico. Id.

5 The action against the United States and GSA is pursuant to the Federal Tort Claims Act  
6 (“FTCA”), 28 U.S.C. §§ 1346 & 2671, et seq., whereas the claims against the local Defendants,  
7 Rainforest Kids, Aida Herrans Berreras, and their insurer Universal Insurance Co. (“Universal”),  
8 Genett, and its insurer, ACE Insurance Company (“ACE”), are grounded upon Article 1802 and  
9 Article 1803 of the Puerto Rico Civil Code. P.R. Laws Ann. tit. 31, §§ 5141 & 5142. Plaintiffs  
10 claim that the United States is liable due to its negligence in coordinating the activities of  
11 Rainforest Kids, which operates a childcare center on GSA property, and Genett, which the  
12 GSA contracts with to maintain the Federico Degetau Federal Building’s adjacent grounds. The  
13 United States rejoins that it has no such duty, and that this is a specious argument because  
14 Genett and Rainforest Kids are independent contractors, and the FTCA states that the federal  
15 government may not be sued for the negligent acts of its contractors. Both Plaintiffs and the  
16 United States have found something to cavil at in each cross-motion, which has dragged the  
17 disposition of this controversy on for too long. However, the moment for disposition of this  
18 simple controversy has arrived.

19 **Standard of Review**

20 FED. R. CIV. P. 12(b)(1) is the proper vehicle for challenging a court’s subject matter  
21 jurisdiction. Valentín v. Hospital Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001). Under this  
22 rule, a wide variety of challenges to the Court’s subject matter jurisdiction may be asserted,  
23 among them those based on sovereign immunity, ripeness, mootness, and the existence of a  
24 federal question. Id. (citations omitted). When faced with such a jurisdictional challenge, this  
25 Court must “. . . give weight to the well-pleaded factual averments in the operative pleadings  
26 [. . .] and indulge every reasonable inference in the pleader’s favor.” Aguilar v. U.S.

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3 Immigration and Customs Enforcement Div. of Dept. of Homeland Sec., 510 F.3d 1, 8 (1st  
4 Cir.2007).

5 A plaintiff faced with a motion to dismiss for lack of subject matter jurisdiction has the  
6 burden to demonstrate that such jurisdiction exists. See Lord v. Casco Bay Weekly, Inc., 789  
7 F. Supp. 32, 33 (D. Me. 1992); see also SURCCO V. PRASA, 157 F. Supp. 2d 160, 163 (D.  
8 P.R. 2001). However, in order for a plaintiff's claim to be dismissed for lack of subject matter  
9 jurisdiction, due to the inadequacy of the plaintiff's federal claim, that claim must be ". . . so  
10 insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely  
11 devoid of merit as not to involve a federal controversy." Oneida Indian Nation of N.Y. v.  
12 County of Oneida, 414 U.S. 661, 666 (1974). In this context, this Court is empowered to resolve  
13 factual disputes by making reference to evidence in the record beyond the plaintiff's allegations  
14 without having to convert the motion to dismiss into one for summary judgment. See Lord, 789  
15 F. Supp. at 33 (D. Me. 1992); see also SURCCO, 157 F. Supp. 2d at 163 (D. P.R. 2001);  
16 Garcia-Perez v. Santaella, 364 F.3d 348, 350 (1st Cir. 2004). Accordingly, "[w]here a party  
17 challenges the accuracy of the pleaded jurisdictional facts, the court may conduct a broad  
18 inquiry, taking evidence and making findings of fact." Hernández-Santiago v. Ecolab, Inc., 397  
19 F. 3d 30, 33 (1st Cir. 2005). Therefore, the court may consider extrinsic materials, "and, to the  
20 extent it engages in jurisdictional fact-finding, is free to test the truthfulness of the plaintiff's  
21 allegations." Dynamic, 221 F. 3d at 38; Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir.  
22 1996). That is, the principle of conversion of a motion to dismiss into a motion for summary  
23 judgment when extrinsic materials are reviewed, does not apply in regards to a motion to  
24 dismiss for lack of subject matter jurisdiction. Id. This is not true when a party proffers a merits  
25 defense, which leads to conversion to a Rule 56 analysis. Hernandez-Santiago, 397 F.3d at 34.

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3 Motions brought under Rule 12(b)(1) are subject to a similar standard of review as Rule  
4 12(b)(6) motions. Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994);  
5 Torres Maysonet v. Drillex, S.E., 229 F.Supp.2d 105, 107 (D.P.R. 2002). Under Rule 12(b)(1),  
6 dismissal would be proper if the facts alleged reveal a jurisdictional defect not otherwise  
7 remediable. The Court accepts all well-pleaded factual allegations as true, and draws all  
8 reasonable inferences in plaintiff's favor. See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d  
9 49, 51 (1st Cir. 1990)(overruled on other grounds). The Court need not credit, however, "bald  
10 assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when  
11 evaluating the Complaint's allegations. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).

### 12 **Applicable Law & Analysis**

13 The United States makes two sets of arguments in favor of dismissal. The first is that  
14 FTCA provides an exclusive remedy against the United States, and not its individual agencies,  
15 such as the GSA. Secondly, the United States argues that liability in this case falls squarely on  
16 the shoulders of Genett and Rainforest Kids, and that any possible claims against the federal  
17 government are shielded either by the FTCA's independent contractor defense, or the statute's  
18 discretionary function exception. This Court will discuss each of the above arguments in turn.

#### 19 *Defendant GSA*

20 28 U.S.C. § 1346(b)(1) establishes that the United States District Courts have exclusive  
21 jurisdiction for claims against the United States. The statute also "provides that the federal  
22 district courts shall have exclusive jurisdiction over damages claims against the United States  
23 for injury or loss of property, or for personal injury or death 'caused by the negligent or  
24 wrongful act or omission of any employee of the Government while acting within the scope of  
25 his office or employment.'" Celestine v. Mount Vernon Neighborhood Health Center, 403 F.3d  
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3 76, 80 (2nd Cir. 2005). Furthermore, the FTCA immunizes most federal employees and agents  
4 from “. . . liability for negligent or wrongful acts done in the scope of their employment.” Id.

5 Federal agencies and employees cannot be sued under the FTCA, which only allows for suits  
6 against the United States *eo nomine*. 28 U.S.C. § 2679(a); Diaz, 372 F.Supp. 2d. at 680;  
7 F.D.I.C. v. Meyer, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Accordingly, all  
8 claims against the GSA are **DISMISSED WITH PREJUDICE**.

9 *Independent Contractor Defense*

10 The United States pleads for dismissal under the principle of sovereign immunity, arguing  
11 that the FTCA does not allow government liability for an independent contractor’s negligence.  
12 The FTCA acts as a waiver of the United States’s sovereign immunity for some torts claims.  
13 Diaz v. United States, 372 F. Supp. 2d 676, 679 (D.P.R. 2004); Thames Shipyard & Repair Co.  
14 v. United States, 350 F.3d 247, 253 (1st Cir. 2003). However, this Court lacks subject matter  
15 jurisdiction when said waiver has not been unequivocally expressed. Id.

16 The FTCA applies to actions by employees, federal agencies, and instrumentalities of the  
17 government, but generally “. . . does not include any contractor with the United States.” 28  
18 U.S.C. § 2671. Therefore, in general, “. . .the federal government will not be liable for the  
19 negligence of independent contractors.” Sanchez Pinero v. Department of Housing and Urban  
20 Development, 592 F.Supp.2d 233, 236 (D.P.R. 2008); see also United States v. Orleans, 425  
21 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976); Logue v. United States, 412 U.S. 521, 93 S.Ct.  
22 2215, 37 L.Ed.2d 121 (1973); Larsen v. Empresas El Yunque, Inc., 812 F.2d 14 (1st Cir.1986);  
23 Brooks v. A.R. & S. Enterprises, Inc., 622 F.2d 8, 10 (1st Cir.1980). However, the general  
24 contractor exception does not apply when the government controls the “detailed physical  
25 performance of the contractor,” and supervises its day-to-day activities. Heinrich v. Sweet, 83  
26 F.Supp.2d 214, 221 (D.Mass.2000) (quoting United States v. Orleans, 425 U.S. 807, 814-15, 96

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3 S.Ct. 1971, 48 L.Ed.2d 390 (1976)); see also Diaz, 372 F.Supp. 2d. at 681; Brooks v. A. R. &  
4 S. Enterprises, Inc., 622 F.2d 8, 10 (1st Cir. 1980); Logue, 412 U.S. at 523. In determining  
5 whether the United States bears potential liability, the courts must discern whether it has  
6 sufficient control over the contractor's daily operations to overcome the exception. Sanchez  
7 Pinero, 592 F.Supp.2d at 236 (citing Brooks, 622 F.2d at 10-11).

8 However, a right to inspect the work of a contractor does not generally nullify this rule.  
9 Id.; Larsen, 812 F.2d at 15 (quoting Brooks, 622 F.2d at 12). District courts have used the First  
10 Circuit's totality of the circumstances approach for state level immunities when examining the  
11 FTCA's independent contractor exception. Diaz, 372 F.Supp. 2d. at 681 (citing Nieves v.  
12 University of Puerto Rico, 7 F.3d 270, 279 (1st Cir. 1993)). Plaintiffs make arguments based on  
13 state law, and while this Court finds them unavailing, it should also note that the FTCA, and not  
14 state law, establishes the United States' tort liability. Fisko v. U.S. General Services Admin., 395  
15 F.Supp. 2d. 57, 66 (S.D.N.Y. 2005) (citing Logue, 412 U.S. at 521).

16 As much as the facts of the situation elicit compassion, this Court cannot foist liability  
17 on the United States where the FTCA grants immunity. Both Genett and Rainforest Kids were  
18 at all times independent contractors, holding contractual agreements with the GSA to operate  
19 on federal property. Rainforest Kids obtained a license to operate its daycare, which gave  
20 significant leeway for operation, and indemnified the United States from liability stemming  
21 from the daycare's operation. Docket # 50-2.

22 GSA and Genett also signed a similar contract, but for janitorial and maintenance  
23 services, which placed the duty for supervision on the shoulders of the contractor, and also gave  
24 Genett responsibility for management, operation, and buildings in an economical, and  
25 satisfactory manner. Dockets ## 50-3 & 50-4. According to the GSA's contracting practices, the  
26 United States and the contractors sign different forms, validating the contract, which in the case

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3 of Genett included a Safety Plan. Docket # 67-11. The United States has proffered a copy of the  
4 Safety Inspection Plan submitted by Genett. Docket # 67-6. The agreement clearly puts the  
5 every day safety procedures in the hands of the contractor, and these are related to workplace  
6 safety and not scheduling. Nothing in the agreement, or any other document included in the  
7 record of the present action, insinuates that Rainforest Kids and Genett could not confer  
8 regarding the scheduling of outdoor playtime and lawn mowing.

9 In this case, the United States delegated to Genett the responsibility to maintain the  
10 property's grounds, along with the right to implement how said maintenance would be  
11 accomplished. This precluded the United States' authority to control the detailed physical  
12 performance of Genett's work, and the "... ability to compel compliance with federal regulation  
13 does not change a contractor's personnel into federal employees." Letnes v. U.S., 820 F.2d 1517,  
14 1519 (9th Cir. 1987). Furthermore, Genett had a schedule for cutting the facility's grass, and  
15 Rainforest Kids was cognizant of said schedule, or at least had access to it. Docket 67-5 at 3.

16 This Court concurs with the United States' argument that the method and extent of  
17 contractor supervision are included within the independent contractor exception. See, e.g.,  
18 Moreno v. United States, 965 F.Supp. 521, 527 (S.D.N.Y. 1997). Moreover, the choice of a  
19 contractor is discretionary, and based on policy judgments. United States v. Gaubert, 499 U.S.  
20 315, 322, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), created a process when determining the  
21 applicability of the discretionary duty exception. This involves determining whether the act  
22 "involv[es] an element of judgment or choice" intertwined with the nature of the conduct. U.S.  
23 v. Gaubert, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273 (1991)(citing Berkovitz v. United States,  
24 486 U.S. 532, 536, 108 S.Ct. 1954, 1958 (1988) and United States v. Varig Airlines, 467 U.S.  
25 797, 813, 104 S. Ct. 2755, 2764 (1984)). Moreover, the decision must be based on public policy  
26 considerations. Id. at 323 (citing Berkovitz, 486 U.S. at 537). While hardly of central policy

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3 importance, maintenance and repair contracts have been covered by the discretionary duty  
4 exception. Diaz, 372 F.Supp. 2d. at 682 (citing Hostetler v. United States, 97 F.Supp.2d 691,  
5 695 (E.D.Va.2000); Varig, 467 U.S. at 819-820). Likewise, the mere right to inspect the work  
6 of a contractor does not defeat the exception. Brooks, 622 F.2d at 12. Given that this Court has  
7 held that the independent contractor exception governs the present action, there is no need to  
8 analyze the discretionary function test. However, the duty to coordinate could create FTCA  
9 liability where the government is cognizant of the dangers presented to the public by a particular  
10 activity.

11        Nevertheless, such circumstances are not present in this case, which presents a quotidian  
12 example of the FTCA’s independent contractor exception. Accepting Plaintiffs’ position that the  
13 GSA had a duty to coordinate its contractors’ schedules would also require the United States and  
14 Rainforest Kids to coordinate the activities occurring at the day-care center, and when these  
15 were permitted. The same would be true for Genett and janitorial services. Such a standard  
16 would lead to micro-management, provide few if any practical benefits, and create an unneeded  
17 level of bureaucracy. Plaintiffs did not leave their child in the care of the United States, so they  
18 should have no legitimate expectation of governmental liability when their claim arises from  
19 alleged facts involving a private child care provider, and a private janitorial contractor. This  
20 standard does not place Plaintiffs in a situation where they are without a legal remedy. They may  
21 pursue their claims against the allegedly directly culpable parties, Rainforest Kids and Genett.  
22 Therefore, all claims under the FTCA against the United States are hereby **DISMISSED WITH**  
23 **PREJUDICE.**

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25                    *Supplemental Law Claims*  
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3 Plaintiffs brought the present claim to this Court under federal question jurisdiction, 28  
4 U.S.C. § 1346(b), due to the FTCA claims against the United States. However, the complaint  
5 also included supplemental causes of action under the Commonwealth’s general torts statutes,  
6 Articles 1802 & 1803 of the Puerto Rico Civil Code, against Rainforest Kids and Ganett.  
7 Nevertheless, having dismissed Plaintiffs’ federal law claims, this Court will similarly dismiss  
8 Plaintiffs’ supplemental Commonwealth law claims, for which jurisdiction depends on the  
9 presence of a federal question. See Newman v. Burgin, 930 F.2d 955, 963 (1st Cir. 1991) (“[t]he  
10 power of a federal court to hear and to determine state-law claims in non-diversity cases depends  
11 upon the presence of at least one ‘substantial’ federal claim in the lawsuit.”). Plaintiffs’  
12 supplemental law claims will be **DISMISSED WITHOUT PREJUDICE**.

13 **Conclusion**

14 For the foregoing reasons, all claims against the United States and the GSA are  
15 **DISMISSED WITH PREJUDICE**, and all claims against the private actors are **DISMISSED**  
16 **WITHOUT PREJUDICE**. Judgment shall be entered accordingly.

17 **IT IS SO ORDERED.**

18 In San Juan, Puerto Rico, this 7<sup>th</sup> day of December, 2009.

19 *S/ Salvador E. Casellas*  
20 SALVADOR E. CASELLAS  
21 U.S. Senior District Judge  
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