UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, *Plaintiffs,* v. UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, *Defendants.*	DOCKET NO.: 14-CV-583 (LGS) **Document Electronically Filed**

PLAINTIFFS' RULE 56.1 STATEMENT OF UNDISPUTED FACTS

Plaintiffs submit this statement of uncontested facts pursuant to Local Civil Rule 56.1 in support of their Motion for Partial Summary Judgment, which seeks release of information that that Defendants Immigration and Customs Enforcement ("ICE") and Department of Homeland Security ("DHS") have improperly withheld pursuant to 5 U.S.C. §552(b)(4) ("Exemption 4").

THE DETENTION BED QUOTA

1. ICE manages the civil detention of immigrants through a system of facilities operated by private contractors, local governmental authorities, and the federal government itself. Since at least 2009, the United States Congress has appropriated funding for ICE on the

condition that it maintain a certain number of immigration detention beds per day. In Fiscal Year 2015, in the Appropriations Act authorizing more than $5.93 billion in funding for ICE, Congress required ICE to maintain 34,000 detention beds per day. *Department of Homeland Security Appropriations Act, 2015*, available at https://www.congress.gov/bill/114th-congress/house-bill/240/text?overview=closed.

2. This Detention Bed Quota or mandate has been a topic of persistent public and legislative debate, with Congressional representatives taking legislative action each year to eliminate the quota. For example, on September 17, 2015, members of both the House of Representatives and the Senate introduced the Justice Is Not For Sale Act, aiming to end contracting with private prison corporations and to eliminate the detention bed quota. *See* Sec. 8, "Termination of Detention Bed Quota," in https://www.congress.gov/bill/114th-congress/house-bill/3543/text (text of H.R. 3543); https://www.congress.gov/bill/114th-congress/senate-bill/2054/text (text of S. 2054).

3. Similar legislation previously was introduced in the House of Representatives. *See, e.g.*, https://www.congress.gov/amendment/113th-congress/house-amendment/107/index/ (describing H. Amdt. 107 to the 2013 DHS Appropriations Act, an amendment in the House of Representatives to "strike[]the provision in the bill that U.S. Immigration and Customs Enforcement maintain a level of not less than 34,000 beds"); https://rules.house.gov/bill/114/hr-240 (listing House or Representatives amendments to 2015 DHS Appropriations Act, including a bi-partisan amendment to "strike[] the provision" requiring ICE to "maintain a level of not less than 34,000 beds."); http://amendments-rules.house.gov/amendments/DEUTCH_008_xml112151437313731.pdf (text of 2015 amendment introduced by Representative Deutch of Florida).

4. In the last two years, public concern about the Detention Bed Quota has focused on the profits accruing to private prison corporations as a result of the expanding immigration detention system. For example, in September 2013, Bloomberg News cited Congressional pressures on ICE to fill detention beds and the coincident rise in lobbying by private prison corporations that provide immigration detention services. *See* William Selway and Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, Bloomberg (Sept. 24, 2013), available at http://www.bloomberg.com/news/articles/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants. On January 20, 2014, the editorial board of the New York Times criticized the Detention Bed Quota – and its attendant $2.8 billion cost – as "mindless" and "irrational" given that "more pressing government obligations are being starved." Editorial, *Detention Must Be Paid*, N.Y. Times (Jan. 20, 2014), available at http://www.nytimes.com/2014/01/21/opinion/detention-must-be-paid.html?_r=0. The New York Times took particular note of the excessive costs of "keeping prison beds warm" when compared with "low-cost alternatives to detention that don't involve fattening the bottom lines of for-profit prison corporations." *Id.*

PLAINTIFFS' FOIA REQUEST AND DEFENDANTS' PRODUCTIONS

5. On November 25, 2013, Plaintiffs Detention Watch Network ("DWN") and the Center for Constitutional Rights ("CCR") submitted a Freedom of Information Act ("FOIA") Request to ICE and DHS seeking information regarding ICE's interpretation and implementation of the Detention Bed Quota. Compl. ¶ 2 (ECF No. 1). Plaintiffs sought, *inter alia*, records related to ICE's contracts with private prison corporations and local governments, as well as information about the costs of "guaranteed minimum" provisions in contracts with private prison corporations. *Id.* ¶¶ 2, 41, 57.

6. On January 30, 2014, Plaintiffs filed a Complaint to compel DHS and ICE to search for and produce documents, Compl. ¶¶ 73-74, followed by a Motion for Preliminary Injunction on February 2, 2014, Mot. Prelim. Inj., (ECF No. 6). On July 3, 2014, this Court issued an Order directing ICE to produce at least 1,200 pages of responsive documents per month, and directing DHS to either review 4000 pages or produce 1200 pages per month. (ECF No. 48).

7. In July, 2014, ICE began producing the required number of documents to Plaintiffs on a monthly basis, including its detention contracts with both local governments and private contractors. *See* ECF No. 49.

8. Critical terms of these contracts were withheld pursuant to Exemption 4, which permits the government to redact "trade secrets and commercial or financial information obtained from a person" that is "privileged or confidential." The information redacted included bed day rates and unit prices, including those prices that vary with detainee population (sometimes referred to as "tiered pricing"). *See* Declaration of Ghita Schwarz, ¶ 2 (hereinafter "Schwarz Decl.").

9. ICE also redacted staffing plans, which reflect the labor the Government procures for detention and agrees to pay for in a contract. Schwarz Decl. ¶ 3. Staffing plans are guided by ICE's Detention Standards, which require facilities to review and update such plans "at least annually" in order to ensure that staffing is sufficient to "maintain facility security and prevent or minimize events that pose a risk of harm to persons and property." *See* Performance-Based National Detention Standards (2011) at 96, available at https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.

GUARANTEED MINIMUMS IN GOVERNMENT CONTRACTS

10. Relying on these redacted contracts, as well as on communications produced in the litigation, on June 11, 2015, Plaintiffs published *Banking on Detention: Local Lockup Quotas and The Immigrant Dragnet*. *See* Schwarz Decl. Exhibit 1. The report discussed the use of "guaranteed minimum" provisions in private detention contracts.

11. "Guaranteed minimums" are contractual provisions that require ICE to pay private prison corporations for a specific number of detained immigrants regardless of whether detention beds are filled. Schwarz Decl. Exhibit 1 at 3. Documents received to date indicate that they exist only in contracts with private contractors, both at privately-owned facilities as well as at government-owned facilities that subcontract with private prison corporations. *Id*. at 3-5.

12. When ICE agrees to pay certain private contractors for a "guaranteed minimum" number of detainees, its agreed-upon rates are reflected in bed day-rates or unit prices, which may include "tiered pricing." Tiered pricing gives ICE a "discount on each person detained above the guaranteed minimum." Schwarz Decl. Exhibit 1 at 6.

13. *Banking on Detention* argues that "tiered pricing creates direct financial incentives for ICE not only to meet the guaranteed minimum, but also to fill guaranteed-minimum facilities to capacity in order to take advantage of discounts for additional immigrants." *Id*.

14. Within a week of the publication of *Banking on Detention*, Congressional representatives Ted Deutch, Adam Schiff, and Bill Foster sponsored a bill to end the use of guaranteed minimums, H.R. 2808, the "Protecting Taxpayers and Communities from Local Detention Quotas Act," available at https://www.congress.gov/bill/114th-congress/house-bill/2808.

THE LACK OF COMPETITION IN THE PRIVATE IMMIGRATION DETENTION MARKET

15. The Government Accountability Office has criticized ICE for its dependence on private contractors, stating in a 2014 report that private contractors do not meaningfully compete for immigration detention contracts and attributing the high cost of contracts with private detention companies to "the lack of competition that drives up prices." U.S. Gov. Accountability Office, *Gao-15-153, Immigration Detention, Additional Actions Needed To Strengthen Management And Oversight Of Facility Costs And Standards* 27 n.54 (2014) (excerpt attached as Schwarz Decl. Exhibit 2).

16. Private contractors currently account for 62% of immigration detention beds. *See* Bethany Carson and Eleana Diaz, Grassroots Leadership, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, (April 2015) (available at http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf), (excerpts attached as Schwarz Decl. Exhibit 3 at 3 & n.4, citing ICE Authorized Facilities Matrix (March 5, 2015)).

17. The two largest private immigration detention contractors are Corrections Corporation of America ("CCA") and The Geo Group ("GEO"), which are reported to control "72 percent of the privately contracted ICE immigrant detention beds." Schwarz Decl. Exhibit 3 at 4 & n.13, citing ICE Authorized Facilities Matrix (March 5, 2015).

18. CCA and GEO expanded their share of the total ICE immigrant detention system from 37 percent in 2010 to 45 percent in 2014. Schwarz Decl. Exhibit 3 at 4 & n.14, citing the ICE Authorized Facilities Matrix (March 5, 2015).

19. Lack of effective competition is particularly apparent in the contract renewal process. Two studies of immigration detention, published by the non-partisan think tank

Migration Policy Institute ("MPI"), are illustrative. In tables listing the largest immigration detention facilities (those holding more than 500 immigrants), the majority of which are held by private contractors, not one private contract changed hands between 2009 and 2012. *Compare* Donald Kerwin and Serena Yi-Yang Lin, Migration Policy Institute, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities*, 16 (Sept. 2009) at 15-16, with Donald Kerwin, *Piecing Together the US Immigrant Detention Puzzle One Night at a Time: An Analysis of All Persons in DHS-ICE Custody on September 22, 2012*, Journal of Migration Studies, 352-53 (Nov. 5, 2015) at 352-53 (excerpts attached together as Schwarz Decl. Exhibit 4).

20. ICE is required to use an open competitive process for rebidding. 10 U.S.C. § §2304.

21. Nonetheless, in some instances, ICE has rebid contracts without the full and open competition required by statute. For example, in rebidding for a contract in Broward County, Florida, ICE stated that "[n]o other parties expressed interest in competing" for a contract in Broward County, Florida, and noted that two potential contractors lacked detention facilities within 50 miles of a Field Office and were unable to provide detention services. *See* Justification for other than Full and Open Competition, U.S. Immigration & Customs Enforcement at 3 (Aug. 26, 2014), attached as Schwarz Decl. Exhibit 5.

22. Local governments delegated with detention authority reportedly have received similarly few bids. For example, in 2011, the New York Times reported that Essex County, New Jersey, received only one bid for a contract to run a 450-bed immigrant detention center in Newark in two separate rounds of bidding. *See* Sam Dolnick, *Reversing Course, Officials in New Jersey Cancel One-Bid Immigrant Jail Deal*, N.Y. Times, Aug. 15, 2011, at A15, attached as

Schwarz Decl. Exhibit 6. It canceled the contract to the would-be contractor following public opposition. *Id.* But only a few months later, the County awarded the contract a second time to the very same contractor, noting that after it "conducted a new round of bidding. . . the same company was again the only participant." *See* Sam Dolnick, *New Jersey Company Is Given Jail Contract It Lost*, N.Y. Times, Dec. 14, 2011, at A34, attached as Exhibit 7.

THE GOVERNMENT'S INVOCATION OF EXEMPTION 4 TO WITHHOLD UNIT PRICING, BED DAY-RATES, AND STAFFING PLANS AND ITS COMMUNICATIONS WITH PRIVATE CONTRACTORS

23. The instant Partial Motion for Summary Judgment arises out of Defendants' invocation of Exemption 4 to withhold the bed day rates, unit prices (including tiered pricing) and staffing plans from government contracts.

24. On February 6, 2015, Plaintiffs advised the Assistant United States Attorney representing the Defendants of Plaintiffs' position that the information in governmental contracts with both public and private entities was improperly redacted pursuant to Exemption 4. *See* Letter from Ghita Schwarz to Jean-David Barnea, February 6, 2015, attached as Schwarz Decl. Exhibit 8.

25. The Government conceded that unit pricing had been erroneously redacted in detention contracts with public entities such as local and county governments, and on March 15, 2015, ICE began producing contracts with public entities (known as Inter-Governmental Service Agreements, or "IGSAs") without the Exemption 4 redactions. *See* March 13, 2015 Letter from Catrina Pavlik-Keenan (ECF No. 58-2). In addition, on April 15, 2015, ICE began reproducing IGSAs that it had already produced, this time without the Exemption 4 redactions. *See* April 15, 2015 Letter from Catrina Pavlik-Keenan (ECF No. 59-2).

26. In contrast to its position on contracts with public entities, ICE stated that prior to releasing information from its contracts with private contractors, it would seek their input pursuant to 6 C.F.R. §5.8, the regulation implementing FOIA for DHS. (ECF No. 58-2 at 3).

27. 6 C.F.R. §5.8 requires ICE to provide "prompt written notice" to "any person or entity from whom the Department obtains business information," that a FOIA requester seeks such information. 6 C.F.R. §5.8(d). Submitters, in this case private detention contractors, then have the opportunity to "object to disclosure." 6 C.F.R. §5.8(d), (f).

28. On June 15, 2015, ICE filed with the Court a letter from Catrina Pavlik-Keenan of the FOIA Privacy Office. Ms. Pavlik-Keenan's letter stated that ICE had contacted the relevant contractors, received input from them, and would continue to invoke Exemption 4 to protect unit prices and related information from disclosure. (ECF No. 61-2).

29. On June 30, 2015, Plaintiffs submitted a FOIA Request to DHS and ICE seeking communications with the contractors that occurred through the process outlined in 6 C.F.R. §5.8. *See* June 30, 2015 FOIA Request (attached as Schwarz Decl. Exhibit 9).

30. Plaintiffs received 49 pages of communications between ICE and four contractors on August 13, 2015. *See* Schwarz Decl. ¶ 11. The four contractors were Immigration Centers of America ("ICA"), Valley Metro-Barbosa Group JV ("Valley Metro"), Asset Protection Security Services LP ("Asset Protection"), and Akal Security Group. *Id.*

31. Among the communications were letters from Catrina Pavlik-Keenan of ICE to contractors stating that ICE's "preliminary analysis indicates that the requested information was a required submission." *See, e.g.*, Excerpts from ICE Production 2015ICE186421 at 1-2 (attached as Schwarz Decl. Exhibit 10).

32. Plaintiffs received no copies of communications from CCA or GEO, ICE's two largest contractors. Schwarz Decl. ¶ 11. Nor did Plaintiffs receive copies of communications from Valley-Metro, *id*., although ICE did produce the notification letter it sent. *See* Excerpts from ICE Production Responsive to 2015ICE86421, Schwarz Decl. Exhibit 10 at 47-49.

33. In the copies of communications that Plaintiffs did receive, the contractors made general assertions that they believed the information sought by Plaintiffs was confidential pursuant to Exemption 4. *Id*. For example, one contractor, ICA, provided the same justification for redaction of prices in its ICE contracts, including the November 4, 2011 contract discussed as Contract 2 in the instant motion (*see* ¶41 *infra*): "The units and pricing data are themselves or can be used to calculate negotiated financial terms that are confidential and proprietary to the particular contract and can be unfairly used by competitors on future contracts and bids." *See* Excerpts from Response to 2015ICE86421, Schwarz Decl. Exhibit 10 at 28, 36.

34. Another contractor, Asset Protection, stated that release of unit prices, even on detention facilities that already been closed, would permit other contractors to "reverse-engineer our pricing strategies and predict our future pricing by analyzing data contained therein." Schwarz Decl. Exhibit 10 at 20.

35. Because ICE's response did not include responses from all relevant private contractors, Plaintiffs filed an administrative appeal with ICE on October 9, 2015. Schwarz Decl. Exhibit 11.

36. On November 10, 2015, Plaintiffs received a response from ICE to their appeal. In the response, ICE determined that "new search(s), or modifications to the existing search(s) could be made," and remanded the appeal to "ICE FOIA" for further action. Schwarz Decl. Exhibit 12.

37. To date, Plaintiffs have not received copies of any communications between ICE and CCA, GEO or Valley Metro regarding these private prison contractors' basis for believing that Exemption 4 applies to the information withheld from their contracts. Schwarz Decl. ¶ 13.

THE CONTRACTS AND WITHHOLDINGS AT ISSUE

38. After the parties' pre-motion conference on November 10, this Court approved the parties' plan to seek summary judgment regarding the appropriateness of invoking Exemption 4. (ECF No. 68).

39. On November 10, 2015, ICE filed six government contracts with private contractors with the Court, along with indexes describing the basis for the claimed exemptions pursuant to *Vaughn v. Rosen*, 415 U.S. 977 (1974). *See* ECF No. 69.

40. The six government contracts include the following:

- Contract 1: September 28, 2011 contract modification for detention bed-days at the Broward Transitional Center in Pompano Beach, Florida operated by GEO (ECF No. 69-1);

- Contract 2: November 4, 2011 contract modification for detention bed-days at the Farmville Detention Center in Farmville, Virginia, owned by Farmville, but operated by Immigration Centers of America ("ICA") (ECF No. 69-2)

- Contract 3: June 30, 2011 contract modification for the Otay Mesa Detention Facility in San Diego, California, operated by CCA (ECF No. 69-3);

- Contract 4: June 20, 2012 contract modification to update pricing at Otay Mesa Detention Facility in San Diego, California, operated by CCA (ECF No. 69-4);

- Contract 5: March 11, 2011 contract modification for the Buffalo Federal Detention Facility in Batavia, New York, operated by DHS with Valley Metro-Barbosa Group JV ("Valley Metro") providing detention services (ECF No. 69-5); and

- Contract 6: June 1, 2009 contract modification for the Florence Detention Center in Phoenix, Arizona, operated by ICE, with Asset Protection Security Services LP ("Asset Protection") providing detention services (ECF No. Doc. 69-6).

41. Contracts 1 and 3-6 redact "the specific per-detainee bed-day rate" the Government agreed to pay under the contracts. *See Vaughn* Index, ECF 69.

42. Contracts 1, 3 and 4 also redact units and quantity. *See Vaughn* Index; Contracts 1, 3, 4.

43. Contract 2, CCA's contract modification with ICE for the Farmville detention facility, does not include a specific "bed day rate." *See Vaughn* Index at 2; Contract 2. In that contract, however, ICE redacted "the number of detainee bed spaces, the number of units, and unit price information" that ICE agreed to pay under the contract. *See Vaughn* Index at 2.

44. The *Vaughn* Index states that because ICE "has disclosed the total amount to be paid under the contract, the disclosure of the number of beds, quantity or unit price fields could be used to determine the specific bed-day rate." *See Vaughn* Index, ECF No. 69 at 2. The Government asserts that this disclosure would therefore cause private contractors "substantial competitive harm." *Id.*

45. The Government also justifies the redaction of the "staffing plan" from CCA's contract for the Otay Mesa Detention Facility, which it describes as "the specific number of employees and staff that the contractor proposes using to fulfill or carry out its obligations under the contract" and one of the "terms and conditions of [the company's] contract with the government." *See Vaughn Index,* Contract 4.

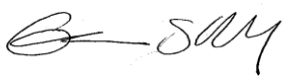
46. The Government justifies each of these withholdings under Exemption 4 by claiming that release of the concealed information "is likely to cause substantial harm to the company's competitive position by, *inter alia*, allowing the company's competitors to identify the company's terms and conditions of its contract with the government." *See Vaughn Index,* Contract 1.

47. The *Vaughn* Index does not provide any guidance as to how competitors, if any, would be able to use unit prices to uncover confidential information generated solely by the contractors. *See generally Vaughn* Index.

48. Nor does the *Vaughn* Index provide any indication of an imminent or substantial threat to any private contractor's competitive position. *Id*.

Dated: November 17, 2015

Respectfully submitted,



GHITA SCHWARZ
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel.: (212) 614-6445
Fax: (212) 614-6422
gschwarz@ccrjustice.org

JENNY-BROOKE CONDON
ANASTASIA A. STYLIANOU (Student Attorney)
JOHN P. BURNS (Student Attorney)
Center for Social Justice
Seton Hall Law School
833 McCarter Highway
Newark, New Jersey 07102
(973) 642-8700
Jenny-Brooke.Condon@shu.edu