1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF WASHINGTON AT TACOMA

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4 UGOCHUKWO GOODLUCK NWAUZOR, et al.,

5

6 Plaintiffs,

7 v.

8 THE GEO GROUP, INC.,

9 Defendant.

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STATE OF WASHINGTON,

11

12 Plaintiff,

13 v.

THE GEO GROUP, INC.,

14

15 Defendant.

3:17-cv-05769-RJB
3:17-cv-05806-RJB

Tacoma, Washington

January 10, 2020

Preliminary Pretrial Conference

10:30 a.m.

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17 VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

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25 Proceedings stenographically reported and transcribed
with computer-aided technology

APPEARANCES

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1 MORNING SESSION

2 JANUARY 10, 2020

3 THE COURT: This is the time we set for a preliminary

4 pretrial conference in Cause Number 17-5769, Nwauzor versus

5 GEO, and 17-5806, State versus GEO.

6 Let me call the role here. First, for Washington,

7 Ms. Chien, Ms. Brenneke and Mr. Polozola.

8 For the plaintiffs, Nwauzor and others, Mr. Whitehead.

9 MR. WHITEHEAD: Good morning, Your Honor.

10 THE COURT: Mr. Theriot-Orr

11 MS. THERIOT-ORR: Yes, sir, good morning.

12 THE COURT: Mr. Free.

13 MR. FREE: Yes, sir.

14 THE COURT: For the defendants, Mr. Barnacle.

15 MR. BARNACLE: Good morning.

16 THE COURT: Ms. Scheffy and Ms. Mell.

17 MS. MELL: Good morning, Your Honor.

18 THE COURT: We have a number of things to cover this

19 morning. First thing is, I want to get a better feel than I

20 have for exactly what the claims of the plaintiffs are here,

21 and understand a bit more of how you propose to prove your

22 claims.

23 I had this nice sheet with your names on it, and then I

24 covered it up.

25 I guess I should ask Mr. Whitehead to go first and tell me

1 exactly what claims you are pushing here and also what you
2 propose to do to prove them and an --
3 MR. WHITEHEAD: Your Honor, would you --
4 THE COURT: -- outline the evidence, if you will.
5 Yes, use the mic at the lectern, if you would.
6 MR. WHITEHEAD: Your Honor, our claim is a claim for
7 back wages owed under the Washington Minimum Wage Act. We
8 argue that under the law and the applicable standards for
9 determining an employment relationship, that GEO is in an
10 employment relationship with the detainee workers at
11 Northwest Detention Center.
12 Using the *Anfison* test, there other factors to consider as
13 well, but looking at the factors that Washington courts look
14 to, to establish an employment relationship, we will put
15 forth evidence showing those factors were met and there was,
16 in fact, a relationship there between GEO and the detainee
17 workers.
18 THE COURT: Not by name, but who do you plan to call?
19 What types of witnesses?
20 MR. WHITEHEAD: Your Honor, we intend to call
21 participants within the voluntary work program, as well as
22 GEO personnel.
23 Specifically, GEO detention officers would be a category
24 of personnel we would look to, to put flesh on the bones, so
25 to speak, about the level of supervision and management that

1 GEO exercised over the detainee workers in the voluntary work
2 program.
3 THE COURT: Have you coordinated your anticipated
4 case in chief with the State?
5 MR. WHITEHEAD: Yes, Your Honor.
6 THE COURT: If I understand what you just told me,
7 your claim is based on the statute that is 49.46.090?
8 MR. WHITEHEAD: Correct, Your Honor.
9 THE COURT: That is the only claim the class has?
10 MR. WHITEHEAD: That is correct, Your Honor.
11 THE COURT: Okay. All right.
12 Let me ask the State the same question.
13 MS. BRENNEKE: Good morning, Your Honor. On behalf
14 of the State, we just want to also extend some gratitude for
15 having this preliminary pretrial conference because, as we
16 are working on our pretrial statement, there are a lot of
17 logistical issues that we hope to be able to work out to be
18 more efficient in presenting the case, so thank you.
19 We have two claims. Ours is first brought under the
20 Minimum Wage Act for injunctive relief moving forward for a
21 declaration that the Minimum Wage Act does apply to the
22 detainee worker relationship with GEO inside Northwest
23 Detention Center and to ensure that they pay minimum wage
24 moving forward.
25 As you know, we have no back wage claim or any kind of

1 damages claim associated with the Minimum Wage Act.
2 Our second claim, which is unique and separate from that,
3 is for the unjust enrichment under Washington State common
4 law. For that claim, we need to prove that there was a
5 benefit to GEO from this detainee work that they knew about
6 and/or was a detriment to those detainees, and that it would
7 be unjust under the circumstances for them to retain that
8 benefit without disgorging it.
9 We seek a disgorgement of that unjust enrichment for the
10 period of 2005 to present.
11 THE COURT: First, under the Minimum Wage Act, where
12 is your authority to bring this?
13 MS. BRENNEKE: Your Honor, that issue was one of the
14 very first issues raised in this case.
15 THE COURT: Speak right into the mic.
16 MS. BRENNEKE: I believe that issue was one of the
17 very first issues that the Court confronted when this case
18 was filed.
19 THE COURT: I don't remember what happened that long
20 ago.
21 MS. BRENNEKE: Yeah, so the Washington State Attorney
22 General has parens patriae authority to enforce the laws of
23 the state of Washington, and our general structures of the
24 state laws allow us to do that with any state law that
25 impacts a substantial number of Washington residents.

1 In this case, in our parens patriae authority, we are
2 recognizing that the Minimum Wage Act laws and the unjust
3 enrichment common law is not being -- is not being abided by,
4 if you will. This is a lot enforcement action to ensure that
5 the laws of Washington apply across our state, including in
6 the private contractor's facility at the Northwest Detention
7 Center.
8 THE COURT: You think you have authority to seize on
9 any wrong that affects a substantial number of Washington
10 citizens to go after them?
11 MS. BRENNEKE: Your Honor, to the extent we have a
12 Washington law that is being violated, the Attorney General's
13 Office has the authority to enforce the law. Of course, if
14 it didn't involve a substantial number, as the Court has
15 already found that it does, that would be a different story.
16 If we were representing one individual plaintiff, for
17 example, that may not be ours to do. That is not our lane.
18 Here, what we are doing is representing all of the state of
19 Washington.
20 We are doing what we can to ensure a vibrant economy in
21 the state of Washington, the way the legislature had intended
22 it when passing the Minimum Wage Act.
23 We are looking to make sure that all rules are enforced
24 equally for all employers of the state of Washington so one
25 doesn't get to benefit by a dollar-a-day policy when others

1 pay minimum wage or more for each hour of work. We are
2 looking at not just the detainee workers who are there, which
3 we care about, but all immigrant workers, and really all
4 employees in the state of Washington and, in particular, in
5 Pierce County who could have had these jobs if GEO hadn't
6 taken advantage of this vulnerable set of workers.
7 THE COURT: Let me ask you about the unjust
8 enrichment. You have approached this as a separate claim.
9 It sort of seems to me that it is more a way to measure
10 damages than it is a separate claim.
11 What are the elements you have to prove if it is a
12 separate claim?
13 MS. BRENNEKE: Your Honor, there is a little bit of
14 confusion around this when it comes to measurement of
15 damages.
16 When it comes to liability, they are absolutely separate.
17 I will go through those two things separately. Okay?
18 For liability, what we need to prove is that the detainee
19 work was a benefit to GEO. We need to prove that GEO knew of
20 that work happening, asked for it, whatever, or it has been
21 formulated alternatively that the work was a detriment to
22 those who performed it.
23 The third element is simply a question of equity for the
24 Court, which is: Is it unjust under all the circumstances
25 for GEO to retain those benefits without disgorging it or

1 paying them back. It is a purely equitable claim in that
2 regard.
3 When it comes to measurement of damages or -- let me
4 correct myself because they are not damages. I sometimes
5 fall into that. That is important to clarify. When it comes
6 to a measurement of the remedy, we are seeking disgorgement
7 of the full benefit they have retained from that unjust
8 enrichment.
9 The way to measure that -- this is the slight area of
10 overlap -- one measurement of that is how much would they
11 have had to pay in minimum wages.
12 It is not the only one, because had they employed
13 non-detainee workers, had they employed people from the
14 Tacoma area, they would have had to have paid a prevailing
15 wage, which is higher than minimum wage. Our economist
16 expert has analyzed this aspect of what was a fair wage by
17 those two well-established measurements in the field.
18 In addition to that, unjust enrichment can be measured
19 also by the profits they have gained from this work. That is
20 a separate analysis. To the extent we can, we will be
21 demonstrating evidence to you of the profits at the Northwest
22 Detention Center arising from the work.
23 There are basically three categories of number crunching,
24 if you will, and pieces of evidence that go into the
25 calculation of the remedy.

1 THE COURT: Well, we are maybe a little ahead of this
2 discussion here, but since we are here, let me ask you
3 another question, which is: How do your claims, if they are
4 not damages, claim results overlap with the class?
5 MS. BRENNEKE: Yes, it is a really important
6 question. If we keep in mind that we are working on behalf
7 of the state of Washington and all of the people of the state
8 of Washington, and that the class is representing the
9 specific detainee workers who worked at the Northwest
10 Detention Center, it is pretty easy to see the different
11 lanes. They are looking at back wages to give to those class
12 members and distribute to those class members.
13 We have no representational obligations or distribution
14 obligations to distribute money to that class. Instead, what
15 we are looking at is full disgorgement so that there is no
16 benefit to an employer that creates unfair labor practices in
17 the state of Washington and thinks they can get away with it.
18 Yeah, we can follow the law moving forward, but we still get
19 to keep our profits.
20 Part of the law enforcement importance of the disgorgement
21 remedy is to not allow them that windfall and that benefit
22 from having done these practices all this time.
23 THE COURT: How are you going to measure disgorgement
24 other than by the minimum wage?
25 MS. BRENNEKE: Our economist has done that for us.

1 We will present to the Court a number of different measures.
2 One is the minimum wage. The other is the difference between
3 the prevailing wage, which is the fair wage they would have
4 had to pay the Tacoma area workers had they not had this
5 voluntary work product from detainee workers, that's
6 different.
7 We also have a measurement of their profits that they have
8 gained from this and have been able to benefit from by
9 reinvesting.
10 Those are the three factual and evidentiary pockets, if
11 you will.
12 The analyses for the damages and remedy phase, the number
13 crunching, we think could be distinct from the liability
14 trial. The evidence of benefits and the way in which the
15 money works at GEO for the liability claims of the Minimum
16 Wage Act and on unjust enrichment, as we are working through
17 this, really seemed to need to be in the same case or the
18 same trial.
19 Your Honor, if I may. I also just want to preserve two
20 things. We are here to talk about a consolidated trial on
21 liability because that is what the court order was. We are
22 working the best we can to make that happen.
23 Washington brought its claims separately, and we do not
24 consent to or -- and really did object to the consolidation
25 of the case because we would like to be able to try our case

1 in a cohesive manner before the Court with both the liability
2 and the damages intact. We see some overlap in those things,
3 and we think it would be more efficient that way.
4 Because of this other case, we are working the best we can
5 to figure out how to preserve our claims and our rights, sort
6 of the integrity of our interests, together with the
7 efficiency of the Court in the consolidated trial.
8 We still want to register our objection for the record,
9 and also the fact that we do not consent in any way to a jury
10 trial in either of our claims.
11 THE COURT: All right. We will get to that in a
12 minute.
13 What kinds of evidence do you propose to submit here?
14 MS. BRENNEKE: The evidence in some ways overlaps.
15 In terms of the witnesses and -- because those are the people
16 who were involved in the actual operations of the policies
17 and practices of the detention center, yes, there are GEO
18 employees; yes, there are detainee workers. We also have
19 others who are going to testify to the benefit to the
20 detainee workers, including a GEO employee who is a -- we
21 have 30(b)(6) basically on their finances. That is
22 additional evidence of the way this all works factually right
23 now, the way they have it operating. That is important to
24 show the benefit to GEO of this work.
25 We also have -- we also have some witnesses, or at least

1 one witness, who would testify to the fact that there are
2 other employees in the community who would be interested and
3 need work, if the detainees didn't have that work.
4 A lot of the evidence is overlapping, although they have
5 slightly different, maybe -- the scope might be slightly
6 different. The same witnesses and a lot of the same
7 materials will be there. Our case will require some focus on
8 the financials of the operation.
9 THE COURT: Even on the liability phase?
10 MS. BRENNEKE: Yes, to some limited extent because
11 part of what we need to demonstrate is that there was a
12 benefit to GEO. To that extent, we can show the benefit of
13 the work in an operational sense, but we should also be
14 entitled to show in the financial sense how it has benefitted
15 them in their operations generally.
16 THE COURT: Something I wanted to ask you all about
17 is the work in issue. I guess it has been a concern to me in
18 the back of my mind somewhere that perhaps even if GEO should
19 have paid a minimum wage or some other wage to detainees
20 under the program, there are some things that detainees do
21 and should be asked to do that may be outside of employment.
22 I mean, when you are living together with a bunch of people,
23 it's fair, I would think, to expect you to keep your own
24 space clean. I don't know what else there might be. That
25 comes to mind.

1 We used to have an awful time in the Kitsap County Jail
2 with people messing up their cells and then getting out and
3 leaving a mess. I told the sheriff, "Don't let them out
4 until they clean up their cells." That worked for a while.
5 The superior court judges once were in charge of jail
6 rules, and thankfully we got out of that business.
7 Is there some cut off of labor that would not be covered
8 by their minimum wage?
9 MS. BRENNEKE: So your experience in the jail world
10 may be very helpful here. There is a cut off that GEO has
11 established already and that creates a nice, I think, factual
12 distinction between work that is done to maintain one's own
13 cell and work that is done for the common good that GEO asks
14 for and permits them to do and pays them to do as employees.
15 What is, I think, helpful in terms of that bright line is
16 they have constituted what they call the voluntary work
17 program. I think for purposes of thinking this through for
18 preparation for trial, the voluntary work program is what is
19 being addressed here in this case.
20 To the extent GEO has jobs and is asking them to do work
21 for the common good and is paying them a dollar a day, that
22 is what we are talking about.
23 In addition, GEO has expectations that detainees maintain
24 their own private cells. Voluntary work is not -- the
25 voluntary work program does not cover whether you're making

1 your bed or putting away your stuff, you know, or leaving
2 that a mess. I don't think we have to worry about that piece
3 of it.
4 There may be some -- there may be some argument from GEO
5 that not all the work is necessary. We have heard that
6 before. We would dispute that. We believe any work within
7 the voluntary work program that they permit them to do and
8 pay them a dollar an hour is work that should be paid at
9 minimum wage.
10 What I will also say is there is additional work that
11 happens inside the pods. The pods are very large spaces
12 with, you know, like 60 or more detainees. The work that
13 happens in the pods that is part of the voluntary work
14 program includes, again, the general service to GEO and its
15 operations. For example, making sure that the detainees'
16 eating areas are cleaned and that people aren't going to get
17 sick when the food is served. Serving food and then cleaning
18 up food and trays after the meals because they do satellite
19 feeding. It also includes things like their common restrooms
20 or common bathrooming area, so they have toilets that they
21 all use in common. They also have showers that they use in
22 common. Those are cleaned a few times a day and people are
23 paid for their jobs in those areas.
24 I think there is a fairly clean line between the work we
25 are saying needs to be paid minimum wage and the work that

1 doesn't.
2 MR. WHITEHEAD: Your Honor, to --
3 THE COURT: Counsel, you can remain seated so you can
4 reach the mic easily.
5 MR. WHITEHEAD: Thank you. I am trying to be
6 respectful. I will sit back down.
7 Your Honor, to put a final point on it. Certainly
8 maintaining your living space is a baseline requirement of
9 being within the facility.
10 The voluntary work program is a separate animal entirely.
11 If you look at the work of the laundry workers, the women in
12 the D Pod fold laundry for the entire facility. If you look
13 at the work performed by the kitchen workers, they are
14 preparing food and serving the entire facility.
15 The work being performed in the voluntary work program is
16 truly work that benefits GEO and has nothing to do with
17 baseline cleanliness and hygiene of the individual living
18 quarters.
19 When it comes to cleaning the living quarters, for
20 example, you are not cleaning just your bed. You are
21 cleaning the shower for the 100 other people in your pod.
22 That is a task that people should be fairly compensated for.
23 THE COURT: I have heard anecdotally that there have
24 been some inappropriate things that went on there. I have no
25 idea if any of it is true, and I haven't kept track of what I

1 have heard. It seems to me there are things like punishment
2 for not working or different things that are not within what
3 you two have described today. Are you anticipating any
4 evidence along those lines of inappropriate activities on the
5 part of GEO toward detainees?
6 MS. BRENNEKE: I am thinking about our claims as
7 being fairly discrete whether or not the Minimum Wage Act is
8 being applied for work, and also whether there is an
9 injustice for them to retain the benefits of those for the
10 unjust enrichment claim moving forward.
11 I believe with the unjust enrichment claim, there is some
12 maybe potential for thinking about the circumstances in which
13 they are working and the injustice of that, that is a bit
14 broader because that is an equitable claim that is a
15 subjective standard.
16 We are not bringing claims you might have seen reported in
17 some of the cases like in Colorado and other places where
18 there is like a forced work situation or other types of
19 claims that I think could be brought in some circumstances.
20 We have not brought those claims.
21 Jamal, I don't know if --
22 MR. WHITEHEAD: No, I don't have anything further to
23 add. Certainly, Your Honor, we believe those things to be
24 true. In terms of what we would try to present and prove at
25 trial, that is not the case we intend to bring.

1 THE COURT: Okay. All right.
2 Let me ask counsel for GEO to tell me what they think
3 about -- I am particularly interested in the affirmative
4 defenses that we have floating around here and what you
5 anticipate being proof to support those defenses.
6 MR. BARNACLE: Yes, Your Honor. The primary
7 affirmative defense --
8 THE COURT: Keep your voice up.
9 MR. BARNACLE: The primary affirmative defenses we
10 intend to pursue at trial would be on the immunity side of
11 the coin, so derivative sovereign immunity as well as
12 intergovernmental immunity, preemption as it exists in the
13 Nwauzor case, as well as full defenses to the Minimum Wage
14 Act claims, arguments that certain exceptions under the
15 Minimum Wage Act do apply, as well as a defense on the
16 economic dependence test, as well as looking at the
17 fundamental nature of the work being done and where it is
18 being done.
19 THE COURT: What do you have to prove in regard to
20 those defenses?
21 MR. BARNACLE: For the derivative sovereign immunity,
22 I think the primary piece of evidence is the contract itself
23 and various provisions of the contract that the federal
24 government and ICE has asked GEO to do, and GEO following the
25 terms of that contract in that regard.

1 Obviously, the documentary evidence is very important as
2 well as testimony from individuals at GEO, as well as
3 individuals from the federal government to talk about that
4 contract and how GEO is, in fact, following that contract.
5 On the intergovernmental immunity defense, the important
6 evidence is proof that the State runs very similar programs
7 at its institutions. It is a direct regulation as well as a
8 discriminatory regulation against GEO and the federal
9 government.
10 In that regard, the evidence would consist of documentary
11 evidence proving the State's own programs at its own
12 institutions, as well as testimony from individuals from
13 those institutions as to those programs in the parameters of
14 the work, purpose of the work, et cetera.
15 For the defense to the Minimum Wage Act, various
16 exceptions we believe apply. Testimony from GEO as to the
17 conditions of detainment, the duties performed at the
18 facility, and why certain exceptions do apply, as well as the
19 economic dependence test and why those factors aren't met. I
20 think that would include not only GEO employees, but
21 testimony from the detainees, probably the same detainees
22 that the State and the Nwauzor plaintiffs would bring
23 forward.
24 THE COURT: Okay. I gather those things are the
25 subject of further motions for summary judgment in the

1 Nwauzor case?
2 MR. BARNACLE: Yes, Your Honor, you're correct.
3 THE COURT: Well, we will get to those when they are
4 ripe.
5 With regard to the liability issues, let me ask you,
6 without commitment at this point, how long do you think it
7 will take? It is a question directed to all of you.
8 MR. WHITEHEAD: Your Honor, before we move on from
9 that, just a question in terms of GEO's defenses. I
10 understand that the offset defense has been dropped as to the
11 State. Is that live as to the private plaintiffs?
12 MR. BARNACLE: It is. In fact, it is something I
13 didn't mention when we were talking about it, but, yes, the
14 offset defense is alive and well against the Nwauzor
15 plaintiffs. It is something we intend to pursue.
16 THE COURT: Okay.
17 MR. WHITEHEAD: Your Honor, as relates to length of
18 trial, as we have plotted it out, perhaps ten trial days,
19 maybe less.
20 MS. BRENNEKE: Yeah. We are talking for the
21 liability trial. Obviously, our number crunching is going
22 to --
23 MR. BARNACLE: My question is: Is the ten days for
24 liability for you to present your case?
25 MS. BRENNEKE: Correct.

1 MR. BARNACLE: I think we probably have anywhere from
2 five to seven defense days to put on our case in defense of
3 that liability.
4 THE COURT: Are you talking about the total trial or
5 your presentation?
6 MS. BRENNEKE: We were trying to estimate our
7 presentation.
8 THE COURT: You are looking at three or four weeks
9 just for the liability?
10 MS. BRENNEKE: Probably three, uh-huh.
11 THE COURT: That is a long time.
12 MR. BARNACLE: Yes, it is.
13 THE COURT: Efficiency is helpful and appreciated.
14 Now, then, if there is a judgment for plaintiffs as a
15 result of the first proceeding, we should, I guess, consider
16 what is that going to mean in terms of further trial?
17 MR. WHITEHEAD: In terms of the damages phase of the
18 private plaintiffs' case, maybe a morning. That is one of
19 the beauties and simplicities of a Minimum Wage Act case. It
20 is just math. They moved to strike our expert that would do
21 the math. Assuming he's permitted to testify, I think our
22 damages case could be put on quickly.
23 MS. BRENNEKE: For the bench to determine the Minimum
24 Wage Act and then calculate the remedy on the -- and the
25 liability on unjust enrichment and calculate that remedy, we,

1 too, could put that on in a short period of time. We are
2 conscious, though, that to the extent there is any additional
3 unjust enrichment evidence and argument, like the closing,
4 for example, that wouldn't be brought before the jury, we are
5 going to also need to set aside some time for that and also
6 for the opening at the beginning. There is a little bit of
7 logistics, but we feel like we can make that work.
8 THE COURT: Well, this is tied up with the jury
9 issue. That is next on my list to consider.
10 I have read everything you have submitted. We have done
11 some additional work on that. Without just repeating your
12 briefs, if there is anything else you want to say about it?
13 MS. BRENNEKE: May I?
14 THE COURT: Ms. Brenneke, it is your motion.
15 MS. BRENNEKE: Your Honor, I appreciate the
16 opportunity to address the Court and to just reaffirm for
17 purposes of the record that we have not and will not consent
18 to a jury in our case.
19 I feel like -- it has been helpful for me to think about
20 the big picture of what is happening here, and that
21 Washington filed this lawsuit to enforce state law on behalf
22 of the State and all of its residents and for the health of
23 its economy. We have unique claims. There are some unique
24 defenses in the different cases.
25 Whether or not a right to jury attaches must be decided

1 for Washington's case only, and irrespective of the
2 consolidated trial and logistics around that.
3 It has been helpful to me to think of it, therefore, as
4 sort of in different lanes. Driving down here sort of
5 reaffirmed that.
6 The plaintiffs' class is in a lane of the freeway, and
7 they have essentially one passenger, they are representing
8 the class of detainee workers.
9 State of Washington is effectively in the HOV lane. We
10 have a bus. Okay. We have all of the State's residents. So
11 while there is a seat for the detainee workers, all immigrant
12 workers and other workers are on that bus. We have all
13 non-immigrant workers, all Tacoma area workers. We have all
14 employers with a seat on the bus who want a fair playing
15 field for their businesses. We also have the economy and the
16 very importance of enforcing laws that exist on our books so
17 that people don't run rampant in society.
18 To the extent we think about these as separate lanes, at
19 times they are going in the same direction and at times ours
20 is going to diverge because we are representing a very
21 different and much broader group of interests and elements in
22 our case.
23 It is important, I think, to keep the lanes separate, both
24 for the integrity of our claims and also to preserve issues
25 on appeal.

1 So for purposes of this motion, I would like us to think
2 about what would this case look like if the other case didn't
3 exist, which is how it was when we first filed it, how we
4 crafted the claims and how we brought them.
5 First, the Court has been very clear, and we agree, I
6 think all parties agree, that whether or not a right to a
7 jury depends upon the nature of the claims. If it is an
8 equitable claim, it is a bench trial for the judge to decide.
9 If it is a legal claim, a jury decides.
10 Washington's Minimum Wage Act claim is for injunctive
11 relief only. We need this Court to say yes, the Minimum Wage
12 Act applies, and that you need to follow it moving forward.
13 The declaratory judgment component of that is sui generis
14 in the sense that it doesn't have a right one way or the
15 other. In our case, it is only attached to forward-looking
16 relief.
17 For these reasons, and because GEO doesn't dispute that
18 injunctive relief is inherently equitable, we don't see there
19 being any dispute on this Court being the trier of fact and
20 the deciding body for the Minimum Wage Act claim.
21 On our unjust enrichment case, it is equally clear the
22 Washington State Supreme Court, and all the courts that have
23 considered the elements of unjust enrichment, have talked
24 about this as an equitable claim, but it is a common law
25 claim. Whether in equity one party has benefitted from

1 another party, and it is unjust under the circumstances for
2 them to retain that benefit without returning it, it is
3 inherently an equitable exercise, also for the Court.
4 The fact that we are seeking monetary relief doesn't
5 change the equitable nature of the claim. This is not an
6 ERISA claim. This is not a claim based upon whether there is
7 a legal right to get the money. This has to do with the GEO
8 and NWDC profits and benefits that it has retained. There is
9 no dispute they have retained those profits and have been
10 consistently profitable throughout the years.
11 We don't have the kinds of issues you might get in an
12 ERISA case or some other case where, hey, the money is
13 somewhere else, we don't have it, and now you have to do
14 something else. It is not a money case in that sense. It is
15 a disgorgement case.
16 For that reason, we do not see on our claims any issues of
17 controversy, legally or factually, that would suggest those
18 should be jury -- have a right to a jury or have a jury
19 trial.
20 GEO has raised some additional defenses. The difficulty
21 we have here is that these are immunity defenses as to the
22 State. There are no legal defenses as to the State. I am
23 going to set aside whatever is happening in the Nwauzor case
24 with the offset and all those things.
25 For the immunity claims, generally those are

1 jurisdictional issues that a court is going to decide before
2 trial, in our experience. Now, you run this case. I don't
3 know how this proceeds exactly under the circumstances
4 because you have not yet ruled on the Nwauzor motions for
5 summary judgment.
6 When you ruled on the summary judgment motions in the
7 State's case, it was apparent that GEO did not have any
8 evidence to support those immunity claims. The Court left
9 open the possibility that they could get some. We have had a
10 substantial amount of discovery in the interim. Okay.
11 We are at a place where, having sat through that
12 discovery, it is apparent to us that there is no
13 State-equivalent program to what is happening here. The
14 State runs its own government facilities that have patients
15 in mental hospitals or have penological purposes, people are
16 indebted to society for having broken the law. We don't have
17 a situation where we are contracting out to a private party
18 to operate those.
19 There is no State comparator, if you will, that would
20 create a factual foundation necessary for GEO to bring either
21 the intergovernmental immunity or the other sovereign
22 immunity claims against the State. Just as before, they
23 didn't have evidence -- the threshold level of evidence to
24 support those claims, and we don't believe they do now.
25 The difficulty is where there is no such evidence, there

1 is some theoretical notion that maybe they could bring those
2 claims if they had that evidence, that can't transform a
3 non-jury trial into a jury trial. We have to make the cutoff
4 threshold determination, is there substantial evidence that
5 they could support those claims at the outset? Our answer
6 would be no, there is nothing there. We have already tested
7 this. We have briefed this issue. The Court has ruled on
8 it. We don't see anything new that has come up that is going
9 to alter those determinations.
10 When the Court's deciding on the jury trial versus not
11 jury trial, we would submit that looking at this based upon
12 our claims, first, no, there is no right to a jury trial on
13 the claims that Washington has brought separate from GEO's
14 defenses. If there are factual issues that need to be tried,
15 then you need to consider whether or not those result in a
16 jury. We would submit they shouldn't transform the nature of
17 our claim and we should not. Those should be considered
18 separately. We would submit to you that because there is no
19 threshold evidence of those, and the Court's going to need to
20 determine that up front, that just gets set aside. As to our
21 case then, both the claims and defenses, there is no right to
22 a jury.
23 THE COURT: You don't think there are any fact issues
24 that are likely to be presented on the affirmative defenses?
25 MS. BRENNEKE: No, not as to the derivative sovereign

1 immunity or intergovernmental immunity. Nothing that the
2 Court hasn't seen. There are no fact issues that are
3 material. They have tried to find them. We don't believe
4 those exist.
5 THE COURT: If I recall my last ruling, it basically
6 was on that subject that there were issues of fact to be
7 resolved at the trial on those defenses -- or on the one
8 defense that was before me.
9 MS. BRENNEKE: Which was the intergovernmental
10 immunity?
11 THE COURT: Yes.
12 MS. BRENNEKE: Yeah, you know, seems to me the Court
13 has been prudent to recognize that if there is an immunity,
14 and there is evidence of that, the Court needs to consider
15 it. At some point, the threshold question of whether that
16 evidence exists must be addressed. Here, we have had the
17 opportunity for full briefing. GEO didn't establish the
18 requisite evidence. The Court's order clearly stated that
19 the evidence they had presented was not of comparable
20 institutions or situations in the state of Washington such
21 that intergovernmental immunity would apply.
22 What the Court did, though, I think rightly, was to
23 recognize that the Nwauzor case still had a discovery period
24 open, and because they were raising concerns that there might
25 be some development of that theory in their case. Well, that

1 discovery is now done. In our estimation, and we are not
2 briefing in that case, but in our estimation, nothing came up
3 that would be any different than what the Court has already
4 ruled on. In other words, there is no relevant comparator
5 evidence that would have us run afoul of the
6 intergovernmental immunity doctrine.
7 For those reasons in Washington's case and for GEO's
8 defenses to Washington's case, there are no legal issues that
9 give right to a jury trial. There should be no jury trial on
10 either claim.
11 THE COURT: Let me ask you a question. In regard to
12 the claim of unjust enrichment, assume that that claim is
13 going to go to a jury. What are the elements of the claim
14 that you have to prove? Of course, you have to prove whether
15 there is a jury or not, but what are the elements of the
16 claim?
17 MS. BRENNEKE: Right. So the elements would remain
18 the same, which is: Was the work a benefit -- was the
19 detainee work to the benefit of GEO; was GEO aware of that
20 work; and/or was that work to the detriment of the detainees;
21 and would it be unjust under all the circumstances for GEO to
22 retain that benefit without disgorging it or returning it.
23 Three elements.
24 The reason the second element is a little wonky is because
25 it has been described in different ways in different cases.

1 Part of what it goes to is the idea that GEO -- that there
2 wasn't a situation that GEO simply didn't know about. Do you
3 know what I'm saying? There wasn't some benefit to them that
4 they didn't know about and didn't authorize.
5 In this case, they clearly knew about the voluntary work
6 program. They operated it. They knew every detail. They
7 tracked the work to a tee.
8 THE COURT: Ms. Brenneke, what if there was no
9 Minimum Wage Act?
10 MS. BRENNEKE: No Minimum Wage Act claim, or if there
11 was no Minimum Wage Act, you would just look at the fair
12 wage. That is really what the unjust enrichment action looks
13 at is: Is it action that is unfair? What I would say --
14 yes, sorry.
15 THE COURT: Let me try and focus on what I am
16 thinking about and see if there is a response to this.
17 Leaving out the Minimum Wage Act, assuming there is no
18 governmental role in that way in the statute, where is your
19 authority to go after some corporation that is doing
20 something that you think is bad for the public?
21 MS. BRENNEKE: Well, Your Honor, the common law of
22 the state of Washington is just as important as our statutory
23 law. The parens patriae authority applies also to common law
24 violations.
25 What I would say is -- so I don't think our authority or

1 our right to bring those claims differs in any respect. The
2 analysis is also on liability completely separate from the
3 Minimum Wage Act. We are looking at was there a benefit,
4 right? That has nothing to do with whether they are
5 employees under the law.
6 THE COURT: How do you decide who is worthy of your
7 efforts to stop a corporation or an individual doing
8 something you don't like?
9 MS. BRENNEKE: You're asking about how is it that the
10 state of Washington determines what cases to bring under its
11 authority? We are fortunate that we now have some
12 affirmative litigation units in our Attorney General's Office
13 that can bring affirmative litigation in the areas of civil
14 rights, environmental protection, consumer protection, where
15 in the past, perhaps, it was a more defensive kind of an
16 office. Over the years, that has evolved.
17 The issues we bring, of course, are part of our
18 prosecutorial discretion, but we look at things very
19 carefully to see, is this something that impacts a broad
20 issue of importance to the people of the State. Does it
21 impact a lot of people in our State?
22 THE COURT: The things you mentioned all have some
23 statutory foundation. Civil rights. What else did you
24 mention?
25 MS. BRENNEKE: Consumer protection.

1 THE COURT: Consumer Protection Act.
2 MS. BRENNEKE: Yes and no. Just like ours has some
3 statutory rights and some common law rights, there are also
4 Consumer Protection Act claims that are brought that have
5 also similar common law claims brought alongside of them. So
6 sometimes the state of Washington looks at things from a
7 holistic perspective as to the wrong that is being done in
8 our community, and then what are the legal strategies that we
9 can use to address it.
10 We are going to bring statutory claims, but we are also
11 going to bring common law claims, if that actually meets the
12 facts and the scenario better.
13 It is kind of like in Colorado where the -- that
14 particular Minimum Wage Act was so specific that it didn't --
15 that it looked at different standards. The district court
16 determined, you know what, the Minimum Wage Act in Colorado
17 doesn't actually fit the detention work in that facility, but
18 they also had brought the common law claim of unjust
19 enrichment. The court said, it does fit the standards for
20 common law unjust enrichment. That decision went to the
21 Tenth Circuit and it was affirmed. They are moving forward
22 on unjust enrichment class action alone in Colorado.
23 Our State statute on the Minimum Wage Act has much broader
24 purposes. I think our legislature saw the importance of
25 minimum wage in a more holistic way to all of the people of

1 Washington and the economy and built that into the purposes
2 of the law.
3 We don't have the problem that they had in Colorado in our
4 case. It doesn't mean that our unjust enrichment claim isn't
5 any more valid than what they are pursuing in the Colorado
6 case for very similar kind of work.
7 THE COURT: What are the limits on you and what kind
8 of unjust enrichment claims could you bring?
9 MS. BRENNEKE: Your Honor, I think the limits of
10 unjust enrichment are set forth by the elements that the
11 Supreme Court has identified for that claim.
12 We are very careful when we do an evaluation of a case to
13 determine what are the facts, what are the harms, what is the
14 justice.
15 The unjust enrichment claim, in particular, because it is
16 so subjective, this has been -- this was scrutinized and has
17 continued to be scrutinized with a lot of detail about
18 whether or not this is a fair and appropriate way of
19 organizing labor for a for-profit corporation in our state.
20 There are a lot of reasons that it is unjust for them to
21 create -- take advantage of vulnerable workers in a situation
22 that deprives other workers of good, prevailing-wage jobs.
23 We have looked at this from many, many angles. I don't
24 feel any discomfort with that. In a theoretical sense, what
25 I can tell you is there are always limited resources. We

1 can't bring every claim that comes before us. We are always
2 looking at cases that have a wide impact.
3 In this case, you have an internationally successful
4 company that is traded on the New York Stock Exchange that is
5 making profits from the Northwest Detention Center in
6 consistent ways since 2005, and has continued to invest that
7 into its company to the detriment of our people.
8 THE COURT: I understand your arguments about that.
9 MS. BRENNEKE: I get a little heated about that one.
10 Sorry.
11 THE COURT: I need to look at those cases because
12 this is troubling to me.
13 MS. BRENNEKE: Your Honor, the parens patriae cases
14 were briefed even before I was involved in the case. It was
15 a long time ago. I have been with this case for some time.
16 They were well briefed and well considered. The Court made
17 its decision at the outset of the case.
18 If there is any concern about that, we would like the
19 opportunity to brief that again. I can't see that anything
20 has happened in the intervening period that would lead the
21 Court to second guess the decision it made before.
22 THE COURT: I will look back and see what I said.
23 This started out discussing the jury trial.
24 Mr. Barnacle, do you --
25 MS. BRENNEKE: Are you complete with me, Your Honor?

1 THE COURT: I am not done with you.
2 MS. BRENNEKE: Do you want me to sit down?
3 THE COURT: Yes. For the moment, yes.
4 MR. BARNACLE: Back to the motion to strike the jury
5 demand. If we look at the two claims that have been brought
6 by the State of Washington, the minimum wage claim and the
7 unjust enrichment claim, first and foremost on the State of
8 Washington's minimum wage claim, yes, they have an injunctive
9 relief portion of it, but they also brought a declaratory
10 judgment action for forward-looking, future-looking
11 application of the law. They have talked quite a bit about
12 this being a law enforcement action, that is their role in
13 this case.
14 First and foremost, the Ninth Circuit has definitively
15 stated a declaratory judgment action is an action at law. We
16 cited that in our response to the brief. They are seeking a
17 legal determination that a particular law applies to a
18 certain set of people on a going-forward basis. If you look
19 at the type of action as well as the remedy sought, I think
20 the Ninth Circuit would support there being a jury
21 determination on that issue.
22 On the unjust enrichment claim, the State has stated
23 multiple times today and throughout this litigation that they
24 are seeking disgorgement of profits. However, that issue is
25 not decided. As of right now, GEO did move for summary

1 judgment saying that disgorgement of profits is not the
2 appropriate remedy on an unjust enrichment claim for personal
3 services.
4 The Court did not decide it, and said this is something
5 that needs to be determined on facts ultimately. That
6 matters a lot because if we are talking about restitution for
7 the value of services performed, the Supreme Court has said
8 in this type of context, that is a legal claim. The Supreme
9 Court has also said disgorgement of profits is an equitable
10 claim.
11 As we sit right now, we don't know what the proper remedy
12 for the unjust enrichment case is. We believe it is
13 restitution based on personal services performed and the
14 value of the money. That is a legal claim. The
15 Supreme Court said that. If it is truly disgorgement of
16 profits, which we don't think is appropriate in these
17 circumstances, then that would be inequitable. As we sit
18 here right now, we don't know. We think the Ninth Circuit
19 and Supreme Court has said when you talk about the Seventh
20 Amendment right to jury trial, you have to basically give
21 every reasonable presumption in favor of a jury.
22 I think those two issues leave us undecided, and we
23 deserve a jury on that issue.
24 I think when we are addressing, particularly, the
25 intergovernmental immunity defense, first, a couple of

1 observations. First observation, I believe the State is
2 sticking to its guns on its analysis of the law. The pre
3 *U.S. vs California*, the pre *Dawson vs Steager* state of the
4 law, we believe the Court, with those two cases, in its
5 proposed order stated what the law is at this point, then
6 basically said it is a factual issue now as to whether we
7 have met the legal standard. Didn't say the issue was
8 closed. Didn't say you have no evidence. It said, I don't
9 see on this record here alone whether you met that standard.
10 That doesn't mean the evidence doesn't exist. Doesn't mean
11 it is not in the record. Doesn't mean it wasn't in their
12 record. Doesn't mean it is not in the Nwauzor record. We
13 believe it is, based on this Court's understanding of
14 intergovernmental immunity law today, we believe the evidence
15 is in the record, and it is before you in our Nwauzor brief.
16 THE COURT: Okay. Mr. Whitehead, do want to weigh in
17 on this issue at all?
18 MR. WHITEHEAD: No, Your Honor. I don't have
19 anything to add beyond what the State has offered. I would
20 amplify and support their position.
21 MS. BRENNEKE: May I have a quick rebuttal?
22 THE COURT: Sure.
23 MS. BRENNEKE: On the issue of our parens patriae
24 authority, it was also reminded to me from a colleague that
25 the Washington State Attorney General routinely brings acts

1 of negligence, which are also common law claims in a lot of
2 different areas which are necessarily statutory claims. It
3 helps to broaden the perspective of what we do.
4 I want to talk about two things. The Ninth Circuit
5 decision that the defense relies upon saying that
6 declaratory -- a declaratory judgment action is an action at
7 law. It is based upon one case. That is dicta in a case
8 where they had waived the right to a trial.
9 What the profound majority of the case law, including U.S.
10 Supreme Court case law, says is that the declaratory judgment
11 action is sui generis and it attaches to whatever it is going
12 along with. In this case, it is going along with injunctive
13 relief.
14 Secondly, the unjust enrichment issues of the remedy phase
15 can include disgorgement of profit, but it can include
16 disgorgement of the unjust enrichment from the perspective of
17 the benefit of the beneficiary. It is very important to
18 recognize that whether or not you measure that one way or the
19 other, the Washington State Supreme Court, which is the
20 authority on what this action is, looked at, in *Young vs*
21 *Young*, what that remedy should be. They specifically
22 rejected what GEO has suggested, which is it is only based
23 upon the value of the services and some restitution kind of
24 measurement, and instead said you could do that or you can
25 look at the full benefit, the full benefit of that practice

1 from the perspective of that person or that party that
2 received the benefit and disgorge that full amount.
3 We are looking in a holistic way, as the State Supreme
4 Court has recognized we should, at what are the full measures
5 of the benefit to them. It can't be limited to just what
6 they could get in a marketplace.
7 THE COURT: Let me talk about this for a minute.
8 First, we have already a divided trial. There are fact
9 issues that are to be determined in the first trial. They
10 include whether there is a violation of the Minimum Wage Act.
11 Somebody will have to determine whether the detainees are
12 employees and whether GEO is an employer. Those are fact
13 questions. I think they deserve a jury.
14 That is not to say that insofar as the State's claim is
15 concerned, that the -- if we get to damages or judgment of
16 some kind against the defendant, that those are not equitable
17 issues that should be resolved by the Court.
18 Rachel, my law clerk, who is sitting over here, found a
19 parallel here that is particularly interesting. What the law
20 we found indicates basically is that if there are both legal
21 and equitable issues in a case, the legal issues should be
22 resolved first. Also, that if there are two parties in a
23 case, one of whom may be entitled to a jury and the other one
24 not, and then there is a judgment by the jury, that is likely
25 to be res judicata or collaterally estop the Court from

1 coming to a different result.
2 It seems to me that a jury trial is called for on the fact
3 issues that remain in this case. It seems to me that whether
4 you call it an advisory jury or a true jury, doesn't make any
5 difference. It would be a distinction without a difference
6 in regard to the Minimum Wage Act claim.
7 It is a little different with the second claim. I need to
8 analyze that more to determine whether that jury should be
9 designated as an advisory jury.
10 I think you can -- no matter how we detail this issue out,
11 I think you can anticipate trying this first case before a
12 jury, then we will go from there.
13 I am also inclined to think that as to the class claims,
14 that we should proceed with the same jury and determine those
15 claims and set the State's relief trial, if there is a call
16 for one, separately so we don't get mixed up with the relief
17 question with that first -- after the first hearing. There
18 may, of course, be no call for relief.
19 MS. BRENNEKE: May I address the Court, Your Honor?
20 THE COURT: Yes.
21 MS. BRENNEKE: Presuming the first phase of the trial
22 is focused on issues and dispute regarding the Minimum Wage
23 Act claim, that is one lane or two lanes, if you will, that
24 are running parallel.
25 The State's case and the class action case end, though, at

1 a different point. It would be our -- it would be our
2 suggestion to the Court that while the State's case ends in a
3 binding jury verdict -- sorry, when the plaintiffs' class
4 action case ends in a binding jury verdict, that the State's
5 case would be determined by the bench through its findings of
6 facts and its determination of the law, with the possibility
7 of the jury verdict being an advisory jury. That is on the
8 Minimum Wage Act claim.
9 The problem, Your Honor, is that the class doesn't have an
10 unjust enrichment claim. The jury is not going to be
11 instructed on unjust enrichment, and it won't be issuing any
12 verdict on unjust enrichment.
13 THE COURT: Why won't it be?
14 MS. BRENNEKE: There is no claim. The class doesn't
15 have an unjust enrichment claim.
16 THE COURT: I know. You do. Why can't we try them
17 in the same case?
18 MS. BRENNEKE: We could. That's the cart and the
19 horse question. There is no right to a jury on that claim.
20 We have sought a bench trial on that claim. While we are in
21 parallel presenting the evidence, our lane ends in the Court
22 determining the findings of fact as to unjust enrichment and
23 a determination of the law on whether or not there is unjust
24 enrichment.
25 There isn't a radical difference in terms of the logistics

1 of how this is done. I think it is very important as to what
2 the jury is instructed to do, and then what is in the Court's
3 lane to do in our State case.
4 I would also say that as to the remedy phase, because the
5 Court will be making findings of fact and a determination on
6 unjust enrichment in the State's case, we would appreciate
7 being able to put on our remedy phase shortly thereafter,
8 like not a long time after. So maybe the same jury considers
9 the number crunching and damages on the Minimum Wage Act case
10 for the class, but that we also be able to present that small
11 amount of additional evidence for the Court in order to award
12 and determine the remedy.
13 THE COURT: Well, I hear what you are saying. I am
14 inclined to tell you, I think at least there will be an
15 advisory jury on the unjust enrichment claim; because one
16 party has two claims and the other party only has one on the
17 plaintiffs' side doesn't mean they can't be resolved
18 together.
19 MS. BRENNEKE: Your Honor, advisory jury, and then
20 the lane would ultimately end in your determination?
21 THE COURT: Yes, but that's not a final ruling. That
22 is what I am thinking right now. You can prepare with that
23 in mind. I will -- after we discuss it further, we will
24 decide exactly how this should shake out.
25 MS. BRENNEKE: Thank you, Your Honor.

1 THE COURT: What else do you want to talk about? Oh,
2 I know what we have to talk about. That is notice to the
3 class.
4 I must say, Mr. Whitehead, I am a little disgusted that we
5 have to deal with this at this late date, and I gather that
6 you have a plan in effect, or I shouldn't say that. A plan,
7 ready to be adopted, that is changed from the original?
8 MR. WHITEHEAD: Yes, Your Honor. I share your
9 disgust. I regret to be in front of you this morning talking
10 about this issue.
11 Dealing with getting contact information for the class has
12 just been a complete quagmire. We have tried to work
13 cooperatively with GEO's various counsel. When the issue
14 finally came to an impasse, meaning it was clear that no
15 better or more information was coming, we have proposed this
16 plan to counsel in October and November. I thought that we
17 would be able to get an agreement, because there was a
18 similar agreement in place in *Menocal*. When it became clear
19 that we could not reach an agreement, I brought the current
20 motion before the Court.
21 It is late, but it is not too late. We have got a plan in
22 place. We have a third-party administrator called JND.
23 Counsel is familiar with JND and has used their services
24 previously. It is a comprehensive publication campaign. We
25 have Google, we have Facebook, we have radio ads, we have

1 press releases, website, a toll-free number. We are ready to
2 execute on all of it.
3 I can give you some dates, if you like, because I
4 understand that's what you would like. Would you like me to
5 go through the dates now?
6 THE COURT: No. What I am curious about is under
7 your plan, will all the notices be complete before the date
8 we have set for this trial?
9 MR. WHITEHEAD: Yes. Publication notice is a
10 different animal. When we talk about direct mail, service is
11 effective as of the date of the postmark. Whether or not it
12 gets to the intended recipient, who knows. There is no
13 distinction to be drawn when it comes to what we are talking
14 about here with publication. The standard isn't -- we have a
15 large class. The standard isn't actual notice on every one.
16 It is the best notice practicable under the circumstances.
17 We have a transient class. This is the best we can do
18 under these circumstances to apprise as many folks as we can
19 of the rights and the fact that there is this action going
20 on.
21 We know that we got this information recently. I believe
22 we learned December 3rd that there are about 135 people that
23 are still in custody. Frankly, I am suspect of that number,
24 but according to GEO, there are 135 people that are in the
25 class that are in custody. We can have notice -- direct

1 notice to those people next week in the form of the long form
2 notice the Court previously approved.
3 I would suggest also posting would be nice. Simply
4 blowing up a short form notice and making it a posting. I
5 understand from counsel that hasn't been a problem in other
6 facilities. I don't know what GEO's current position is on
7 that issue. As to folks that are still in custody, which is
8 a large number of people at the 1500-bed facility on the Tide
9 Flats, just posting alone, in addition to direct mail alone,
10 in the facility is going to get a substantial number of
11 people.
12 For the radio, social media and the website, we are ready
13 to go live. The website and the social media by no later
14 than -- on or before January 24th is the date. I suspect it
15 is going to be before. We are at the point now where we are
16 setting deadlines. I don't want to be too aggressive and not
17 be able to execute.
18 That being the case, we would execute notice to the class
19 before adjudication on the merits, which is the standard that
20 the Court and we are operating under is notice before
21 adjudication on the merits.
22 THE COURT: Have you shared your amended plan with
23 other counsel?
24 MR. WHITEHEAD: The broad strokes of the plan are the
25 same. The major change is removing the direct mail campaign.

1 I spoke with counsel on Wednesday. It was a short
2 conversation. I didn't have dates yet. That was the part
3 that was the hang up.
4 In terms of what I have just proposed, there is no
5 difference from what the parties and what the Court had
6 previously complicated -- contemplated, excuse me, beyond --
7 THE COURT: Complicated may be --
8 MR. WHITEHEAD: Yes. I think an appropriate slipup
9 there.
10 The substantial change is the direct mail to people in the
11 United States. The address information, we have indication
12 from GEO that we have 9,000 class members. 46,000 rows of
13 address information where it is just maybe a street number or
14 a street name. No indication of city, no indication of the
15 country. To try and do direct mail under those
16 circumstances, I might as well stand over the overpass on I-5
17 and fling them into the air.
18 THE COURT: Well, do you have something for me to
19 sign?
20 MR. WHITEHEAD: No, Your Honor, I do not. I can
21 prepare an order. We submitted an order with the motion. If
22 the Court would like a detailed order, I can submit that
23 before the end of the day.
24 THE COURT: I haven't seen it. I gather from Rachel
25 that we need a new order.

1 MS. DOLVEN: Taking into account what was in the
2 other order, the order that came out.
3 MR. WHITEHEAD: Yes. Okay. Certainly, I can put
4 together a detailed order and submit it before the end of the
5 day.
6 THE COURT: Let me ask defense if they have input on
7 this.
8 MS. SCHEFFY: I do. May I approach, Your Honor?
9 Your Honor, is this volume okay?
10 The first thing I think that GEO needs to address here is
11 the timing of the notice. This is the first time GEO has
12 learned that notice effectively won't go out until January
13 24th. That is going to be the same date that summary
14 judgment will be fully briefed. That puts us directly into
15 the one-way intervention rule, which the Ninth Circuit
16 said --
17 THE COURT: The what rule?
18 MS. SCHEFFY: It is called one-way intervention. The
19 key case in the Ninth Circuit is 69 F.3d, 293, from 1995. It
20 is *Schwarzschild vs Tse.* Effectively, because this is a due
21 process right for the individuals and also a due process
22 right for GEO because GEO wants to ensure that notice is
23 adequate so it can rely on collateral estoppel going forward
24 if a member of the class were to bring a separate suit,
25 notice is not effective when it goes out after the Court has

1 had the opportunity to rule on the merits or will rule on the
2 merits. That's because a potential plaintiff could wait and
3 see. They could hedge their bets. They could say, I am
4 going to see if the court rules on summary judgment in my
5 favor, in which case I will opt in. If not, I am going to
6 exclude myself from the class so I have a second bite at the
7 apple. That is controlling here.
8 The Sixth circuit ruled last month, which is obviously
9 persuasive on this court, in a very similar circumstance.
10 The court had certified a class but notice hadn't gone out
11 before summary judgment was ripe and ruled upon. The court
12 concluded that effectively the notice was -- the class
13 certification remains functionally incomplete until class
14 members receive notice. The notice was of no consequence,
15 and the decision was only binding on the parties to that
16 case.
17 Here, that is the first issue we run into. Looks like
18 there would only be 35 days between full briefing on summary
19 judgment and trial. I have not found a case that would say
20 that is effective notice or that gives sufficient time.
21 Maybe plaintiffs' counsel has.
22 Also, one of the key aspects of notice is each individual
23 has the opportunity, should they wish to, to have their own
24 attorney file an entry of appearance and represent them. If
25 summary judgment has been fully briefed, that is effectively

1 not a right they have anymore. There is a question about
2 whether notice would be effective.
3 Beyond that, I did call counsel. We have not had the
4 opportunity yet to discuss the actual notice plan and what he
5 envisions. I haven't seen the website. For example, one of
6 the components was a website. I don't know what the web
7 address would be.
8 GEO would ask, if this Court asks plaintiffs' counsel for
9 a subsequent order, that GEO has 24 hours to make any
10 comments to the proposed order to make sure the language is
11 adequate and GEO can rely upon that for collateral estoppel
12 and res judicata purposes going forward.
13 If Your Honor wants me to address the factual issues of
14 posting notice, I can. There are a few other issues I am
15 happy to address.
16 THE COURT: I guess, what I don't get is what you're
17 suggesting.
18 MS. SCHEFFY: We effectively have two choices, from
19 what I see in the case law. Obviously, I would defer to
20 Your Honor. It is either, we go forward with the individuals
21 who have received due process and are aware of this case --
22 that would be the named plaintiffs in GEO -- and that any
23 judgment of the court is only binding upon those individuals,
24 or the deadlines would have to move and summary judgment
25 would have to be reserved until after the notice period

1 closes.
2 THE COURT: You mean not rule on the summary
3 judgments?
4 MS. SCHEFFY: I have seen some cases where courts
5 reserved their ruling on summary judgment or having a trial
6 until the notice period closed.
7 THE COURT: Until after the period closes?
8 MS. SCHEFFY: Uh-huh. I don't know how otherwise we
9 get out of this Ninth Circuit precedent, ensure due process
10 on both sides.
11 I apologize in advance to Rachel for not putting this case
12 before you.
13 THE COURT: What was the cite again?
14 MS. SCHEFFY: Ninth Circuit one is 69 F.3d 293, 1995.
15 That one addresses when class certification had not yet been
16 ruled upon. The Sixth Circuit one which addresses the
17 counterpart is 944 F.3d, 593, that was decided early last
18 month.
19 THE COURT: Let me ask, do you have a response?
20 MR. WHITEHEAD: Your Honor, counsel is referring to
21 the *Schwarzschild* case. In the case, the holding of the
22 Ninth Circuit is the defendant had waived as relates to the
23 one-way intervention rule by moving for summary judgment.
24 I would submit to the Court it has already been waived in
25 this case given that GEO -- this is the fourth or fifth

1 dispositive motion that we are up against here.
2 I think that is -- just in terms of contextualizing the
3 *Schwarzschild* case, it is about whether or not the defendant
4 has waived the one-way intervention rule.
5 I think just sort of taking a step back as a practical
6 matter, given that we are dealing with consolidated cases and
7 the fact the Court just acknowledged that a ruling in the
8 Nwauzor case would perhaps act as res judicata or estop, have
9 some sort of estoppel effect in the State's case, without
10 opining whether that is correct, I submit to the Court that I
11 would suspect the reverse would be true. That if, for
12 whatever reason, let's say notice didn't even go out at all,
13 if there was a ruling in the State's case, I would think that
14 ruling would operate to estop anyone from bringing any
15 subsequent case in their own name.
16 You know, in that way, I appreciate the concerns being
17 raised by GEO. As a practical matter, I see them as a
18 nullity.
19 THE COURT: You have a response?
20 MS. SCHEFFY: Just three quick things. First, as to
21 the claim that the State's case would be preclusive.
22 Collateral estoppel requires privity between the parties. I
23 am not sure GEO could effectively argue there is a privity
24 between the State and individuals.
25 Second, this is a mandatory requirement. It is pretty

1 clear that notice must be given before any party can be
2 bound. That would include a favorable ruling on plaintiffs'
3 summary judgment for class members.
4 Third, I wanted to raise that we believe GEO would be
5 prejudiced if the Court reserved ruling on summary judgment
6 until before trial.
7 THE COURT: I don't think parties are legally
8 prejudiced when a judge doesn't get -- a federal judge
9 doesn't get his work out timely.
10 I have not had a motion or a bench trial under advisement
11 over 30 days since 1969.
12 MS. SCHEFFY: I appreciate that, Your Honor.
13 THE COURT: It may be just appropriate -- we'll take
14 a look at this. It may be just appropriate to sit on that,
15 on those motions. I don't like to do that.
16 Mr. Whitehead, let me ask you to get your proposed order
17 in here as complete as possible as soon as possible. We will
18 look at these cases in the meantime and decide what to do
19 about notice.
20 MS. SCHEFFY: Your Honor, will GEO have the
21 opportunity to weigh in if that order includes language that
22 we believe doesn't effectuate notice?
23 THE COURT: It will have to be quick.
24 MS. SCHEFFY: We can do it within 24 hours.
25 THE COURT: Like Monday?

1 MS. SCHEFFY: We'll plan on it. Thank you,
2 Your Honor.
3 THE COURT: Any other matters for discussion,
4 recognizing that it is almost noon?
5 MS. BRENNEKE: Your Honor, this may not be a
6 substantive matter to address in this moment. We did want to
7 raise some issues having to do with the post mandamus
8 financial document production. The parties are still
9 working -- GEO had a date certain by which it was to produce
10 those documents. They did produce some of those documents.
11 We are in dialogue right now about supplementing those.
12 There is one document, however, that we have met and
13 conferred about where we have a disagreement as to whether
14 they are going to produce an unredacted version of a one-page
15 letter in which GEO has estimated the cost necessary to
16 achieve compliance with minimum wage for the plaintiffs in
17 this case and others.
18 Whether or not we want to talk about that now and have a
19 ruling or make time somehow for us to do that next week, we
20 feel like that issue is ripe for the Court's involvement.
21 THE COURT: What has been cut out of the letter?
22 MS. BRENNEKE: I have a copy of the letter here. I
23 have copies for everyone. There are large sections redacted.
24 What is pertinent is that this is a letter from GEO to ICE
25 seeking a request for equitable adjustment in a certain

1 amount. The amount has been blacked out. The total amounts
2 for request for equitable adjustment have been blacked out.
3 The legal expenses have been blacked out. Frankly, we don't
4 care about those. We are looking at the underlying issues.
5 There is a large block that says that -- that follows the
6 sentence, "We have conducted an estimation of the costs
7 necessary to achieve compliance with the plaintiffs."
8 In that block, we are imagining that for each state, there
9 was probably that assessment of what it would cost them.
10 This is very clearly a measure of the value of the work of
11 the detainees in those places. That would go both to our
12 liability and damages. We request it be produced in an
13 unredacted form.
14 THE COURT: What is the secret? This is a letter
15 from the government contractor to the government? What is
16 the secret?
17 MR. BARNACLE: Your Honor, what is redacted, in fact,
18 is not responsive in any way to what was ordered on the Ninth
19 Circuit's mandamus. It required the disclosure of specific
20 information to the Northwest Detention Center.
21 Counsel just represented that she thinks it is broken down
22 by state. It is not. It is an aggregate of a number that
23 applies to every facility across the country, which is not
24 ordered by the mandamus order. It is being withheld on those
25 grounds. It is not ordered by mandamus. It is not relevant

1 to this case. It is not broken down for the Northwest
2 Detention Center.
3 MS. BRENNEKE: Your Honor, if it would assist the
4 Court, we have a copy of that letter here.
5 I guess I have two points in response. One is that if
6 there is only an aggregate analysis, then we should have that
7 aggregate analysis. We know from other financial records,
8 discovery, that there is probably some underlying backup that
9 the facility -- or that the corporation has conducted that
10 would have, you know, the spreadsheets or whatever it is that
11 they use to determine that. We would also ask that be
12 produced.
13 May I approach the Court?
14 THE COURT: No. I hate to say this, if you can't
15 agree, you should make a motion.
16 I find it hard to believe that after all this, you can't
17 agree on these things. I would have to go back and look at
18 my order that was affirmed and apply it to this document.
19 You know, I have other things going on around here, too. I
20 am starting what looks like a month-long case on Monday. If
21 you can't agree, make a motion and we will deal with it.
22 It is hard for me to -- you know, I am not a government
23 contractor. I am a government employee, I guess, not a
24 contractor. It is always hard for me to understand what the
25 big deal is. Why can't we have open government? What is the

1 big deal? There may be some big deal. It gives you a right
2 to keep things back, but I don't know. Because I don't know
3 the answer to this, I don't want to rule on it without full
4 briefing.
5 Okay. Anything else? You have burned into my lunch hour.
6 MS. SCHEFFY: This may be something for briefing. We
7 have been contacted about ICE about the photographs taken of
8 the site inspection. You may recall your order had advised
9 counsel for both sides to be cautious not to photograph the
10 faces of detainees.
11 THE COURT: Photograph what?
12 MS. SCHEFFY: Faces of detainees, their likeness.
13 About 557 photos have photographs of detainees' faces.
14 ICE has asked to make the redactions and needs additional
15 time to make those. We have reached an agreement that it
16 could be just to those the State intends to produce at trial,
17 but we don't have an agreement that ICE can make the
18 redactions.
19 In the interest of time, it is worth getting those to ICE
20 as soon as possible and the redactions can be disputed later.
21 It doesn't seem there would be any reason the faces of
22 detainees would be relevant to this claim.
23 MS. CHIEN: We have proposed that there are, as you
24 heard, 557 photos -- possibly 557. I actually don't know.
25 It is just really not efficient for ICE to sit there and

1 redact all those photos. Since we are going through our
2 pretrial statement exhibit photos, we are narrowing the
3 photos we have and we can address that issue once we have
4 done our own culling so ICE doesn't spend so much time. I
5 promise you we won't be submitting 557 photos before trial.
6 We would like to have the time to do so ourselves.
7 MS. SCHEFFY: My only fear is ICE --
8 THE COURT: You are all grown-ups. Work it out.
9 MS. CHIEN: We are happy to do that.
10 THE COURT: Okay. If there needs to be redactions,
11 figure out the most efficient way to do it and do it. Okay.
12 Thank you for coming in. I know a lot more about this, I
13 think, than did I before, but maybe it is because I have
14 forgotten so much.
15 Thank you.
16 (The proceedings adjourned.)
17
18 C E R T I F I C A T E
19
20 I certify that the foregoing is a correct transcript from the
21 record of proceedings in the above-entitled matter.
22
23 /s/ Angela Nicolavo
24 ANGELA NICOLAVO
COURT REPORTER
25