

The Honorable Robert J. Bryan

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UGOCHUKWU GOODLUCK  
NWAUZOR, FERNANDO AGUIRRE-  
URBINA, individually and on behalf of all  
those similarly situated,

Plaintiffs,

v.

THE GEO GROUP, INC., a Florida  
corporation,

Defendant.

No. 3:17-cv-05769-RJB

PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTIONS IN  
LIMINE

**I. INTRODUCTION**

Defendant The GEO Group, Inc. raises nine enumerated motions in limine in this case and the consolidated case brought by the State of Washington. Plaintiffs Nwauzor and Aguirre-Urbina address each of GEO's motions below in the order they were presented in GEO's moving papers. To avoid burdening the Court with repetitive argument and unnecessary paper, Plaintiffs try not to duplicate arguments made by the State in opposition to GEO's motions in limine and instead adopt and incorporate those by reference where appropriate as specifically indicated below.

## II. DISCUSSION

### 1. That VWP positions should have or could have been filled by non-detainee Washington citizens or residents.

Plaintiffs specifically adopt and incorporate by reference the State's response to this motion. Plaintiffs only reiterate that to the extent the Court concludes that the economic realities test governs the question of whether the VWP participants were employees for purposes of the Washington Minimum Wage Act ("MWA"), numerous courts have concluded that a relevant consideration under that test is whether a defendant used unpaid or underpaid workers to perform work that otherwise would have been performed by a paid employee. *See, e.g., Walling v. Portland Terminal Co.*, 330 U.S. 148, 149-50, 67 S. Ct. 639, 642, 91 L. Ed. 809 (1947); *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139, 1143-44, 1147-48 (9th Cir. 2017) (discussing *Walling* and other cases); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011); *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016); *Reich v. Shiloh True Light Church of Christ*, 895 F. Supp. 799, 815 (W.D.N.C. 1995), *aff'd*, 85 F.3d 616 (4th Cir. 1996). Therefore, Plaintiffs should not be prohibited from introducing evidence or arguing that the labor provided by VWP workers in the kitchen, barbershop, laundry, and various janitorial and maintenance roles displaces the work of paid employees.

### 2. That the VWP is a "forced work situation."

Plaintiffs have made clear that they are bringing claims only under the MWA, not under the Trafficking Victims Protection Act or other laws prohibiting forced labor. Nor will Plaintiffs argue that any workers participated in the VWP under the threat of harm or threat of legal process. *See* GEO Mot. [Doc. 256] at 4. However, throughout this litigation Plaintiffs have pointed out that detainees are motivated to work in the VWP in part to earn money to

1 supplement their food and toiletries at the commissary and to make phone calls to family,  
2 legal counsel, and other persons outside the NWDC. Moreover, it is clear from GEO's  
3 opposition to Plaintiffs' motions in limine and GEO's other filings in this case that GEO  
4 intends to stress the "voluntary" nature of work in the VWP and the fact that GEO already  
5 provides food and shelter to the detainees per its contract with U.S. Immigration and  
6 Customs Enforcement ("ICE"). GEO also presumably will attempt to adduce evidence and  
7 argue, as it has in the past, that detainees participate in the VWP merely to have something to  
8 occupy their time.<sup>1</sup> Plaintiffs agree that an individual's motivation for performing work  
9 generally is not relevant to determining employee status under the MWA. *See* GEO Mot.  
10 [Doc. 256] at 4. However, evidence that individuals participate in the VWP in whole or in  
11 part to earn money to use at the commissary is relevant and necessary to balance and  
12 contextualize any evidence and arguments regarding voluntariness, provision of necessities,  
13 or detainees' other motivations for work. Such evidence does not suggest that the detainees'  
14 labor is "forced" and should not be prohibited.

17 **3. Evidence related to GEO's legal fees, including requests for**  
18 **compensation for legal fees sent to ICE.**

19 Plaintiffs specifically adopt and incorporate by reference the State's response to this  
20 motion.

21 **4. Evidence or argument related to GEO's size, profitability,**  
22 **financial status or overall wealth.**

23 Plaintiffs specifically adopt and incorporate by reference the State's response to this  
24 motion. GEO acknowledges that Plaintiffs can discuss the fact that GEO is a for-profit

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25 <sup>1</sup> For example, GEO's proposed jury instructions – incorrectly – include the statement, "A program that is  
26 designed to allow detained individuals to remain active and feel productive on a daily basis, for example,  
likely does not indicate an employment relationship." GEO Proposed Jury Instructions, at 21.

1 company, as this is directly relevant to its exemption defenses under the MWA. However,  
 2 Plaintiffs should also be able to discuss how use of VWP labor impacts GEO's bottom line.  
 3 In its own proposed jury instructions, GEO identifies "whether the service rendered is an  
 4 integral part of GEO's business" as a relevant element in determining employee status. In  
 5 order to make this assessment, the jury will first need to understand what "GEO's business"  
 6 is, and second how much of a contribution VWP labor makes to that business. Thus, in  
 7 deciding employee status, courts have looked not only at the displacement of paid labor (as  
 8 discussed in section 1 above), but also at the extent to which the company receives direct  
 9 economic advantage from the alleged employees' work. *See Walling*, 330 U.S. at 153; *Shiloh*  
 10 *True Light Church*, 895 F. Supp. at 815. For example, in *Marshall v. Baptist Hosp., Inc.*, the  
 11 trial court found that unpaid trainees in a hospital radiology department were employees  
 12 where,  
 13

14 It is beyond question that the defendant received direct and substantial benefit  
 15 from the work performed by trainees, work that would otherwise have been  
 16 done by regular employees and work for which the hospital charged patients  
 17 at full rates.... Simply stated, the hospital exploited the training program,  
 18 turning it to its own advantage.

19 473 F. Supp. 465, 476–77 (M.D. Tenn. 1979), *rev'd*, 668 F.2d 234 (6th Cir. 1981). Viewing  
 20 the circumstances of "the whole activity," the court concluded, "The economic reality is that  
 21 the trainees functioned as an integral part of the operation of the Radiology Department  
 22 without pay."<sup>2</sup> Evidence relating to the budget and staffing of the NWDC, and how much  
 23 VWP labor contributes to the facility's bottom line is relevant and admissible to allow the

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24  
 25 <sup>2</sup> The Sixth Circuit reversed the district court's judgment for the workers, holding that the hospital reasonably  
 26 relied on ambiguous Department of Labor interpretive guidelines and therefore established a good faith  
 defense under the Portal to Portal Act. However, the circuit court also concluded that "we do not believe that  
 the District Court applied an erroneous test of liability under the FLSA, and we agree that the record supports  
 the general findings of the court below." *Marshall v. Baptist Hosp., Inc.*, 668 F.2d 234, 236 (6th Cir. 1981).

1 jury to assess whether this work is “integral” to GEO’s business and whether GEO obtained a  
2 direct and substantial economic advantage from this labor.

3 **5. Evidence or argument that GEO is involved in other lawsuits.**

4 Plaintiffs do not oppose this motion, unless GEO opens the door by arguing that the  
5 lawsuits brought by Plaintiffs and the State are irrational, politically motivated, or driven by  
6 some purpose other than Plaintiffs’ legitimate belief that the MWA applied to their work for  
7 GEO. If GEO opens the door by arguing that Plaintiffs’ claim is irrational or motivated by  
8 political considerations beyond the reasonable application of fact to law, Plaintiffs have a  
9 right to rebut those assertions by pointing to the myriad other cases in which parties have  
10 made similar claims regarding the employment status of detainee workers and which claims  
11 were not and could not have been motivated by any political considerations of the  
12 Washington Attorney General’s Office.  
13

14 **6. Exclusion of Mr. Strawn’s testimony.**

15 GEO’s motion in limine to exclude Mr. Strawn’s testimony merely reiterates its  
16 earlier failed motion to exclude, in brief and without the introduction of any new facts or  
17 argument. Moreover, by indicating its opposition to several of Plaintiffs’ pending motions in  
18 limine, GEO has highlighted the potential relevance and admissibility of Mr. Strawn’s  
19 testimony.  
20

21 For example, GEO has indicated that it opposes Plaintiffs’ motions to preclude  
22 evidence that class members violated federal immigration laws and to prohibit use of the  
23 terms “illegal alien” and “illegal immigrant” at trial. *See* Pl. Motions in Limine [Doc. 259] at  
24 7-9. Mr. Strawn’s testimony would be relevant to rebut the implications of these emotionally  
25 charged terms, and indeed the pre-existing misunderstandings of potential jurors, by  
26

1 explaining that many NWDC detainees and VWP participants have not been found guilty of  
2 breaking any laws and that they are merely detained while their immigration status is being  
3 determined.

4 Similarly, GEO has indicated that it opposes Plaintiffs' motion in limine precluding  
5 evidence and argument about work authorization, *see* Pl. Motions in Limine [Doc. 259] at  
6 15-16, and continues to suggest in its motion in limine that "whether detainees are eligible to  
7 work for GEO" is a relevant consideration, *see* GEO Mot. [Doc. 256] at 8. To the extent that  
8 GEO is allowed to discuss work authorization, Mr. Strawn's testimony regarding the work  
9 eligibility of detainees and the reasons why detainees might not obtain the requisite work  
10 permits even if eligible will be relevant and helpful to the jury in forming a complete  
11 understanding of the evidence.  
12

13 Finally, much of GEO's documentary evidence concerns practices at State  
14 correctional facilities, presumably in support of its intergovernmental immunity defense. To  
15 the extent that type of evidence is deemed admissible or relevant, Mr. Strawn's testimony  
16 distinguishing non-punitive civil detention in the NWDC from punitive detention in state  
17 facilities will again be relevant to avoid confusion and undue prejudice and to provide a  
18 complete view of the evidence to the jury.  
19

20 For these reasons, the Court should affirm its earlier denial of GEO's motion to  
21 exclude and determine the admissibility of Mr. Strawn's testimony at the time of trial when it  
22 is clear what evidence the parties are allowed to and either have or intend to introduce.  
23

#### 24 **7. Limiting Dr. Munson's testimony.**

25 The scope of GEO's motion to limit Dr. Munson's testimony is unclear. Plaintiffs do  
26 not oppose this motion to the extent GEO only seeks to ensure compliance with this Court's

1 Order denying GEO's earlier motion to exclude and limiting Dr. Munson's testimony to the  
2 "human calculator" role described in Plaintiffs' earlier briefing [Doc. 237] and authorized by  
3 the Court's Order [Doc. 251]. Dr. Munson's testimony will be limited to describing his  
4 process and the outcome of his calculations, and he will not offer any opinions on the  
5 average shift lengths worked by VWP participants, the credibility of evidence relating to that  
6 issue, or the appropriate measure of damages (beyond the accuracy of his calculations).  
7

8 However, it appears that GEO may be seeking to exclude Dr. Munson's revised  
9 calculations as described in his amended report, without expressly stating so. *See* GEO Mot.  
10 [Doc. 256] at 8-9 & n.5. To the extent that is GEO's intent, it rests on flawed factual and  
11 legal grounds and should be denied.

12 To begin, GEO suggests that Dr. Munson's revised calculations somehow expand his  
13 expert role and go beyond the limitations proscribed in the Court's order. This is incorrect. In  
14 performing his original calculations, Dr. Munson used an overall average shift length  
15 generated by GEO itself and invoice data from GEO to ICE reflecting the number of VWP  
16 shifts worked in a given month. *See* Pl. Opp. to Def. Mot. to Exclude Munson [Doc. 237], at  
17 3-4; Report of Dr. Munson (Sept. 11, 2019) [Doc. 218-2]. Dr. Munson used this approach  
18 because GEO had not produced more precise data in electronic form regarding the work  
19 assignments of VWP participants during the class period, despite longstanding and repeated  
20 discovery requests by Plaintiffs for these data.<sup>3</sup>  
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25 <sup>3</sup> The history of these requests and of the data production leading up to Dr. Munson's amended report is set  
26 forth in the letter appended as Exhibit 2 to the accompanying Declaration of Jamal N. Whitehead. Plaintiffs  
are prepared to submit copies of all documents and correspondence referenced in that letter should the Court  
need that information to rule on the present motion. Dr. Munson's amended report is appended as Exhibit 1 to  
the accompanying Whitehead Declaration.

1 On November 13, 2019, well after the deadline for Dr. Munson's original report,  
2 GEO finally produced electronic data showing the daily work assignments of VWP  
3 participants for most of the class period. These data are from the Keefe banking system and  
4 reflect daily payments by GEO to the commissary accounts of VWP participants for work in  
5 the VWP. Dr. Munson took these data, and using assumptions provided by counsel regarding  
6 the different shift lengths for different work assignments (e.g., kitchen, laundry, janitorial),  
7 calculated minimum wages owed to each VWP participant. *See* Amended Report of Dr.  
8 Munson (Feb. 6, 2020) (Whitehead Dec. Ex. 1). Thus, Dr. Munson's amended report  
9 contains more precise calculations of damages owed, but does not fundamentally alter his  
10 approach or the scope or nature of his testimony. He is simply applying assumptions about  
11 shift lengths to data showing the number of shifts, without opining on the accuracy of those  
12 assumptions (which will be left to the determination of the jury and which Plaintiffs  
13 anticipate will be established by the testimony of GEO's own employees, officers, and  
14 supervisors).

17 Plaintiffs produced Dr. Munson's report to GEO on February 10, 2020, including an  
18 Excel workbook containing multiple spreadsheets showing his amended calculations by  
19 month, by individual, the work locations to which each shift-length assumption was applied,  
20 data source documents, and the like. Thus, it is not clear what GEO means when it suggests  
21 Dr. Munson's exact mathematical calculations "appear to be missing from his most recent  
22 report," and GEO has not previously raised any such complaint or concern with Plaintiffs.

24 GEO also suggests in a footnote that Dr. Munson's amended calculations are "subject  
25 to automatic exclusion" because they were provided after the deadline for disclosure of  
26 expert reports. GEO Mot. [Doc. 256] at 8 n.5. As Plaintiffs previously explained to GEO, this



1 is not so. *See* Whitehead Dec. Ex. 2. GEO has never responded to this correspondence, other  
2 than by filing the present motion in limine, which does not address any of the points raised in  
3 Plaintiffs' letter.<sup>4</sup>

4 If GEO's motion is intended to press this argument, it is flawed and should be  
5 rejected. Fed. R. Civ. P. 37(c)(1) provides that expert testimony disclosed after the normal  
6 deadline may still be allowed if it was substantially justified or is harmless. Both exceptions  
7 are met here.

8  
9 To begin, the timing of Dr. Munson's amended report is substantially justified by  
10 GEO's delays in providing electronic Keefe banking data that had been repeatedly requested  
11 in discovery by Plaintiffs' counsel. These data were not produced in usable format until after  
12 the deadline for Plaintiffs' expert report. Indeed, although Plaintiffs originally requested  
13 these data in their first discovery requests on January 31, 2018, they were not produced until  
14 November 13, 2019, after they had been used by GEO's expert, Serena Morones, to prepare a  
15 critique of Dr. Munson's original report. *See* Whitehead Dec. Ex. 2, at 1-2 (summarizing  
16 history). Amendment of Dr. Munson's report was not only substantially justified, but  
17 inevitable given the timing of GEO's document production.

18  
19 Second, Dr. Munson's amended calculations are also harmless. If anything,  
20 Dr. Munson's amended report benefits GEO because his damage calculations decreased by  
21 approximately \$736,000, even with the addition of an extra six weeks of extrapolated  
22 damages. Dr. Munson's amended report also calculates an average shift length of 1.4569

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25 <sup>4</sup> Footnote 5 to GEO's motion ends with the cryptic statement that "GEO believes that this issue is easily  
26 addressed by limiting Dr. Munson's testimony to only that which is consistent with this Court's prior ruling."  
As explained above, Dr. Munson's testimony regarding his amended calculations can and will be consistent  
with the Court's ruling. It thus is not clear whether GEO is objecting to introduction of the amended  
calculations or not.

1 hours (compared to the 1.72 hours calculated by Mr. Heye and used in Dr. Munson's initial  
2 report), which is virtually identical to the average shift length calculated by Ms. Morones in  
3 her rebuttal report. Dr. Munson's amendment also should have come as no surprise to GEO,  
4 since both Plaintiffs' counsel and Dr. Munson himself told GEO's counsel that he would be  
5 revising his calculation once Plaintiffs learned that the electronic Keefe banking data were  
6 available. *See* Whitehead Dec. Ex. 2, at 2. Any minor prejudice to GEO is further  
7 ameliorated by Plaintiffs' offer to provide Dr. Munson for a second deposition, by the  
8 bifurcation of liability and damages in this case, and now, by the postponement of the trial,  
9 which allows further time for evaluation of the amended calculations and any redeposition.  
10

11 In sum, to the extent GEO's motion simply seeks to enforce this Court's earlier order,  
12 it is unnecessary and unopposed. To the extent it seeks to exclude Dr. Munson's amended  
13 calculations, it is ill-founded and should be denied.  
14

15 **8. Exclusion of evidence related to pay rates at other facilities.**

16 Plaintiffs anticipate that GEO will adduce evidence and argue that either federal law  
17 or its contract with ICE prohibit it from paying VWP participants more than \$1 per day.  
18 Plaintiffs have a right to rebut such assertions with evidence that GEO in fact has paid more  
19 than \$1 per day to VWP participants at other facilities that are subject to the same laws and  
20 contract language. This evidence is not unduly prejudicial to GEO, is not so complex that it  
21 would confuse the jury, and would be necessary to rebut or impeach patent  
22 misrepresentations of fact by GEO.  
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24 **9. Exclusion of Mr. Martinez and Mr. Ho.**

25 Plaintiffs no longer intend to call Mr. Martinez or Ms. Ho at trial and therefore do not  
26 oppose this motion.

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DATED this 23rd day of March, 2020.

SCHROETER GOLDMARK & BENDER

*s/ Jamal N. Whitehead*

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED at Seattle, Washington this 23rd day of March, 2020.

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