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/Counter-Defendants, v. THE GEO GROUP, INC., Defendant/Counter-Claimant.	Case No. 3:17-cv-05769-RJB **DEFENDANT THE GEO GROUP, INC.'S OPPOSITION TO PLAINTIFFS' MOTIONS IN LIMINE** **NOTE ON MOTION CALENDAR:** March 27, 2020 ORAL ARGUMENT REQUESTED

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Defendant The GEO Group, Inc. ("Defendant" or "GEO"), by and through its undersigned counsel, hereby submits its Opposition to Plaintiffs' Motions in Limine ("Motion"). Dkt. No. 259.

I. The Use of Exhibits in Opening Statements

Plaintiffs first Motion in Limine is a motion in limine in name only. It does not ask this Court to limit any specific evidence at trial, but rather asks the Court to permit Plaintiffs to introduce unidentified exhibits in their opening statement—without limitation. Because this particular Motion is better addressed through another procedural vehicle, the Court should deny Plaintiffs' first Motion in Limine.

Should the Court determine Plaintiffs' Motion should be addressed at this juncture, the motion should be denied for a lack of specificity. Plaintiffs seek to use unidentified exhibits in their opening statement. Plaintiffs do not even take the initial step of identifying the general categories of exhibits they seek to use. As the exhibits are unknown to both GEO and the Court, Plaintiffs' Motion should be denied. *Coachman v. Seattle Auto Mgmt. Inc.*, No. 17-187RSM, 2018 WL 4510067, at *1 (W.D. Wash. Sept. 20, 2018) ("The Court does not know what exhibits are at issue, and, out of caution, concludes that the parties may not show any exhibit or portion of an exhibit where admissibility is disputed.").

Furthermore, Plaintiffs make a baseless claim that GEO may engage in "gamesmanship" that would prohibit the admissibility of a proposed exhibit merely to prevent them from introducing the document in its opening statement. GEO has not unreasonably withheld its consent to the admissibility of any documents, and as such, this Motion serves as nothing more than an underhanded and groundless attempt to undermine GEO's credibility with the Court. Ironically, while GEO has stipulated to the admissibility of over 100 exhibits, the State and Private Plaintiffs have disputed the admissibility of *every single exhibit proposed by GEO*,

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including exhibits that are duplicates of those proposed by Private Plaintiffs.[1] Dec. of Barnacle ¶ 2. Thus aspersions of "gamesmanship" are nothing more than projection and are misdirected. Accordingly, should the Court rule on this Motion now, as opposed to during the pretrial proceedings (which it should not), it should make clear that the ruling applies to all parties with equal force. Such a ruling should equally caution the State and Private Plaintiffs against improper tactics of "gamesmanship."

II. Order of Witness Examination.

Plaintiffs seek a ruling from the Court that preemptively bars any cross-examination by GEO that goes beyond the scope of direct examination. FRE 611. Specifically, where witnesses may be called both in GEO's and Plaintiffs' case in chief, Plaintiffs seek a ruling from the Court that it *will not* exercise its discretion under Rule 611(b) to allow witnesses who will be called by both parties to be examined by GEO and Plaintiffs in successive order. Plaintiffs' Motion is both premature and runs contrary to the underpinnings of FRE 611. Thus, Plaintiffs' Motion should be denied.

As an initial matter, Plaintiffs' Motion first requires the Court to determine the threshold issue of whether GEO's cross-examination will fall outside of the scope of the direct examination, without any specific information about how or when this may actually arise at trial. Plaintiffs have not identified specific witnesses who are likely to be questioned about topics beyond the scope of direct testimony. Because GEO does not yet know the scope of Plaintiffs direct testimony, it is impossible at this juncture to determine whether GEO's cross-examination will go beyond the scope of Plaintiffs' direct testimony. Thus, Plaintiffs Motion is premature and not ripe for a ruling.

If the Court is inclined to entertain Plaintiffs' Motion at this early juncture, GEO requests that if some limited questions at trial fall outside of the scope of Plaintiffs' direct examination,

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[1] By not consolidating their motions and instead submitting a combined total of 22 motions in limine, the State and Private Plaintiffs have taken the untenable position during pre-trial conferrals that over 90% of GEO's proposed exhibits are the subject of a motion in limine.

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1 the Court consider expanding the scope of GEO's cross-examination consistent with FRE 611.
2 As the gatekeeper, "the court should exercise reasonable control over the mode and order of ...
3 presenting evidence so as to: (1) make those procedures effective for determining the truth; [and]
4 (2) avoid wasting time . . . " FRE 611(a). To that end, Rule 611(b) permits the Court to allow
5 cross-examination that goes beyond the scope of direct examination where doing so is more
6 efficient from a trial management perspective. Certainly, here, reducing the number of times the
7 same witnesses are called to the stand will increase the efficiency at trial. Witnesses that will be
8 called by both GEO and Plaintiffs should not be needlessly required attend multiple days of trial,
9 as Plaintiffs request. This is particularly true where, as here, a number of the trial witnesses will
10 be travelling from out-of-state or significant distances from the Tacoma courthouse, to testify. If
11 Plaintiffs' Motion is granted, not only will it increase the strain on the witnesses, but it will also
12 break up the testimony of each witness into discrete parts, making it more difficult for the jury to
13 put together the entirety of each individual's testimony and determine the truth. This is also
14 particularly true where, here, the trial is anticipated to last three weeks and therefore a single
15 witnesses' testimony could be spread out over the course of nearly a month. The added
16 complexities associated with breaking each witnesses' testimony into discrete parts runs directly
17 contrary to foundational principles of FRE 611. Because this Motion seeks only to further
18 complicate an already complex and lengthy trial, Plaintiffs' request should be denied.

19 Plaintiffs also seek a blanket ruling under FRE 611(c) that they are permitted to ask
20 leading questions of all individuals who are current or former GEO employees. Plaintiffs request
21 is over inclusive and overbroad. Plaintiffs request assumes, without any support, that all current
22 and former GEO employees should be treated as hostile. Plaintiffs do not identify specific
23 witnesses and any basis for believing such witnesses are hostile and for that reason alone their
24 Motion should be denied. Indeed, for example, there are a number of former GEO employees
25 listed in the State and Private Plaintiffs' witness list that cannot properly be identified as hostile
26 to Plaintiffs and in fact may actually be hostile to GEO. *Yousefi v. Delta Elec. Motors, Inc.*, No.
27 C13-1632RSL, 2015 WL 11217257, at *1 (W.D. Wash. May 11, 2015) (denying Plaintiffs'

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motion in limine on the basis that "[p]ast employment . . . does not, standing alone, give rise to an inference that the witness' self-interest or affections would align him with defendants or make him hostile to plaintiff."). Because neither the Court nor GEO have sufficient information about which witnesses Plaintiffs seek to treat as hostile and in what context, Plaintiffs fifth Motion in Limine should be denied. In the alternative, any ruling should be reserved for trial.

III. Evidence of Intergovernmental Immunity and Washington Minimum Wage Act ("WMWA") Exceptions.

Citing its forthcoming response to GEO's motion for summary judgment (which neither the Court nor GEO has reviewed), Plaintiffs seek exclusion of argument and evidence of GEO's defenses of intergovernmental immunity and that detainees are not employees under the exceptions to the WMWA. RCW 49.46.010. Plaintiffs' Motion is speculative at best and not ripe for decision by this Court (or briefing by GEO). Plaintiffs argue that the legal basis for its Motion in Limine will be detailed in a yet-to-be filed response to GEO's motion. GEO is unable to respond to arguments it has not seen. Likewise, the Court cannot rule upon issues that are not yet before it. Nevertheless, GEO notes that the proper standard for intergovernmental immunity is set forth in its motion for summary judgment (Dkt. No. 227), its response to the State's Motion in Limine, and again here. Furthermore, Plaintiffs argument that the exceptions to the WMWA are not before this Court similarly lack merit.

1. Intergovernmental Immunity.

Binding Ninth Circuit precedent makes clear that in the context of federal immigration detention centers, federal government contractors are treated the same as the federal government itself for purposes of intergovernmental immunity. *United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019); *see also Boeing v. Movassaghi*, 768 F.3d 832, 842-43 (9th Cir. 2014) ("The federal government's decision to hire Boeing to perform the cleanup rather than using federal employees does not affect our immunity analysis . . . When the state law is discriminatory, a private entity with which the federal government deals can assert immunity."). Thus, GEO steps into the shoes of the federal government for purposes of intergovernmental immunity.

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California, 921 F.3d at 879; *see also Boeing*, 768 F.3d at 842-43. This principle has been recognized by both the United States in its Statement of Interest filed in this case (Dkt. No. 185 at 5-6) and this Court, (SOW Proposed Order, Dkt. No. 306-1 at 7).

The Supreme Court recently clarified that "[w]hether a State treats similarly situated state and federal employees differently depends on how the State has defined the favored class." *Dawson v. Steager*, 139 S. Ct. 698, 705 (2019). Under the WMWA the definition of employer is the same for all entities, public or private. RCW 49.46.010(4).[2] Thus, it is not the "employer" or operator of the detention facility that defines the "favored class" for purposes of this Court's intergovernmental immunity analysis. Instead, it is the definition of "employee" that controls. The Washington legislature has defined the class of individuals exempted from the WMWA as "[a]ny resident, inmate, or patient of a state . . . correctional, detention, treatment or rehabilitative institution[.]" RWC § 49.46.010(3)(k) ("detainee exception"). Accordingly, the "favored class" in the WMWA consists of state detainees who are exempted from the coverage of the Act.

Thus, here, the proper comparison to the federal government's detainees, held at the NWIPC, is any resident, inmate, or patient of a state detention, treatment, correctional, or rehabilitative institution – again, the "favored class" defined by the legislature.[3] This analysis is consistent with the Supreme Court's explanation in *Dawson* that "if a State exempts from taxation all state employees, it must likewise exempt all federal employees." *Dawson v. Steager*, 139 S. Ct. at 704. Substituting the relevant factors here, the comparison stands: "if a State exempts from [the WMWA] all state [detainees], it must likewise exempt all federal [detainees]." *Id*. It follows that if the federal government (and by extension GEO) is not afforded the same exemptions as the state, the WMWA violates the principle of intergovernmental

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[2] For the avoidance of doubt, the WMWA's definition of "employer" does not distinguish between public and private employers. Nor does the detainee exception distinguish between facilities where the state engages a contractor and those where it does not. Certainly, the detainee exception would be superfluous if both the state and federal governments were exempt from the WMWA's definition of employer.

[3] The WMWA is silent as to the potential "employer" of these detainees, in that it does not draw a distinction between private and governmental entities. Likewise, the WMWA is silent as to who owns or operates the facility in which the individuals are housed.

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immunity. Accordingly, if the issue is not resolved through the pending summary judgment motions, GEO will introduce evidence at trial that there are individuals in Washington who: (i) are in state custody (both criminal and civil); (ii) participate in work programs; and (iii) are not paid minimum wage under the WMWA. Through evidence of sub-minimum wage work performed by those in state custody, GEO will establish its defense of intergovernmental immunity. Thus, this evidence is not only relevant to GEO's intergovernmental immunity defense, but it rests at its core.

2. Exceptions to the WMWA.

Plaintiffs also argue that GEO should not be permitted to introduce evidence of the "detainee exception"[4] found in 49.46.010(3)(k) or the "resident exception" found in 49.46.010(3)(j) on the basis that the exceptions were not pled with sufficient specificity. Like the State's argument, Plaintiffs argument that GEO has not adequately pled, and put Plaintiffs on notice, that the exemptions of the WMWA will be at issue in the upcoming trial stretches credulity. In response to Plaintiffs' Complaint, GEO filed a motion to dismiss for failure to state a claim that argued that detainees are not "employees" because they fall into exemptions under the WMWA. Dkt. No. 8 at 24. The Court denied GEO's motion to dismiss ruling that "[at] least based on the pleadings, it is plausible that the Plaintiff, arguably, comes within the State definition of 'employee,' and is not subject to any existing statutory exception." Dkt. No. 28 at 14.[5] Following the Court's Order, GEO re-alleged the failure to state a claim for which relief may be granted in its Answer. Dkt. No. 33 at ¶ 8.1. Additionally, GEO pled a counterclaim for affirmative relief in the form a declaratory judgment that detainees are not GEO's "employees" and GEO is not an 'employer' with respect to participation in the Voluntary Work Program. *Id.* at ¶¶ 12.12. At that point, GEO put the Plaintiffs on notice that, in addition to its defenses, it would be making an *affirmative claim* that detainees are not employees under the WMWA.

[4] Plaintiffs misleadingly refer to this exception as the "government-owned facility" exception despite the fact that none of those words, let alone in that order, appear in the text of the statute.

[5] Like the State, Plaintiffs grossly mischaracterize this holding as conclusively determining that the detainee exception does not apply in this case. To the contrary, the issue has yet to be decided on its merits.

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Plaintiffs filed a motion to dismiss GEO's Counterclaims, including GEO's claim for declaratory relief under the WMWA, arguing that Plaintiffs' own Complaint "necessarily require[s] the Court to determine whether [Plaintiffs] are 'employees' and whether GEO is an 'employer.'" Dkt. No. 37 at 9. The Court denied the Plaintiffs' motion to dismiss GEO's claim for declaratory relief under the WMWA on the basis that the counterclaims "go to the heart of Defendant's view of Plaintiff's claims." Dkt. No. 40 at 6. Plaintiffs subsequently amended their Complaint and GEO once again alleged its defenses and counterclaims. Dkt. No. 92 ¶¶ 12.8,12.12. The pleadings and briefing in this case make clear that the exceptions to the WMWA have been at issue in this case since GEO's initial motion to dismiss. Thus, the record is clear that GEO's pleadings met the requirements of Fed. R. Civ. P. 8(c). Plaintiffs were adequately provided notice of GEO's contentions and has not been prejudiced. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979) ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.").

In any event, well-settled Ninth Circuit precedent makes clear that the failure to allege an affirmative defense, without any showing of prejudice to the Plaintiff, is not grounds for waiver. *Lowerison v. Yavno*, 26 F. App'x 720, 722 (9th Cir. 2002) ("Affirmative defenses are not waived even if they are first raised in pretrial dispositive motions, if the plaintiff is not unfairly surprised or prejudiced"); *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984) (finding employer did not waive its defense by failing to plead it until the summary judgment phase); *Healy Tibbitts Const. Co. v. Ins. Co. of N. Am.*, 679 F.2d 803, 804 (9th Cir. 1982) ("The defendant should be permitted to raise its policy exclusions defense in a motion for summary judgment, whether or not it was specifically pleaded as an affirmative defense, at least where no prejudice results to the plaintiff."); *Olson v. Snohomish Cty. Pub. Transp. Ben. Area*, No. C03-3841RSM, 2005 WL 2573328, at *2 (W.D. Wash. Oct. 12, 2005). Furthermore, GEO raised the exceptions to the WMWA in its summary judgment briefing, precluding a claim of waiver. *Healy*, 679 F.2d at 804. Plaintiffs do not allege any prejudice, nor does any exist. *See e.g. K Networks Co. Ltd. v. Bentley Forbes Holdings, LLC*, No. CV1208997MMMSHX, 2013 WL 12131715, at *13 (C.D.

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Cal. Nov. 7, 2013) (finding no prejudice where Plaintiff was aware of the arguments not pled in advance of trial). Thus, GEO's defenses cannot be deemed waived.

Finally, GEO's claim for declaratory relief has not yet been assessed on the merits. Surely, a motion in limine is not the proper procedural vehicle for the State to seek a ruling on the merits of GEO's claim for declaratory judgment under the WMWA. For these reasons, Plaintiffs twelfth Motion in Limine regarding evidence of state work programs should be denied in its entirety.

IV. Evidence that Detainees Volunteer for the Voluntary Work Program ("VWP").

The voluntary nature of the VWP goes to the heart of whether detainees are employees under the WMWA and therefore its relevance outweighs any prejudice to Plaintiffs. FRE 403. As GEO has previously argued, the fact that the VWP is completely voluntary goes directly to the *Anfinson* factors. See Dkt. No. 270 at 11; *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 870 (2012). *Anfinson* instructs that whether an employee-employer relationship exists depends upon the circumstances of the whole activity. *Id.* at 869. While there is no exclusive set of factors to consider, two factors that are commonly considered are permanence and control. Clearly, whether a detainee is a volunteer participant goes directly to those two factors. Because detainees are volunteers, GEO has no control over what tasks they choose to perform or if they choose to participate at all. Nor can GEO control whether detainees continue to volunteer, what positions detainees volunteer for, or if the detainee will consistently show up for each shift. In addition, because the program is purely voluntary, GEO has no control over the quality of a detainee's participation or whether more highly skilled detainees volunteer for positions requiring higher levels of skill. Likewise, because the program is voluntary, detainees are free to set their own schedule. For these same reasons, the voluntary nature of the program goes to the permanence of the relationship. Because detainees can volunteer one day and change their mind the next, they are not "permanent" fixtures in GEO's business, and by extension are not employees.

Additionally, the fundamental nature of the activity is relevant to whether an employee-

employer relationship exists. *Rocha v. King Cty.*, 435 P.3d 325, 333 (Wash. Ct. App.), *review granted sub nom. Bednarczyk v. King Cty.*, 193 Wash. 2d 1017, 448 P.3d 64 (2019). The *Rocha* court concluded that despite the State's control over jurors, they were not employees for purposes of the WMWA because the fundamental nature of jury service was a civic duty—not an employer-employee relationship. *Id*. Here, the fundamental nature of the detainee's relationship with GEO is not one of employment, but rather a custodial relationship. The ability to perform tasks on a voluntary basis exists not for employment purposes, but rather to avoid idleness, reduce disciplinary issues, and instead provide detainees with an opportunity to feel productive and useful. Indeed, directly analogous case law, addressing civilly detained individuals at the State of Washington's Special Commitment Center on McNeil Island ("SCC"), makes clear that where a detention facility operates a voluntary program for its residents as part of their custodial detention programming, the detainees are not employees. *Calhoun v. State*, 146 Wash. App. 877, 886 (2008), as amended (Oct. 28, 2008). Establishing that the NWIPC's program is the same as in the work program at the SCC in *Calhoun* (including that the program is voluntary) is a key issue for trial. Therefore, the relevance of the voluntariness of the VWP outweighs any perceived prejudice Plaintiffs have expressed. Accordingly, Plaintiffs' second Motion in Limine should be denied.

V. Evidence that Detainees Benefit from the VWP.

Plaintiffs argue that GEO should not be permitted to introduce evidence of the benefits that the VWP provides to detainees on the basis of relevance. Plaintiffs' argument rests on inapplicable case law[6] and should therefore be denied. The fact that detainees benefit from the VWP is relevant both to the "fundamental nature" of the program, for purposes of determining whether detainees are employees, and to GEO's intergovernmental immunity defense. *Rocha*, 435 P.3d at 333. Accordingly, Plaintiffs' third Motion in Limine should be denied.

In *Calhoun*, the Washington Court of Appeals addressed whether an individual who was

[6] Curiously, despite repeated arguments that federal case law is not relevant to this case, Plaintiffs now appear to concede that it is appropriate to turn to federal precedent in interpreting the WMWA.

civilly committed by the Washington Department of Social Health Services was an "employee" who could bring a claim for discrimination under Washington law. *Calhoun*, 146 Wash. App. at 884-885. The Court concluded that the detainee was not an employee because the purpose of the work program in which he participated was to "maintain a healthy lifestyle and promote good habits." *Id.* Likewise, rather than serving the purpose of providing detainees with an opportunity to earn minimum wage or obtain work experience—the purpose of the VWP is to address the "negative impact of confinement" by decreasing idleness, improving morale, and reducing disciplinary incidents. PBNDS § 5.8. Plaintiffs have testified that they received these benefits through their participation, thus, GEO should be able to introduce this evidence.

Plaintiffs' claim that benefits conferred upon detainees are not relevant to whether detainees can be classified as "employees" is not only inconsistent with *Calhoun*, but also with the balance of federal law. The majority of circuit courts to address whether a civil detainee who participates in a work program is an "employee" under the Fair Labor Standards Act ("FLSA") have held that civil detainees are not "employees." *See e.g., Matherly v. Andrews*, 859 F.3d 264, 278 (4th Cir. 2017) (holding that civil detainee was not an "employee" under the FLSA); *Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008) (same); *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992) (same); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir. 1999) (same); *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997) (same); *Alvarado Guevara v. Immigration and Naturalization Service*, 902 F.2d 394 (5th Cir. 1990) (holding that the FLSA does not apply to immigration detainee work programs). In reaching this conclusion, courts across the country place significant weight on the fact that detainees in a custodial setting perform tasks for non-monetary benefits, including reducing idleness, rehabilitation, and training. *See e.g., Matherly*, 859 F.3d at 278 (detainees work "not to turn profits for their supposed employer, but rather as a means of rehabilitation"); *Sanders*, 544 F.3d at 814 (one beneficial purpose of detainee work programs is to "keep detainees out of mischief"). Federal courts also emphasize that because individuals in custody receive all basic necessities from the facilities where they are detained, the underlying purpose of a minimum wage is satisfied. *See*

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1 *e.g., Matherly*, 859 F.3d at 278 (detainees receive "all necessities, satisfying the underlying
2 purpose of the FLSA's minimum wage provision."); *Sanders*, 544 F.3d at 814 (same); *Miller*,
3 961 F.2d at 9 (same); *Tourscher*, 184 F.3d at 243 (same); *Villarreal*, 113 F.3d at 207 (same). As
4 a result, the purposes of detention work programs are inconsistent with an employer-employee
5 relationship. *See e.g., Matherly*, 859 F.3d at 278 (the purpose of a detention work program is
6 inconsistent with an employer-employee relationship); *Sanders*, 544 F.3d at 814 (same); *Miller*,
7 961 F.2d at 9 (same); *Tourscher*, 184 F.3d at 243 (same); *Villarreal*, 113 F.3d at 207 (same).
8 Thus, contrary to Plaintiffs' allegations in their Motion, evidence of the benefits of a custodial
9 work program are always relevant to the analysis of whether detainees are "employees."
10 Moreover, evidence of non-monetary benefits is also relevant to GEO's
11 intergovernmental immunity defense. Like GEO, the State offers work programs to individuals
12 who are in state custody to provide non-monetary benefits to those detainees. Those programs
13 allow confined individuals to participate in tasks for subminimum wages in return for a sense of
14 fulfillment or connection to their custodial communities. These benefits are appreciated by the
15 State in the form of decreased idleness and other positive non-monetary features. GEO provides
16 those same benefits to detainees within the NWIPC. But, if GEO is prohibited from operating its
17 VWP in the same manner as the State, it will lose the non-monetary benefits of the VWP.
18 Indeed, classifying detainees as employees would drastically shift the nature of the VWP. Rather
19 than focusing on allowing detainees to feel a sense of purpose regardless of their skill level, the
20 program would shift to one focused on performance metrics and skills—potentially leaving
21 behind unskilled detainees. And, it is likely that fewer detainees would be afforded the
22 opportunity to participate, reducing the inherent benefits of the program as a whole. Certainly,
23 because of the web of employment laws that would be applicable to detainees, GEO could not
24 provide detainees with special treatment when it came to their performance reviews, scheduling,
25 or job assignments. As a result, the VWP would lose its fundamental purpose. At trial, GEO
26 should be permitted to introduce evidence that such discriminatory treatment is impermissible
27 under the doctrine of intergovernmental immunity. Accordingly, Plaintiffs' third Motion in

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1 Limine should be denied.

2 **VI. <u>Evidence That Detainees Did Not Request an Increase in Compensation.</u>**

3 Plaintiffs also ask this Court to exclude any evidence that detainee workers did not
4 request more than $1 per day for participation in the VWP on the basis that such information is
5 not relevant. FRE 403. To the contrary, whether the detainees sought more than $1 per day is
6 relevant to whether their motivations for participating in the VWP were consistent with those of
7 "employees" or instead reflected a different motive. Indeed, GEO intends to introduce evidence
8 that many detainees participated in the VWP solely to feel productive, a singular motivation that
9 is inconsistent with the concept of employment. This singular motive is only possible in a
10 custodial setting, where ordinary costs of living are not relevant since room, board, and food are
11 provided. Additionally, the fact that detainees never requested a raise is relevant context for
12 GEO's derivative sovereign immunity defense. GEO anticipates that Plaintiffs will try to
13 introduce evidence that ICE's Performance Based National Detention Standards ("<u>PBNDS</u>")
14 stated that GEO could pay "at least" $1 per day to detainees and therefore that GEO *could* have
15 paid more. In response, GEO should not be precluded from arguing that it never raised the
16 amount of pay because individuals continued to participate in the VWP without asking for a
17 raise. Accordingly, Plaintiffs' <u>fourth</u> Motion in Limine should be denied.

18 **VII. <u>Work Authorization of Detainees.</u>**

19 Plaintiffs move to prevent GEO from introducing evidence of the work authorization
20 status of detainees while simultaneously seeking to introduce testimony of Chris Strawn that
21 detainees are able to obtain work authorization while detained. Plaintiffs have also listed a
22 number of work authorization forms on its list of proposed exhibits. Surely, there is no basis for
23 excluding evidence solely based upon the party who will introduce it. For this reason alone the
24 State's Motion should fail.

25 Additionally, evidence about work authorization is relevant to GEO's derivative
26 sovereign immunity defense. GEO's contract with ICE sets forth specific work authorization
27 requirements for any GEO employees. To the extent detainees do not fall within those

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requirements, that is relevant to GEO's defense. Thus, Plaintiffs' eleventh Motion in Limine should be denied in full.

VIII. Plaintiff Nwauzor's Disciplinary History.

Plaintiffs seek to exclude evidence of Plaintiff Nwauzor's disciplinary history at trial on the basis that it is prejudicial and improper character evidence. FRE 403, 404. But, Mr. Nwauzor's disciplinary incident is relevant to the claims in the case and GEO intends to introduce it for purposes other than to show Mr. Nwauzor's character. Accordingly, Plaintiffs' Motion should be denied.

While detained, Mr. Nwauzor volunteered to clean the showers in his dorm as part of the VWP. Others in his housing unit volunteered to clean the bathrooms and other common areas. During his detention, Mr. Nwauzor had an incident where he urinated on the bathroom floor, as opposed to in the toilet. Ex. A, Nwauzor Dep. 80-81. As part of GEO's presentation of the "fundamental purpose" of the VWP, GEO will present evidence and argument that the VWP positions are akin to the chores that any individual would complete in his or her daily life without the expectation of compensation, including the tasks of cleaning and folding laundry, cleaning toilets, making beds, and taking out the trash (among others). Rather than mandating that each individual complete all chores each day, the VWP divides the chores among detainees who wish to reduce their idleness, increase their morale, amongst other benefits, and adds an incentive for detainees to participate in the form of $1 per day. Thus, an individual who cleans the shower does not need to do his laundry, clean the bathroom, or wipe his table after dinner. The fact that Mr. Nwauzor urinated outside of the toilet and then did not thereafter clean up his mess reinforces this point. Contrary to Plaintiffs' assertion, GEO will not argue that because Mr. Nwauzor urinated on the floor on one occasion that he did so on multiple occasions. FRE 404. Instead, GEO will use this anecdote to help the jury understand the nature of the VWP and operations at the NWIPC. Accordingly, there is no reason to exclude evidence of Mr. Nwauzor's bathroom incident and Plaintiffs' tenth Motion in Limine should be denied.

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IX. Criminal and Mental Health History of Plaintiff Aguirre Urbina.

GEO has proposed a limited use of Plaintiff Aguirre Urbina's criminal history at trial. As an initial matter, GEO seeks an opportunity to question Mr. Aguirre Urbina outside of the presence of the jury, prior to his testimony, so that the Court can make a finding as to his competence to testify on that day. FRE 601 (state law controls competence determinations); *State v. Brousseau*, 172 Wash. 2d 331, 337, 259 P.3d 209, 212 (2011) (trial judge should determine the witnesses competency prior to the witness testifying at trial). GEO seeks this relief because Plaintiff Aguirre Urbina has previously sworn, under penalty of perjury, that on occasion he has been controlled by voices in his head—which he describes as "the enemy." Ex. B. According to Mr. Aguirre Urbina, "the enemy" has been responsible for his actions in prior court proceedings. *Id.* And, he has sought to have his prior admissions in sworn proceedings revoked based upon his mental health. Accordingly, GEO seeks the opportunity to have the Court rule he is competent to testify at trial to preserve the ruling for the record in the event that Mr. Aguirre Urbina later raises concerns of his competence.[7]

Next, GEO proposed that because positions in the VWP may vary based upon an individual's criminal history, GEO be permitted to introduce evidence that Mr. Aguirre Urbina has a criminal record which disqualified from participating in various VWP positions. GEO does not seek to introduce evidence of Mr. Aguirre Urbina's specific bad acts or convictions. Rather, GEO seeks to provide an explanation to the jury about why Mr. Aguirre Urbina was ineligible for certain VWP positions. In the absence of this opportunity, Plaintiffs will be able to exploit GEO's forced silence to imply that GEO limited the positions for which Aguirre Urbina could apply based upon a lack of actual voluntariness of the VWP or GEO's preferences, when in reality it is an issue of ICE-mandated facility security. As the element of control is relevant to whether detainees are employees, this limitation would be highly prejudicial to GEO. Thus, GEO should be permitted to introduce limited evidence of Mr. Aguirre Urbina's criminal history.

[7] Contrary to Plaintiffs assertions in their motion, GEO has not and does not seek to introduce evidence of Mr. Aguirre Urbina's drug addiction.

Because GEO's proposed compromise strikes a balance between relevant information and the prejudicial nature of criminal convictions, this compromise would not violate FRE 403 or FRE 609.

In this same vein, there are a number of circumstances where Plaintiffs may open the door to Mr. Aguirre Urbina's criminal history. For example, if the State argues that Mr. Aguirre Urbina meets all qualifications under GEO's contract with ICE to be an employee—GEO should be allowed to introduce evidence that Mr. Aguirre Urbina has a criminal history that would preclude him from employment at GEO. FRE 609. Likewise, if Plaintiffs introduce testimony of Chris Strawn describing the reasons that detainees are held in the NWIPC, GEO should be able to inquire whether a criminal history could be a factor in an individual's detention. Equally, if Plaintiffs offer testimony of Chris Strawn that detainees could receive work authorization, GEO should be permitted to ask if Mr. Aguirre Urbina would be eligible given his criminal history.

Finally, Mr. Aguirre Urbina also swore, under penalty of perjury, that he is receiving treatment at the NWIPC for his mental health, and that he now "feels much better." GEO should be able to introduce this sworn testimony as impeachment testimony, should Mr. Aguirre Urbina deny that he receives treatment at the NWIPC. Ex. B. Accordingly, the Plaintiffs eighth and ninth Motions in Limine should be denied in part, subject to the proposal herein.

X. Descriptors for Detainees.

Plaintiffs also seek to exclude the use of the phrases "undocumented," "illegal immigrant" or "illegal alien" under FRE 403.[8] This Motion lacks merit. The simple fact is that Plaintiffs were detained by ICE for alleged violations of immigration law. Many of Plaintiffs were, in fact, "illegal aliens" or "undocumented." And, the jury will deduce as much based upon the Plaintiffs' detention. GEO should not be unnecessarily hamstrung at trial in the accurate and non-inflammatory terms it may use to describe a detainee's status in the United States. Additionally, Plaintiffs seek to introduce the testimony of Chris Strawn to explain why and how

[8] Contrary to Plaintiffs' title in its Table of Contents, which GEO assumes was an honest mistake, GEO has agreed not to use the term "illegals."

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1 detainees come to be at the NWIPC. GEO is certainly entitled to question Mr. Strawn about
2 whether Plaintiffs' detention is the result of illegal immigration. Accordingly, Plaintiffs' seventh
3 Motion in Limine should be denied.

4 **XI. Evidence that Detainees Violated Immigration Laws.**

5 Plaintiffs ask this Court to exclude any evidence or argument that detainees violated
6 immigration laws under FRE 403. However, this evidence is relevant to provide jurors with,
7 amongst other things, context about detainee's lack of permanence in the VWP, a key
8 consideration under *Anfinson*. 174 Wash. 2d 851. Detainees at the NWIPC are held there because
9 they are the subject of legal proceedings regarding their immigration status. Thus, during their
10 detention at the NWIPC, a significant portion of their time is consumed with preparing for and
11 attending court hearings related to their immigration case. GEO intends to introduce evidence
12 that because of this reality, many detainees will decide not to volunteer or decide to skip their
13 volunteer shift in order to attend a court hearing or work in the law library. This results in a lack
14 of permanence in the VWP. Similarly, detainees' immigration status frequently changes with
15 some detainees becoming eligible for bond (and thus release from the NWIPC) and others
16 receiving an order of deportation. Because of these changes, over which GEO has no control,
17 detainees participation in the VWP is limited and subject to change at any time. These facts are
18 critical to the jury's understanding of the detainees' transience, and therefore lack of permanence
19 in the VWP. Therefore, the relevance of this evidence outweighs any prejudice. FRE 403.
20 Accordingly, Plaintiffs' sixth Motion in Limine should be denied.

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Respectfully submitted, this 23rd day of March, 2020.

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PROOF OF SERVICE

I hereby certify on the 23rd day of March, 2020, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **DEFENDANT THE GEO GROUP, INC.'S OPPOSITION TO PLAINTIFFS' MOTIONS IN LIMINE** via the Court's CM/ECF system on the following:

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