IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:14-cv-02887 JLK

ALEJANDRO MENOCAL,
MARCOS BRAMBILA,
GRISEL XAHUENTITLA,
HUGO HERNANDEZ,
LOURDES ARGUETA,
JESUS GAYTAN,
OLGA ALEXAKLINA,
DAGOBERTO VIZGUERRA, and
DEMETRIO VALERGA
on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO COMPEL RULE 30(b)(6) DEPOSITION AND INSPECTION WITH VIDEO RECORDING

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INTRODUCTION

GEO's opposition papers further support Plaintiffs' Motion to Compel. First, although GEO offered at the eleventh hour to produce a Rule 30(b)(6) witness, it attempted to exact compromises limiting deposition topics in exchange for its agreement to comply with the Court's scheduling order and its previous positions in the litigation. Such last-minute, bad-faith efforts to confer are counter-productive and waste Plaintiffs' and the Court's resources. GEO's half-hearted attempt at compromise is akin to a belated request for a protective order limiting Rule 30(b)(6) deposition topics, which the Court should deny.

Second, the privacy and security concerns that ICE and GEO associate with a videotaped inspection are addressed by the Amended Stipulated Protective Order ("Protective Order," ECF No. 157) entered in this action, and neither GEO nor ICE has explained why the Protective Order's protections are insufficient. If anything, GEO's concerns are premised on Plaintiffs violating the Protective Order, which only underscores the fact that the Order solves the problem. Further, ICE has taken a different position, permitting photography during plaintiffs' inspection, in related cases. Finally, Plaintiffs have proposed additional measures – blurring faces, removing voice recording, not recording secure entryways and exits, and, to the extent possible, avoiding filming surveillance and other security equipment – to protect detainee and staff privacy.

Finally, GEO's pattern of wasteful brinksmanship and bad-faith negotiation has misused the parties' resources in this case and in related cases, and the Court must order sanctions to deter this conduct.

FACTUAL AND PROCEDURAL HISTORY

I. GEO Only Attempted to Negotiate the Scope of the Rule 30(b)(6) Notice at the Eleventh Hour When Its Opposition to This Motion Was Due.

GEO's opposition papers adopt a different position than GEO took during the meet and confer process. After repeatedly refusing to designate a Rule 30(b)(6) witness in discovery, GEO only expressed willingness to designate a witness and attempted to negotiate the scope of Plaintiffs' Rule 30(b)(6) Notice at the eleventh hour, the day before its opposition to this Motion was due.

As detailed in Plaintiffs' Motion to Compel Rule 30(b)(6) Deposition and Inspection with Video Recording ("Pls.' Br."), ECF No. 181, GEO previously represented that it would produce a 30(b)(6) witness for classwide merits discovery in this litigation, but beginning on April 26 and throughout May of 2019, took a firm and unwavering position that it would not produce any 30(b)(6) witness. Pls.' Br. at 5-7; ECF No. 181-1 (Declaration of Michael J. Scimone in Support of Plaintiffs' Motion to Compel ("Scimone Decl.")) ¶¶ 5-8; Declaration of Michael J. Scimone in Further Support of Plaintiffs' Motion to Compel Rule 30(b)(6) Deposition and Inspection with Video Recording ("Scimone Reply Decl.") ¶ 5. GEO maintained this position after Plaintiffs informed it that the parties had reached impasse, and that Plaintiffs would raise the issue with the Court. Scimone Decl. ¶¶ 7-8; Scimone Reply Decl. ¶ 6. Plaintiffs tried to break the impasse several times between May 9, 2019 and May 22, 2019, but to no avail, leading to this motion. Scimone Decl. ¶¶ 5-8; Scimone Reply Decl. ¶ 6. At no point during this time did GEO raise the specific objections to the deposition topics that it now

seeks to impose through motion practice, and it never attempted to engage Plaintiffs in a negotiation over those objections before forcing Plaintiffs to file this motion. *Id*.

GEO only offered to negotiate the topics in the notice on June 19, 2019, one day before its response was due, by email. Scimone Reply Decl. ¶ 7; ECF No. 187-2 (Declaration of Valerie Brown in Opposition to Motion to Compel ("Brown Decl.")), Ex. A. This is not the first time that GEO has instigated a dispute, waited for Plaintiffs to present the issue to the Court, then tried to negotiate a resolution under the pressure of a court-ordered outcome. In March 2019, GEO objected to Plaintiffs' discovery requests on the basis of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) and its implementing regulations, despite an order from this Court that *Touhy* did not apply. *See* ECF No. 168 (Plaintiffs' Motion to Compel dated Mar. 18, 2019) at 2-7. In that instance, as here, Plaintiffs met and conferred with GEO multiple times and exchanged multiple letters attempting to resolve the dispute, to no avail, before filing a motion to compel production. *See id*. Also in that instance, as here, right before GEO's deadline to respond to the motion, GEO abruptly changed position and offered to stipulate to the relief Plaintiffs sought. *See* Scimone Reply Decl. ¶¶ 10-11. The parties accordingly stipulated to withdraw Plaintiffs' Motion to Compel. ECF No. 174.

II. ICE Explained Its Privacy and Security Objections to Videotaped Inspection the Day GEO's Opposition to This Motion Was Due.

As explained in Plaintiffs' opening brief, Plaintiffs served their Second Set of Requests for Inspection ("Second RFI") on GEO on November 2, 2018, ECF No. 181-2 (Hood Decl., Ex. O (Second RFI)), which requested a videotaped site inspection.

Although GEO objected generally that the proposed inspection infringed upon the privacy rights and "other statutory, regulatory, and contractually protected rights of individuals who are not party to this litigation," and that due to "privacy and security concerns," it objected to photography and videotaping, it did not explain what "other . . . rights" were at issue, or articulate the "privacy and security concerns" in a way that would permit Plaintiffs to try to address or minimize them. Hood Decl. ¶ 25, Ex. Q.

Plaintiffs accordingly filed the instant Motion to Compel an inspection with video recording. On June 20, 2019, the day GEO's response to this Motion was due, ICE – not GEO – sent a letter to Class Counsel stating ICE's position that "[p]ermitting photography and video-recording of [Aurora] could essentially provide a blueprint of the facility," which would pose safety and security risks to "detainees, facility staff, and the public." ECF No. 187-8 (Brown Decl., Ex. E (ICE June 20 letter)) at 1-2. ICE further stated that "although ICE/ERO may have previously considered possible options to accommodate photography and/or video-recording, ICE/ERO currently cannot make any accommodations in this regard," due to changed leadership in its Denver Field Office, an increase in the number of detainees in the facility, and the June 16, 2019 escape of three detainees from the facility. *Id*. at 3. Finally, ICE explained that photography and video recording would also infringe the privacy interests of detainees and staff. *Id.* at 3-4. Presumably in response to Plaintiffs' proposal to blur images of detainees and staff (which Plaintiffs had proposed to GEO to address some of its vaguely-articulated privacy concerns), ICE further stated that "it is reported that, given the state of current

technology, individuals and computers are able to reverse obfuscation of faces and images," but cited to no source for this proposition. *Id*. at 4.[1]

ARGUMENT

I. Plaintiffs' Motion to Compel a Rule 30(b)(6) Deposition is Not Moot Because GEO Now Effectively Seeks a Protective Order, Which the Court Should Deny.

GEO's response attempts to shift the focus of Plaintiffs' motion from the issue of whether a 30(b)(6) deposition will be allowed at all to the content of that deposition. This attempt to limit the testimony Plaintiffs may seek is functionally a request for a protective order pursuant to Fed. R. Civ. P. 37(a)(5)(B) (authorizing a protective order after the court denies a motion to compel). Plaintiffs do not agree that GEO's requested limitations are appropriate, and oppose them; therefore Plaintiffs' motion is not moot.[2] The Court should deny GEO's request for the reasons set forth below, and should allow the deposition to proceed, where GEO may evaluate the questions at the time they are asked, and raise objections then, seeking the Court's relief if doing so appears warranted. *See* Fed. R. Civ. P. 30(d)(3).

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[1] GEO did cite a *Quartz* article in support of this proposition in its opposition papers. ECF No. 187 (Response in Opposition to Plaintiffs' Motion to Compel ("Def.'s Br.")) at 14; Brown Decl., Ex. I. It is unclear whether ICE's letter is referring to this article as the source of the "reporting" it references.

[2] Although Plaintiffs would have taken the same initial position a month ago, if GEO had raised timely objections, it is possible that the parties could have conferred and reached a compromise, or discussed the scope of Plaintiffs' intended deposition questions and allayed GEO's concerns. If that process had failed, GEO could have sought a protective order under Fed. R. Civ. P. 26(c), and would have been able to certify that it met and conferred with Plaintiffs, as that rule requires.

A. GEO's Objections to The Notice are Procedurally Improper.

The day before filing its opposition, GEO chose to serve formal written objections to the Class Merits Notice. The Federal Rules of Civil Procedure do not contemplate a process for written objections to deposition notices, as GEO concedes. *See* Def.'s Br. at 6-7. Federal Rule of Civil Procedure 30 does not contain a mechanism for formally objecting to a deposition notice, including one served under Rule 30(b)(6). *See generally* Fed. R. Civ. P. 30. Unlike other discovery rules that explicitly delineate an objection process, Rule 30 only discusses objections made at the time of deposition. *Compare* Fed. R. Civ. P. 30(c)(2) ("objection at the time of examination") *with* Fed. R. Civ. P. 33(b) ("responding party must serve its answers and any objections within 30 days after being served with the interrogatories") *and* Fed. R. Civ. P. 34(b) (among other things, response must "state with specificity the grounds for objecting to the request"). The proper vehicle for the relief GEO seeks is a motion for a protective order under Rule 26(c) or a motion to quash the deposition notice, but GEO has filed no such motion. *See McCarty v. Liberty Mut. Ins. Co.*, No. 15 Civ. 210, 2016 WL 8290151, at *5 (D. Wyo. Sept. 27, 2016) (objections to content of 30(b)(6) deposition notice ruled on in motion for protective order); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, No. 09 Civ. 3701, 2013 WL 6439069, at *2 (S.D.N.Y. Dec. 9, 2013) ("The weight of the authority holds that a party believing it has received a flawed 30(b)(6) notice may not merely rest upon its objections, but must move for a protective order. . . . In the absence of an agreement, a party cannot decide on its own to ignore the notice.").

The Court should allow the deposition to proceed as noticed, so that GEO can make its "objection[s] at the time of examination," *see* Fed. R. Civ. P. 30(c)(2), which would conserve the Court's resources because GEO might find that its anticipated objections do not truly require the Court's attention.

B. Even if GEO's Objections Were Proper, They are Waived.

Even if GEO's objections to the Class Merits Notice were contemplated under the Federal Rules, their untimeliness would constitute a waiver. As a general matter, where the Federal Rules do contemplate a formal objection process, discovery objections are waived if they are untimely. *See, e.g., e.Digital Corp. v. Pentax of Am., Inc.*, No. 09 Civ. 02578, 2011 WL 148083, at *2 (D. Colo. Jan. 18, 2011) ("untimely objections are waived"); *In re Matter of Caswell Silver Family Tr. Created Under the Terms of the Caswell Silver Revocable Tr. U/A Dated Nov. 21, 1985*, No. 10 Civ. 0934, 2012 WL 13013062, at *3 (D.N.M. Apr. 19, 2012) ("Petitioners' objections were not timely asserted and, therefore, are waived.").

GEO's objections are untimely by any reasonable standard. GEO did not serve its objections until June 19, 2019, nearly eight months after Plaintiffs served the Class Merits Notice and just one day before its deadline to respond to Plaintiffs' Motion to Compel. GEO's service is far outside the typical thirty-day deadline to object to discovery requests set forth in the Federal Rules. *See* Fed. R. Civ. P. 33(b)(2); Fed R. Civ. P. 34(b)(2)(A). Because GEO's "objections were not timely asserted [they] are waived." *See In re Matter of Caswell Silver Family Tr.*, 2012 WL 13013062 at *3.

C. Plaintiffs Oppose GEO's Proposed Limitations to the Notice.

Plaintiffs have been open to negotiating the scope of the Class Merits Notice from the outset, but GEO failed to meaningfully engage in these negotiations until Plaintiffs filed a motion to compel and GEO's response deadline loomed. Productive negotiations cannot occur in this context. To the extent the Court entertains GEO's objections, Plaintiffs' position on each of GEO's proposed limitations is as follows.

1. Relevant Period Limitations

Plaintiffs do not agree that limiting testimony to only the class period is appropriate. Testimony regarding changes GEO made to its policies or facility operations since the end of the class period is relevant to Plaintiffs' claims because such testimony may shed light on GEO's ability to implement programmatic and policy change. *Cf.* Fed. R. Evid. 407 (subsequent remedial measures are admissible to prove the feasibility of precautionary measures). This would rebut GEO's argument that it was acting pursuant to ICE instructions and unable to deviate from them. *See* ECF No. 149 (Amended Stipulated Scheduling and Discovery Order) at 5 (explaining position as to defensibility of Sanitation Policy that "GEO is contractually required to abide by the [Performance-Based National Detention Standards ("PBNDS")] and DHS/ICE policy."); ECF No. 23 (Order on Motion to Dismiss) at 12-13 (explaining that government contractor defense is unavailable to extent that GEO could deviate from ICE contract). It would also inform the type of injunctive relief Plaintiffs may seek.

2. Limitations on Types of Communications

Though not discussed in its brief, GEO seeks in its redline of the Class Merits Notice to limit all testimony about communications to testimony about written communications. Plaintiffs do not believe this limitation to the topics is appropriate at this time. Deposition testimony is one of the only ways to discover oral communications, and there is no reasonable argument that oral communications are not relevant to Plaintiffs' claims. If GEO is concerned that it cannot prepare a witness to testify as to all oral communications, GEO is only obligated to prepare the witness on information "reasonably available" to it. *See* Fed. R. Civ. P. 30(b)(6). Discussions about what the witness does and does not know, the basis for the information the witness provides, and the quality of the witness's preparation, are best reserved for the record at the deposition.

3. Limitations on Topic 2: GEO's Policies and Practices Relating to Discipline

GEO seeks to limit testimony on its policies and practices relating to detainee discipline to testimony regarding those policies with respect to the Housing Unit Sanitation Policy ("HUSP") at the Aurora Detention Facility. These limitations are not appropriate.

First, testimony relating to all of GEO's policies and practices regarding detainee discipline is relevant so that Plaintiffs can compare the way detainees are disciplined for failing to clean under the HUSP to the way they are disciplined for other infractions. Such testimony bears directly on the showing the Plaintiffs must make under the

Trafficking Victims' Protection Act ("TVPA"). *See* 18 U.S.C. § 1589(a) (creating liability for obtaining labor using force, physical restraint, or threats thereof).

Second, testimony relating to other facilities bears on GEO's defenses. Testimony about how GEO enforces the HUSP at other facilities can shed light on the degree to which it is following ICE's instructions, facts important to rebutting GEO's derivative sovereign immunity defense. *See* ECF No. 149 (Amended Stipulated Scheduling and Discovery Order) at 5. It also would bear on GEO's sixth affirmative defense, which pleads that the work Plaintiffs performed was consistent with work done at other ICE facilities throughout the U.S. *See* ECF No. 26 (Answer).

4. Limitations on Topic 3: Participation in the Voluntary Work Program ("VWP") and ICE Policies

GEO proposes limiting this topic to testimony regarding the Aurora Detention Facility. Plaintiffs oppose such a limitation. Testimony regarding the VWP at other facilities is relevant to rebut GEO's defense that paying detainees $1 per day is mandated by its contract with ICE and consistent with work performed in other ICE facilities. It is also relevant to prove Plaintiffs' claim that paying detainees $1 per day is unjust.

GEO's proposal to limit the testimony to GEO's interpretation of ICE policies rather than the policies themselves would create unnecessary obstacles to establishing a clear record. Plaintiffs are capable of drawing out this distinction through their questioning, and GEO is equally capable of clarifying the record should the need arise. This objection amounts to an argument about what information is within GEO's personal knowledge, and appears to be geared toward the admissibility of the evidence. It is well

established that "[i]nformation within [the] scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). GEO presumably knows something about ICE policies, as suggested by its defense that it was acting within their scope; Plaintiffs are entitled to discover the basis for this knowledge and whether there are grounds for its admissibility at trial.

5. Limitations on Topic 4: Costs and Benefits of Detainee Labor

GEO seeks to limit testimony regarding the costs and benefits of using detainee labor. Specifically, it wishes to strike the subtopics relating to current staffing at the Aurora Detention Facility, as well as testimony about the cost of using GEO employees to replace detainees' labor. Such limitations are inappropriate.

As noted previously, testimony from outside the class period is relevant because it can establish a point of comparison for certain GEO policies, and can shed light on the types of changes GEO is capable of making to the operation of its facilities.

In addition, testimony about subtopics (f) and (g), relating to the cost of using GEO employee labor, would not cause the deponent to "speculate about the costs associated," as GEO claims. Even if GEO has not itself conducted any studies or analyses regarding the cost of operating the facility without detainee labor, Plaintiffs are entitled to ask questions relevant to these subtopics – which are directly relevant to Plaintiffs' damages calculations – and gather any information needed to conduct relevant analyses themselves. If GEO truly does not have knowledge of its own cost structure, its designee can testify to that effect, but that fact is itself relevant to the case, and if true, imposes little cost on GEO to prepare the witness to so testify.

II. The Court Should Allow Plaintiffs to Inspect the Aurora Facility and Take Photos and Video During the Inspection.

A. Videotaped Footage and Photographs of the Inspection Provide Key Evidence That is Not Available to Plaintiffs Through Other Means.

Plaintiffs have established that videotaped footage of an inspection is relevant to their claims. Video footage will show the layout, size, and flow between detainee living and recreation areas, including bunks, restrooms, showers, dining areas, and common rooms that were subject to the HUSP and VWP.[3] The blueprints GEO has produced are no substitute, as they show only the positioning of walls, doors, windows, tables, and beds. They do not show how detainee pods and common areas look, their size, how they are furnished, or how they transition from one area to another. This information will show that the scope of the cleaning required under the HUSP far exceeds any reasonable definition of "personal housekeeping."

Likewise, video footage of the segregation unit would not, as GEO avers, "prove only that segregation units exist." Def.'s Br. at 11. Rather, it would illustrate what the segregation units look like, their condition, and the way they are used, all factors that would illustrate the inherently coercive nature of the detention environment. This is relevant to whether solitary confinement constitutes force, physical restraint, or serious harm, by means of which GEO obtained Class Members' labor under the TVPA.

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[3] Although the Aurora GEO facility has expanded since the class period, Plaintiffs understand that this expansion involved the addition of an annex and not a fundamental restructuring of the spaces that were in use during the class period. *See, e.g.*, Conor McCormick-Cavanagh, Immigration Detention Facility in Aurora Expands With 432-Bed Annex, Westworld (Feb. 1, 2019) https://www.westword.com/news/aurora-immigration-detention-facility-in-aurora-expands-with-432-bed-annex-11212275. Plaintiffs do not seek to videotape areas of the facility that did not exist during the class period.

Because the size, space, and overall environment of the GEO facility is directly related to Plaintiffs' claims, this case is on all fours with the authority Plaintiffs cited in their opening brief. *See* Pls.' Br. 21-23. In *Nourse v. City of Jefferson*, No. 17 Civ. 807, 2018 WL 6444226, at *1 (N.D.N.Y. Dec. 10, 2018), the court held that a videotaped site inspection was merited where the size of the booking area in a jail was at issue in the case. Similarly, in *Dang ex rel. Dang v. Eslinger*, No. 14 Civ. 37, 2015 WL 13655675, at *3 (M.D. Fla. Jan. 20, 2015), a videotaped inspection was granted where liability hinged, in part, on the orientation of the jail's mental health unit. Plaintiffs' claims here are similarly informed by the structure of GEO's Aurora facilities, and just as in *Nourse* and *Dang*, the Court should compel a recorded inspection.

A videotaped inspection is especially important here because surveillance videos from the class period have been destroyed, *see* Scimone Reply Decl. ¶¶ 13-14, Ex. A (Mar. 4, 2019 letter from N. Beer), leaving Plaintiffs without access to this key evidence.[4] *See Dang*, 2015 WL 13655675, at *4-5 (granting request for videotaped inspection where surveillance video was unavailable). Video can convey "a relevant firsthand sense impression to the trier of fact," 44 Am. Jur. Trials 171 § 4 (1992) (quoting McCormick on Evidence (3d ed.) § 212), which for the reasons described above cannot be captured by blueprints alone. Thus, as in *Dang*, "[p]hotographs and videotapes of areas where

[4] Through the meet-and-confer process, Plaintiffs have learned that GEO overwrites its video surveillance footage on a 30-day rotation, meaning that each day, the recording from the 31st day prior is overwritten by new footage. Scimone Reply Decl. ¶¶ 13-14, Ex. A (Mar. 4, 2019 letter from N. Beer). GEO did not take steps to preserve the 30 days of footage that were presumably available to it when it was served with the Complaint, which would have showed the facility's operations during the class period. *Id.* ¶ 14.

Plaintiff[s] [were] held may help the jury better understand the events at issue in the case." *Dang*, 2015 WL 13655675, at *5.

B. Plaintiffs' Proposed Solutions and the Protective Order Will Protect the Privacy of Detainees and GEO Employees.

Although Plaintiffs take GEO's security concerns seriously, there are procedures in place that adequately address them. Plaintiffs have consistently been willing to accommodate ICE security protocols, such as the need to disclose the identity of site inspection attendees in advance. Had GEO provided more specific security concerns and ICE's position – rather than waiting to present that position in motion practice – the parties could have reached a solution to each of these issues.[5] Plaintiffs believe their proposed solutions adequately address GEO and ICE's concerns.

1. The Stipulated Protective Order Addresses the Security Concerns GEO and ICE Identify.

GEO's opposition fails to acknowledge the existence of a Protective Order in this case, which was carefully and extensively negotiated between the parties and resolves nearly all of GEO's privacy and security concerns. Plaintiffs take their obligations under the Protective Order seriously, and as long as GEO designates any inspection footage as Confidential or Highly Confidential – Attorneys' Eyes Only, such footage is restricted to Plaintiffs or, in the case of Highly Confidential material, Class Counsel only. Violation of the protective order would violate Class Counsel's ethical obligations and could lead

[5] ICE's June 20 letter also reflects an inaccurate understanding of the current state of the parties' negotiations over an inspection, which has limited the areas for proposed inspection significantly. *Compare* Brown Decl., Ex. E (ICE June 20 letter) *with* Scimone Reply Decl. ¶¶ 15-16, Ex. B (May 15, 2019 email from M. Scimone).

to sanctions up to dismissal of the action or a finding of contempt. *See, e.g., Kaufman v. Am. Family Mut. Ins. Co.*, 601 F.3d 1088, 1092-93 (10th Cir. 2010) (upholding sanctions issued pursuant to Fed. R. Civ. P. Rule 37(b)(2)(A) for violation of a protective order); Fed. R. Civ. P. 37(b)(2)(A) (listing sanctions for violation of a discovery order including dismissal, default judgment, and contempt).

Moreover, Plaintiffs seek to use video of the Aurora facility as evidence in a legal proceeding, not to publish on the internet. Thus, concerns about viewers who could, for example, "exploit any perceived weaknesses in operational security," or about the public identification of GEO staff, *see* Def.'s Br. at 5, are not relevant.

To ensure the utmost confidentiality for any footage of the inspection, Plaintiffs propose that any video footage be designated Highly Confidential – Attorneys' Eyes Only, in accordance with Section 5 of the Protective Order. That designation addresses precisely the concerns GEO raises, *i.e.*, evidence that constitutes "[h]ighly sensitive information, the disclosure of which could result in compromise of the safety or security of GEO facilities and/or harm or retaliation to individuals." Protective Order at 3-4.

2. Plaintiffs Have Proposed Measures to Address GEO's Remaining Privacy and Security Concerns.

With respect to the details of a videotaped inspection, GEO mischaracterizes Plaintiffs' request as one "for unrestricted videography throughout [Aurora]." Def.'s Br. at 12. Far from demanding free range of the facility, Plaintiffs have agreed to limited sampling of the areas to be inspected. Scimone Reply Decl. ¶¶ 15-16, Ex. B (May 15, 2019 email from M. Scimone). Thus, for example, not all housing units will be subject to

inspection; instead, Plaintiffs will inspect one male and one female pod, plus common areas. *Id*. ¶ 16. This compromise narrows the scope of the inspection and lessens the burden on GEO.

GEO does not substantively respond to Plaintiffs' offer to pixelate or otherwise anonymize any GEO detainees or employees who appear on any video recording. Instead, it cites to a single *Quartz* article that states generally that machine learning may be used to identify some blurred images posted online. Def.'s Br. at 14; Brown Decl. Ex. I (*Quartz* article). Even if this article were probative, it is not relevant, because as noted above, Plaintiffs seek the video to use as evidence in a judicial proceeding, not to post online or otherwise publish to third parties. In order to further anonymize the video, Plaintiffs are also willing to obscure any voice recording.

Furthermore, the stated concern that a video recording may allow a viewer to re-create a blueprint of the facility is unpersuasive, because GEO has already provided Plaintiffs with an *actual* blueprint of the facility. *See* Brown Decl., Ex. E (ICE June 20 letter); ECF No. 189 (Brown Decl., Ex. H (renderings of the Aurora Detention Center)). However, Plaintiffs are willing to agree not to video record secure entryways and exits, and, to the extent possible, to avoid filming surveillance and other security equipment.

3. GEO's Remaining Concerns are Outweighed by Plaintiffs' Need or Inconsistent with Positions It Has Taken Previously.

None of GEO's remaining concerns outweigh the substantial need Plaintiffs have demonstrated for video footage of the facility. As GEO notes, the PBNDS allow video access to immigration detention facilities to be limited "[i]f the presence of video, film, or

audio *equipment* or related personnel poses a threat to the safety or security of the facility, its staff or its detainees." ECF No. 187-6 (Brown Decl., Ex. C (PBNDS)) at 8 (emphasis added). But GEO does not explain at any point why or whether the presence of a video camera or a videographer – as opposed to the resulting video – have any impact on safety and security. To the extent GEO believes that the presence of a videographer increases the risk of a detainee escape, there is no reason to believe this risk is any different for a videographer than any other member of Class Counsel's team.

With respect to the purported statutory bases for GEO's concern about detainee privacy, the anonymizing measures Plaintiffs have proposed alleviate any such concern. Even if they did not, "statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure." *Hassan v. United States*, No. 05 Civ. 1066, 2006 WL 681038, at *2 (W.D. Wash. Mar. 15, 2006) (citing *Zambrano v. INS*, 972 F.2d 1122, 1125 (9th Cir. 1992), and *St. Regis Paper Co. v. United States*, 368 U.S. 208, 217-18 (1961)); *see also Rodriguez v. Robbins*, No. 07 Civ. 3239, 2012 WL 12953870, at *2 (C.D. Cal. May 3, 2012) ("The asylum and VAWA, T & U confidentiality provisions do not foreclose court ordered discovery.").

Finally, GEO's arguments about ICE approval for the video recording represent yet another attempt to allow a third party to commandeer discovery. This Court has already held that allowing ICE to control discovery would "result[] in a separation of powers problem" and cannot be allowed. ECF No. 84 (Order Granting Plaintiffs' Motion to Compel and Denying Defendant's Motion for Protective Order) at 5. Even if the Court were to consider ICE's input, it is unpersuasive. First, ICE's June 20 letter does not

reflect the request for a videotaped inspection as it currently stands; as noted *supra* n.5, the scope of the inspection that Plaintiffs have agreed to with GEO is much narrower than the one ICE responded to. Second, ICE set forth nearly the identical position in a letter submitted to the court in *State of Washington v. GEO Group*, No. 17 Civ. 5806 (W.D. Wash.), another set of consolidated cases in which the plaintiffs sought inspection of a GEO facility, but ultimately approved a different result, allowing plaintiffs to photograph the facility. *Washington*, ECF Nos. 231-1 (Letter from ICE to Warden Langford), 235 (Order) (permitting inspection with photography pursuant to parties' agreement). To the extent that GEO's position is that Aurora is different because it is overcrowded and understaffed, *see, e.g.*, Def.'s Br. at 5; ECF No, 187-1 (Declaration of Assistant Warden Dawn Ceja in Opposition to Motion to Compel ("Ceja Decl.")) ¶¶ 10-12; Brown Decl., Ex. E (ICE June 20 letter) at 4, denying access to counsel for Plaintiffs asserting civil rights violations *because of poor conditions at the facility* would be a particularly perverse result.[6]

III. Sanctions are Necessary to Deter GEO's Pattern of Brinksmanship.

GEO should not get credit for agreeing to designate a Rule 30(b)(6) witness at the last minute, after provoking a discovery dispute. This conduct supports Plaintiffs' request for sanctions under both Rules 37(b)(2)(C) and 37(a)(5)(A) of the Federal Rules of Civil Procedure. First, GEO failed to comply with the Court's scheduling order, *see* ECF No. 149 (Amended Stipulated Scheduling Order), and GEO did not reverse its

[6] To the extent that GEO is concerned that overcrowding will tend to mislead a viewer as to conditions that existed during the class period, it may seek a limiting instruction at trial to cure that impression.

position until Plaintiffs expended resources bringing this motion, wasting Plaintiffs' and the Court's resources and delaying discovery.[7] *See Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1556 (10th Cir. 1996) (affirming district court's sanctions under Rule 37(b) to enforce defendant's obligation to provide complete, meaningful accounting, where defendant's non-compliance and ensuing dispute had "expended far more judicial resources than should have been necessary" and forced plaintiff to relitigate the sufficiency of the accounting several times).

Second, GEO's reversal on the eve of a filing deadline further shows that its position as to the requested discovery was not substantially justified, supporting sanctions under Rule 37(a)(5)(A). *See* Fed. R. Civ. P. 37(a)(5)(A); *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 680 (10th Cir. 2012) ("[T]he rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists." (alteration in original) (quoting Fed. R. Civ. P. 37(a)(4) advisory committee's note to 1970 amendment [currently Rule 37(a)(5)])).

The Court must apply sanctions here as a deterrent to GEO's pattern of conduct in this and other cases. "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who

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[7] GEO attempts to shift blame for its inconsistent positions to Plaintiffs for allegedly failing to point to a "notation in the record where GEO had agreed to a second Rule 30(b)(6) deposition." Def.'s Br. at 3; Brown Decl. ¶ 6. Plaintiffs explained during the parties' meet and confer discussions on this issue that GEO's position was inconsistent with its prior position taken in the litigation and with the bifurcated discovery plan. Scimone Decl. ¶¶ 5-8. GEO's attempt to shift blame is further evidence that it was negotiating in bad faith, suggesting that it was willing to contradict prior representations to Plaintiffs' counsel only as long as it believed there was no evidence of this contradiction in the record.

might be tempted to such conduct in the absence of such a deterrent.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980) (alteration in original) (quoting *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976)); *Ordonez v. Serv*, No. 13 Civ. 67, 2017 WL 5054398, at *2 (D. Utah Mar. 27, 2017) ("[M]onetary sanctions provide the least severe sanction the Court can impose in hopes of deterring continuing discovery abuse."). GEO has not only repeated this wasteful brinksmanship on two occasions in this case, but has also used this tactic in related cases, *Washington*, No. 17 Civ. 5806. There, GEO and ICE took a similar hardline position with respect to inspections of the GEO facility at issue. The same day the parties' briefing on the issue of the inspection request was due to the court, GEO presented the plaintiff with a letter from ICE agreeing to some of the relief the plaintiff sought, but the State of Washington filed its brief anyway because of "the last-minute nature of GEO's and ICE's positions and the fact that the scope of allowable photography and date of the inspection is not clear." *Washington*, ECF No. 232 at 4. The Court must make clear that GEO cannot continue to delay, adopt hardline positions, and then reverse its position as soon as it is required to answer to the Court after Plaintiffs have expended time and resources on a motion to compel.

Finally, GEO's hollow attempt to confer with Plaintiffs on the eve of its deadline to respond undermines the purpose of Local Rule 7.1(a), with which this Court requires "complete compliance." *See* Memorandum of Judge John L. Kane, Pretrial and Trial Procedures – Civil Cases, at 7 (January 2019). The Local Rule and this Court's rules require a "reasonable, good faith effort to confer with opposing counsel to resolve the

issue," *id.*, an obligation Plaintiffs' counsel took seriously in their many attempts to confer with GEO. GEO, on the other hand, did not take this obligation seriously, but rather acted in contravention of this Court's admonition in its rules that attempts to confer 24 hours prior to a deadline are not good faith efforts. *See id.* ("Certification that a telephone call, e-mail or fax was directed to opposing counsel fewer than 24 hours before the paper was intended to be filed and 'no response' was received is per se NOT a good faith effort."). This further supports a monetary sanction as a deterrent to similar future conduct.[8]

GEO's opposition does not address Plaintiffs' request for sanctions associated with this Motion to Compel except for a brief mention in its conclusion in opposition to this motion, so the Court may consider the issue conceded. Def.'s Br. at 15; *see Rosales v. Bd. of Regents of the Univ. of Okla.*, No. 15 Civ. 560, 2015 WL 4644832, at *1 n.2 (W.D. Okla. Aug. 4, 2015) ("[The plaintiff] failed to respond to the argument in the motion to dismiss, and therefore the Court considers the issue conceded.").

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court (1) compel GEO to produce a witness or witnesses prepared to testify on the topics in Plaintiffs' Class Merits Notice dated November 2, 2018 on a date mutually agreed to by the parties following production of relevant documents, and deny GEO's de facto motion

[8] To the extent that the Court grants GEO's request for a protective order with respect to the deposition topics, a fee award in GEO's favor would not be warranted under Rule 37(a)(5)(B). For all the reasons discussed above, Plaintiffs' motion was substantially justified, and an award of expenses in GEO's favor would be unjust.

for a protective order limiting the topics in Plaintiffs' Class Merits Notice; (2) permit inspection of Aurora with video recording; and (3) order GEO to pay the Class's costs and fees associated with bringing this motion.

Dated this 3rd day of July, 2019.

Respectfully submitted,

OUTTEN & GOLDEN LLP

By: *s/ Michael J. Scimone*

Michael J. Scimone
Ossai Miazad
Elizabeth Stork
685 Third Avenue, 25th Floor
New York, NY 10017
Telephone: (212) 245-1000
mscimone@outtengolden.com
om@outtengolden.com
estork@outtengolden.com

David Lopez
OUTTEN & GOLDEN LLP
601 Massachusetts Avenue NW
Second Floor West Suite
Washington, DC 20001
Telephone: (202) 847-4400
pdl@outtengolden.com

Rachel Dempsey
Adam Koshkin
OUTTEN & GOLDEN LLP
One California Street, 12th Floor
San Francisco, CA 94111
Telephone: (415) 638-8800
Facsimile: (415) 638-8810
E-Mail: rdempsey@outtengolden.com
E-Mail: akoshkin@outtengolden.com

Alexander Hood
David Seligman
Andrew Schmidt
Juno Turner
TOWARDS JUSTICE
1410 High St., Suite 300
Denver, CO 80218
Telephone: (720) 441-2236
alex@towardsjustice.org
david@towardsjustice.org
andy@towardsjustice.org
juno@towardsjustice.org

R. Andrew Free
LAW OFFICE OF R. ANDREW FREE
P.O. Box 90568
Nashville, TN 37209
Telephone: (844) 321-3221
andrew@ImmigrantCivilRights.com

Brandt Milstein
MILSTEIN LAW OFFICE
1123 Spruce Street
Boulder, CO 80302
Telephone: (303) 440-8780
brandt@milsteinlawoffice.com

Andrew Turner
THE KELMAN BUESCHER FIRM
600 Grant St., Suite 450
Denver, CO 80203
Telephone: (303) 333-7751
aturner@laborlawdenver.com

Hans Meyer
MEYER LAW OFFICE, P.C.
P.O. Box 40394
Denver, CO 80204
Telephone: (303) 831-0817
hans@themeyerlawoffice.com

Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2019, a true and correct copy of the foregoing **Reply in Further Support of Plaintiffs' Motion to Compel Rule 30(b)(6) Deposition and Inspection with Video Recording** was electronically filed with the Clerk of the Court using the CM/ECF electronic filing system, which will send notification to all counsel of record.

s/ Michael J. Scimone
Michael J. Scimone

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ALEJANDRO MENOCAL, MARCOS BRAMBILA, GRISEL XAHUENTITLA, HUGO HERNANDEZ, LOURDES ARGUETA, JESUS GAYTAN, OLGA ALEXAKLINA, DAGOBERTO VIZGUERRA, and DEMETRIO VALERGA on their own behalf and on behalf of all others similarly situated, Plaintiffs, v. THE GEO GROUP, INC., Defendant.	Civil No. 1:14-cv-02887-JLK

DECLARATION OF MICHAEL J. SCIMONE IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO COMPEL RULE 30(B)(6) DEPOSITION AND INSPECTION WITH VIDEO RECORDING

I, Michael Scimone, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am an attorney at Outten & Golden LLP, which, together with Towards Justice, the Law Office of R. Andrew Free, Milstein Law Office, The Kelman Buescher Firm, P.C., and Meyer Law Office, P.C., are Plaintiffs' and Class Counsel in this action. I am an attorney in good standing admitted to practice before this Court.

2. I have been one of the lawyers primarily responsible for the prosecution of Plaintiffs' and the Class's claims in this case.

3. I make the statements in this Declaration based on my personal knowledge and would so testify if called as a witness at trial.

GEO's pattern of brinksmanship

4. Throughout this litigation, Plaintiffs have taken their obligations under Local Rule 7.1 seriously, and have engaged GEO in the meet and confer process to resolve its objections to discovery. Many of those efforts have been fruitful, and the parties have been able to compromise on a number of requests for documents and related discovery issues.

5. The parties have not had similar success in resolving GEO's objections to Plaintiffs' 30(b)(6) notice, despite Plaintiffs' best efforts. Beginning in April 2019, GEO refused to produce a 30(b)(6) witness based on a theory that Rule 30 limited Plaintiffs to a single such deposition, and based on the fact that Plaintiffs had taken an earlier, limited 30(b)(6) deposition during an earlier stage of discovery, which was limited by the Court's scheduling order to the subject of class certification.

6. Plaintiffs tried on numerous occasions to break this impasse, pointing out to GEO that the rules did not support its argument, and that prior counsel had recognized and explicitly argued that the earlier deposition should not extend beyond the topic of class certification.

7. After maintaining the position throughout the meet-and-confer process that it would not produce any witnesses for Plaintiffs' 30(b)(6) notice, GEO sent an email offering for the first time to negotiate the topics in that notice on June 19, 2019. This e-

mail was sent one day before GEO's response to Plaintiffs' Motion to Compel was due.

8. The June 19, 2019 e-mail was the second time in a short period that GEO has reversed its position on a dispute over which Plaintiffs filed a motion to compel on the eve of the due date for its opposition brief.

9. On March 18, 2019, Plaintiffs filed a motion to compel GEO's disclosures and discovery responses and the production of a complete class list. *See* ECF No. 168 ("Prior Motion to Compel"). GEO took the position during the meet-and-confer process that it could withhold documents pending ICE review pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), in spite of the Court's prior holding that it could not.

10. GEO's opposition to the Prior Motion to Compel was due on April 2, 2019. On March 28, 2019, GEO e-mailed Plaintiffs with further information on the production of the class list, an offer to withdraw its *Touhy* objections, and a request to meet and confer to attempt to resolve the remaining issues raised in the Prior Motion to Compel. This represented an abrupt change from the position GEO had maintained during the meet and confer process.

11. On Monday, April 1, 2019, the parties met and conferred, and GEO agreed to stipulate to the relief Plaintiffs sought in the Prior Motion to Compel.

12. On April 2, 2019, the parties stipulated to withdraw the Prior Motion to Compel and set forth their compromises for the Court. ECF No. 174. The Court granted

the stipulation the following day, on April 3, 2019. ECF No. 175

Videotape preservation

13. On March 4, 2019, then-counsel for GEO Naomi Beer sent a letter informing Plaintiffs that GEO overwrites its video surveillance footage every 30 days. During the subsequent meet-and-confer process, GEO explained that the video is overwritten on a rolling basis, such that each day, the recording from 31 days ago is overwritten by new footage. A true and correct copy of Ms. Beer's March 4, 2019 letter is attached as **Exhibit A**.

14. GEO's counsel represented during the meet & confer process that GEO did not take any steps to preserve the 30 days of footage that were presumably available to it on the date it was served with the complaint, which would have shown the facility's operations during the class period.

Scope of inspection request

15. During the meet-and-confer process on the scope of Plaintiffs' inspection of the GEO Aurora facility, Plaintiffs agreed to limited sampling of the areas to be inspected. Plaintiffs set forth their compromise offer in a May 15, 2019 e-mail from Michael Scimone to Valerie Brown and Carolyn Short. A true and correct copy of this email is attached as **Exhibit B**.

16. For example, Plaintiffs agreed that, instead of all housing units, only one male and one female pod, plus common areas, would be subject to inspection. Plaintiffs also offered other compromises to resolve GEO's security concerns, such as blurring the faces of detainees and guards caught on camera. Plaintiffs further requested that if GEO

could provide specifics about the nature of the security concerns, Plaintiffs would like to work to address them. This did not change GEO's position.

Dated: New York, NY
July 3, 2019

Respectfully submitted,

By: /s/Michael Scimone
Michael Scimone
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
(212) 245-1000
mscimone@outtengolden.com

Class Counsel

Exhibit A

GT GreenbergTraurig

Naomi G. Beer
Tel 303.572.6549
Fax 303.572.6540
BeerN@gtlaw.com

March 4, 2019

VIA EMAIL
Juno Turner
Elizabeth Stork
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, New York 10017
jturner@outtengolden.com
estork@outtengolden.com

Re: Alejandro Menocal v. The GEO Group, Inc. - Case No. 2014CV02887

Dear Juno and Elizabeth,

I write on behalf of The Geo Group, Inc. ("GEO") to respond to your letter of February 15, 2019 and other recent correspondence.

ICE Review

Your February 15 letter first asks to "meet and confer" as to the legal basis for GEO's belief that it cannot produce certain documents without ICE's review and/or approval, and the specific identification of documents GEO has withheld as a result of the belief. Letter at p. 1. While you are correct that the Parties negotiated a Protective Order that has mitigated some of the need for ICE review prior to production, certain categories of documents – in particular, documents that may contain "Covered Information" – were carved out of the Protective Order with the agreement that such documents would be addressed on a case by case basis. *See* Joint Status Report and Motion for Entry of Proposed Amended Stipulated Protective Order ("Joint Status Report") at ¶ B(2). Further, prior to the filing of the Protective Order and accompanying Joint Status Report, there was extensive back and forth regarding this precise issue. Ultimately, the following language was included in the Joint Status Report:

> Additionally, the parties recognize that nothing in the Proposed Amended Protective Order prohibits the Government from reviewing documents prior to disclosure in discovery. Plaintiffs reserve the right to oppose any such review.

(*Id.*). While Plaintiffs have reserved the right to object to such review, GEO has made its position clear throughout these discussions that certain documents need ICE review and approval prior to production. By way of example, you point to VWP reimbursement records maintained by Keefe Commissary as documents that GEO should be able to produce without ICE review.

The issue with those records, however, is that they contain detainees' names. While it is likely that ICE will approve their production quickly (as it did with respect to the class list, which also contains detainee names), GEO cannot produce those documents without prior ICE approval.

With respect to your request that GEO identify the "specific documents that [we] believe require ICE review" (Letter at p. 1), this is where the carve out from the Protective Order for "Covered Information" becomes significant. Notwithstanding Judge Kane's Order, some of the information that Plaintiffs seek through discovery in this litigation is still controlled by ICE and, accordingly, is subject to disclosure pursuant to the U.S. Department of Homeland Security's ("DHS") "*Touhy*" regulations, 6 C.F.R. §§ 5.41 *et seq.* The entire point of working with ICE and the U.S. Department of Justice ("DOJ") on the Protective Order was to try to facilitate a process whereby GEO could meet its discovery obligations with minimal disruption while *complying* with DHS's *Touhy* regulations.

Moreover, GEO's understanding of the categories of documents that may be subject to ICE review in this case is based on ICE's position in related litigation where ICE has also reviewed and provided input regarding the protective order in place.[1] Additionally, as you know, in this case, ICE and DOJ have communicated the Government's position that ICE needs to review and redact data that may contain information that is subject to certain statutory and regulatory disclosure restrictions ("Covered Information") prior to its production. The Government has based this position on its conclusion that the following federal statutes and regulations "prohibit disclosure of records that may be the subject of discovery" and contain Covered Information:

- 8 U.S.C. § 1367(a)(2), which prohibits disclosure of any information which relates to an alien who is the beneficiary of an application for relief, whether pending or approved, under the Violence Against Women Act;

- 8 U.S.C. § 1367(a)(2), which prohibits disclosure of any information which relates to an alien who is the beneficiary of an application for a T Visa, concerning trafficking victims;

- 8 U.S.C. § 1367(a)(2), which prohibits disclosure of any information which relates to an alien who is the beneficiary of an application for a U Visa, concerning victims of crimes;

- 8 U.S.C. § 1255a(c)(5), which prohibits disclosure of information relating to Legalization/Special Agricultural Worker claims; and

- 8 C.F.R. § 208.6, which prohibits disclosure of information contained in or pertaining to an asylum or refugee application, information pertaining to a credible fear determination pursuant to 8 C.F.R. § 208.30, and information pertaining to a reasonable fear determination pursuant to 8 C.F.R. § 208.31.

[1] It is GEO's hope that, here, because of ICE and DOJ's involvement in the Protective Order in this case, they might further relax their need to review certain categories of documents that might contain ICE information.

The Government has also advised that the "consequences for unauthorized disclosure of these categories of records include criminal and civil penalties." For your convenience, we have attached the August 21, 2018 letter from the DOJ, which notably was issued *after* Judge Kane's decision regarding *Touhy*, and which makes clear the DOJ's position that *Touhy* still applies to GEO, notwithstanding Judge Kane's order.

Based upon the guidance previously provided by ICE and DOJ in a related case, GEO has identified the following categories of data that likely will require ICE review before they may be disclosed to Plaintiffs in this case:

- Documents marked "For Official Use Only," "FOUO," "Law Enforcement Use Only," or with similar text;
- ICE audits and inspections;
- Communications with ICE;
- Invoices submitted to ICE;
- Non-public ICE policies or procedures;
- Information related to applications submitted pursuant to the Violence Against Women Act;
- T Visa/U Visa information;
- Information related to Seasonal Agricultural Worker claims;
- Information related to asylum/refugee claims;
- Personally identifiable information of detainees (including names and A-numbers); and
- Personally identifiable information of ICE officials.

As to the pace of discovery, GEO has made two supplemental productions thus far (and a third if you count the class list), and anticipates producing an additional group of documents shortly. GEO also is preparing to produce the Keefe documents, discussed above, as soon as it gets approval from ICE to do so. The parties' recent meet and confer correspondence – including some of the clarification made in your February 15, 2019 letter – have further focused areas for supplemental production. We also had a call on February 7, 2019 regarding ESI and received a follow-up email from you on Friday, March 1, 2019. Moreover, as discussed during our January 15, 2019 meet and confer, and in our January 28, 2019 letter, part of GEO's supplementation is tied to finalizing a new set of search terms, which, as you know, is still a work in progress. In your March 1 email, you note that you are still reviewing the search terms we provided. GEO looks forward to discussing your feedback when your review is complete.

Plaintiffs' First and Second Set of Requests for Production of Documents

Request Nos. 1–3

As to the VWP reimbursement documents and the need for ICE approval prior to production, please see the discussion above.

As to your question about whether GEO tracks the hours worked by class members, as stated in GEO's Responses and Objections to Plaintiffs' Third Set of Interrogatories served on February 6, 2019, GEO does not track the actual hours worked by class members. *See* Resp. to Interrogatory No. 17.

Request Nos. 5–7 (and related Interrogatory Nos. 5 & 6)

With respect to your reference to emails that may have been sent to or from Dawn Ceja, the warden and/or the chief of security at the Aurora Facility on the topic of disciplinary charges, GEO expects that this would be covered through the new search terms discussed in the prior meet and confer correspondence. As to disciplinary records contained in the detainee files, as has been previously explained, there is a significant burden attendant to review and production of those files. That being said, GEO is willing to meet and confer on this issue as you propose in your letter.

Request No. 8

GEO has asked ICE to clarify the extent to which it has class list information for the 2004 to 2006 time period that would be the same as (or similar to) the class list information already produced. To date, GEO has not received a substantive response from ICE. However, GEO remains hopeful that ICE will be able to provide the requested information, which would resolve this issue. Alternatively, some class list information potentially could be extracted from detainee files, but this would be an extremely burdensome exercise, and would be unlikely to provide information that is anywhere near as robust as the information that was extracted electronically for the 2007 to 2014 time-period. Moreover, given that this request seeks information from 12 to 15 years ago, any contact information that could potentially be derived from such files is almost certainly stale. As to your threat to file a motion to compel on this issue, GEO cannot provide what it does not have, nor is it proportional to the needs of the case to insist on manually extracting what is almost certainly stale information from the detainee files.

Request No. 12

You have agreed to limit this Request to:

> [A]ll documents summarizing, constituting, or reflecting any contract and/or agreement you executed to purchase labor for services for which GEO either used or considered using detainee labor, including but not limited to cleaning,

housekeeping, laundry, landscaping, kitchen and snow removal services at the Aurora Facility between October 22, 2004 and the present.

Based on this clarification, we understand that you are now seeking only agreements between GEO and third-parties relating to the Aurora facility for services where GEO has actually used or considered using detainee labor for the same services. Given that the VWP class starts in 2012, not 2004, we think the request for all such contracts dating back to 2004 – including for things such as housekeeping, laundry, landscaping, kitchen and snow removal – is overly broad, not proportional and far afield of the scope of the certified claims. Similarly, the extension of the time- period to the present is also overly broad and not proportional, given that both classes end in 2014. That being said, GEO appreciates your effort to narrow this Request and will, subject to the Protective Order, produce copies of contracts for cleaning services, if any, for the time period from October 22, 2004 through October 22, 2014. Similarly, GEO will produce copies of contracts with housekeeping, laundry and kitchen services for the time period from October 22, 2012 through October 22, 2014.[2] Based on its reasonable investigation to date, GEO does not believe that it has used or considered using detainee labor for snow removal or landscaping services.

Request Nos. 17–21

While you state your position that these Requests encompass video footage, we disagree that they could be fairly read to include such footage. Merely including a stock lengthy list in the definition of documents does not transform these Requests into ones for video footage. Indeed, Request Nos. 20 and 21 refer to "records of hours" and "hours spent by Plaintiffs performing such work," respectively. A reasonable reading of those Requests does not contemplate the production of video footage, which likely would not even capture all of the hours spent working by any individual detainee and thus cannot fairly be construed to be a "record of hours."

That being said, GEO can confirm that it does not have responsive video footage. GEO's CCTV system has a fixed amount of memory and once it reaches its capacity, it overwrites the oldest recorded footage. Generally, the capacity is such that it overwrites about every 30 days. Moreover, the preservation of such video is extremely burdensome and cannot be justified as proportional to the needs of the case, given the lack of relevance of the content to the claims and defenses at issue here.

Request Nos. 32 & 33

You state that it is your position that disclosure of the wages required under the Service Contract Act constitutes an incomplete response to these Requests, but note that you are willing to meet and confer to narrow the scope of documents requested. GEO agrees it makes sense to meet and confer regarding your position on these Requests.

[2] GEO anticipates that these contracts would be between GEO and third parties, and would thus not constitute the type of "Official Information" that requires ICE review. However, GEO reserves all rights regarding its need to follow applicable regulations if they are implicated by these documents.

Plaintiffs' First and Second Sets of Interrogatories

Interrogatory Nos. 3 & 4

You asked for clarification that the employee roster produced at GEO_MEN_00020548: "(1) reflects everyone who supervised class members working in the VWP and pursuant to the Housing Unit Sanitation Policy throughout the class period, and (2) includes only employees who supervised class members working in the VWP and pursuant to the Housing Unit Sanitation Policy."

The referenced roster contains all of the GEO employees at the Aurora Detention Facility during the class periods. In addition, the roster contains each employee's date of hire and termination date. Further, it remains GEO's position that all detention officers are assigned to supervise VWP participants or detainees performing HUSP tasks because a detention officer on shift at a location that has VWP participants or detainees performing HUSP tasks is responsible for the safety and security of all the detainees at that location. Thus, all detention officers assigned to the Aurora Detention Facility during the class periods are responsive to these Interrogatories. Plaintiffs can extract the detention officers working at the Aurora Detention Facility during the class periods from this roster. GEO trusts that this clarification answers your questions and confirms that GEO has fully responded to these Interrogatories.

Interrogatory No. 8

You insist that GEO policies from other facilities related to disciplinary or corrective action under the HUSP are "relevant to whether GEO's conduct at the Aurora Facility was purportedly authorized or required by ICE, and to whether GEO's conduct at the Aurora facility was unjust" and ask GEO to amend its response to this Interrogatory. GEO does not see the connection between the policies at other facilities and what happened (or did not happen) at Aurora. It therefore remains GEO's position that policies from other facilities are not relevant to this case. Moreover, even if these policies were relevant (which they are not), GEO objects to this request for other facility information as not proportional to the needs of this case. Accordingly, GEO declines to amend its response to this Interrogatory.

Interrogatory No. 16

You reiterated that it is Plaintiffs' position that calculating the fair-market value of Class Members' work requires consideration of the cost to GEO of employee leave, fringe benefits, and other costs attendant to recruiting, screening, hiring, and retention of workers. Like the response under RFP 32 and 33 above, GEO is willing to meet and confer to discuss why you believe the information provided thus far is not adequate.

Other Matters

We also wanted to follow up regarding the questions you posed in your December 6, 2018 email regarding the produced class list data, which GEO obtained from ICE. Because GEO could not answer Plaintiffs' questions about the ICE information, we posed the questions directly

to ICE. On Friday, March 1, we finally received a response from ICE to our inquiry. We have restated your questions and have included ICE'S responses below.

- Question (2): Please provide us with a key to the spreadsheet that explains the meaning of the column labels, as well as the values within those labels. For example, what is the meaning of "domicile," "home," "permanent residence," etc. in the "Address Type" column?

  Response: The labels in the Address Type column have no significant meaning. Rather, the case Officer at the time of case creation randomly picks a label that may correlate to where the subject is currently residing at the time of entry. The Officer may also just select the first drop down descriptor they see.

- Question (3): We understand that the class member contact information comes from ICE and reflects the address ICE obtained from the class member at each contact point. From our review, it appears that much or all of this data was exported from the ICE Ident-Enforce database. Can you confirm? If yes, our understanding is that that database records when particular information was added to the database, which would enable us to determine what information was provided most recently. Can you add that information to the spreadsheet?

  Response: ICE Ident is a fingerprint database. Enforce is no longer used and ICE has switched over to EAGLE for case or encounter creations which then reflects in EARM. STU can only provide what information is put in the database by the Officer. The entry date for addresses is not a mandatory field, STU can pull all addresses but not the actual date it was entered.

- Question (4): What information sources or databases did ICE search to obtain the information in the spreadsheet? Does the information come only from ICE-controlled sources, or was ICE able to access other government agencies' databases or source information? Please identify each source individually, and note any databases or sources of information that reside outside of ICE.

  Response: STU pulls the supporting data from the ICE Integrated Decision Support database (IIDS). Any case information created by an Officer will be stored and or reported to this database for extraction. The information came from an ICE database.

- Question (6): The spreadsheet contains columns for the name and contact information of the class members' immigration attorneys, but none of those cells contain any information. Please provide that information where available, as it may facilitate the notice process.

  Response: The information where available has been provided. This is not a mandatory field and is not always filled in or completed.

Thank you for your consideration. We trust that this responds to the questions in your letter. As always, GEO is available to discuss any questions or concerns you have about the contents of this letter.

Very truly yours,

NGB/ck
Enclosure
cc: Scott Schipma (via email schipmas@gtlaw.com)
David Palmer (via email palmerd@gtlaw.com)
Dawn Ellison (via email ellisond@gtlaw.com)
Dana Eismeier (via email deismeier@bfwlaw.com)
Mickey Ley (via email mley@bfwlaw.com)
Ossai Miazad (via email om@outtengolden.com)
Rachel Dempsey (via email rdempsey@outtengolden.com)
Adam Koshkin (via email akoshkin@outtengolden.com)
David Lopez (via email pdl@outtengolden.com)
Alexander Hood (via email alex@towardsjustice.org)
David Seligman (via email david@towardsjustice.org)
Andrew Schmidt (via email andy@towardsjustice.org)
R. Andrew Free (via email Andrew@ImmigrantCivilRights.com)
Brandt Milstein (via email brandt@milsteinlawoffice.com)
Andrew Turner (via email aturner@laborlawdenver.com)
Hans Meyer (via email hans@themeyerlawoffice.com)

Exhibit B

From: Scimone, Michael
To: Valerie.Brown@hklaw.com; Carolyn.Short@hklaw.com
Cc: GeoPlaintiffsCounsel
Subject: Menocal v. GEO Group
Date: Wednesday, May 15, 2019 1:23:36 PM

Carolyn and Valerie,

In the wake of our meet & confer last week on general discovery, I believe we're waiting to receive a written response from you on the open items listed below. Can you either respond to the substance, or let us know when you expect to have a response? Additional questions follow the chart.

Request(s)	Discussed in Meet & Confer	Status
Requests 32, 33, 46 (cost of operating Aurora without detainee labor)	Read as a "documents sufficient to show" request; specific documents listed in 46 may be responsive	GEO to respond
Requests 37, 40 (pay rates at non-Aurora facilities)	Plaintiffs further described relevance	GEO to respond
Request 39 (communications about this litigation)	Plaintiffs further described relevance	GEO to respond
Request No. 48 (documents related to contracts)	Plaintiffs maintain request for documents reflecting negotiations	GEO will produce as to negotiations on topics at issue in litigation; will clarify which categories it believes are at issue
Interrogatory No. 22 (class members currently detained at GEO facilities)	There is a burden to checking against detainee list for a given time period, so continuous updating is problematic; Pls.' propose checking now, and limiting additional updates to one other point closer to trial.	GEO to respond
Class list	Query whether GEO has exhausted its search for all class members	GEO to confirm in writing

30(b)(6) deposition

In addition, you told us you would provide formal objections to the current 30(b)(6) notice. Please provide those by the end of this week; while we are willing to review your formal objections in writing, there is no specific procedure requiring them in the FRCP or Local Rules. We understand GEO's position to be that Plaintiffs must seek leave to issue a second notice; we disagree, and contend that GEO must make a designation and produce a witness under Rule 30. We have conferred and appear to be at impasse; therefore we intend to move to compel a response no later than next week.

Overwritten Video Footage

Following up on our correspondence regarding security footage that was overwritten at the outset of the lawsuit, please let us know the date on which the Aurora facility's overwrites occur.

Inspection Request

We appear to be at impasse on aspects of our inspection request – specifically whether the inspection will be

recorded. Our request is to videotape the facility; GEO objects to both video and still photography. In an effort to narrow other issues, we will agree to limited sampling of the areas to be inspected. In addition to the areas you proposed in your April 26 letter, we propose the following:

Requested areas	**Offered in 4/26 letter**	**Counter-proposal**
Segregation areas		+ Segregation areas
Housing units (cells & common areas)	One unit pod	One male, one female pod plus common areas
Record & ESI storage areas		[Withdrawn]
on-site medical facility	Medical unit	[Agreed]
laundry room	Laundry facilities	[Agreed]
dining area		+ Dining area to the extent detainees do not eat inside pods.
kitchen	Kitchen	[Agreed]
law library	Library	[Agreed]
barbershop		+ Barbershop
intake area		+ intake area
solitary confinement unit	Solitary confinement unit	[Agreed]
warehouses		+ Warehouses
exterior or outdoor areas		Include exterior areas where detainees performed work (shoveling snow, landscaping)
ICE and GEO offices		Include to the extent detainees were responsible for cleaning this area.
conference rooms		Include to the extent detainees were responsible for cleaning this area.
break rooms		Include to the extent detainees were responsible for cleaning this area.
	Common areas (undefined)	(See Housing units above; if this refers to something else, please clarify).

Thanks in advance for getting back to us on this. We are available to speak this week if helpful.

Michael

Michael J. Scimone
646-825-9806