IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 1:14-cv-02887-JLK-MEH

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

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

DEFENDANT THE GEO GROUP, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JURY VIEW

Defendant The GEO Group, Inc. ("Defendant" or "GEO"), by and through its undersigned counsel, hereby submits its Response in Opposition to Plaintiffs' Motion for Jury View (ECF No. 301) ("Motion") and respectfully requests that this Court deny Plaintiffs' Motion for Jury View.

I. INTRODUCTION

Plaintiffs' Motion is premature. Multiple motions that could dispose of the case, or at a minimum reduce the number of issues for trial, remain outstanding including a motion to decertify the class, a motion to dismiss the case, and three motions for summary judgment. *See* ECF Nos.

312, 307, 305, 284, 260. Because these motions are unresolved, consistent with this Court's Practice Standard V.A.1, no pretrial conference has been set. As is to be anticipated at this stage in the litigation, the parties have not discussed jury instructions, witness lists, or exhibits. Thus, it is impossible to meaningfully discuss how a jury view would be helpful for the presentation of either side's case to the jury, how to avoid undue prejudice, and whether such evidence would be cumulative. Indeed, jury views are "highly unusual" and "rarely appropriate" and therefore a determination on such an issue should not be made without careful consideration of the other evidence that would be available at trial that could obviate the need for a jury view. *United States v. Santiago*, 203 F. Supp. 3d 1135, 1137 (D. Colo. 2016). It is impractical to resolve these issues without first having a better sense of the issues and framework of trial, not to mention how to account for the coronavirus pandemic.[1] Even if this Court finds Plaintiffs' motion is not premature, Plaintiffs have failed to meet their burden to establish that there are not other sources of evidence available that would outweigh the logistical hurdles to a jury view. As it currently stands, the jury view requested by Plaintiffs would be cumulative and would not help the jury resolve any key issues. Accordingly, GEO respectfully requests that this Court deny Plaintiffs' Motion.

II. LAW

Jury views are "highly unusual" and "rarely appropriate." *Santiago*, 203 F. Supp. 3d at 1137. Thus, in considering whether to grant a jury view, the Court is guided by "a number of considerations, including but not limited to: the availability of other sources of documentary evidence and/or witness testimony[;]" "whether conditions at the site have changed since the time

[1] At a minimum, this Court should reserve ruling on this issue until after the Pretrial Conference when the issues for trial have been crystallized.

of the incident[;]" and "any logistical difficulties that may be associated with coordinating and executing an out-of-court excursion." *Id.* "A court generally acts within that discretion in denying a motion for a view when there is sufficient evidence describing the scene in the form of testimony, diagrams, or photographs." *United States v. Crochiere*, 129 F.3d 233, 236 (1st Cir. 1997). The requesting party "bears the burden of demonstrating the need for a jury view." *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 778-79 (E.D. Tex. 2000).

III. ANALYSIS

a. The Motion is Premature Because the Issues for Trial are Unknown.

Plaintiffs' Motion seeks to bring the jury to the Aurora ICE Processing Center ("AIPC") in order to show the jury an empty women's dorm, men's dorm, and the segregation unit. Plaintiffs vaguely state that viewing the housing unit will better help the jury understand their claims under the Trafficking Victims Protection Act ("TVPA"). ECF 301 at 2. Currently, Plaintiffs' TVPA claim is the subject of four pending dispositive motions and a motion to decertify. *See* ECF Nos. 312, 307, 305, 284, 260. If any of those motions narrow or resolve Plaintiffs' TVPA claims, it could obviate the need for a jury view. Even if Plaintiffs' claims are not narrowed or resolved by the pending motions, because the trial plan remains unsettled, Plaintiffs have not met their burden to establish why a jury view would be necessary or helpful to the jury in proving their TVPA claim. Indeed, touring vacant areas of the facility, rather than looking at extensive photographs and facility layouts, would not provide any additional probative information about why detainees may have worked or GEO's intent (or lack thereof) in enforcing and implementing the policies at the facility.

The Court must balance the probative value of a jury view against the potential for undue prejudice, confusion, waste of time, and/or needless presentation of cumulative evidence. At this stage, determinations about the relevance of the information and the alternative sources of evidence that may be presented to the jury are nebulous: the witness lists and exhibits have not been exchanged among the parties, trial has not been set, and pretrial motions have not been filed or resolved. Importantly, it is unresolved what evidence Plaintiffs will rely upon at trial to prove their case. Will they present evidence of the named Plaintiffs' experiences and attempt to extrapolate those to the entire class? Or, will they present evidence of a single classwide policy, as they represented at the class certification stage? If they are presenting evidence of a classwide policy, in this case the AIPC Handbook, a jury view would not be necessary as the case will turn on whether the representations in the policy were themselves threatening. Indeed, there are no allegations that detainees had seen (or knew of) the layout and schematics of the segregation unit when they reviewed the policy. Additionally, if Plaintiffs' TVPA claim is resolved by the pending motions, the issue would be moot.

If Plaintiffs' TVPA claim is not dismissed, narrowed, or moot and a jury view is appropriate, GEO may seek to have the jury view include additional portions of the Facility or have the jury experience the meal clean-up of which Plaintiffs complain—rather than showing only the areas unilaterally chosen by Plaintiffs. Additional areas of the AIPC may be probative of GEO's defenses, depending upon the witnesses available at trial and the exhibits the parties will be able to introduce (following any motions in limine). Indeed, depending upon the status of COVID-19 at the time this case is set for trial, the witness list could shrink or a number of witnesses may be remote, both of which could impact whether a jury view is appropriate. At this time,

however, the key details remain unknown. It is not possible for GEO to address specifics without first understanding what other evidence will be presented at trial. Thus, resolution of this issue should, at a minimum, be delayed until the parties have a better sense of what trial will look like.

b. A Jury View Would Not Assist the Jury.

In order to determine whether Plaintiffs' request involves relevant information or merely an attempt to prejudice the jury by taking them to a detention facility where there are currently ongoing protests,[2] it is necessary to consider the relevance of the jury view and the potential alternatives to the proposed jury view. *Santiago*, 203 F. Supp. 3d at 1137.

As an initial matter, because Plaintiffs seek a jury view for their TVPA claims, viewing the current facility would not assist the jury. Plaintiffs' claims span the timeframe between 2004 and 2014. From 2004 to 2010, detainees were housed in a different building. Thereafter, in July 2010, all operations were moved to a new building. Ex. 2 (Ceja 30(b)(6) Dep. at 27).[3] In showing the jury only the building used between 2010 and 2014, the jury will be misled into believing that the building was the same for the entirety of the class period, when really, the layout was significantly different for the majority of the class period (between 2004 and 2010). Between 2004 and 2010, all detainees were housed in dorm style units, with no cells. Ex. 2 (Ceja 30(b)(6)Dep. at 27-28) (describing the layout of the old building). When detainees were moved to the new building, they

[2] Protestors have been camped outside of GEO's Aurora facility for three months. Those protestors have large signs that would be prejudicial to a jury. See ICE Protests Aurora, 303 Magazine, *available at* https://303magazine.com/2020/08/ice-protests-aurora-colorado/ (last visited August 26, 2020). GEO has no way of predicting whether these protests will continue through the time of trial.

[3] Per this Court's recent order, ECF 320, the Declaration of Adrienne Scheffey is attached hereto as Exhibit 1. All documents referenced in the Declaration are filed as their own exhibits to the instant motion and referred to throughout by their exhibit numbers. An index of these exhibits is included with this filing.

were housed in both dorm-style units and pod-style units with cells. *Id.* Thus, a jury view of a facility that was in use for less than half of the class period would not assist the jury.

Furthermore, in their Motion, Plaintiffs argue: "It is one thing to hear a description of solitary confinement, or even expert testimony about its effects; it is another to actually see a solitary confinement cell and imagine what it would be like to be confined inside it or to be threatened with such a sanction." ECF 301 at 9. It is hard to square this statement with Plaintiffs' current theory of the case: that Plaintiffs could have felt threatened by the mere mention of segregation as a possible sanction for failing to clean, despite having no knowledge of the actual conditions of segregation. ECF 260 ("GEO compelled detainees at the Aurora Facility to perform necessary janitorial work without pay by threatening anyone who tried to refuse with solitary confinement.") (emphasis added). Indeed, none of the Plaintiffs were ever sent to segregation for refusing to clean. ECF 305 at 13. Those Plaintiffs that did go segregation did so for other reasons. Thus, there is no reason to believe that Plaintiffs' knowledge of the layout and schematics of the segregation unit—if they even had such knowledge— were in any way relevant to their perceptions of the alleged threats. A jury view would serve only to overemphasize information that the Plaintiffs themselves did not have at the time they allegedly perceived the AIPC Handbook as a threat. Such a use of a jury view would be improper.

Plaintiffs also argue that the jury will be able to draw an inference about causation by "viewing the size of the housing unit" and what the meal clean-up entailed. But Plaintiffs do not seek to make the jury view informative or have the jury view a meal clean-up. Instead, they seek to show the jury an empty dorm, without any detainees, to emphasize size of the room, rather than the actual details about what the clean-up entailed. Because the dorm would be empty, it would

not be as it appeared during the actual meal clean-up. The jury will not be able to see the average number of detainees in the room, nor will they see how detainees maintain their personal area. Thus, an empty dorm would not be helpful to the jury. What *could* be helpful to the jury would be observing the meal clean-up to see what actually occurred. Or, how the detainees experience living in such a dorm, how they interact with one another, and the general experiences in the dorm. But these details have not yet been worked out with ICE. Rather, Plaintiffs determined unilaterally to file this Motion seeking a jury view without allowing GEO sufficient time to consider its trial plan and information that may assist the jury in its factfinding. Thus, as currently proposed, Plaintiffs' request for a jury view should be denied.

c. The Jury View As Proposed Would Likely Be Cumulative.

Based upon the evidence available in this case, it is likely that a jury view would be cumulative. The parties already went to extensive lengths to conduct a site visit wherein Plaintiffs were permitted to take 177 photographs of the AIPC, in addition to the stock photographs provided by ICE. Ex. 3 (March 27, 2020 Letter from ICE); *see also United States v. Bernal*, 533 F. App'x 795, 796 (9th Cir. 2013) (holding that a jury view would have been cumulative where the trial evidence included "over one hundred photographs and exhibits related to the rock face at the Red Elk Rock Shelter, and testimony of witnesses who described the site and the damage caused to the site."). GEO has also disclosed architectural drawings depicting the layout of the Facility. Further, the nine named Plaintiffs can easily describe their living conditions with the aid of the photographs. Similarly, those Plaintiffs who went to segregation for reasons other than refusing to clean will be able to testify about their experience. Finally, there are no fewer than four GEO officers who have

been deposed in this case that can provide a firsthand description of the segregation unit. Thus, a jury view would be cumulative.

In support of their contention that schematics and photographs are insufficient to allow the jury to decide the issues before them, Plaintiffs state (in a footnote) that Dr. Grassian was unable to support his position that the AIPC was "tighter than in prisons" without viewing the Facility in person. ECF 301, 10 at n.4. Yet, this is not a full description of Dr. Grassian's testimony. In reviewing the entire testimony, Dr. Grassian expressed an opinion that the Facility was more cramped than in prisons, but had not made any effort to support his statement. ECF 304-1, (Grassian Dep. at 296-97). He had not compared the square footage (which was available to him) to that of a prison or otherwise made any objective comparison. ECF 304-1, (Grassian Dep. at 298). Nor had he presented with his report any schematic of a prison. Indeed, such a comparison was unwarranted given that the AIPC itself also houses individuals who are detained by the U.S. Marshals unrelated to ICE's enforcement authority. Plaintiffs have similarly not disclosed any prison schematics to which the Facility could be compared. Thus, Dr. Grassian's testimony does not provide a compelling basis for a jury view.

d. The Logistics Required Must Be Weighed Against the Relevance.

"A trial judge would understandably be reluctant to halt a trial and cause the jurors to be transported to the jail for a view. The security problems are not small and the risk of comment by the prisoners is not insubstantial." *Stokes v. Delcambre*, 710 F.2d 1120, 1129 (5th Cir. 1983). In addition to the other considerations noted above, in considering Plaintiffs' Motion, this Court should also take into account the logistics involved in permitting such a view. First, ICE has represented that individuals must pass a background check prior to entering the Facility. This raises

the question of whether individuals who likely cannot pass that background check will be screened from the jury pool in advance. Additionally, the jurors will need to be transported to the Facility from the courthouse—presumably at Plaintiffs' expense, along with the Court, its staff, any appropriate witnesses who may be asked to provide testimony about the jury view, the parties, and counsel. This trip could easily take at least a half of a day, if not more. Depending on the length of trial, such a dalliance may not be appropriate. In a week-long trial, a half-day trip would not be warranted, whereas such a time-consuming endeavor may make more sense in a three-week trial. Moreover, if a jury view is granted, GEO's staff at the Facility will be required to adjust their daily routines within the Facility to ensure the jury can be safely escorted between dorms, requiring them to take time away from their normal duties. Further, the Parties will be required to coordinate with ICE to ensure the background checks are granted and access to the Facility is permitted. As ICE is not a party to this action, additional coordination will be required to ensure any approval is timely. Thus, the logistics weigh against a jury view.

e. The Date Of Trial is Unknown, As is The Trajectory of COVID-19.

Finally, the trial date is unknown. As of the date of this filing, any jury trial scheduled to commence between now and October 2, 2020 has been continued. General Order 2020-14. The COVID-19 pandemic is ongoing and ICE has suspended all social visitation at its facilities, including the AIPC.[4] Surely, if detainees' social visitation is not permitted, a jury visit would likewise pose concerns about the safety of the detainees in the midst of a pandemic. Further, Plaintiffs have not provided a solution for jurors who are uncomfortable visiting the AIPC during

[4] Ex. 3 (March 27, 2020 Letter from ICE); *see also* ICE Guidance on COVID-19, *available at* https://www.ice.gov/coronavirus (last visited August 25, 2020).

the pandemic (if it is ongoing). Will jurors be permitted to opt-out of the visit? Will they be instructed at the beginning before serving on the jury? Will jurors be required to be tested before entering the facility? Given the current state of the pandemic, these are unknowns that cannot be resolved without a better understanding of when trial will be set and the status of the ongoing pandemic. At the present moment, given the tangential relevance to the jury, a jury view does not seem warranted when weighed against the substantial risk of exposing detainees to a large group of individuals from outside of the facility.

IV. CONFERRAL

Plaintiffs submitted the declaration of Michael Scimone with their motion for a jury view indicating that they had satisfied their conferral obligations under the Local Rules. ECF 302. In his declaration, Mr. Scimone suggests that he met his conferral obligations regarding the instant motion for a jury view by insinuating that there was unreasonable delay on GEO's counsel's behalf in responding to his conferral request. *Id.* The declaration suggests that GEO had sufficient time to digest the information provided by ICE and form a position regarding the same. *Id.* To the contrary, on Friday July 17, 2020, ICE indicated to the Parties that it would provide specific information about the background screening procedures it would require as soon as it received those procedures from ERO. Ex. 1, ¶ 6; Ex. 4. Without awaiting a reply, on a Friday, July 31, 2020, Plaintiff asked for GEO's position on Plaintiffs' motion for a jury view and simultaneously followed up with ICE about the background check requirements for jury members visiting the facility. *Id.* The following Monday, the undersigned replied to Mr. Scimone that it was conferring with its client and would get back to him in the near future. *Id.* Thereafter, the undersigned was tied-up with matters in this case and others. *Id.* On the morning of Friday, August 7, 2020, ICE

provided additional background requirements for jury members who may visit the facility. *Id.* Before GEO's counsel could digest the additional information and respond to Plaintiffs' counsel, Plaintiffs filed the instant motion at 3:43 p.m. on August 7, 2020. GEO had less than a full work day between when it received the additional information from ICE and when Plaintiffs filed their motion. Thus, this Court should not consider Plaintiffs' conferral requirements to have been met.

V. CONCLUSION

For the foregoing reasons, GEO respectfully requests that the Court deny Plaintiffs' Motion for Jury View.

Respectfully submitted, this 28th day of August, 2020.

AKERMAN LLP

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CERTIFICATE OF SERVICE

I hereby certify on this 28th day of August, 2020, a true and correct copy of the foregoing **DEFENDANT THE GEO GROUP, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JURY VIEW** was filed and served electronically via the Court's CM/ECF system on the following:

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s/ Nick Mangels
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 1:14-cv-02887-JLK-MEH

ALEJANDRO MENOCAL,
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on their own and on behalf of all others similarly situated,

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THE GEO GROUP, INC.,

Defendant.

INDEX OF EXHIBITS TO DEFENDANT THE GEO GROUP, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JURY VIEW

Exhibit	Description
1.	Declaration of Adrienne Scheffey dated August 28, 2020.
2.	Attachment A to Declaration of Adrienne Scheffey – Excerpts of Dawn Ceja's Deposition Transcript dated August 5, 2020
3.	Attachment B to Declaration of Adrienne Scheffey – Letter from ICE to Parties dated March 27, 2020
4.	Attachment C to Declaration of Adrienne Scheffey – E-mails between Anne Rose and Parties regarding a Jury View

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 1:14-cv-02887-JLK-MEH

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

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

DECLARATION OF ADRIENNE SCHEFFEY IN SUPPORT OF DEFENDANT THE GEO GROUP, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR JURY VIEW

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

1. I am an attorney for defendant The GEO Group, Inc. ("Defendant" or "GEO") in the above-captioned matter.

2. I submit this Declaration in support of GEO's Response in Opposition to Plaintiffs' Motion For Jury View.

3. Attached as **Attachment A** are true and correct copies of excerpts of Dawn Ceja's deposition transcript dated August 5, 2020. Per the Court's order, ECF 320, this document is filed as **Exhibit 2** to GEO's Motion.

4. Attached as **Attachment B** is a true and correct copy of a letter from ICE to the Parties in the above-captioned case that was sent on March 27, 2020. Per the Court's order, ECF 320, this document is filed as **Exhibit 3** to GEO's Motion.

5. Attached as **Attachment C** is a true and correct copy of emails between Anne Rose and the Parties regarding a jury view. Impertinent information has been redacted. Per the Court's order, ECF 320, this document is filed as **Exhibit 4** to GEO's Motion.

6. On August 5, 2020, the deposition of Ms. Ceja took place and the undersigned defended her deposition. That deposition was taken by one of Mr. Scimone's co-counsel, Juno Turner.

7. On August 4, 2020, the undersigned was preparing Ms. Ceja for her deposition in this case.

Executed this 28th day of August, 2020, in Denver, Colorado.

s/ Adrienne Scheffey
Adrienne Scheffey

EXHIBIT 2

(Attachment A to Declaration of Adrienne Scheffey)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

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

RULE 30(b)(6) DEPOSITION OF:
DAWN CEJA, VOLUME I - August 5, 2020
The GEO Group, Inc.
(Via RemoteDepo)

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

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

PURSUANT TO NOTICE, the Rule 30(b)(6) deposition of DAWN CEJA, THE GEO GROUP, INC., Volume I, was taken on behalf of the Plaintiffs by remote means in Arapahoe County, Colorado, on August 5, 2020, at 9:04 a.m. MDT, before Sherry Wallin, Certified Realtime Reporter, Registered Merit Reporter and Notary Public within Colorado, appearing remotely from Adams County, Colorado.

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I N D E X

INFORMATION REQUESTED:

Page 93, Line 17
Page 175, Line 5

WHEREUPON, the following proceedings were taken pursuant to the Federal Rules of Civil Procedure.

* * * * *

THE REPORTER: The attorneys participating in this deposition acknowledge that I am not physically present in the deposition room and that I will be reporting this deposition remotely.

They further acknowledge that in lieu of an oath administered in person the witness will verbally declare her testimony in this matter is under penalty of perjury.

The parties and their counsel consent to this arrangement and waive any objections to this manner of reporting.

Please indicate your agreement by stating your name and your agreement on the record.

MS. SCHEFFEY: Adrienne Scheffey, counsel on behalf of defendant GEO, and we agree.

Sorry, Juno.

MS. TURNER: Juno Turner, class counsel for plaintiffs. We agree as well.

THE REPORTER: And Ms. Dawn Ceja, do you solemnly state that the testimony you are about to give in the cause now pending will be the truth, the

whole truth, and nothing but the truth?

THE DEPONENT: Yes.

DAWN CEJA,

having sworn to state the whole truth, testified as follows:

THE REPORTER: Thank you. Please proceed.

EXAMINATION

BY MS. TURNER:

Q. Thank you. Good morning, Ms. Ceja. We met briefly before we got on the record again. My name is Juno Turner, and I am one of the attorneys who's been appointed as class counsel for the plaintiff class in this matter.

Could you just please state your full name and business address for the record?

A. Dawn Ceja. Business address 3130 North Oakland Street, Aurora, Colorado 80010.

Q. Thank you. And is that the Aurora detention facility operated by The GEO Group?

A. Yes. The Aurora ICE Processing Center.

Q. Great. Thank you. And do you understand that although, given the circumstance of the deposition, the court reporter wasn't able to administer an oath to you in person, you've agreed to

Q. And I'm sorry, I just want to go back, actually, before we talk about this document.

When we were talking about housing units, you made mention of the new building. When did the facility begin occupying the new building?

A. July of 2010.

Q. And is there an old building that's still in use?

A. There is an old building that just recently was started being used.

Q. So it was unused for some period of time?

A. For about seven or eight years.

Q. And when did that building stop being used to house detainees?

A. It stopped being used in July of 2010.

Q. Okay. And it recently began being used to house detainees again?

A. Yes.

Q. Approximately when was that, do you recall?

A. Within the last three years.

Q. And in the old building, was the configuration of housing units the same or different?

A. Different.

Q. Okay. Can you describe how the housing units were configured in the old building?

A. The housing units were all dormitory style.

Q. Okay. And did those dormitory-style housing units have a common area?

A. Yes.

Q. Okay. And did it contain, generally, the same types of things as the common areas in the new building?

A. Yes. In essence, yes, without the commissary kiosks.

Q. So back to Exhibit 2, this appears to me to be aimed at GEO staff. Do you agree with that?

A. That's what it appears, yes.

Q. Okay. And if you look at the second page of the PowerPoint, it lists some equipment to provide to detainees. Do you see that?

A. Yes.

Q. And there is additional equipment listed on the third slide as well, correct?

A. Yes.

Q. Okay. And then if you go through to page 13 of the PowerPoint --

A. Okay.

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, SHERRY WALLIN, Certified Realtime Reporter, Registered Merit Reporter and Notary Public ID 19874212873, State of Colorado, do hereby certify that previous to the commencement of the examination, the said DAWN CEJA verbally declared her testimony in this matter is under penalty of perjury; that the said deposition was taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 10th day of August, 2020.

My commission expires May 14, 2023.

__X__ Reading and Signing was requested.

_____ Reading and Signing was waived.

_____ Reading and Signing is not required.

Sherry Wallin
Certified Realtime Reporter
Registered Merit Reporter

EXHIBIT 3
(Attachment B to Declaration of Adrienne Scheffey)

Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, SW; MS 5900
Washington, DC 20024

U.S. Immigration and Customs Enforcement

March 27, 2020

Michael J. Scimone
685 Third Avenue, 25th Floor
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mscimone@cuttengolden.com

Re: *Menocal v. The GEO Group*, No. 14-cv-2887-JLK (D. Colo.)

Dear Mr. Scimone,

A copy of your subpoenas dated March 4, 2020 to the U.S. Immigration and Customs Enforcement (ICE) has been forwarded to my attention. One subpoena requests testimony pursuant to Rule 45 of the Federal Rules of Civil Procedure and the Local Rules of the District of Colorado for use in the above federal proceeding, to which the United States is not a party. The deposition was noticed for April 7, 2020 at 10:00 a.m. in Washington D.C. For the reasons that follow, your request for the testimony of an ICE official is denied pursuant to the Department of Homeland Security's (DHS) *Touhy* regulations. *See* 6 C.F.R. §§ 5.41-5.49; *see also generally United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Accordingly, ICE does not intend to produce the requested witness in response to the subpoena. In addition, even were the request for testimony not denied, ICE nonetheless objects to the requested testimony pursuant to Federal Rule of Civil Procedure 45(d)(2)(B).

The second subpoena requests to enter, inspect, photograph and videotape the Aurora Contract Detention Facility, located at 3130 Oakland Street, Aurora, Colorado, pursuant to Rule 45 of the Federal Rules of Civil Procedure and the Local Rules of the District of Colorado for use in the above federal proceeding, to which the United States is not a party. For the reasons that follow, your request for inspection is also denied pursuant to the DHS *Touhy* regulations. *See* 6 C.F.R. §§ 5.41-5.49. Accordingly, ICE does not intend to permit a subsequent inspection of the facility. In addition, even if the request for inspection were not denied, ICE nonetheless objects to the requested inspection pursuant to Federal Rule of Civil Procedure 45(d)(2)(B).

The parties made an agreement in January 2020 regarding how to proceed with respect to Plaintiffs' inspection of the Aurora Contract Detention Facility. ICE had expected to receive from Plaintiffs a proposal if they sought an additional inspection. Plaintiffs issued a subpoena. Therefore, in order to preserve all of its rights, ICE is providing this formal response. Nevertheless, this letter should be seen as ICE's initial position and the agency welcomes further discussions regarding the inspection issue.

ICE also notes that GEO may also object to an inspection of the Aurora Contract Detention Facility. This response is not made on behalf of GEO and is not intended to affect any rights GEO may have with respect to an inspection.

Touhy

As noted above, there are published procedural prerequisites for obtaining information, whether oral or written, from the Department of Homeland Security (DHS) of which ICE is a component. DHS has promulgated regulations that govern the release of testimony by DHS employees or documents in a legal proceeding where the United States is not a party. These regulations are commonly referred to as *Touhy* regulations and can be found at 6 C.F.R. §§ 5.41-5.49. *See Touhy*, 340 U.S. 462. Compliance with the *Touhy* regulations is an absolute condition precedent to obtaining testimony or other information from a DHS employee, as well as documents. *See U.S. v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007); *Ho v. U.S.*, 374 F.Supp.2d 82 (D.D.C. 2005); *Boeh v. Gates, et. al*., 25 F.3d 761 (9th Cir. 1994); *Saunders v. Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968); *United States Steel Corp. v. Mattingly*, 663 F.2d 68 (10th Cir. 1980).

Section 5.43 of the DHS *Touhy* regulations requires that service of subpoenas, court orders, and other demands or requests for official information be served on the DHS Office of the General Counsel (OGC). DHS OGC has delegated the ability to receive service of and respond to such requests to its components. In the event that the request for ICE information is delivered directly to an employee, the employee is to immediately forward a copy of that document to DHS OGC or its designee, ICE Office of the Principal Legal Advisor (OPLA).

Further, DHS regulations bar all DHS employees, including former employees, from *inter alia* providing responses to questions by attorneys in situations involving litigation regarding any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the request for information is or was employed by DHS, unless authorized to do so by the DHS Office of General Counsel or its designees. *See* 6 C.F.R. § 5.44. Section 5.45 of the regulations also requires that the party seeking information must "set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought."

Upon receipt of a sufficiently detailed request, DHS or ICE will consider the following factors: (1) whether compliance would be unduly burdensome or otherwise inappropriate; (2) whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information; (3) the public interest; (4) the need to conserve the time of DHS employees for the conduct of official business; (5) the need to avoid spending the time and money of the United States for private purposes; (6) the need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated; (7) whether compliance would have an adverse effect on performance by the DHS of its mission and duties; and (8) the need to avoid involving the DHS in controversial issues not related to its mission. *See* 6 C.F.R. § 5.48(a).

In addition, ICE will not comply with a request when such compliance would violate a statute, regulation, Executive Order, or agency policy. Likewise, the ICE will not comply with a request when such compliance would reveal agency deliberations, or potentially impede or prejudice an on-going law enforcement investigation. *See* 6 C.F.R. § 5.48(b). Also, to the extent that your request calls for legal conclusions and/or expert or opinion testimony, this type of testimony and information is generally prohibited under 6 C.F.R. § 5.49.

ICE has reviewed your subpoenas and accompanying "*Touhy* Statements" and has determined that these requests do not currently meet the requirements of 6 C.F.R. § 5.45. The subpoenas do not adequately specify what information is being requested nor do they describe how the information sought is relevant to the present legal proceeding. For example, your request regarding testimony does not identify a specific ICE official. Moreover, the information sought in the subpoenas may be law-enforcement sensitive and/or subject to an Executive Privilege. Your requests as currently written are also overly broad and unduly burdensome as they request necessarily duplicative access to the Aurora Contract Detention Facility which the agency has already provided.

Request for Testimony:

Your subpoena for testimony requests ICE "produce any and all representatives of ICE or DHS that have been or will be identified to The GEO Group, Inc., as witnesses in *Alejandro Menocal, et. al. v. The GEO Group Inc.*".[1] At this time, ICE is not aware of any ICE officials who have been identified as witnesses in this case. Therefore, Plaintiffs' request for depositions of ICE officials is unnecessary to "test the claims and the evidence GEO has indicated it will present at trial." ICE also objects under Federal Rules of Civil Procedure Rule 45(d)(2)(B) because the subpoena is not directed to a specific person and also purports to require the appearance of a specific person through a Rule 30(b)(6) notice. ICE reserves the right to raise additional objections to the requested testimony if specific ICE officials are later identified.

Request for a Second Inspection:

Your subpoena requests a second tour of the Aurora Contract Detention Facility for the purpose of "inspecting, photographing and videotaping" the facility. ICE has already permitted a tour of the facility. Four attorneys representing the Plaintiffs were permitted to tour the facility on February 13, 2020, for several hours, accompanied by ICE officials. During this tour, an ICE photographer took 177 photos, at your colleagues' direction, of many locations within the facility. There were only two locations of which you colleagues requested photos that were not photographed: (1) the laundry room and (2) areas within an administrative segregation unit. ICE did not permit photos of those areas for security reasons. Your colleagues were also able to access the facility and take notes; they were not prohibited from accessing any areas to which they requested access.

ICE provided the photos taken during the tour, along with stock photos of the facility, within approximately two weeks after the tour. Your *Touhy* statement indicates you need a second tour to in order to obtain videography of the facility, but you do not explain how the photographs ICE has already provided to you fail to depict the information necessary for you to advance your claims. The photographs provided clearly depict detainee "bunks, restrooms, showers, dining areas, and common areas" including the "scale, layout and flow of these areas." There are several photographs of "the barbershop, where detainees cut hair…the areas throughout the interior of the facility where detainees performed maintenance, janitorial and cleaning work." The overwhelming majority of the request appears to duplicate the areas toured

[1] This response is solely on behalf of ICE, not DHS.

and photographed on February 13, 2020. ICE further notes that you are in possession of blueprints of the facility's layout.

You provided a follow-up response on March 25, 2020. You indicated the reason for the follow-up inspection was because the segregation unit and the laundry room were previously excluded and that "it's more difficult to get a sense of scale from a photograph as compared with video." You have been provided multiple photographs from different angles, with clearly identifiable items to serve as points of reference, such as doorways, table, chairs, bulletin boards, etc. and you have the blueprints to the facility. ICE concludes the totality of the information in your possession may adequately demonstrate "a sense of scale" compared to the burden of a second tour with videography.

Your *Touhy* statement indicates a videotaped inspection would "increase efficiency because it would eliminate the need for future inspections" but you do not explain why the previously negotiated tour and photographs failed to accomplish this, with the exception of two discrete locations with security concerns. ICE cannot foresee any need for future inspections. Especially since your request to inspect "all housing units…[and] all areas where detainees performed work…" involve the same locations you were previously permitted to tour and photograph. Thus, ICE denies your request for a subsequent tour to videotape the facility.

ICE highlights that the February 13th tour came at the conclusion of extensive negotiations over the terms of this tour. ICE has previously articulated the agency's objections and heighted security concerns regarding this facility, including denying your previous request for videography. Those objections remain valid and are re-incorporated here. *See* Letter from ICE Enforcement and Removal Operations Field Office Director Fabbricatore to Warden Choate (June 20, 2019).

Please note, due to COVID-19, social visitation has been suspended in all facilities. Facility inspections are subject to strict protocols to ensure the safety of detainees and employees. *See* www.ice.gov/covid19 . Currently, this would require personal protective equipment (PPE) (e.g., gloves, N-95 masks, and eye protection) for all participants and further limitations may be in place at the time of any scheduled inspection.

Rule 45

Additionally, this letter serves as notice pursuant to Federal Rules of Civil Procedure Rule 45(d)(2)(B) that ICE is objecting to the requirements of the subpoena to permit a second inspection of the Aurora Contract Detention Facility with videography.

The subpoena, as currently written, contains requests that are overly broad and unduly burdensome in violation of Rules 26 and 45 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(c), 45(d)(1), (d)(3). Your requests are also unduly burdensome under the applicable agency *Touhy* regulations. *See* 6 C.F.R. § 5.48(a)(1). Additionally, your requests seek an "overly broad" inspection and information for a civil dispute in which the Executive is not a party. *See Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 386 (2004). As the Supreme Court has noted, "special considerations control" when discovery such as that involved in your subpoena is sought from the Executive. *Id.* at 385. The "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract from the energetic

performance of its constitutional duties," as well as the unique privileges that may be implicated in this context, require a subpoenaing party, at the very least, to meet "exacting standards" of relevancy, admissibility, and specificity." *Id.* At 382, 386-87.

Under Rule 45(d)(1) of the Federal Rules of Civil Procedure, a party issuing a subpoena must avoid imposing undue burden or expense on the respondent. As currently written; however, the subpoena in this matter violates that obligation. This subpoena is overly broad and unduly burdensome because the subpoena seeks a fundamentally identical request for inspection as was afforded on February 13, 2020. In addition, you have already been provided substantial photographic evidence that clearly demonstrates the layout, flow and scope of many areas of the facility. A second tour yielding essentially the same documentary evidence which is currently in your possession is overbroad and unduly burdensome on ICE, who is not a party to this litigation.

In addition, as ICE objects to the inspection to the extent it seeks information protected under the law-enforcement privilege. The limitations on the scope of the tour and on photo and video equipment is based on serious operational security and law enforcement concerns. These restrictions aim to limit risk of harm to persons including detainees, facility staff, and the public; limit risk to property, prevent the introduction of contraband, including drugs, weapons, and/or escape tools into the facility; and prevent detainee escapes from the facility. The segregation units and laundry rooms are locations with heighted security concerns due to their purpose and location in the facility relative to the external perimeter.

ICE reserves the right to assert further privileges should a more detailed request be provided.

Conclusion and Counteroffer

As stated above, ICE denies your request for testimony and request for a subsequent inspection with videography. In an effort to prevent further expenditure of ICE resources in duplicative negotiation and litigation where the agency is not a party, ICE is willing to provide Plaintiffs with still photographs of the segregation unit and the laundry room. ICE will provide these photographs within ninety days of the parties' agreement. The photographs will be taken by an ICE photographer, at ICE's direction, provided in the same manner as previous photographs taken on the February 13th tour, and subject to the same confidentiality agreement.

I trust that this information clarifies ICE's position. I look forward to further discussing this matter with regard to your request for a second tour of the Aurora Contract Detention Facility. Thank you.

Sincerely,

Christa Lesh
Associate Legal Advisor
District Court Litigation Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

cc:
Adrienne Scheffey
Colin Barnacle
Akerman LLP
1900 Sixteenth Street, Suite 1700
Denver, CO 80202

EXHIBIT 4

(Attachment C to Declaration of Adrienne Scheffey)

Scheffey, Adrienne (Assoc-Den)

From: [redacted]@ice.dhs.gov>
Sent: Friday, August 7, 2020 9:18 AM
To: Scimone, Michael; Scheffey, Adrienne (Assoc-Den); [redacted] Barnacle, Colin (Ptnr-Den); mley@bfwlaw.com; deismeier@bfwlaw.com
Subject: RE: Menocal v. GEO Group - Subpoenas served on ICE

Michael,

Here is the information that has been provided by our Enforcement and Removal Operations (ERO) regarding the jury viewing:

ERO would need a valid government issued ID for anyone attending the viewing. If a person is a foreign national a valid immigration document would be required. ERO runs individuals for criminal history and then makes entry decisions based upon the results. ERO typically denies entry to individuals with felony convictions and/or arrests or charges, as well as individuals with certain misdemeanor convictions. For misdemeanors, the convictions cannot have occurred within the last 5 years. For felonies, the individual can have no convictions, arrests or charges at any time. ERO would need the juror information and the information for anyone accompanying the jurors on the viewing at least 72 hours prior to the viewing. Electronic devices are not allowed in the facility.

Please let me know if the parties have any further questions.

[redacted] I will be going on medical leave as of Monday, for about a week, but will provide an update via email beforehand to update the parties with where that stands. To the extent that it is not complete before I am out, the updated records and log will likely not be provided until I return the week of August 17th. While ICE has been working hard to keep up with the parties requests, ICE resources are stretched very thin at the moment. I will keep you posted.

Thanks.

From: Scimone, Michael <mscimone@outtengolden.com>
Sent: Friday, July 31, 2020 1:43 PM
To: [redacted]@ice.dhs.gov>; adrienne.scheffey@akerman.com; [redacted]
Cc: GeoPlaintiffsCounsel <GeoPlaintiffsCounsel@outtengolden.com>; colin.barnacle@akerman.com; mley@bfwlaw.com; deismeier@bfwlaw.com
Subject: RE: Menocal v. GEO Group - Subpoenas served on ICE

Anne,

Just closing the loop on this – was there any more information about background check requirements that you wanted to bring to our attention?

Adrienne,

Sorry if I missed a response on this, but can you let us know GEO's position on our motion for a jury view? Happy to discuss by phone if you like.

Michael

From: [redacted]@ice.dhs.gov>
Sent: Friday, July 17, 2020 12:28 PM
To: Scimone, Michael <mscimone@outtengolden.com>; adrienne.scheffey@akerman.com; Le[redacted]
Cc: GeoPlaintiffsCounsel <GeoPlaintiffsCounsel@outtengolden.com>; colin.barnacle@akerman.com; mley@bfwlaw.com; deismeier@bfwlaw.com
Subject: RE: Menocal v. GEO Group - Subpoenas served on ICE

Good afternoon Michael,

Attached please find a copy of the email. [redacted]

[redacted]

With regard to the background check on the jurors, the only thing that was initially highlighted was that entry would be denied if a juror was a convicted felon, but then there would likely be larger issues since that individual shouldn't be on the jury in the first place. I will get back to you however regarding any other disqualifying information once I get that information from ERO.

Thanks.

From: Scimone, Michael <mscimone@outtengolden.com>
Sent: Tuesday, July 14, 2020 5:16 PM
To: Rose, Anne <Anne.Rose@ice.dhs.gov>; adrienne.scheffey@akerman.com; Lesh, Christa <Christa.Lesh@ice.dhs.gov>; Simkins, Frances <Frances.Simkins@ice.dhs.gov>; Panthaky, Shiraz <Shiraz.Panthaky@ice.dhs.gov>; Timothy.Jafek@usdoj.gov
Cc: GeoPlaintiffsCounsel <GeoPlaintiffsCounsel@outtengolden.com>; colin.barnacle@akerman.com;

mley@bfwlaw.com; deismeier@bfwlaw.com
Subject: RE: Menocal v. GEO Group - Subpoenas served on ICE

Thank you, Anne. T[redacted]

[redacted]

[redacted]

Thank you for the update on the issue of the jury view. We agree not to seek further recordings of Aurora if that motion is granted; we plan on filing it in the near future. We will note in the motion that the jury would need to be escorted, and to pass screening procedures. Can you give us a summary of what the background check process screens for, and whether there are criteria resulting from the background check that would lead to ICE seeking to have any member of the jury barred from entry?

Michael

From: [redacted]@ice.dhs.gov>
Sent: Tuesday, July 14, 2020 4:33 PM
To: Scimone, Michael <mscimone@outtengolden.com>; adrienne.scheffey@akerman.com; [redacted]
Cc: GeoPlaintiffsCounsel <GeoPlaintiffsCounsel@outtengolden.com>; colin.barnacle@akerman.com; mley@bfwlaw.com; deismeier@bfwlaw.com
Subject: RE: Menocal v. GEO Group - Subpoenas served on ICE

Hi Michael,

Sorry to just be getting back to you. [redacted]

[redacted]

I also have an update with regard to the jury viewing. ICE does not oppose the jury viewing the segregation unit and male/female housing units at Aurora, subject to Plaintiffs' agreement not to seek further photo or video of the facility. The jury's admission would be subject to the facility's usual security procedures, which includes providing identification for a background check in advance. The jurors would be escorted through the facility and allowed to view the agreed-upon areas. The parties should let ICE know if this resolves the issue or if there are any additional questions or concerns.

Thanks.