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18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

20 RAUL NOVOA, JAIME CAMPOS
21 FUENTES, ABDIAZIZ KARIM, and
22 RAMON MANCIA, individually and on
23 behalf of all others similarly situated,

24 Plaintiff,

25 vs.

26 THE GEO GROUP, INC.,

27 Defendant.

28 THE GEO GROUP, INC.,

Counter-Claimant,

vs.

RAUL NOVOA, JAIME CAMPOS
FUENTES, ABDIAZIZ KARIM, and
RAMON MANCIA, individually and on
behalf of all others similarly situated,

Counter-Defendant.

Case No. 5:17-cv-02514-JGB-SHK

Assigned to Hon. Jesus G. Bernal

**DEFENDANT THE GEO GROUP,
INC.'S NOTICE OF MOTION AND
MOTION TO EXCLUDE
DECLARATIONS OF MUNOZ-
AGUILERA AND MARWAHA**

Hearing Date: December 2, 2019
Hearing Time: 9:00 a.m.
Location: Courtroom 1

TAC Filed: September 16, 2019
SAC Filed: December 24, 2018
FAC Filed: July 6, 2018
Complaint Filed: December 19, 2017
Trial Date: June 23, 2020

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TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2019, at 9:00 a.m., or as soon thereafter as the parties may be heard, before The Honorable Jesus G. Bernal, in Courtroom 1 of the above-entitled Court, located at 3470 Twelfth Street, Riverside, California 92501, Defendant The GEO Group, Inc. (“GEO”) moves to exclude the declarations of Fernando Munoz-Aguilera and Gagandeep Marwaha.

This Motion is based on this Notice of Motion and Motion and upon such matters as may be presented to the Court at the hearing on this Motion.

Dated: November 4, 2019

AKERMAN LLP

By: /s/ Damien P. DeLaney
Damien P. DeLaney
Ashley E. Calhoun
Attorneys for Defendant
THE GEO GROUP, INC.

GEO'S MOTION TO EXCLUDE THE DECLARATIONS OF MUNOZ-AGUILERA AND MARWAHA

I. RULE 7-3 CONFERRAL

This motion is made following the ongoing conferences of counsel pursuant to L.R. 7-3 which took place on October 9, 2019, October 11, 2019, and November 4, 2019. Plaintiffs oppose the relief sought herein.

II. RELEVANT FACTUAL BACKGROUND

On September 27, 2019, Plaintiffs' filed their Motion for Class Certification, ECF 192, (the "Motion"), attaching declarations of two¹ individuals who had never before been disclosed: Fernando Munoz-Aguilera and Gagandeep Marwaha.² Both declarations, signed July 26, 2019, made allegations that could be relevant for this Court's consideration of whether a class should be certified. Despite months passing between the date of the declarations and the disclosure of the declarants for the first time in the Motion, GEO quickly began the process to try to depose the declarants.

On October 9, 2019, GEO was informed by Plaintiffs that "Gagandeep Marwaha has been deported and is not available for a deposition at this time." GEO thereafter asked Plaintiffs to withdraw Marwaha's declaration, as he was unavailable for cross-

¹ Plaintiffs Ramon Mancia and Abdiaziz Karim were also never disclosed before they were added as party plaintiffs to this action, but their non-disclosure is not the focus of the present motion.

² Indeed, Plaintiffs did not fully comply with Local Rule 7-3 prior to filing their Motion. Any meet and confer would have been an opportunity to disclose the proposed declarants. Plaintiffs failed to do so. As another Court in this district held in a similar circumstance, "[a]n adequate meet-and-confer, conducted in good faith, allows and indeed requires Parties to share their factual and legal basis for their positions so that the motion, opposition, and reply that are filed contain no surprises. Had the Parties adequately met and conferred prior to the filing of Plaintiff's Motion for Class Certification, their respective briefs would have contained no surprises regarding their legal arguments, supporting witnesses, and so forth." *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298 GHK, 2012 WL 9507910, at *1 (C.D. Cal. June 14, 2012). In *Pedroza*, the Court struck the Motion for Certification in its entirety. Here, GEO seeks less drastic relief.

1 examination. On October 11, 2019, Plaintiffs informed GEO that they had lost contact
2 with Marwaha but were "hopeful of establishing contact in the near term." On
3 November 4, 2019, in response to another inquiry by GEO, Plaintiffs' counsel indicated
4 that she will not be withdrawing Marwaha's declaration and noted that in order to get in
5 touch with him, she needs information about his departure from Adelanto, presumably
6 held by GEO. Plaintiffs' counsel has had Marwaha's deactivation date since October 21,
7 2019 and still do not appear to be in touch with him. To date, Plaintiffs' counsel has not
8 provided GEO with an opportunity to cross-examine Marwaha. Instead, it appears that
9 Plaintiffs' untimely disclosure has foreclosed the possibility of doing so, as Marwaha
10 was deported to India and is not currently in contact with Plaintiffs' counsel.

11 GEO similarly made efforts to depose Munoz-Aguilera, who is currently detained
12 in ICE custody at the Adelanto Facility. Plaintiffs' counsel stated that Munoz-Aguilera
13 was available for a deposition on Thursday October 24, 2019, at the Adelanto Facility;
14 however, Plaintiffs' counsel made little effort to facilitate the same. In order to ensure
15 the deposition occurred on the proposed date, GEO contacted ICE about the possibility
16 of deposing Munoz-Aguilera, as he is in their custody. ICE reviewed the request and
17 eventually agreed to permit Munoz-Aguilera's deposition to proceed, but did not agree
18 to do so on the October 24th date proposed by Plaintiffs' counsel. Rather, ICE explained
19 that the deposition had to be held on a date where Munoz-Aguilera's counsel would be
20 able to attend. Accordingly, on October 22, 2019, GEO, through its counsel, informed
21 Plaintiffs' counsel of this requirement, and noted "it is not clear to us whether you
22 represent [Munoz-Aguilera] in any capacity." Rather than provide a substantive
23 response, Plaintiffs' counsel responded that it took issue with ICE's policies, and offered
24 to take the deposition by phone—a condition that had never before been discussed or
25 cleared with ICE. Despite these additional barriers presented by Plaintiffs' counsel, on
26 October 28, 2019, GEO again asked Plaintiffs' counsel if they in fact represent Munoz-
27 Aguilera – the same question required by ICE in order to conduct Munoz-Aguilera's
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1 deposition, whether in person or by telephone. On November 4, 2019, a week after
 2 GEO's opposition brief was filed (and after objecting to an extension to the same),
 3 Plaintiffs' counsel sent an email to GEO noting that she will represent Mr. Munoz-
 4 Aguilera for purposes of his deposition. Like the delayed disclosures, the belated
 5 information related to Mr. Munoz-Aguilera's representation has prevented GEO from
 6 deposing Munoz-Aguilera. Indeed, if Plaintiffs' counsel has represented Mr. Munoz-
 7 Aguilera since October 11th, Plaintiffs' counsel could have worked with ICE to make
 8 Mr. Munoz-Aguilera available for a deposition prior to GEO's response deadline.
 9 Instead, Munoz-Aguilera was not available for a deposition prior to GEO's response
 10 deadline. As a result, GEO has been unable to present evidence to this Court regarding
 11 the credibility of Munoz-Aguilera's declaration claims.

12 Accordingly, because the declarants were not timely disclosed, and because GEO
 13 was unable to depose the declarants before filing its motion in opposition to class
 14 certification, GEO respectfully requests that this Court exclude the declarations of
 15 Munoz-Aguilera (ECF 192-8) and Marwaha (ECF 192-7) and decline to consider the
 16 contents of the same for purposes of class certification.

17 **III. ANALYSIS**

18 Federal Rule of Civil Procedure 26(a) requires that “a party must, without awaiting
 19 a discovery request” provide the other parties with certain initial disclosures. Disclosures
 20 required under Rule 26(a) include “the name and, if known, the address and telephone
 21 number of each individual likely to have discoverable information-along with the
 22 subjects of that information-that the disclosing party may use to support its claims or
 23 defenses, unless the use would be solely for impeachment[.]” Fed.R.Civ.P.
 24 26(a)(1)(A)(I). Rule 26(e) requires parties to supplement disclosures made under Rule
 25 26(a) or through responses to interrogatories or requests for production “in a timely
 26 manner if the party learns that in some material respect the disclosure or response is
 27 incomplete or incorrect, and if the additional or corrective information has not otherwise
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1 been made known to the other parties during the discovery process or in writing[.]”
2 Fed.R.Civ.P. 26(e)(1)(A). Rule 37 gives teeth to the requirements of Rule 26, providing
3 for sanctions against a party that fails to disclose information required under Rule 26(a)
4 or (e). Specifically, Rule 37 states that:

5 If a party fails to provide information or identify a witness as required by
6 Rule 26(a) or (e), the party is not allowed to use that information or
7 witness to supply evidence on a motion, at a hearing, or at a trial, unless
the failure was substantially justified or is harmless.

8 Fed.R.Civ.P. 37(c)(1). Rule 37's exclusionary sanction may be avoided and
9 “information may be introduced if the non-disclosing parties' failure to disclose the
10 required information was substantially justified or barnharmless." *Id.* “The party facing
11 sanctions bears the burden of proving that its failure to disclose the required
12 information was substantially justified or is harmless.” *R & R Sails, Inc. v. Ins. Co. of*
13 *Penn.*, 673 F.3d 1240, 1246 (9th Cir. 2012).

14 Accordingly, this Court may exclude evidence submitted in support of class
15 certification as a sanction for the failure to timely disclose such evidence under Fed. R.
16 Civ. P 26(a). *Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594, 606 (S.D. Cal. 2015).
17 (striking declaration submitted with motion for class certification where the failure to
18 disclose was not harmless); *Roberts v. Scott Fetzer Co.*, No. 4:07-CV-80 CDL, 2010
19 WL 3546499, at *4 (M.D. Ga. Sept. 7, 2010) (holding that it was appropriate to exclude
20 declarations submitted in support of certification where the declarants were not properly
21 disclosed under Rule 26). Here, excluding the declarations of the undisclosed declarants
22 would further the goals of Rule 37's exclusionary sanction to deter parties from "hiding
23 the ball," as Plaintiffs have done here. *Guzman*, 305 F.R.D. at 608.

24 There is no question that Plaintiffs failed to disclose Munoz-Aguilera and
25 Marwaha. Plaintiff Novoa served his initial disclosures on July 27, 2018. Neither
26 Munoz-Aguilera nor Marwaha were identified as individuals with knowledge in
27 Plaintiff Novoa's disclosures. Thereafter, Plaintiffs Novoa and Fuentes served
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1 supplemental disclosures on June 17, 2019. Likewise, in the 2019 disclosures, neither
 2 Munoz-Aguilera nor Marwaha were disclosed. Nor were they identified at any point
 3 thereafter. Instead, the very first time GEO was made aware of Munoz-Aguilera and
 4 Marwaha was upon the filing of Plaintiffs' Motion. As these individuals are the *only*
 5 non-plaintiff declarants, they should have been disclosed in advance of the Motion so
 6 that GEO could conduct a proper investigation into their allegations, including by
 7 taking their depositions.

8 There is no substantial justification for Plaintiffs' failure to disclose any
 9 individuals with relevant information upon whose declarations Plaintiffs intended to
 10 rely in the Motion. While it is likely Plaintiffs knew of Marwaha and Munoz-Aguilera's
 11 identity well in advance of obtaining their declarations,³ even assuming that Plaintiffs
 12 were unaware Marwaha and Munoz-Aguilera's identities until the very day they signed
 13 their declarations (July 26, 2019), Plaintiffs knew of the identity of these declarants two
 14 full months before filing their Motion. Plaintiffs had numerous opportunities to disclose
 15 their identities—but declined to do so.

16 Plaintiffs did not supplement their Rule 26 disclosures. Nor did they mention the
 17 discovery of new witnesses in their briefing seeking leave to amend their Complaint,
 18 despite the fact that the alleged basis for seeking leave was newly discovered evidence.
 19 Rather, in their reply in support of their motion for leave to amend, Plaintiffs stated that
 20 they "began on-the-ground investigations of the Adelanto HUSP and Uncompensated
 21 Work Program immediately after the June depositions. Several detained immigrants,
 22 including Abdiaziz Karim and Ramon Mancía, came forward with allegations
 23 pertaining to both policies." ECF 181, 3-4. At the time of that filing, Marwaha and
 24 Munoz-Aguilera had already signed their declarations and Plaintiffs should have
 25 disclosed their identity. Instead, as they had done with Plaintiffs Karim and Mancía's
 26

27 ³ Indeed, Plaintiffs have previously conceded that they investigated the Adelanto
 28 Facility following depositions in June. ECF 181, 3.

1 identities, they concealed the information for months, only disclosing their identities in
 2 connection with motions filed with this Court, not Rule 26 disclosures. Given this
 3 recurring pattern, GEO anticipates that Plaintiffs will be unable to meet their burden to
 4 establish substantial justification. *Braggs v. Dunn*, No. 2:14CV601-MHT, 2017 WL
 5 659169, at *7 (M.D. Ala. Feb. 17, 2017) (concluding that Plaintiffs' failure to disclose
 6 declarants was not substantially justified).

7 Further, GEO was prejudiced by Plaintiffs' failure to disclose the additional
 8 declarants. Had Plaintiffs disclosed the identities of those declarants, GEO could have
 9 scheduled a deposition of Marwaha before his deportation. And, GEO could have had
 10 sufficient time to schedule a deposition of Munoz-Aguilera. *Gonzalez v. State of Fla.*
 11 *Dep't of Mgmt. Servs.*, 124 F. Supp. 3d 1317, 1327 (S.D. Fla. 2015) (striking
 12 declarations provided by Plaintiffs where Defendant was unable to depose the
 13 declarants prior to the ruling on the relevant motion); *see also Edwards v. Nat'l Vision,*
 14 *Inc.*, 946 F.Supp.2d 1153, 1159 (N.D. Ala. 2013), *aff'd*, 568 Fed.Appx. 854 (11th Cir.
 15 2014) (same). Instead, GEO was unable to depose the declarants in advance of this
 16 Court's consideration of the Motion. This is particularly prejudicial where, as here, the
 17 declarations include statements that are not otherwise supported by any evidence
 18 offered by Plaintiffs. As GEO believes there are reasons to doubt the veracity of the
 19 statements made in Marwaha and Munoz-Aguilera's declarations, but has been
 20 precluded from cross-examining them on their statements, their declarations should be
 21 excluded from the class certification analysis.

22 To be clear, GEO seeks a reasonable sanction for Plaintiffs' failure to timely
 23 disclose the evidence upon which it intended to rely in seeking class certification. GEO
 24 does not (at this point) seek to exclude the evidence at trial, nor does it seek monetary
 25 sanctions. *Cf. Pedroza*, 2012 WL 9507910, at *1 (striking the entirety of a class
 26 certification brief for inadequate disclosure of declarants prior to filing). Rather, GEO
 27 asks this Court to exclude the declarations of Marwaha and Munoz-Aguilera from its
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1 consideration of the class certification motion to cure the prejudice caused by Plaintiffs'
2 failure to disclose the same. This minimal sanction is justified by Plaintiffs' ongoing
3 failure to disclose individuals with knowledge of their claims.

4 **IV. CONCLUSION**

5 For the foregoing reasons, GEO respectfully requests that this Court exclude the
6 declarations submitted by Munoz-Aguilera and Marwaha from its consideration of
7 Plaintiffs' motion for class certification, and any other relief that this Court deems just
8 and proper.

9 Dated: November 4, 2019

AKERMAN LLP

10 By: /s/ Damien P. DeLaney
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PROOF OF SERVICE

1
2 STATE OF CALIFORNIA)
3 COUNTY OF LOS ANGELES)

4 I am employed in the County of Los Angeles, State of California; I am over the
5 age of 18 years and not a party to this action. My business address is 601 West Fifth
Street, Suite 300, Los Angeles, California 90071.

6 On **November 4, 2019**, I served the following document(s) described as:

7 **DEFENDANT THE GEO GROUP, INC.'S NOTICE OF MOTION AND**
8 **MOTION TO EXCLUDE DECLARATIONS OF MUNOZ-AGUILERA AND**
9 **MARWAHA**

on the persons as indicated below:

10 **(CM/ECF ELECTRONIC FILING)** I caused the above document(s) to be
11 transmitted to the office(s) of the addressee(s) listed below by electronic mail
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I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction this service was made and that the foregoing is true and correct.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 4, 2019, at Los Angeles, California.

Maxine Maritz



(Signature)