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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **EASTERN DIVISION**

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

15 *Plaintiffs,*

16
17 v.

18 **THE GEO GROUP, INC.,**

19 *Defendant.*
20
21

Civil Action No. 5:17-cv-02514-JGB-SHKx

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO GEO'S
MOTION TO EXCLUDE
DECLARATIONS OF MUNOZ-
AGUILERA AND MARWAHA**

22 For the second time in as many weeks, Plaintiffs must expend time and resources
23 to set straight GEO's material misrepresentations of fact. Plaintiffs have fully complied
24 with their discovery obligations and should not be made to suffer the consequences of
25 GEO's litigation choices. GEO presents no credible reason to exclude the declarations
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1 of Fernando Munoz Aguilera¹ and Gagandeep Marwaha from the class certification
2 analysis. The Court should deny GEO's Motion (the "Mot."), ECF 211.

3 **A. Plaintiffs have timely complied with their discovery obligations.**

4 GEO accuses Plaintiffs of "hiding the ball" and failing to supplement their Rule
5 26 disclosures to identify Mr. Munoz and Mr. Marwaha. Mot. at 6-7. GEO is wrong.
6 Plaintiffs served GEO with their Second Supplemental Rule 26 Initial Disclosures on
7 October 8, 2019. *See* Declaration of Lydia Wright ("Wright Decl.") at Ex. 1. Those
8 disclosures listed both Mr. Marwaha and Mr. Munoz as "individuals likely to have
9 discoverable information that Plaintiffs may use to support their claims or defenses." *Id.*
10 at 3.

11 In reality, GEO knew the identities, locations, and specific allegations of Mr.
12 Munoz and Mr. Marwaha even before Plaintiffs' updated initial disclosures. GEO was
13 served with the declarations of Mr. Munoz and Mr. Marwaha on September 27, 2019,
14 only eleven days after Plaintiffs filed their Third Amended Complaint alleging the
15 existence of GEO's Uncompensated Work Program Policy and Housing Unit Sanitation
16 Policies. GEO itself served deposition notices on Mr. Munoz and Mr. Marwaha—as
17 well as the four named Plaintiffs—on October 7. *See* ECF 202 at 8. There is no question
18 that GEO knew of Mr. Munoz and Mr. Marwaha on September 27, 2019—30 days
19 before the deadline to oppose class certification, ten days before GEO first noticed a
20 single deposition in this case, and more than four months before the close of discovery.
21 Plaintiffs have timely complied with their obligations pursuant to Rule 26.²

22 _____
23 ¹ The declarant's surname is Munoz, not Munoz-Aguilera.

24 ² GEO, in contrast, has failed to comply with its discovery obligations in this case. *See*
25 Wright Decl. at Ex. 2. For instance, GEO listed Mr. Novoa's detention file in its August
26 16, 2018 initial disclosures. Plaintiffs' detention files are also responsive to discovery
27 requests Plaintiffs served on GEO on July 27, 2018. But GEO waited until October
28 20, 2019—72 hours before Mr. Novoa's deposition—to produce Mr. Novoa's records
to Plaintiffs. Similarly, GEO waited until 48 hours before Mr. Campos Fuentes'

1 Even if a Rule 37 analysis was warranted here—it clearly is not—GEO’s claims
 2 of prejudice strain credulity and lack a reasonable basis in law or fact. GEO has suffered
 3 no harm here. *See Van Maanen v. Youth With a Mission–Bishop*, 852 F.Supp.2d 1232, 1237
 4 (E.D. Cal. 2012), *aff’d sub nom. Van Maanen v. Univ. of the Nations, Inc.*, 542 Fed. App’x.
 5 581 (9th Cir. 2013) (a failure to disclose a witness is harmless where the identity, location
 6 and subject of information possessed by a witness was revealed in the same case months
 7 before the discovery cut-off date); *Orellana v. Cty. of Los Angeles*, 2013 WL 12129290, at
 8 *7 (C.D. Cal. June 26, 2013) (a failure to disclose a witness is harmless where the identity
 9 of the witness was revealed earlier); *Frontline Med. Assocs., Inc. v. Coventry Health Care*, 263
 10 F.R.D. 567, 570 (C.D. Cal. 2009) (denying motion for sanctions for failure to comply
 11 with Rule 26 where “disclosure [was] made sufficiently in advance of the discovery cut-
 12 off date to permit the opposing party to conduct discovery and defend against the . . .
 13 claims”).

14 GEO’s reliance on *Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594 (S.D. Cal.
 15 2015) is misplaced. There, the court excluded a witness’s declaration because the plaintiff
 16 refused to disclose the witness in interrogatory responses, actively hid the witness’s
 17 identity, and waited until after discovery closed to rely on the individual as “one of the
 18 few, if not the only, witness.” *Id.* at 603-606. But, as the *Guzman* court explained, a failure
 19 to disclose the identity of a witness has been found harmless where the other party was
 20 otherwise on notice of the identity, location, and type of information possessed by a
 21 witness. *Id.* at 607 (citing *Van Maanen*, 852 F. Supp. 2d at 1237).

22 The other cases upon which GEO relies are similarly inapposite. *See Roberts v. Scott*
 23 *Fetzer Co.*, 2010 WL 3546499, at *2, *9 (M.D. Ga. Sept. 7, 2010) (defendant repeatedly
 24 refused to provide the names, addresses, and telephone numbers of material witnesses

25 deposition to produce his detention files. In addition to the manifest unfairness of the
 26 timing of these productions, there is no assurance that the documents GEO produced
 27 constitute the entirety of the evidence responsive to Plaintiffs’ requests, rather than
 28 simply the documents GEO wished to use for its depositions. Plaintiffs intend to raise
 these issues with Magistrate Judge Kewalramani in accordance with Local Rule 37-1.

1 and instead waited until after discovery closed and plaintiffs moved for class certification
2 to “blinds[de]” them with those material witness’ declarations); *Gonzalez v. State of Fla.*
3 *Dep’t of Mgmt. Servs.*, 124 F. Supp. 3d 1317 (S.D. Fla. 2015), *aff’d sub nom. Gonzalez v. Fla.*
4 *Dep’t of Mgmt. Servs.*, 683 Fed. App’x 738 (11th Cir. 2017) (striking declaration because
5 plaintiff deliberately withheld the witness’s identity from the outset of the case in a
6 “tactical decision to ambush the defendant”); *Edwards v. Nat’l Vision, Inc.*, 946 F. Supp.
7 2d 1153, 1160 (N.D. Ala. 2013), *aff’d*, 568 Fed. App’x 854 (11th Cir. 2014) (striking a
8 declaration where plaintiff, under oath, denied obtaining the declaration at all).

9 And in *Braggs v. Dunn*, 2017 WL 659169 (M.D. Ala. Feb. 17, 2017) (unpublished),
10 a prison conditions lawsuit, the court held that plaintiffs’ failure to disclose 244 witnesses
11 until six days before the discovery deadline was harmless and denied the defendant’s
12 motion to strike. *Id.* at *4. The *Braggs* court explained that systemic litigation poses unique
13 challenges to the discovery process:

14 [T]his is not a typical case in which the focus of the litigation is a particular
15 event and the parties know when the case begins who most of the
16 potential witnesses are; here, given the wide scope of the case and the
17 ongoing nature of the claims, it is unsurprising that plaintiffs learned the
18 identities of many potential witnesses long after the start of the litigation
and discovery.

19 *Id.* The same is true in this case, which challenges GEO’s longstanding and ongoing
20 conduct toward all detained immigrants in its care at Adelanto and, for the Nationwide
21 HUSP Class, at eleven other civil immigration detention facilities. Even if Mr. Munoz
22 and Mr. Marwaha had not been identified and timely disclosed (they were), *Braggs* would
23 counsel against excluding their declarations. GEO has not offered any authority to the
24 contrary.

25 **B. Plaintiffs are not responsible for GEO’s failure to depose Mr. Munoz.**

26 Plaintiffs have already discussed GEO’s dilatory conduct with respect to the
27 deposition of Mr. Munoz. *See* ECF 202 at 6-9 (explaining GEO’s choice not to depose
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1 Mr. Munoz on Oct. 24, 2019); ECF 202-1 at 107-116 (Plaintiffs' correspondence to
2 GEO attempting to coordinate the deposition); *id.* at 119 (Oct. 22, 2019 correspondence
3 from GEO contending that Mr. Munoz could not be deposed because, among other
4 things, he "is not yet a named plaintiff"); ECF 201-1 (Oct. 23, 2019 Declaration of
5 Damien DeLaney) at ¶ 11 (stating for the first time that "Mr. Aguilera [sic] may be
6 deposed without being named as a plaintiff in this lawsuit . . ."). Plaintiffs will not repeat
7 that discussion here.

8 Plaintiffs were, are, and remain ready and willing to set a reasonable schedule for
9 Mr. Munoz's deposition. *See* Wright Decl. at Ex. 3 at 2 ("As we have stated several times,
10 we remain willing and able to work with you to set a reasonable schedule for the
11 deposition."); 3 ("As before, Plaintiffs stand ready to accommodate GEO's reasonable
12 requests for an expedited deposition schedule. I can be reached at the number below if
13 you would like to discuss Mr. Munoz's deposition further."). Plaintiffs should not be
14 made to suffer for GEO's decisions to hide behind a phantom ICE policy and cancel
15 Mr. Munoz's deposition. The Court should deny GEO's Motion with respect to Mr.
16 Munoz.

17 **C. Mr. Marwaha's declaration should not be excluded.**

18 Plaintiffs do not dispute that Mr. Marwaha appears to be unavailable for a
19 deposition because he was been deported. GEO's own records do not indicate his
20 location or contact information, and GEO offers no information beyond his detainee
21 file to help locate him. But Mr. Marwaha's declaration should not be excluded at the
22 class certification stage simply because he is unavailable for a deposition. Courts in the
23 Ninth Circuit have discretion to weigh evidence submitted in support of class
24 certification, and may even consider evidence which may ultimately be inadmissible. *See*
25 *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct.
26 1651 (2019). At this stage, the Court should exercise its discretion to consider Mr.
27 Marwaha's declaration and weigh the allegations contained therein as it finds most
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1 appropriate. Accordingly, the Court should deny GEO's Motion with respect to Mr.
2 Marwaha.

3 **D. GEO should not be rewarded for its failure to comply with the Local Rules.**

4 GEO acknowledges that an adequate meet-and-confer under Local Rule 7-3
5 "requires Parties to share their factual and legal basis for their positions so that the
6 motion, opposition, and reply that are filed contain no surprises." Mot. at 3 n.2 (citing
7 *Pedroza v. PetSmart, Inc.*, 2012 WL 9507910, at *1 (C.D. Cal. June 14, 2012) (unpublished)).
8 But, for the second time in as many weeks, GEO has done no such thing. *See* ECF 202
9 at 10.

10 Contrary to GEO's representations, GEO did not contact undersigned counsel
11 on October 9 or 11, 2019 to discuss this Motion in any respect. No conference regarding
12 this Motion occurred on either date. Rather, Plaintiffs contacted GEO on October 9 to
13 attempt to accommodate GEO's request for an expedited deposition schedule. *See* ECF
14 202-1 at 113-14. When GEO did not respond, Plaintiffs contacted GEO on October 11
15 in another attempt to coordinate the deposition schedule. Finally, after Plaintiffs' second
16 message, GEO responded: "As Mr. Marwaha is unavailable for a deposition, and
17 therefore cannot be cross-examined regarding the contents of his declaration, will you
18 be withdrawing his declaration?" *Id.* at 112-13. There was no conference of counsel, and
19 no discussion of the present Motion.

20 On November 4, GEO notified Plaintiffs that it would move to strike the
21 declarations of Mr. Munoz and Mr. Marwaha. When asked whether GEO intended to
22 comply with Local Rule 7-3, GEO took the position that "Rule 7-3 does not require
23 additional conferral." Wright Decl. at Ex. 3 at 1. GEO filed the pending Motion to
24 Exclude less than two hours later. There was never a discussion, let alone a thorough
25 one, of "the substance of the contemplated motion and any potential resolution . . . at
26 least seven (7) days prior to the filing of the motion." L.R. 7-3. As a result, Plaintiffs first
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1 learned of GEO’s “concerns” regarding their initial disclosures upon reading GEO’s
2 Motion.

3 Finally, although GEO purports to base its Motion on Federal Rules of Civil
4 Procedure 26 and 37, it made no attempt to comply with the requirements of Local Rule
5 37-1 *et seq.*, which apply to “any motion relating to discovery pursuant to F.R.Civ.P. 26-
6 37.” Local Rule 37-1 (providing that “[t]he failure of any counsel to comply with or
7 cooperate in the foregoing procedures may result in the imposition of sanctions”). *See*
8 *also* Fed. R. Civ. P. 37(a)(5)(B) (“If the motion is denied, the court . . . must, after giving
9 an opportunity to be heard, require the movant, the attorney filing the motion, or both
10 to pay the party or deponent who opposed the motion its reasonable expenses incurred
11 in opposing the motion, including attorney’s fees.”).

12 Plaintiffs recite these rules and highlight their rights to seek fees to underscore
13 their frustration with GEO’s tactics. At this time, Plaintiffs do not seek fees for GEO’s
14 failure to adhere to the rules, or for the time Plaintiffs have spent responding to GEO’s
15 many misrepresentations of fact. Plaintiffs hope, earnestly, that GEO will cease its
16 noncompliance so this case may proceed in an orderly fashion to its just resolution. But
17 if GEO persists with offering false statements and/or subverting the rules, Plaintiffs will
18 have no choice but to seek fees.

19 **CONCLUSION**

20 GEO’s Motion to Exclude the Declarations of Munoz-Aguilera and Marwaha,
21 ECF 211, should be denied.

22
23 Dated: November 8, 2019

/s/ Lydia Wright

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CERTIFICATE OF SERVICE

I, Lydia A. Wright, electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Central District of California, using the electronic case filing system. I hereby certify that I have provided copies to all counsel of record electronically or by another manner authorized by Fed. R. Civ. P. 5(b)(2).

Dated: November 8, 2019

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