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17 THE GEO GROUP, INC.

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 REPLY IN SUPPORT OF
ITS 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

1 **I. INTRODUCTION**

2 While Plaintiffs use their Response to attack GEO and attach extraneous emails¹,
 3 they do not dispute the two critical facts at issue: (1) Plaintiffs did not disclose
 4 Fernando Munoz-Aguilera² and Gagandeep Marwaha prior to September 27, 2019; and
 5 (2) Plaintiffs did not, and could not, coordinate the depositions of Munoz-Aguilera and
 6 Marwaha prior to GEO's deadline to file its Opposition to Conditional Certification.
 7 *See Plaintiffs' Response in Opposition* ECF 213 at 2 ("There is no question that GEO
 8 knew of Mr. Munoz and Mr. Marwaha on September 27, 2019 . . ."). Likewise,
 9 Plaintiffs have not provided *any* legal authority that would support their position. Rule
 10 26 does not permit a party to disclose a new witness simultaneously with the filing of a
 11 motion or brief, but rather requires a party to disclose the new witness "without
 12 awaiting a discovery request." Fed.R.Civ.P. 26(a). When a party fails to do so, Rule 37
 13 makes clear that the withholding party should not be able to rely upon the undisclosed
 14 information at a hearing or on a motion. Fed.R.Civ.P. 37(c)(1).³

15 _____
 16 ¹ While bemoaning GEO's "material misrepresentations of fact" and offering of
 17 "false statements", Plaintiffs remarkably present only a portion of the parties'
 18 correspondence regarding this issue. GEO will provide the omitted emails at this
 19 Court's request, but will not unnecessarily inundate the Court with the parties'
 20 voluminous correspondence over the past month—without reason. As Plaintiffs' own
 21 motion shows, the parties have reached an impasse with respect to the present issue
 22 which satisfies the requirements under Local Rule 7-3 that before a motion is filed, the
 23 parties ensure they are "unable to reach a resolution which eliminates the necessity for a
 24 hearing." It is unreasonable for Plaintiffs to hide behind Rule 7-3 while also declining to
 25 offer a compromise that *could* have been reached through further conferral.

26 ² Presuming that the Plaintiffs and GEO have identified the same detainee as the
 27 individual who may have facts related to this case, GEO's files indicate that his name is
 28 Munoz-Aguilera. *See* Exhibit A. Plaintiffs have been provided these documents in
 discovery.

³ Plaintiffs' Response indicates that this Motion should be subject to Local Rule
 37-1, which governs discovery disputes (and therefore ruled upon by the Magistrate
 Judge). As GEO asks *this* Court to exclude evidence from *its* consideration of a

1 Accordingly, because Plaintiffs admit that the declarants were not timely
2 disclosed before they filed their Motion for Class Certification, and because GEO was
3 unable to depose the declarants before filing its opposition to class certification, GEO
4 respectfully requests that this Court exclude the declarations of Munoz-Aguilera (ECF
5 192-8) and Marwaha (ECF 192-7) and decline to consider the contents of the same for
6 purposes of class certification.

7 **II. PLAINTIFFS HAVE NOT ESTABLISHED THE NON-DISCLOSURE**
8 **WAS HARMLESS OR JUSTIFIED.**

9 Rule 37's exclusionary sanction may be avoided and "information may be
10 introduced if the [non-disclosing] parties' failure to disclose the required information
11 [wa]s substantially justified or harmless." *Guzman v. Bridgepoint Educ., Inc.*, 305
12 F.R.D. 594, 606 (S.D. Cal. 2015) (alterations in original). "The party facing sanctions
13 bears the burden of proving that its failure to disclose the required information was
14 substantially justified or is harmless." *R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d
15 1240, 1246 (9th Cir. 2012). Here, Plaintiffs have not met their burden to establish that
16 their non-disclosure was either substantially justified or harmless.

17 It is undisputed that Plaintiffs failed to disclose Munoz-Aguilera and Marwaha
18 prior to filing their Motion for Class Certification. Plaintiffs obtained both declarations
19 on July 26, 2019, and first "disclosed" both declarants with the filing of the Motion for
20 Class Certification on September 27, 2019, a delay of, at a minimum, two months.
21 Plaintiffs have offered no justification for this unnecessary delay. Plaintiffs do not (and
22 cannot) claim that they learned of Munoz-Aguilera and Marwaha shortly before they
23 filed their Motion for Class Certification. Nor do they argue any other mitigating factor.
24 Instead, conspicuously absent from their Response is any mention of *when* they

25
26 substantive motion (Plaintiffs' Motion for Class Certification), Rule 37-1 does not
27 apply. *See e.g., Jang v. Bos. Sci. Corp.*, No. EDCV05426VAPMRWX, 2014 WL
28 12787223, at *1 (C.D. Cal. Mar. 27, 2014) (The Honorable Chief District Court Judge
Phillips deciding a motion to exclude based upon failure to make Rule 26 disclosures).

1 identified Munoz-Aguilera and Marwaha and *why* they did not disclose their identities
2 before filing their Motion for Class Certification.

3 Plaintiffs try to minimize their failure to timely disclose Munoz-Aguilera and
4 Marwaha, by explaining that GEO knew of their identities on September 27, 2019, (the
5 date Plaintiffs filed their Motion for Class Certification) and therefore had 30 days to
6 depose both individuals. This misses the point. Plaintiffs knew of Munoz-Aguilera and
7 Marwaha *at least two months* prior to filing their declarations in this Court. Plaintiffs
8 *did not disclose* either individual *prior* to filing their Motion for Class Certification.
9 GEO was prejudiced because it was unable to depose or otherwise conduct discovery
10 on either individual prior to its response deadline. While Plaintiffs state that GEO had
11 30 days to conduct discovery, neither party was available for a deposition prior to
12 GEO's opposition deadline and interrogatories, requests for production, and requests for
13 admission could not have been completed on such a short timeline. The timeline for
14 discovery was further truncated by Plaintiffs' counsels' schedules, wherein all ten
15 attorneys entered on behalf of Plaintiffs were unavailable to defend depositions the
16 week of October 12, 2019—compressing the discovery timeline to an eight day window
17 (including weekends) prior to GEO's opposition deadline. As a result, by the time GEO
18 learned that Munoz-Aguilera's deposition would not go forward, it could not be moved
19 to a different date before the deadline for GEO to file its opposition. And, Plaintiffs
20 opposed GEO's reasonable request for an extension of time.

21 This delay also prejudiced GEO's ability to obtain Marwaha's deposition. Had he
22 been timely disclosed, GEO could have deposed him prior to his departure from
23 Adelanto in mid-August. And, with the benefit of additional time, Plaintiffs' counsel
24 would have been able to identify his whereabouts. Unfortunately, Plaintiffs objected to
25 extending the deadline for GEO's opposition to the Motion for Class Certification to
26 accommodate their own delay in communication with Marwaha and without
27 explanation, and only after GEO's opposition was filed, suddenly has been able to
28

1 reconnect with him. Indeed, as of November 11, 2019, Plaintiffs' counsel now claims to
 2 be in touch with Marwaha and able to make him available for a deposition. Thus, GEO
 3 was prejudiced by Plaintiffs failure to disclose the witnesses.

4 Not only do Plaintiffs fail to present a factual basis for this Court to conclude
 5 their actions were substantially justified or harmless, they also do not provide legal
 6 support for their position that GEO was not prejudiced by the untimely disclosures. For
 7 example, in *Orellana v. Cty. of Los Angeles*, No. CV1201944MMMCWX, 2013 WL
 8 12129290, at *6 (C.D. Cal. June 26, 2013), cited by Plaintiffs, the court found that the
 9 failure to disclose two witnesses prior to trial was *not substantially justified*. The court
 10 also held that the objecting party *was prejudiced* by the failure of the non-disclosing
 11 party to disclose two of the three witnesses at issue. *Id.* As a result, the court excluded
 12 those two witnesses at trial. *Id.* at *9. In reaching its conclusion, the court explained
 13 that the objecting party had been prejudiced by its inability to conduct discovery
 14 regarding the two excluded witnesses. *Id.* In concluding that the third witness' untimely
 15 disclosure was not prejudicial, the court explained that the non-objecting party had the
 16 opportunity to seek discovery from the third witness, and did, in fact, conduct discovery
 17 into his relevant communications. *Id.* at *8. Like in *Orellana*, Plaintiffs failure to timely
 18 disclose Marwaha and Munoz-Aguilera prevented GEO from conducting discovery prior
 19 to its opposition deadline.

20 Plaintiff's position is also unlike *Van Maanen*, where the late disclosure of the
 21 individuals provided the parties with "ample time...to issue further written discovery or
 22 notice Dr. Bloomers deposition." *Van Maanen v. Youth With a Mission-Bishop*, 852 F.
 23 Supp. 2d 1232, 1237 (E.D. Cal. 2012), *aff'd sub nom. Van Maanen v. Univ. of the*
 24 *Nations, Inc.*, 542 F. App'x 581 (9th Cir. 2013). Correspondingly, *Frontline* does not
 25 advance Plaintiffs position. *Frontline Med. Assocs., Inc. v. Coventry Health Care*, 263
 26 F.R.D. 567, 570 (C.D. Cal. 2009). In *Frontline*, the non-disclosing party was ordered
 27 by the court (in response to a motion for Rule 37 sanctions) to supplement its
 28

1 disclosures regarding its damages calculations five months before plaintiffs intended to
 2 rely upon the inadequately disclosed information. *Id.* Here, there is no such mitigating
 3 factor. Plaintiffs' untimely disclosure (and failure to agree to any remedial steps—such
 4 as GEO's reasonable request for a one-week extension to be able to depose Munoz-
 5 Aguilera) prejudiced GEO.

6 Contrary to Plaintiffs' inaccurate representations, the cases cited by GEO in its
 7 initial Motion provide clear guidance for the present situation. In *Guzman v.*
 8 *Bridgepoint Educ., Inc.*, the court excluded a witness's declaration where the plaintiff
 9 could not establish that the untimely disclosure was substantially justified or harmless.
 10 305 F.R.D. 594, 608 (S.D. Cal. 2015) ("[B]ecause Plaintiff's non-disclosure violates
 11 Rule 26 and is not substantially justified or harmless, exclusion of Mr. Ferguson's
 12 declaration is appropriate."). And, contrary to Plaintiffs' blatant misrepresentation that
 13 "*Braggs* would counsel against excluding [Marwaha and Munoz-Aguilera's]
 14 declarations," (ECF 213, at 4) *Braggs* states the exact opposite. The *Braggs* court
 15 concluded that "plaintiffs have not marshaled sufficient facts and law to convince the
 16 court that they were substantially justified." *Braggs v. Dunn*, No. 2:14CV601-MHT,
 17 2017 WL 659169, at *7 (M.D. Ala. Feb. 17, 2017). Thereafter, the Court found that the
 18 nondisclosure was harmless *only because* "the court did not rely upon the challenged
 19 declarations at all in resolving the plaintiffs' motion for class certification." *Id.*
 20 Accordingly, *Braggs* actually stands for the exact result GEO seeks here—exclusion of
 21 the declarations for purposes of Plaintiffs' Motion for Class Certification.

22 *Roberts* is also instructive. *Roberts v. Scott Fetzer Co.*, No. 4:07-CV-80 CDL,
 23 2010 WL 3546499 (M.D. Ga. Sept. 7, 2010). There the non-disclosing party failed to
 24 identify declarants prior to relying upon their declarations in its opposition to class
 25 certification—despite having the information available prior to filing its motion. *Id.* at
 26 *7 Like here, the non-disclosing party did not allege it "did not know of the [declarants]
 27 identities prior to the filing of Plaintiff's motion for class certification." *Id.* As a result,
 28

1 the plaintiffs in *Roberts* were "blindsided" by the declarations. *Id.* at *9. Accordingly,
 2 the Court excluded the declarations from its consideration of the class certification
 3 motion.

4 As in *Roberts* and *Braggs*, here, Plaintiffs failed to disclose information that was
 5 relevant to their Motion for Class Certification until filing it with the Court. Plaintiffs
 6 admit this much. Plaintiffs claim they are absolved of any consequences for their
 7 untimely disclosure because ten days *after* they filed the declarations, they
 8 supplemented their initial disclosures to include the declarants. However, this
 9 explanation does not establish that Plaintiffs timely disclosed the declarants. It does not
 10 indicate *when* the declarants were discovered and does not excuse the two-month period
 11 of non-disclosure preceding their Motion for Class Certification.

12 And, despite updating their disclosures on October 8, 2019, Plaintiffs *once again*
 13 did not disclose all evidence they intended to rely upon for class certification. In their
 14 Reply, Plaintiffs again, relied upon information from two individuals who were never
 15 previously disclosed: Shannon Ely and Selene Saavedra-Roman.⁴ ECF 210-2; 210-3.
 16 Ms. Ely's declaration and Ms. Saavedra-Roman's statement are both dated well before
 17 GEO's opposition was due. This pattern of not disclosing evidence that purportedly
 18 supports class certification is the definition of "blindsiding" GEO. Thus, both to ensure
 19 GEO is not prejudiced by the non-disclosure and to discourage future non-compliance
 20 with Rule 26's disclosure obligations, the untimely disclosed declarations of Marwaha
 21 and Munoz-Aguilera should be excluded from this Court's consideration of conditional
 22 certification.

23 **III. PLAINTIFFS' COUNSEL REPRESENTS MUNOZ-AGUILERA AND DID**
 24 **NOT MAKE HIM AVAILABLE FOR A DEPOSITION PRIOR TO**
 25 **DEFENDANT'S OPPOSITION DEADLINE.**

26 On October 9, 2019, Plaintiffs' counsel stated that they believed Munoz-Aguilera
 27 would be available for a deposition on October 24, 2019, noting that they would

28 ⁴ GEO intends to move to exclude this evidence in a separate motion.

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1 confirm the same "by early next week." In making this representation, it appears that
2 Plaintiffs, knowing that Munoz-Aguilera was in ICE custody, never confirmed with
3 ICE that he would be available or what the procedure(s)⁵ for making him available
4 were. Nevertheless, GEO attempted to obtain ICE approval⁶ to ensure the deposition
5 moved forward. GEO reached a stumbling block when, because Mr. Munoz-Aguilera's
6 counsel was not making the request themselves, ICE expressed concern about Munoz-
7 Aguilera's counsel having equal access during the deposition. Accordingly, on October
8 22, 2019, GEO asked Plaintiffs' counsel if they in fact represented Munoz-Aguilera. It
9 was not until November 4, 2019, that Plaintiffs' counsel stated that they will represent
10 Munoz-Aguilera for purposes of his deposition. At that point, GEO was unable to
11 obtain Munoz-Aguilera's deposition before its opposition was due. Moreover, to date,
12 Plaintiffs' counsel has not cleared a date with ICE for Mr. Munoz-Aguilera's deposition.

13 ///
14 ///
15 ///
16 ///

18 ⁵ Federal Rule of Civil Procedure 30(a)(2)(B) provides that leave of court must be
19 sought to depose individuals who are in prison. However, the detainees are not in prison
20 and the rule does not provide any guidance about individuals who are in ICE custody.

21 ⁶ Plaintiffs describe this approval process as a "phantom ICE Policy." It is not clear
22 to GEO why Plaintiffs' counsel believes that GEO can simply depose Mr. Munoz-
23 Aguilera on any date it pleases, without the approval of ICE. There is no question that
24 Munoz-Aguilera is in ICE custody. ICE has strict requirements for visits to any
25 detention facility, as can be found at the following website:
26 <https://www.ice.gov/detention-management>. Plaintiffs have not indicated the method
27 through which they claim ICE approval should be obtained, nor have they indicated
28 what policies they apply (despite criticizing those uncovered by GEO). Certainly, if
they have the confidence in the policies that they have uncovered as to imply in a filing
subject to Rule 11 that GEO is fabricating the same (which it is not), they should share
those procedures with GEO and the Court.

1 **IV. CONCLUSION**

2 For the foregoing reasons, GEO respectfully requests that this Court exclude the
3 declarations submitted by Munoz-Aguilera and Marwaha from its consideration of
4 Plaintiffs' Motion for Class Certification, and any other relief that this Court deems just
5 and proper.

7 Dated: November 12, 2019

AKERMAN LLP

8 By: /s/ Damien P. DeLaney
9 Damien P. DeLaney
10 Ashley E. Calhoun
11 Attorney for Defendant
12 THE GEO GROUP, INC.

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