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15 Attorneys for Defendant/Counter-Claimant
 16 CoreCivic, Inc.

17 **UNITED STATES DISTRICT COURT**
 18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 Sylvester Owino and Jonathan Gomez,
 20 on behalf of themselves, and all others
 similarly situated,

21 Plaintiffs,

22 v.

23 CoreCivic, Inc., a Maryland
 24 corporation,

25 Defendant.

NO. 3:17-cv-01112-JLS-NLS

**DEFENDANT’S MEMORANDUM
 IN OPPOSITION TO PLAINTIFFS’
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

Date: October 10, 2019
 Time: 1:30pm
 Courtroom: 4D
 Judge: Honorable Janis L. Sammartino

1 Defendant CoreCivic, Inc. opposes Plaintiffs’ Motion for Partial Summary
2 Judgment (“MPSJ”). Plaintiffs are barred from seeking summary judgment prior to
3 resolution of class certification. Adjudicating the merits of their claims now,
4 without CoreCivic’s consent, will open the door to one-way intervention by
5 putative class members and circumvent the protections that Rule 23(c)(2) was
6 designed to provide. Plaintiffs’ MPSJ is also premature. The parties were directed
7 to defer merits litigation until after class certification. The Court should continue
8 down that path, rule on class certification first, allow the parties to conduct
9 discovery on all remaining claims, and resume summary-judgment briefing after
10 merits discovery has ended. Finally, at a minimum, CoreCivic requests this Court
11 to deny or defer ruling on the MPSJ until it has had a realistic opportunity to
12 conduct discovery essential to refuting Plaintiffs’ evidence.

13 **I. BACKGROUND.**

14 Plaintiffs Sylvester Owino and Jonathan Gomez, both former ICE detainees,
15 filed this lawsuit on May 31, 2017. (Dkt. 1.) Their Complaint raised 12 claims
16 against CoreCivic, including 10 different statutory violations, and claims for
17 negligence and unjust enrichment. (*Id.*) Plaintiffs’ First Amended Complaint
18 added a thirteenth claim under California’s Private Attorney General Act, and
19 sought to certify three classes. (Dkt. 67.)

20 CoreCivic moved to dismiss all claims, which the Court denied in part and
21 granted in part on May 14, 2018. (Dkt. 18; Dkt. 37.) CoreCivic filed its Answer to
22 the First Amended Complaint, along with counterclaims for unjust enrichment and
23 declaratory relief, on October 26, 2018. (Dkt. 70.)

24 In the parties’ Joint Rule 26(f) Report and Discovery Plan, CoreCivic
25 requested “that discovery be conducted in two phases—limited pre-certification
26 class discovery and post-certification merits discovery.” (*See* Joint Rule 26(f)
27 Report and Discovery Plan at 7 [lodged on July 13, 2018, pursuant to Dkt. 46,
28 ¶ 4.b].) Instead, the Court set a class discovery deadline of March 15, 2019, and a

1 motion-for-class-certification deadline of April 15, 2019. (Dkt. 57 at 2.) While the
2 parties could also conduct merits discovery, the Court admonished that it “expects
3 the parties to prioritize discovery related to Plaintiff’s motion for class certification
4 and defer certain discovery that is not necessary for the class certification briefing.”
5 (*Id.*) The Court did not—and has not—set a deadline for merits discovery or
6 dispositive motions. It ordered the parties to contact its chambers “within three
7 court days of receiving a ruling on the class certification motion to set a date for a
8 further Case Management Conference.” (*Id.* at 3.)

9 Plaintiffs filed their Motion for Class Certification on April 15, 2019. (Dkt.
10 84, 84-1.) The 25-page Motion was supported by six Declarations and 88 Exhibits
11 (totaling approximately 1,200 pages). (*See* Dkt. 84-2 to 84-6, 85 to 85-87.) The
12 Motion seeks to certify five classes—two nationwide classes and three California
13 classes. (Dkt. 84, 84-1.)

14 On June 5, 2019, while CoreCivic was preparing its Opposition to the Motion
15 for Class Certification, Plaintiffs filed their 21-page MPSJ. (Dkt. 97, 97-1.) The
16 MPSJ is supported by 42 Exhibits (totaling approximately 480 pages). (*See* Dkt.
17 97-3 to 97-43.) Plaintiffs request summary judgment on one issue—whether
18 participants in the Voluntary Work Program (“VWP”) are “employees” who are
19 “employed by” CoreCivic under California law—and two claims (minimum-wage
20 claim and wage-statement claim). (Dkt. 97-1.)

21 CoreCivic filed its 35-page Opposition to Plaintiffs’ Motion for Class
22 Certification on July 11, 2019. (Dkt. 118.) That Opposition was supported by 33
23 Exhibits (totaling approximately 940 pages). (*See* Dkt. 118-1 to 118-9.) Plaintiffs
24 filed their 15-page Reply on August 1, 2019, which was supported by three more
25 Declarations and two more Exhibits. (*See* Dkt. 127, 127-1 to 127-05.) On that
26 same day, Plaintiffs filed a Motion to Exclude Evidence that CoreCivic submitted
27 in support of its Opposition to the Motion for Class Certification. (Dkt. 128.)
28 CoreCivic filed its Response to that Motion on September 5, 2019. (Dkt. 132.)

1 Oral argument is set for October 10, 2019, on Plaintiffs’ Motion for Class
2 Certification, Motion to Exclude Evidence, and Motion for Partial Summary
3 Judgment, and on Defendant’s Motion for Judgment on the Pleadings. (Dkt. 129.)
4 Before filing this Opposition, undersigned counsel asked Plaintiffs’ counsel if they
5 would withdraw the MPSJ or stipulate to continue briefing, but they refused. (*See*
6 Declaration of Jacob Lee (“Lee Decl.”), ¶¶ 17-18.)

7 **II. LEGAL ARGUMENT.**

8 **A. Plaintiffs Cannot Seek Summary Judgment Prior to Class** 9 **Certification.**

10 Rule 23(c)(2) requires notice of class certification to putative class members
11 and an opportunity to opt-out before a judgment on the merits has been rendered.
12 *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 547-49 (1974); *Schwarzschild v. Tse*,
13 69 F.3d 293, 295-96 (9th Cir. 1995). “This rule exists in part to protect defendants
14 from unfair ‘one-way intervention,’ where the members of a class not yet certified
15 can wait for the court’s ruling on summary judgment and either opt in to a favorable
16 ruling or avoid being bound by an unfavorable one.” *Villa v. San Francisco Forty-*
17 *Niners, Ltd.*, 104 F. Supp. 3d 1017, 1021 (N.D. Cal. 2015). In that “one-way”
18 situation, a putative class member “would not be bound by a decision that favors
19 the defendant but could decide to benefit from a decision favoring the class.” *Id.* If
20 a defendant defeats class certification, it is left open to “being pecked to death by
21 ducks. One plaintiff could sue and lose; another could sue and lose; and another
22 and another until one finally prevailed; then everyone else would ride on that single
23 success.” *Tschudy v. J.C. Penney Corp.*, 2015 WL 5098446, at *6 (S.D. Cal. 2015)
24 (quoting *Fireside Bank v. Superior Court*, 155 P.3d 268, 274 (Cal. 2007)).

25 To prevent plaintiffs and putative class members from skirting this
26 protection, district courts generally will not adjudicate “the merits of a class action
27 until the class has been properly certified and notified.” *Schwarzschild*, 69 F.3d at
28 295; *see also Centeno v. Quigley*, 2015 WL 432537, at *2-3 (W.D. Wash. 2015)

1 (holding that a motion for summary judgment “is premature prior to class
2 certification and [should be] denied”); *Gomez v. Rossi Concrete Inc.*, 2011 WL
3 666888, at *1 (S.D. Cal. 2011) (refusing to consider plaintiffs’ partial motion for
4 summary judgment before class notification). The only exception to this rule is if
5 the defendant affirmatively consents to a pre-certification summary-judgment
6 motion. *Wright v. Schock*, 742 F.2d 541, 546-47 (9th Cir. 1984).

7 Here, Plaintiffs’ MPSJ must be denied because (1) it seeks summary
8 judgment on the merits of a predicate issue and two claims, (2) the Court has not
9 yet resolved class certification, and (3) CoreCivic has not consented—and does not
10 consent—to the adjudication of these merits issues before a class-certification
11 ruling. *See Gessele v. Jack in the Box, Inc.*, 2012 WL 3686274, at *3 (D. Or. 2012)
12 (“[P]laintiffs cannot seek summary judgment prior to class certification if defendant
13 has not waived the one-way intervention doctrine.”).

14 **B. The Court Should Postpone Further Briefing on Plaintiffs’ Motion**
15 **for Partial Summary Judgment Until Merits Discovery Closes.**

16 A district court has “broad discretion to manage its own docket, which
17 includes the inherent power to control the disposition of the causes on its docket
18 with economy of time and effort for itself, for counsel, and for litigants.” *Gress v.*
19 *Smith*, 2017 WL 2833390, at *3 (E.D. Cal. 2017) (internal quotation marks and
20 citations omitted). Courts routinely exercise that discretion to postpone
21 consideration of premature summary-judgment motions and allow a fair, orderly,
22 and efficient administration of the case. *See, e.g., Seaman v. Sedgwick, LLP*, 2014
23 WL 12695096, at *2-3 (C.D. Cal. 2014); *Seismic Structural Design Assocs., Inc. v.*
24 *Gensler*, 2013 WL 12122303, at *10 (C.D. Cal. 2013); *Mohamed v. U.S. Dep’t of*
25 *Agric. Food & Nutrition*, 2009 WL 462710, at *2 (E.D. Cal. 2009).

26 Plaintiffs’ MPSJ is premature. The Court’s Scheduling Order contemplates
27 resolving the issue of class certification first before considering motions for
28 summary judgment. Indeed, the Court has not even set a deadline for merits

1 discovery or dispositive motions, and it admonished the parties to prioritize class
2 discovery and defer non-class discovery until after class certification is resolved.
3 (Dkt. 57.) Despite that admonition, Plaintiffs filed their MPSJ in the midst of class-
4 certification briefing. The Court has not ruled on class certification, nor has it held
5 oral argument; in fact, briefing related to their Motion for Class Certification is still
6 going. (*See* Dkt. 121 & 129.)

7 The Court should proceed first with resolving Plaintiffs' Motion for Class
8 Certification. The significance of that Motion cannot be overstated. *See*
9 *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005) (quoting *Blair v.*
10 *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)) (recognizing that a
11 decision on class certification often "sounds the death knell of the litigation").
12 Resolution of the Motion for Class Certification will also shape the remainder of
13 this litigation and could moot Plaintiffs' MPSJ. For example, if the Court does not
14 certify the California Labor Law Class, only the named Plaintiffs' individual claims
15 remain. They may not have viable claims depending on when their claims accrued
16 and the applicable statute of limitations, issues that are both before the Court in the
17 class-certification briefing. (Dkt. 118 at 24, 27-31.) If the Court finds that neither
18 have a viable state law claim, then the time, money, and resources expended to
19 defend against the MPSJ will have been wasted.

20 Plaintiffs' MPSJ also raises significant legal questions with permanent, far-
21 reaching implications. Plaintiffs request a declaratory judgment that all immigration
22 detainees who participate in federally mandated work programs are "employees" as
23 a matter of California law and therefore entitled to labor law protections. And
24 because Plaintiffs also seek summary judgment on two state-law claims, CoreCivic
25 must raise its affirmative defenses in response, including preemption and derivative
26 immunity (sovereign and intergovernmental).

27 The Court should postpone all dispositive motions until after the close of
28 merits discovery so that the parties can efficiently conduct discovery that covers as

1 much ground as possible. This will allow the Court to consider all merits
2 arguments on all claims and defenses at one time, with the benefit of a complete
3 record. Premature and piecemeal consideration of the merits is an inefficient use of
4 party and judicial resources. *See Seaman*, 2014 WL 12695096, at *2-3 (“The Court
5 declines to force either party to litigate issues still subject to discovery before the
6 appropriate time under the Court’s Scheduling Order. Entertaining the motion at
7 this time ... presents at least some risk of incomplete factual development.”);
8 *Mohamed*, 2009 WL 462710, at *2 (vacating motions for summary judgment
9 without prejudice “in view of the uncertainty of the development of the case
10 through the discovery process and consideration of other claims”).

11 Finally, Plaintiffs will suffer no prejudice if their MPSJ is postponed. It
12 appears that the timing of the Motion was intended to distract CoreCivic from
13 preparing its Response to the Motion for Class Certification.

14 **C. The Court Should Deny or Defer Ruling on Plaintiffs’ Motion for**
15 **Partial Summary Judgment to Allow CoreCivic a Realistic**
16 **Opportunity to Conduct Essential Merits Discovery.**

17 Rule 56(d) authorizes a district court to deny or defer ruling on a motion for
18 summary judgment if a nonmovant shows by declaration “that, for specified
19 reasons, it cannot present facts essential to justify its opposition.” “The purpose of
20 Rule 56(d) is to prevent the nonmoving party from being ‘railroaded’ by a
21 premature summary judgment motion.” *Lanier v. San Joaquin Valley Officials*
22 *Ass’n*, 2016 WL 7178706, at *4 (E.D. Cal. 2016) (citation omitted). This Court has
23 recognized that Rule 56(d) relief should be granted “fairly freely where a summary
24 judgment motion is filed before a party has had a realistic opportunity to pursue
25 discovery relevant to its theory of the case.” *Crossfit, Inc. v. Nat’l Strength &*
26 *Conditioning Ass’n*, 2015 WL 12434308, at *6 (S.D. Cal. 2015) (internal quotation
27 marks and citation omitted). This Court has also recognized that “Rule 56(d)
28 *requires*, rather than merely permit[s], discovery where the nonmoving party has

1 not had the opportunity to discover information that is essential to its opposition.”
2 *Robbins v. The Coca-Cola Co.*, 2014 WL 12160766, at *2 (S.D. Cal. 2014)
3 (internal quotation marks and citation omitted).

4 CoreCivic intends to raise various factual and legal arguments in opposition
5 to Plaintiffs’ MPSJ, including affirmative defenses asserting immunity and
6 preemption that must be resolved at the same time. (Lee Decl., ¶ 3.) But additional
7 discovery is required to allow CoreCivic to present those facts. CoreCivic has not
8 yet had a realistic opportunity to discover this information thus far. Although
9 discovery was not bifurcated in this matter, the focus of discovery up to this point
10 has been on class certification related issues. (Dkt. 57.) As the Court is aware,
11 CoreCivic has produced tens of thousands of documents spanning hundreds of
12 thousands of pages in response to Plaintiffs’ Requests for Production, focusing
13 primarily on those documents that were most relevant to class certification.

14 CoreCivic must be provided the opportunity to develop the following
15 information before responding to Plaintiffs’ MPSJ:

- 16 • Written discovery and/or depositions of ICE and USMS personnel
17 regarding the increased operational and regulatory burdens that would
18 result from a finding that detainees participating in the federally
19 mandated VWP are CoreCivic employees under California law;
- 20 • Written discovery and/or depositions of ICE and USMS personnel
21 regarding federal control over the VWP at each facility;
- 22 • Written discovery and/or depositions of personnel from other federal,
23 state, and local entities that operate similar detainee work programs
24 regarding their implementation of those programs;
- 25 • Written discovery and/or depositions of Plaintiffs and/or putative class
26 members regarding their participation in the VWP;
- 27 • Declarations from CoreCivic personnel regarding the increased
28 operational and regulatory burdens that would result from a finding

1 that detainees participating in the VWP are CoreCivic employees
2 under California law;

- 3 • Declarations from CoreCivic personnel regarding the level of control
4 CoreCivic exerts over ICE detainees in its facilities, as compared to
5 the level of control CoreCivic exerts over convicted prisoners in the
6 same or similar facilities; and
7 • Declarations from CoreCivic personnel regarding ICE’s control over
8 the VWP at each facility.

9 (Lee Decl., ¶¶ 4-10.)

10 There is no reason to believe these facts do not exist. (*Id.*, ¶ 12.) The
11 difficulty, however, lies in identifying those ICE (and other federal government
12 agency) employees who are the best sources of this information, in addition to the
13 regulatory steps CoreCivic must take under *Touhy v. Ragen*, 340 U.S. 462 (1951),
14 to obtain any discovery from ICE and other federal government agencies. (*Id.*,
15 ¶¶ 12-13.) CoreCivic will face similar difficulty identifying those CoreCivic
16 employees who are the best sources of this information, whether at the corporate or
17 facility level, for the applicable time periods. (*Id.*, ¶ 12.) This decision will
18 necessarily be impacted by the Court’s ruling on Plaintiffs’ Motion for Class
19 Certification, which will establish which classes, if any, may proceed, and for what
20 time frame. (*Id.*) CoreCivic is a large company, with sometimes frequent turnover,
21 especially at the facility level, making the identification of the proper declarants
22 more difficult the further back in time CoreCivic is required to go. (*Id.*)

23 The time frame at issue is particularly important with regard to California
24 City Correctional Center (“CaCCC”), which has not housed ICE detainees since
25 late 2013; and when it housed them it did so under a different correctional services
26 structure than the contract that governs the other two facilities in California. (*Id.*,
27 ¶ 14.) If the applicable class period for the California labor law classes is
28 determined to be three years prior to the filing of Plaintiffs’ Complaint (filed on

1 May 31, 2017), CaCCC would not be included. (*Id.*) If, however, the applicable
2 class period is determined to be four years prior to the filing of the Complaint,
3 detainees housed at CaCCC from May 31, 2013 to the date CaCCC stopped
4 housing ICE detainees would be part of the class(es). (*Id.*) Requiring CoreCivic to
5 begin gathering the information listed above and in the attached Declaration for
6 CaCCC even though it may ultimately be unnecessary would only waste time and
7 resources in a case that already involves significant time and resources.¹ (*Id.*)

8 These facts are necessary to establish—or at least demonstrate triable issues
9 of fact as to—CoreCivic’s defenses that it does not “employ” VWP participants, as
10 that term is defined under California law; that it is immune from California’s labor
11 laws with respect to VWP participants under the doctrines of intergovernmental
12 immunity and sovereign immunity as a federal government contractor; and that
13 California’s labor laws are preempted by federal law. (*Id.*, ¶ 15.) Without these
14 facts, CoreCivic cannot establish that it does not exert sufficient control over VWP
15 participants to be considered their employer, and/or that it exerts too much control
16 over ICE detainees generally to be considered their employer. (*Id.*, ¶ 16.)
17 CoreCivic will similarly be unable to establish that application of California’s labor
18 laws to CoreCivic as it pertains to operation of the VWP would discriminate against
19 the federal government by imposing a burden on the federal government’s
20 operations or policy objectives that is not imposed on similar facilities housing state
21 and local pretrial detainees, or that it was acting pursuant to the authorization and
22 direction of the federal government and within the scope of the same. (*Id.*) Finally,
23 CoreCivic cannot establish that application of California’s labor laws to the VWP at
24 CoreCivic facilities would burden or interfere with the federal government’s

25
26 _____
27 ¹ If the Court declines to certify the class, such detailed discovery may not be
28 proportional to the needs of the case, if there is only one or two (depending on the
applicable statute of limitations) Plaintiffs with individual claims.

1 immigration enforcement policy.² (*Id.*)

2 In both *Crossfit, Inc.* and *Robbins*, this Court denied premature motions for
3 summary judgment without prejudice where the nonmoving parties had not yet had
4 the opportunity to develop evidence necessary to oppose the motions. Plaintiffs
5 will suffer no prejudice from a similar outcome here, as discussed above. The
6 Court should either deny the MPSJ without prejudice or defer ruling on it until
7 CoreCivic has had a realistic opportunity to conduct discovery to support its
8 arguments.

9 **III. CONCLUSION**

10 For these reasons, the Court should deny Plaintiffs' Motion for Partial
11 Summary Judgment. Alternatively, it should postpone further briefing until after
12 the close of merits discovery or at least until CoreCivic has had a realistic
13 opportunity to conduct essential discovery. If this relief is denied, CoreCivic
14 requests a 60-day extension of time, from the date of the Court's Order, to file a
15 substantive response to Plaintiffs' Motion.

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² Although the Court addressed some of these arguments in its Order on
26 CoreCivic's Motion to Dismiss, those rulings were made in the context of a Rule
27 12(b)(6) motion, which requires the Court to accept as true the factual allegations of
28 the Complaint for purposes of the motion. CoreCivic is entitled to present facts
demonstrating that the facts alleged in the Complaint are not true, and/or are
insufficient to establish liability.

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Dated: September 5, 2019

By s/ Jacob B. Lee

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15 Attorneys for Defendant/Counter-Claimant
 16 CoreCivic, Inc.

17 **UNITED STATES DISTRICT COURT**
 18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 Sylvester Owino and Jonathan Gomez,
 20 on behalf of themselves, and all others
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21 Plaintiffs,

22 v.

23 CoreCivic, Inc., a Maryland
 24 corporation,

25 Defendant.

NO. 3:17-cv-01112-JLS-NLS

DECLARATION OF JACOB B. LEE

Date: October 10, 2019

Time: 1:30pm

Courtroom: 4D

Judge: Honorable Janis L. Sammartino

1 CoreCivic, Inc., a Maryland
corporation,
2
3 Counter-Claimant,
4
5 v.
6
7 Sylvester Owino and Jonathan Gomez,
on behalf of themselves, and all others
similarly situated,
8
9 Counter-Defendants.

8 I, Jacob B. Lee, make the following Declaration:

9 1. I am over the age of 18 years and competent to testify to the matters
10 set forth in this Declaration.

11 2. I am counsel of record for Defendant CoreCivic (“CoreCivic”) in the
12 above-referenced matter. I am licensed to practice in Arizona and Nevada, and have
13 been admitted *pro hac vice* in this matter. (Doc. 40.) I make this Declaration in
14 support of CoreCivic’s Memorandum in Opposition to Plaintiffs’ Motion for Partial
15 Summary Judgment.

16 3. CoreCivic intends to raise various factual and legal arguments in
17 opposition to Plaintiffs’ Motion, as well as in its own related Cross-Motion.
18 Additional discovery is required, however, to allow CoreCivic to “present facts
19 essential to justify its opposition,” *see* Fed. R. Civ. P. 56(d), as well as to support its
20 related arguments that will need to be addressed in CoreCivic’s Cross-Motion for
21 Summary Judgment.

22 4. Specifically, CoreCivic intends to conduct discovery regarding the
23 following facts:

24 5. Written discovery and/or depositions of ICE personnel regarding the
25 increased operational and regulatory burdens that would result from a finding that
26 detainees participating in the federally-mandated VWP are CoreCivic employees
27 under California law, including but not limited to the following:
28

- 1 a. compliance with tax regulations under federal and state law,
2 such as withholdings, for aliens who are in the country illegally
3 and do not have a Social Security Number, who are not
4 authorized to work, or whose authorization to work has been
5 revoked due to, or in conjunction with, an order of deportation;
- 6 b. compliance with regulations under the Immigration and
7 Naturalization Act, such as verifying employment authorization
8 for prospective VWP participants, obtaining employment
9 authorization for prospective participants who are not already
10 authorized, and denying participation to, or removing from
11 participation, aliens who are not authorized and are not eligible
12 for employment under the applicable statutes;
- 13 c. compliance with regulations under the Services Contract Act,
14 such as identifying prevailing wages in the community;
- 15 d. compliance with regulations under California law, such as the
16 prohibition on informing ICE about the unauthorized status of
17 detainees, and how to allow detainees in a secure detention
18 facility to take legally adequate meal and rest breaks; and
- 19 e. increased cost of operating the VWP, including payment of
20 salaries and benefits to VWP participants, and further including
21 whether CoreCivic could seek to recover the increased costs
22 from ICE, either through directly billing ICE for the increased
23 costs or through an equitable adjustment of the per-diem
24 contract rates.

25 6. Written discovery and/or depositions of ICE personnel regarding
26 ICE's control over the VWP at each facility, including but not limited to the
27 following:
28

- 1 a. the development and purpose of ICE’s Performance-Based
- 2 National Detention Standards (“PBNDS”);
- 3 b. the purpose and intent of the VWP;
- 4 c. how ICE administers the VWP at its SPCs compared to the
- 5 VWP at CoreCivic’s facilities;
- 6 d. whether ICE consider VWP participants at its SPCs to be
- 7 employees;
- 8 e. whether ICE pays VWP participants at its SPCs minimum wage,
- 9 and if not, the wages they actually pay;
- 10 f. whether ICE provides meal and rest breaks, pay stubs, and other
- 11 employment benefits to VWP participants at its SPCs;
- 12 g. the number of ICE personnel at each CoreCivic facility;
- 13 h. ICE’s oversight of operations generally at each CoreCivic
- 14 facility, including the methods by which it ensures compliance
- 15 with applicable contracts, statutes, regulations, and standards;
- 16 i. whether ICE determines or has any input into the assignments
- 17 that are offered at each CoreCivic facility;
- 18 j. whether ICE determines or has any input into eligibility
- 19 requirements for VWP participants at each CoreCivic facility;
- 20 k. whether ICE must approve or has any input into the assignments
- 21 given to particular detainees at each CoreCivic facility;
- 22 l. whether ICE can compel CoreCivic to remove a detainee from
- 23 the VWP at each CoreCivic facility;
- 24 m. Whether ICE determine or has any input into safety procedures
- 25 and training for VWP jobs at each CoreCivic facility;
- 26 n. Whether ICE determines or has any input into the number of
- 27 hours VWP participants work in a shift, day, and/or week in
- 28 each assignment, including whether ICE determines or has any

- 1 input into the minimum or maximum number of hours for each
- 2 at each CoreCivic facility;
- 3 o. whether ICE created or had any input into Policy 19-100 at each
- 4 facility, as well as the Detainee Voluntary Work Program
- 5 Agreement used at each CoreCivic facility, including approval
- 6 of CoreCivic-created documents;
- 7 p. whether ICE must approve, or has any input into or control over,
- 8 the rates paid to VWP participants at each CoreCivic facility,
- 9 including setting limits on the amount that may be paid each
- 10 shift, day, or week;
- 11 q. whether ICE must approve, or has any input into or control over,
- 12 any increases of the rates paid to VWP participants at each
- 13 CoreCivic facility;
- 14 r. whether ICE must approve, or has any input into or control over,
- 15 any bonuses or incentives provided to ICE detainees in certain
- 16 assignments at each CoreCivic facility;
- 17 s. whether ICE evaluates the performance of detainees
- 18 participating in the VWP at each CoreCivic facility;
- 19 t. whether ICE supervises any VWP shifts at each CoreCivic
- 20 facility; and
- 21 u. whether ICE provides any other oversight of the VWP at each
- 22 CoreCivic facility.

23 7. Written discovery and/or depositions of personnel from other federal,
24 state, and local entities that operate similar detainee work programs regarding their
25 implementation of those programs, including but not limited to the following:

- 26 a. whether they consider program participants to be employees;
- 27 b. whether they pay program participants minimum wage, and if
- 28 not, the wages they actually pay; and

1 c. whether they provide meal and rest breaks, pay stubs, and other
2 employment benefits to program participants.

3 8. Written discovery and/or depositions of Plaintiffs regarding their
4 participation in the VWP, including but not limited to the following:

5 a. whether they were authorized to work prior to participating in
6 the VWP;

7 b. the shifts and hours they actually worked;

8 c. the reasons they participated in the VWP;

9 d. their expectations as VWP participants; and

10 e. any statements made to them personally about the purpose and
11 implementation of the VWP by CoreCivic employees.

12 9. Declarations from CoreCivic personnel regarding the increased
13 operational burdens that would result from a finding that detainees participating in
14 the federally-mandated Voluntary Work Program (“VWP”) are CoreCivic
15 employees under California law, including but not limited to the following:

16 a. increased cost of operating the VWP, including payment of
17 salaries and benefits to VWP participants, and further including
18 whether CoreCivic could or would seek to recover the increased
19 costs from ICE, either through directly billing ICE for the
20 increased costs or through an equitable adjustment of the per-
21 diem contract rates;

22 b. adjustments to facility staffing patterns for administrative,
23 management, and security staff, including whether CoreCivic
24 would utilize third-party services to complete the tasks
25 traditionally done by VWP participants; and

26 c. compliance with tax regulations under federal and state law,
27 such as withholdings, for aliens who are in the country illegally
28 and do not have a Social Security Number, who are not

1 authorized to work, or whose authorization to work has been
2 revoked due to, or in conjunction with, an order of deportation.

3 10. Declarations from CoreCivic personnel regarding the level of control
4 CoreCivic exerts over ICE detainees in its facilities, as compared to the level of
5 control CoreCivic exerts over convicted prisoners in the same or similar facilities.

6 11. Declarations from CoreCivic personnel regarding ICE’s control over
7 the VWP at each facility, including but not limited to the following:

- 8 a. whether decisions regarding the implementation of the VWP at
9 each facility were based on comparisons to other correctional
10 and detention facilities in California that operate similar
11 programs, whether for federal, state, or local inmates and/or
12 detainees, including but not limited to government-owned and -
13 operated Service Processing Centers (“SPCs”), whether in
14 California or nationwide;
- 15 b. the number of ICE personnel on-site at each facility;
- 16 c. ICE’s oversight of facility operations generally, including the
17 methods by which it ensures compliance with applicable
18 contracts, statutes, regulations, and standards;
- 19 d. whether ICE determines or has any input into the assignments
20 that are offered at each facility;
- 21 e. whether ICE determines or has any input into eligibility
22 requirements for VWP participants at each facility;
- 23 f. whether ICE must approve or has any input into the assignments
24 given to particular detainees at each facility;
- 25 g. whether ICE can compel CoreCivic to remove a detainee from
26 the VWP;
- 27 h. Whether ICE determine or has any input into safety procedures
28 and training for VWP jobs;

- 1 i. Whether ICE determines or has any input into the number of
- 2 hours VWP participants work in a shift, day, and/or week in
- 3 each assignment, including whether ICE determines or has any
- 4 input into the minimum or maximum number of hours for each;
- 5 j. whether ICE created or had any input into Policy 19-100 at each
- 6 facility, as well as the Detainee Voluntary Work Program
- 7 Agreement used at each facility, including approval of
- 8 CoreCivic-created documents;
- 9 k. whether ICE must approve, or has any input into or control over,
- 10 the rates paid to VWP participants at each facility, including
- 11 setting limits on the amount that may be paid each shift, day, or
- 12 week;
- 13 l. whether ICE must approve, or has any input into or control over,
- 14 any increases of the rates paid to VWP participants at each
- 15 facility;
- 16 m. whether ICE must approve, or has any input into or control over,
- 17 any bonuses or incentives provided to ICE detainees in certain
- 18 assignments at each facility;
- 19 n. whether ICE evaluates the performance of detainees
- 20 participating in the VWP at each facility;
- 21 o. whether ICE supervises any VWP shifts at each facility; and
- 22 p. whether ICE provides any other oversight of the VWP at each
- 23 facility.

24 12. There is no reason to believe these facts do not exist. The difficulty,

25 however, lies in identifying those ICE (and other federal government agency)

26 employees who are the best sources of this information, in addition to the

27 regulatory steps CoreCivic must take under *Touhy v. Ragen*, 340 U.S. 462 (1951),

28 in order to obtain discovery from ICE and other federal government agencies. Such

1 requests typically take up to six months to get a response as to whether the agency
2 will permit the requested discovery.

3 13. CoreCivic will face similar difficulty in identifying those CoreCivic
4 employees who are the best sources of this information, whether at the corporate or
5 facility level, for the applicable time periods. This decision will necessarily be
6 impacted by the Court's ruling on Plaintiffs' Motion for Class Certification, which
7 will establish which, if any, classes may proceed, and for what time frame.
8 CoreCivic is a large company, with sometimes frequent turnover, especially at the
9 facility level, making the identification of the proper declarants more difficult the
10 further back in time CoreCivic is required to go.

11 14. The time frame at issue is particularly important with regard to
12 California City Correctional Center ("CaCCC"), which has not housed ICE
13 detainees since late 2013. If the applicable class period for the California labor law
14 classes is determined to be three years prior to the filing of Plaintiffs' Complaint
15 (filed on May 31, 2017), CaCCC would not be included. If, however, the applicable
16 class period is determined to be four years prior to the filing of the Complaint,
17 detainees housed at CaCCC from May 31, 2013 to the date CaCCC stopped
18 housing ICE detainees would be part of the class(es). Requiring CoreCivic to begin
19 gathering the information listed above for CaCCC even though it may ultimately be
20 unnecessary would only waste time and resources in a case that already involves
21 significant time and resources.

22 15. These facts are necessary to establish—or at least demonstrate triable
23 issues of fact as to—CoreCivic's defenses that it does not "employ" VWP
24 participants, as that term is defined under California labor law; that it is immune
25 from California's labor laws with respect to VWP participants under the doctrines
26 of intergovernmental immunity and sovereign immunity as a federal government
27 contractor; and that California's labor laws are pre-empted by federal immigration
28 detention law.

1 16. Without these facts, CoreCivic will be unable to establish that it does
2 not exert sufficient control over VWP participants to be considered their employer,
3 and/or that it exerts too much control over ICE detainees generally to be considered
4 their employer. CoreCivic will similarly be unable to establish that application of
5 California’s labor laws to CoreCivic as it pertains to operation of the VWP would
6 discriminate against the federal government by imposing a burden on the federal
7 government’s operations or policy objectives that is not imposed on similar
8 facilities housing state and local pretrial detainees, or that it was acting pursuant to
9 the authorization and direction of the federal government and within the scope of
10 the same. Finally, CoreCivic will be unable to establish that application of
11 California’s labor laws to the VWP at CoreCivic facilities would burden or interfere
12 with the federal government’s immigration enforcement policy.¹

13 17. On August 29, 2019, I emailed Plaintiffs’ counsel and asked them
14 whether they would stipulate to continue briefing on the Motion for Partial
15 Summary Judgment to allow CoreCivic to conduct the discovery listed above, or
16 whether CoreCivic would need to seek relief under Rule 56(d).

17 18. Plaintiffs’ counsel stated they would not stipulate to continue briefing,
18 taking the position that CoreCivic should have already conducted the discovery it
19 needed.

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25 ¹ Although the Court addressed some of these arguments in its Order on
26 CoreCivic’s Motion to Dismiss, those rulings were made in the context of a Rule
27 12(b)(6) motion, which requires the Court to accept as true the factual allegations of
28 the Complaint for purposes of the motion. CoreCivic is entitled to present facts
demonstrating that the facts alleged in the Complaint are not true, and/or are
insufficient to establish liability.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 5th day of September, 2019 at Chandler, Arizona.

s/ Jacob B. Lee
JACOB B. LEE

3617682.1

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15 Attorneys for Defendant/Counter-Claimant
 16 CoreCivic, Inc.

17 **UNITED STATES DISTRICT COURT**
 18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 Sylvester Owino and Jonathan
 20 Gomez, on behalf of themselves,
 and all others similarly situated,

21 Plaintiffs,

22 v.

23 CoreCivic, Inc., a Maryland
 24 corporation,

25 Defendant.

NO. 3:17-cv-01112-JLS-NLS

CERTIFICATE OF SERVICE

26
 27
 28

1 CoreCivic, Inc., a Maryland
 2 corporation,
 3
 4 Counter-Claimant,
 5
 6 v.
 7
 8 Sylvester Owino and Jonathan
 9 Gomez, on behalf of themselves,
 10 and all others similarly situated,
 11
 12 Counter-
 13 Defendants.

14 I am a citizen of the United States and am over the age of eighteen years, and
 15 not a party to the within action. My business address is Struck Love Bojanowski &
 16 Acedo, PLC, 3100 West Ray Road, Suite 300, Chandler, AZ 85226. On September
 17 5, 2019, I served the following document(s):

18 **DEFENDANT’S MEMORANDUM IN OPPOSITION TO**
 19 **PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT,**
 20 **DECLARATION OF JACOB B. LEE, and this CERTIFICATE OF SERVICE**

21 **BY MAIL:** by placing the document(s) listed above in a sealed
 22 envelope with postage thereon fully prepaid, in the United States Mail at
 23 Phoenix, Arizona addressed as set forth below.

24 **BY ELECTRONIC SUBMISSION:** submitted electronically by
 25 CM/ECF to be posted to the website and notice given to all parties that the
 26 document(s) has been served.

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Attorneys for Plaintiffs and the Proposed Class

I declare that I am employed in the office of a member who is admitted pro hac vice in this Court at whose direction the service was made. I declare under penalty of perjury that the forgoing is true and correct.

Executed on September 5, 2019, at Chandler, Arizona.

s/ Jacob B. Lee