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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 SYLVESTER OWINO and JONATHAN)
16 GOMEZ, on behalf of themselves and all)
others similarly situated,)

17 Plaintiffs,)

18 vs.)

19 CORECIVIC, INC.,)

20 Defendant.)

Case No. 3:17-CV-01112-JLS-NLS

CLASS ACTION

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION TO
EXCLUDE EVIDENCE FROM CLASS
CERTIFICATION DECISION**

21 _____)
22 CORECIVIC, INC.,)

Counter-Claimant,)

23 vs.)
24

25 SYLVESTER OWINO and JONATHAN)
26 GOMEZ, on behalf of themselves and all)
others similarly situated,)

27 Counter-Defendants.)
28

Date: October 10, 2019

Time: 1:30 p.m.

Courtroom: Courtroom 4D

Judge: Hon. Janis L. Sammartino
Magistrate: Hon. Nita L. Stormes

1 **I. INTRODUCTION**

2 Defendant CoreCivic, Inc. (“Defendant”) waives a white flag in its non-responsive
3 opposition (“Opposition”) to Plaintiffs Sylvester Owino and Jonathan Gomez’s
4 (collectively, “Plaintiffs”) motion to exclude evidence (“Motion”). With respect to the
5 issues that are relevant to whether Defendant violated a court order and whether its late-
6 produced documents should be excluded, Defendant offers no legal or relevant factual
7 support in either its Opposition or supporting declaration. In addition to not addressing
8 the core issue of what Plaintiffs’ Motion is about, Defendant appears to blame Plaintiffs
9 for its violation of this Court’s orders and appears to think that this blame offers it a valid
10 excuse to violate a court order. The unavailing arguments Defendant submits in its
11 Opposition are likely due to the fact that Defendant cannot cite to one piece of legal
12 support for its position that the Court should not exclude its late-produced documents.

13 Further, Defendant’s Opposition shows that it has no “insight” into its
14 shortcomings in this matter. Defendant continuously minimizes, excuses, and justifies
15 the inappropriateness of its actions. Nowhere in its Opposition does it communicate that
16 this is something that it would not do again. In fact, rather than communicating any sense
17 of being contrite, Defendant’s Opposition makes clear that if faced with the same
18 situation again in the future, it would not even hesitate for a moment to similarly
19 disregard and violate this Court’s orders. All of the above shows that the Court should
20 grant Plaintiffs’ Motion in its entirety and exclude the late-produced documents from
21 consideration with respect to Plaintiffs’ Motion for Class Certification (“Class Motion”).

22 **II. ARGUMENT**

23 Defendant proclaims at the start of its Introduction that “Plaintiffs’ motion . . . fails
24 to show that Defendant, CoreCivic, violated either the original Scheduling Order or the
25 Court’s Orders regarding the parties’ Joint Motions for Determination of Discovery
26 Disputes.” Not so. In its Order on Joint Motion for Determination of Discovery Dispute
27 No. 1, this Court: (1) ordered Defendant to produce documents regarding class members
28 and their employment history by November 9, 2018; (2) ordered Defendant to complete

1 production of policies and procedures by January 15, 2019; and (3) ordered the remaining
2 document production be completed by March 15, 2019. [Dkt. 69 at 5-8.] In its Order on
3 Joint Motion for Determination of Discovery Dispute No. 2, this Court reiterated the
4 March 15, 2019 deadline yet again. [Dkt. 80 at 2-3.] Defendant admits that the
5 production deadline for all “remaining documents responsive to Plaintiffs’ requests for
6 Production” was March 15, 2019. Defendant does not dispute that it served thousands of
7 documents past the March 15, 2019 deadline and then utilized many of those documents as
8 support for its opposition to Plaintiffs’ motion for class certification (“Class
9 Opposition”). Defendant even affirmatively declares these facts in its concurrently filed
10 Declaration of Jacob B. Lee [Jacob B. Lee Declaration, ¶¶ 20, 22 (showing Defendant’s
11 awareness of the March 15, 2019 class discovery cutoff); ¶ 26 (showing Defendant
12 intentionally utilized documents in its Class Opposition that it knowingly did not produce
13 to Plaintiffs prior to the close of class discovery); *see* ¶¶ 1-30 (showing that Defendant
14 made no attempt or effort, in the nearly three months from when Plaintiffs filed their
15 Class Motion (4/15/2019) to when Defendant filed its Class Opposition (7/11/2019), to
16 seek permission from this Court to use documents not produced during class discovery or
17 to reopen class discovery).]

18 Notably, in its January 15, 2019 Order, this Court also ruled that Defendant had
19 waived any objections to Plaintiffs’ requests for production of documents both as to their
20 “language or scope.” [Dkt. 69 at 8, fn. 5 (“The dispute presented to the Court did not
21 challenge the language or scope of any specific request, and time has now passed for
22 Defendant to raise such a challenge.”).] The late-produced documents relied on by
23 Defendant are indisputably relevant to class discovery and responsive to Plaintiffs’
24 requests for production of documents.

25 Defendant, having waived its objections by failing to timely submit a discovery
26 dispute (as Plaintiff was repeatedly forced to do as a result of Defendant’s failure to
27 comply with its discovery obligations), was under a Court Order to produce all relevant
28 and responsive documents by March 15, 2019. Defendant failed to do so and—more

1 egregiously—used late-produced documents in support of its Class Opposition.
 2 Plaintiffs’ Motion seeks to exclude the late-produced documents from the Court’s
 3 consideration of the Class Motion.¹

4 **A. Defendant Does Not Address The Relevant Issues In Dispute**

5 Defendant’s Opposition does not address the core issue raised by Plaintiffs in their
 6 Motion. Plaintiffs’ Motion is not about the sufficiency of discovery responses, a failure
 7 to produce documents, meet and confer efforts, or joint discovery disputes. Plaintiffs’
 8 Motion is about Federal Rule of Civil Procedure 16(f)(1)(C), which provides that “[o]n
 9 motion or on its own, the court may issue any just orders, including those authorized by
 10 Rule 37(b)(2)(A)(ii)-(iv), *if a party or its attorney . . . fails to obey a scheduling or other*
 11 *pretrial order.*” (Italics added.) Here, the sole issue is whether to preclude Defendant
 12 from relying on documents produced after the close of class discovery in support of its
 13 Class Opposition.

14 Despite the scheduling order and subsequent orders that closed class discovery on
 15 March 15, 2019, Defendant produced a significant number of documents (over 8,400) for
 16 the first time on July 8, 2019 and July 11, 2019, which was (1) several months after the
 17 close of class discovery, and (2) several months after Plaintiffs’ April 15, 2019 filing of
 18 their Class Motion. [Ridley Decl., ¶ 2-3.] Defendant then utilized and relied on a large
 19 amount of those documents in its Class Opposition.

20 There is no shortage of authority to show that excluding these documents is proper.
 21 In *Hovenkotter v. SAFECO Ins. Co. of Illinois*, No. C09-0218JLR, 2010 WL 3984828, at
 22 *2 (W.D. Wash. Oct. 11, 2010), the plaintiff produced an expert declaration after the
 23 close of class discovery that it relied on in its motion for certification. The court granted
 24

25 _____
 26 ¹ The Opposition attempts to distract from this narrow issue by relying on a lengthy—and
 27 inaccurate—recitation of the procedural history of discovery in this case. Plaintiffs never
 28 agreed that the scope of production would be limited to specific detainees or facilities.
 Rather, Plaintiffs sought—and the Court approved—an order requiring Defendant to
 produce all relevant documents responsive to Plaintiffs’ requests for production by March
 15, 2019, which necessarily included—by Defendant’s own admission—documents
 relating to “detainee misconduct, “commissary items and pricing,” and Defendant’s
 provision of “basic necessities” to detainees. [Opp. at 3:10-4:28.]

1 the defendant’s motion to strike/exclude the expert declaration because it was filed after
 2 the close of class discovery and the court stated that it “will not consider the [the expert
 3 declaration] in determining class certification issues.” Similarly, in *Terrill v. Electrolux*
 4 *Home Prod., Inc.*, 274 F.R.D. 698, 700–02 (S.D. Ga. 2011), a district court granted a
 5 plaintiffs’ motion for leave to file a new motion for certification because of “new
 6 evidence [that] comes from documents produced by Defendant ‘after the close of class
 7 certification discovery, after Plaintiffs filed their motion for class certification, and the
 8 day before [Defendant] filed its opposition to the motion.’”²

9 At its heart, Plaintiffs’ Motion is about the fact that Defendant never sought this
 10 Court’s consent to modify the scheduling order pursuant to Fed. R. Civ. P. 16(b)(4) so as
 11 to allow class discovery to continue past March 15, 2019. Defendant never sought leave
 12 of this Court to rely on documents for its Opposition that it did not produce prior to the
 13 close of class discovery. Nowhere in the Opposition or its supporting declaration does
 14 Defendant provide this Court with information as to why it failed to seek leave of court or
 15 permission to reopen class discovery. Nowhere in the Opposition or declaration does
 16 Defendant state the unfortunate circumstances, hardship, or honest mistake that prevented
 17 it from seeking permission to not proceed in conformity with a court order. Due to the
 18 lack of any argument, testimony or evidence on these topics, the only reasonable
 19 inference is that Defendant cannot offer any valid justification for its failure to seek leave
 20 of court in the three months between when Plaintiffs filed the Class Motion and
 21 Defendants filed the Class Opposition.

22 **B. Defendant Cannot Blame Plaintiffs For Its Own Violation Of The**
 23 **Scheduling Order**

24 Defendant repeatedly argues in its Opposition that its violation of this Court’s
 25 orders was Plaintiffs’ fault. Defendant somewhat astonishingly takes the position in its
 26

27 ² Defendant’s Opposition does not cite to any legal authority to the contrary. Defendant’s
 28 entire Opposition only includes one “see”-cite to Rule 26 of the FRCP and two “see”-
 cites to cases relating to courts’ ability to give a non-moving party an opportunity to
 respond after the submission of new evidence with a reply brief. Defendant has no *direct*
authority for anything it argues in its entire Opposition.

1 Opposition that “[a]ny untimeliness in CoreCivic’s productions was caused by Plaintiffs’
2 failure to timely disclose their putative classes and refusal to timely disclose the
3 witnesses they intended to rely on in seeking to certify those classes.” [Opp. at 9:23-25.]
4 First, Plaintiffs’ proposed classes were encompassed by their operative Complaint, and
5 Plaintiffs’ were not under any obligation to disclose the witnesses that submitted
6 declarations in support of the Class Motion. Moreover, testimony through a written
7 declaration is not a document created as a business record and maintained in the ordinary
8 course of business such as CoreCivic’s late-produced documents. Indeed, CoreCivic
9 submitted voluminous declarations in support of their Class Opposition—none of which
10 Plaintiffs are seeking to exclude from the Court’s consideration. Rather, Plaintiffs’
11 Motion only concerns *documents* that CoreCivic was under a firm Court order to timely
12 produce.

13 Second, noticeably absent from the Opposition is any assertion that Plaintiffs
14 utilized documents in their Class Motion that Defendant did not have access to. This is
15 because all the documentary evidence Plaintiffs relied on, for the Class Motion and Class
16 Reply, was produced *during* class discovery and *by the Defendant* itself. [Ridley Decl.,
17 ¶ 4.] None of the documents Plaintiffs utilized for their Class Motion should have caught
18 Defendant off guard. Defendant’s feigning of confusion and surprise by what Plaintiffs
19 filed is not genuine. Even assuming arguendo that Defendant was confused and surprised
20 by the Class Motion, that in *no way* provides Defendant with a legal basis to violate this
21 Court’s scheduling order.

22 C. Prejudice Is Present In This Situation

23 Defendant argues that Plaintiffs suffered no prejudice from its reliance on late-
24 produced documents in its Class Opposition. [Opposition, p. 11.] This is not so. “A
25 litigant’s failure to abide by discovery deadlines is prejudicial when it prevents the
26 opposing party from timely reviewing relevant evidence.” *Shatsky v. Syrian Arab*
27 *Republic*, 312 F.R.D. 219, 226 (D.D.C. 2015). Here, Defendant’s failure to abide by the
28 discovery deadline for the close of class discovery prevented Plaintiffs from timely

1 reviewing a large amount of relevant evidence that Plaintiffs could have conducted
2 discovery on or utilized or incorporated in their Class Motion. [Ridley Decl., ¶ 5.]
3 Defendant would not have utilized irrelevant documents with its Class Opposition. If the
4 late-produced documents were not relevant to the Class Motion, they would not have
5 been necessary for inclusion with the Class Opposition, and Defendant would not fight
6 their exclusion from consideration as to Plaintiffs' Class Motion. It goes without saying
7 that Plaintiffs would have liked to review all relevant documents *prior* to filing their
8 Class Motion. Rather than producing all relevant evidence responsive to Plaintiffs'
9 Requests for Production, Defendant is now seeking to selectively produce cherry-picked
10 documents that Defendant considers favorable to its position while simultaneously
11 depriving Plaintiffs access to documents that are likely damaging to the same. This is
12 fundamentally unfair and prejudicial. Therefore, Defendant's argument that Plaintiffs
13 were not prejudiced by Defendant's failure to timely produce the late-produced
14 documents is contrary to both the facts and basic common sense.

15 **III. CONCLUSION**

16 Plaintiffs respectfully request that the Court grant their motion to exclude in its
17 entirety and grant any other relief that the Court deems just and proper. As stated above,
18 Defendant's Opposition shows that it has no "insight" into its shortcomings in this matter.
19 It continuously minimizes, excuses, and justifies the inappropriateness of its actions. It is
20 apparent that Defendant would not hesitate to violate a future court order if it feels
21 justified in doing so. "Parties cannot pick and choose when to comply with a court order
22 depending on counsel's unilaterally determined excuses or justifications not to comply
23 with the order. The order is either obeyed or appealed." *Shatsky v. Syrian Arab Republic*,
24 312 F.R.D. 219, 228 (D.D.C. 2015). Defendant's intentional failure to obey this Court's
25 orders and its feeling of justification in doing so provides even more reasons for the
26 Court to exclude the late-produced documents.

1 DATED: September 26, 2019

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7 *s/ Eileen R. Ridley*

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