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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CoreCivic, Inc., a Maryland corporation,

Defendant.

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

DEFENDANT'S SUPPLEMENTAL BRIEF RE: *NOVOA* CLASS CERTIFICATION ORDER

Judge: Honorable Janis L. Sammartino

CoreCivic, Inc., a Maryland corporation,

Counter-Claimant,

v.

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

Counter-Defendants.

CA Labor Law Class

In *Novoa*, the plaintiffs sought only, and the district court certified only, a minimum-wage claim. *See Novoa v. GEO Group, Inc.*, 2019 WL 7195331, at **1, 10 (C.D. Cal. Nov. 26, 2019). No other California Labor Law claims were certified. *Id.* In this case, Plaintiffs' CA Labor Law Class pursues not only a minimum-wage law claim (Fourth Cause), but also an overtime-wage claim (Fifth Cause), a meal-break claim (Sixth Cause), a rest-break claim (Seventh Cause), and a wage-statement claim (Eighth Cause). (Dkt. 84 at 2.) As previously discussed, none of these claims are certifiable individually or as proposed in a single class, and *Novoa* does nothing to save them.[1]

Novoa does not support certification of Plaintiffs' minimum-wage claim either. To the contrary, it confirms the Court's preliminary determination that it

[1] Plaintiffs did not move to certify their Ninth Cause, failure to pay compensation upon termination. *See* Cal. Labor Code §§ 201–203. In addition, none of the Labor Code claims can be certified to the extent that they (1) are based on Wage Order 5-2001 or (2) seek penalties—including Plaintiffs' wage statement claim (Eighth Cause), which seeks *only* penalties, Dkt. 67, ¶ 92—because they had a one-year statute of limitations. *See* Cal. Code Civ. Proc. § 340. Furthermore, Plaintiffs' overtime-wage claim, meal-break claim, and rest-break claim cannot be certified because: (1) the class definitions are over-inclusive or too broad (Dkt. 118 at 21–24); (2) they failed to establish how many detainees were even eligible for overtime wages, rest breaks, or meal breaks to establish numerosity (*id*. at 25–26); (3) they failed to establish that Owino and Gomez were denied a rest break, meal break, or overtime wages within the limitations period, and, in fact, Gomez did not even avow how many hours in a day or week he worked to establish he even had a viable claim, thereby defeating typicality (*id*. at 28–31), *see Van v. Language Line Services, Inc.*, 2016 WL 3143951, at *30 (N.D. Cal. June 6, 2016) ("[C]laims for unpaid overtime and missed meal and rest breaks accrue on each failure to pay compensation or provide the meal or rest break."); (4) the declarations of only a handful of detainees is not "significant proof" of a practice of denying breaks or overtime wages (*id*. at 35–36); (5) individual questions predominate, including whether each detainee worked enough time to be eligible for breaks or overtime wages, whether they received a rest or meal break, and a calculation of their individual damages (*id*. at 39–40); and (7) they lack superiority (*id*. at 40–42).

should *not* be certified in this case. Like this Court, Judge Bernal recognized that a class cannot be certified if the named plaintiffs' individual claims are time barred. Here, the statute of limitations for all of Plaintiffs' substantive Labor Law claims is three years. *See* Cal. Code Civ. Proc. § 338. Gomez was released from the San Diego Correctional Facility ("SDCF") on September 18, 2013 (Dkt. 147-1, ¶ 8), and the last day he worked at SDCF was on September 17, 2013 (Dkt. 188-7 at 205, CCOG00002485). Although Owino's last stay at SDCF was from February 9, 2015 to March 9, 2015 (Dkt. 147-1, ¶ 7), the last day he worked at SDCF (the only CoreCivic facility he was detained at) was during a prior stay (from March 3, 2010 to May 23, 2013, Dkt. 147-1, ¶ 7) on May 22, 2013 (Dkt. 118-7 at 155, CCOG00002464). Plaintiffs filed their Complaint on May 31, 2017 (Dkt. 1), more than three years after they last worked at SDCF.

Plaintiffs argue that their claims for unpaid wages are governed by the four-year statute of limitations applicable to their unfair-competition-law ("UCL") claim (Third Cause). This is not accurate. Although "an action to recover wages that might be barred if brought pursuant to Labor Code section 1194 *still may be pursued as a UCL action* seeking restitution pursuant to section 17203 if the failure to pay constitutes a business practice," *Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 706, 716 (Cal. 2000) (emphasis added), it does not follow that the time-barred Labor Code claims may still be pursued. Rather, only a UCL claim can be pursued.[2] *See Mendoza v. Bank of Am. Corp.*, 2019 WL 4142140, at *9 (N.D. Cal. Aug. 30, 2019) ("This [UCL] claim relies on and is derivative of his meal-break, rest-period, minimum wage, and overtime claims which have been dismissed pursuant to the three-year statute of limitations governing those claims, however, his UCL claim is still within the four-year period that statute allows."); *Van*, 2016 WL 3143951, at *30 ("Plaintiff may pursue UCL claims predicated upon unpaid

[2] Only Gomez may serve as a class representative in that instance because Owino's UCL claim is still barred by the four-year statute of limitations.

overtime and missed meal and rest periods that occurred within the four-year limitations period."); *Vasquez v. Randstad US, L.P.*, 2018 WL 327451, at *4 (N.D. Cal. Jan. 9, 2018) ("These claims are governed by a 3-year statute of limitations, but can be *recovered* for a 4-year period *under the UCL*.") (emphasis added).

Novoa also supports the Courts preliminary conclusion that this Class will be too difficult to manage on a classwide basis because it will require each detainee class member to provide individual evidence of the number of hours that they worked. Whereas in *Novoa* "GEO maintain[ed] records of detainee work hours" to be able to determine whether detainees worked enough hours in a day or week to maintain claims for overtime wages or rest or meal breaks and to determine the amount of unpaid wages any one of them can recover, *id*., *3, the records submitted in this case do not allow for those determinations because they do not indicate the start and stop times for each day worked. (*See, e.g.*, Dkt. 87, Exs. 45–50.) The individual inquiries necessary to make those determinations far outweigh any common question relating to whether the detainees are employees under California law, and render a class action a far inferior litigation vehicle.

CA and National Forced Labor Classes

Although Judge Bernal certified similar TVPA and California TVPA claims in *Novoa*, the evidence supporting those classes was fundamentally different than the evidence purportedly supporting Plaintiffs' Forced Labor Classes. Under GEO's written policy, detainees are required to perform detailed cleaning in all commonly accessible areas of the living unit. *Novoa*, *4; *see also Menocal v. GEO Group, Inc.*, 882 F.3d 905, 911 (10th Cir. 2018) (describing scope of GEO's housing unit sanitation policy). Detainees who refuse to clean are subject to sanctions, including segregation. *Id*.; *see also Menocal*, 882 F.3d at 911 (describing sanctions for those who refuse to perform under the policy). Detainees receive a handbook informing them of this "HUSP" policy and its sanctions for failing to comply. *Id*., *14; *see also Menocal*, 882 F.3d at 911. The *Novoa* plaintiffs based their TVPA and

California TVPA claims on that same written (HUSP) policy, and GEO did not dispute that it exists. *Id*., *5. Judge Bernal relied on and applied the Tenth Circuit's decision in *Menocal*, which certified a similar class of GEO detainees in a Colorado facility, to find commonality and predominance satisfied in *Novoa*. *Id*., *16.

The written sanitation policy at issue in this case is far different. Detainees are required only to "maintain[] the common living area in a clean and sanitary manner"—that is, they must clean up after themselves, not others. (Dkt. 118 at 10–12.) Only VWP workers are required to clean common areas. (*Id*.) And detainees are not sanctioned for refusing to clean common areas. (*Id*. at 12–14.) Plaintiffs' handful of declarations to the contrary is not proof, much less the requisite "significant proof," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), that the policy was implemented in any other way. (*Id*. at 32–34.) *See Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 965 (9th Cir. 2013) (district court correctly concluded that employee declarations did not establish that facially defective uniform policy regarding meal breaks was actually implemented as written so as to allow common question of liability to predominate). As the Ninth Circuit recently held, "Allegations of individual instances of mistreatment, without sufficient evidence, do not constitute a[n] … overarching policy of wrongdoing." *Willis v. City of Seattle*, 943 F.3d 882, 885 (9th Cir. 2019).[3]

Thus, unlike the undisputed HUSP policy in *Novoa*, there is no undisputed written policy in this case that can serve as a springboard for a finding of commonality. Furthermore, *Novoa* adopted *Menocal*'s predominance analysis, which is also inapplicable here. In *Menocal*, the court held that individual inquiries about why each detainee worked was not necessary because it could infer that all detainees felt compelled to work based on the HUSP policy. 882 F.3d at 918–21.

[3] Plaintiffs' declarations are not even enough to establish a practice of forced labor at OMDC, much less nationwide, and, unlike the admitted RFAs in *Novoa*, there were no RFA admissions of companywide policies in this case.

But that conclusion was based on the fact that all detainees received a handbook notifying them of the HUSP policy and its repercussions.[4] *Id*. Unlike the plaintiffs in *Novoa* (at *14) and *Menocal* (at 911), Plaintiffs do not even allege that they were aware of the written policies or worked because of them. Instead, they allege that they worked because they overheard or observed threats of discipline. (*See* Dkt. 84-3, 84-4, 84-5, 84-6.) Thus, to determine whether any class member has a viable TVPA or California TVPA claim will require individualized determinations as to whether they (1) were actually threatened with harm, and (2) worked because of that apparent threat of harm. Those individual, subjective questions predominate.[5]

Additional Supportive Points

1. Unlike this case, the basic necessity class certified in *Novoa* was supported by allegations in the complaint. *Novoa*, *5 n.6. And the plaintiffs there did not seek to certify a *national* basic necessities class. *Id*., *10. Here, Plaintiffs do seek to certify a California *and* National Class based only on a handful of declarations, all from detainees in a California facility.

2. The *Novoa* Plaintiffs moved to certify their claims for injunctive relief pursuant to Rule 23(b)(2), and the district court certified those claims only after analyzing Rule 23(b)(2). *Novoa*, *19. Plaintiffs did not move under Rule 23(b)(2).

3. Judge Bernal agreed that "unjust enrichment is not an independent cause of action, and is only a claim for restitution." *Novoa*, *17.

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[4] It was also based on unique Tenth Circuit jurisprudence permitting classwide causation evidence, *see CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014), which the Ninth Circuit has not adopted, *see Poulos v. Caesars World, Inc.*, 379 F3d 654, 668 (9th Cir. 2004).

[5] The objective standard found in the TVPA and the California TVPA go only to the question of whether a reasonable person would believe that the threatened harm was a "serious harm," 18 U.S.C. 1589(c)(2), or "likely that the person making the threat would carry it out," Cal. Penal Code § 236.1(h)(3). Whether the labor was obtained "by means of" or "accomplished through" the threat is still an individualized, subjective inquiry. *See David v. Signal Int'l, LLC*, 2012 WL 10759668, at *20–22 (E.D. La. Jan. 4, 2012).

Dated: January 31, 2020

By s/ Nicholas D. Acedo

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

CERTIFICATE OF SERVICE

CoreCivic, Inc., a Maryland corporation,

Counter-Claimant,

v.

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

Counter-Defendants.

I am a citizen of the United States and am over the age of eighteen years, and not a party to the within action. My business address is Struck Love Bojanowski & Acedo, PLC, 3100 West Ray Road, Suite 300, Chandler, AZ 85226. On January 31, 2020, I served the following document(s):

DEFENDANT'S SUPPLEMENTAL BRIEF RE: *NOVOA* CLASS CERTIFICATION ORDER and this CERTIFICATE OF SERVICE

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

☒ **BY ELECTRONIC SUBMISSION:** per Court Order, submitted electronically by CM/ECF to be posted to the website and notice given to all parties that the document(s) has been served.

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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 January 31, 2020, at Chandler, Arizona.

s/ Nicholas D. Acedo