

1 STRUCK LOVE BOJANOWSKI & ACEDO, PLC  
 Daniel P. Struck, AZ Bar #012377  
 2 (*admitted pro hac vice*)  
 Rachel Love, AZ Bar #019881  
 3 (*admitted pro hac vice*)  
 Nicholas D. Acedo, AZ Bar #021644  
 4 (*admitted pro hac vice*)  
 Ashlee B. Hesman, AZ Bar #028874  
 5 (*admitted pro hac vice*)  
 Jacob B. Lee, AZ Bar #030371  
 6 (*admitted pro hac vice*)  
 3100 West Ray Road, Suite 300  
 7 Chandler, Arizona 85226  
 Tel.: (480) 420-1600  
 8 Fax: (480) 420-1695  
 dstruck@strucklove.com  
 9 rlove@strucklove.com  
 nacedo@strucklove.com  
 10 ahesman@strucklove.com  
 jlee@strucklove.com

11 LAW OFFICE OF ETHAN H. NELSON  
 12 Ethan H. Nelson, CA Bar #262448  
 4 Park Plaza, Suite 1025  
 13 Irvine, California 92614  
 Tel.: (949) 229-0961  
 14 Fax: (949) 861-7122  
 ethannelsonesq@gmail.com

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 REPLY IN  
 SUPPORT OF REQUEST FOR  
 SUPPLEMENTAL BRIEFING RE:  
 BARRIENTOS**

26  
 27  
 28

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

8 Plaintiffs’ Opposition to CoreCivic’s request for supplemental briefing is  
9 itself a substantive brief. CoreCivic replies in turn, understanding that doing so  
10 may moot its request for further supplemental briefing.

11 1. Plaintiffs first contend: “*Barrientos* supports the Court’s tentative  
12 decision to certify Plaintiffs’ Forced Labor classes” because it “confirms that ICE  
13 detainees may establish claims for violations of the TVPA against CoreCivic  
14 where, as here, ‘CoreCivic coerces alien detainees to perform labor... by, *inter alia*,  
15 the use or threatened use of serious harm, criminal prosecution, solitary  
16 confinement, and the withholding of basic necessities.’” (Dkt. 173 at 2, quoting  
17 *Barrientos v. CoreCivic, Inc.*, No. 18-15081, 2020 WL 964358, at \*1 (11th Cir.  
18 Feb. 28, 2020).) The passage they quote, however, was not the court’s holding;  
19 rather, it was the court’s recitation of what the plaintiffs *had alleged* in their  
20 complaint. *See Barrientos*, at \*1 (“Appellees’ complaint alleged that, far from  
21 operating a ‘voluntary’ work program, CoreCivic coerces alien detainees to perform  
22 labor at Stewart by, *inter alia*, ...”) (emphasis added). CoreCivic’s Notice  
23 accurately quoted the court’s holding: “All we hold today is that the plain language  
24 of the TVPA brings within its scope for-profit government contractors operating  
25 work programs in federal immigration detention facilities, and such entities are not  
26 categorically excluded or shielded from liability under the TVPA.” *Id.* at \*7.

1 CoreCivic does not dispute that this Court reached the same conclusion in  
 2 denying its motion to dismiss. (Dkt. 38 at 7-10.) But that ruling/holding—that  
 3 Plaintiffs *may* bring a TVPA action against a government contractor operating a  
 4 federal detention facility—is not a basis *to certify* the Forced Labor Classes. It  
 5 simply begs the question: does each putative class member actually have a viable  
 6 TVPA claim? As discussed in Point 3 below, that question cannot be answered  
 7 “yes” or “no” in one stroke. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,  
 8 2551 (2011) (a common contention is one that is “capable of classwide resolution—  
 9 which means that determination of its truth or falsity will resolve an issue that is  
 10 central to the validity of each one of the claims in one stroke”); *id.* (a common  
 11 question that merely asks whether putative class members “have all suffered a  
 12 violation of the same provision of law” is not enough to certify a class).

13 2. Plaintiffs next argue that CoreCivic “misrepresents” *Barrientos*,  
 14 contending that the court was careful to limit its holding to the certified question.  
 15 Again, it is Plaintiffs who misconstrue *Barrientos*.<sup>1</sup> What the court refused to  
 16 venture into was any application of its holding to the particular allegations in the  
 17 plaintiffs’ complaint:

18 Because our review is limited to the legal question of the  
 19 TVPA’s applicability to private contractors operating  
 20 federal immigration detention facilities, we do not at this  
 21 time address whether the factual allegations in the  
complaint are sufficient to state a TVPA claim. ...

22 <sup>1</sup> Plaintiffs actually assert that CoreCivic’s misrepresentation was “deliberate.”  
 23 (Dkt. 173 at 3.) These baseless, ad hominem attacks on CoreCivic and its counsel  
 24 must stop. Although resorting to such tactics reveals the weakness in Plaintiffs’  
 25 counter-arguments, it is beneath the dignity of the Court and counsel. (*See, e.g.*,  
 26 Dkt. 134 at 13-14 (accusing Defendant of “surreptitiously” and “slyly altering”  
 27 answer); Dkt. 134 at 18 (accusing Defendant of “blatantly misstat[ing] applicable  
 28 law”); Dkt. 136 at 2-3 (accusing Defendant of “misrepresentations”); Dkt. 139 at 2  
 (“Defendant continuously minimizes, excuses, and justifies the inappropriateness of  
 its actions.”); Dkt. 148 at 2 (accusing counsel of advancing a “contrived legal  
 standard”); Dkt. 156 at 6 n.5 (“One might wonder whether CoreCivic’s aside is  
 simply to highlight the criminal histories of some detainees (inmates or civil) while  
 critical motions are pending before the Court.”).

1           Because we limit our review to the discrete and abstract  
2           legal issue of the TVPA’s applicability to a certain class  
3           of cases, we are not concerned with the specific factual  
4           allegations in the complaint ... In other words, we do not  
5           address whether the complaint in this case sufficiently  
6           alleged a violation of the TVPA, assuming it applies to  
7           private contractors like CoreCivic. ... Indeed, we decline  
8           to address the adequacy of the complaint—or any other  
9           fact-intensive inquiry—at this stage in the litigation.”

10          *Barrientos*, at \*1, 5 (emphasis added). As discussed in Point 3 below (and block  
11          quoted in CoreCivic’s Notice), the court’s discussion excluding from the TVPA  
12          certain forced labor and discipline in the custodial detention setting was part and  
13          parcel of its answer to the certified legal question.

14          3. Plaintiffs last contend that *Barrientos* has “nothing to do” with  
15          whether they and the putative class members have a viable TVPA claim or the class  
16          certification analysis. It certainly does. The court held that its decision does not  
17          “call into question longstanding requirements that detainees or inmates be required  
18          to perform basic housekeeping tasks” and should “not be read to imply” that “basic  
19          disciplinary measures” authorized by ICE detention standards give rise to TVPA  
20          liability. *Barrientos*, at \*7 & n.5 (citing the PBNDS). Indeed, both the United  
21          States and counsel for the plaintiffs—who are putative members of the National  
22          Forced Labor Classes in this case—agreed that conduct that complies with ICE  
23          detention standards does not violate the TVPA. (Dkt. 118-7 at 47-53; [http://www.  
24          ca11.uscourts.gov/oral-argument-recordings](http://www.ca11.uscourts.gov/oral-argument-recordings), search Case No. 18-15081 [*Barrientos*  
25          Oral Argument].)

26          What does ICE require? ICE requires *all* detainees to “maintain their  
27          immediate living areas in a neat and orderly manner.” 2011 PBNDS § 5.8(C);  
28          *Barrientos*, at \*2. ICE instructs detainees: “You must keep areas that you use  
            clean, including your living area and any general-use areas that you use.” (Dkt.  
            118-7 at 13.) ICE prohibits certain conduct and authorizes a range of discipline for

1 any infraction—for example, “[e]ncouraging others to participate in a work  
 2 stoppage or to refuse to work” is a High Offense (214); “[r]efusing to clean  
 3 assigned living area” is a High Moderate Offense (306); and “[b]eing unsanitary or  
 4 untidy” and “failing to keep self and living area in accordance with posted  
 5 standards” is a Low Moderate Offense (413).<sup>2</sup> 2011 PBNDS, § 3.1.A; *Barrientos*,  
 6 at \*3 & \*7 n.5. (*See also* Dkt. 118-7 at 13 [“If you do not keep your areas clean,  
 7 you may be disciplined.”].) A range of discipline is authorized for each category of  
 8 offenses (High, High Moderate, Low Moderate), but the spectrum includes a  
 9 warning, a reprimand, restriction to housing unit, loss of job, change of housing,  
 10 loss of privileges (e.g., commissary, vending machines, movies, recreation),  
 11 disciplinary segregation, and initiation of criminal proceedings. *Id.*

12 In light of these ICE standards, Plaintiffs’ allegations may or may not  
 13 establish a viable TVPA claim depending on the circumstances. For example,  
 14 Plaintiffs allege: CoreCivic requires detainees to clean their “living areas” under  
 15 threat of discipline, and punishes those who “refused to work,” (Dkt. 67, ¶ 16); they  
 16 contend that CoreCivic requires detainees to maintain their common living areas  
 17 under threat of discipline, (Dkt. 114-1 at 14-16; Dkt. 118 at 10-14); they avow that  
 18 they complied with orders “to clean or perform other work” because other detainees  
 19 who “refuse[d] to clean” were disciplined, (Dkt. 84-3, ¶¶ 23-24 [Owino]; Dkt. 84-4,  
 20 ¶¶ 19-20 [Gomez]); and the handful of putative class members who submitted  
 21 declarations avow that they were forced to “perform[] cleaning tasks [of] communal  
 22 and private areas” and disciplined if they “refused to follow orders,” (Dkt. 84-5, ¶ 3  
 23 [Carillo]; Dkt. 84-6, ¶ 3 [Dubon]; Dkt. 127-4, ¶ 3 [Santibanez]; Dkt. 144-3, ¶ 3  
 24 [Geh]).<sup>3</sup>

25 \_\_\_\_\_  
 26 <sup>2</sup> Courts have also recognized that work stoppages are deliberate disruptions of the  
 27 regular order of a prison, *Pilgrim v. Luther*, 571 F.3d 201, 205 (2d Cir. 2009), and  
 28 that the deliberate untidiness throughout a facility compromises the health and  
 safety of detainees and staff, *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978),  
*House v. Vaught*, 993 F.2d 1079, 1085–86 (4th Cir. 1993).

<sup>3</sup> Contrary to Plaintiffs’ recent assertion (Dkt. 169 at 3-4), CoreCivic *did* argue that

1           Whether any particular allegation rises to the level of a TVPA violation can  
2 only be determined on a case-by-case basis. For example, what were the “cleaning  
3 tasks” they were ordered to do? Was the detainee ordered to perform a basic  
4 housekeeping task or to simply clean up after himself? Did the order “to clean”  
5 involve a personal or immediate living area, maintaining a common living area, or  
6 some other area of the facility? For those who claim they were threatened with or  
7 actually disciplined for refusing to work, was their refusal part of an organized  
8 work stoppage?

9           For purposes of class certification, these questions must be asked of each  
10 class member to determine whether they have a viable TVPA claim. No single  
11 question can generate a common answer for every putative class member, which  
12 Plaintiffs guess is “several thousands.” (Dkt. 84-1 at 21.) Because these individual  
13 questions predominate over any conceivable common question, the National Forced  
14 Labor Class cannot be certified. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct.  
15 1036, 1045 (2016) (“An individual question is one where members of a proposed  
16 class will need to present evidence that varies from member to member, while a  
17 common question is one where the same evidence will suffice for each member to  
18 make a prima facie showing [or] the issue is susceptible to generalized, class-wide  
19 proof.”) (alteration in original, internal quotation marks and citation omitted).<sup>4</sup>

20  
21  
22  
23  
24  
25           Geh cannot be substituted in as a class representative (Dkt. 145 at 7 & n.5).  
26           CoreCivic has also explained why *Novoa v. GEO Group, Inc.*, 2019 WL 7195331,  
27           (C.D. Cal. Nov. 26, 2019), is distinguishable. (Dkt. 164 at 5-7.)

28           <sup>4</sup> These predominant questions are in addition to the many others that require  
individualized determinations, including whether the detainee (1) was actually  
threatened with harm, and (2) worked because of that apparent threat of harm.  
(Dkt. 118 at 36-38; Dkt. 164 at 5-7.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: March 23, 2020

By s/ Nicholas D. Acedo

---

Daniel P. Struck  
dstruck@strucklove.com  
Rachel Love  
rlove@strucklove.com  
Nicholas D. Acedo  
nacedo@strucklove.com  
Ashlee B. Hesman  
ahesman@strucklove.com  
Jacob B. Lee  
jlee@strucklove.com  
STRUCK LOVE BOJANOWSKI & ACEDO,  
PLC

Ethan H. Nelson  
LAW OFFICE OF ETHAN H. NELSON  
ethannelsonesq@gmail.com

Attorneys for Defendant/Counter-  
Claimant CoreCivic, Inc.

3685516.1

1 STRUCK LOVE BOJANOWSKI & ACEDO, PLC  
 Daniel P. Struck, AZ Bar #012377  
 2 (*admitted pro hac vice*)  
 Rachel Love, AZ Bar #019881  
 3 (*admitted pro hac vice*)  
 Nicholas D. Acedo, AZ Bar #021644  
 4 (*admitted pro hac vice*)  
 Ashlee B. Hesman, AZ Bar #028874  
 5 (*admitted pro hac vice*)  
 Jacob B. Lee, AZ Bar #030371  
 6 (*admitted pro hac vice*)  
 3100 West Ray Road, Suite 300  
 7 Chandler, Arizona 85226  
 Tel.: (480) 420-1600  
 8 Fax: (480) 420-1695  
 dstruck@strucklove.com  
 9 rlove@strucklove.com  
 nacedo@strucklove.com  
 10 ahesman@strucklove.com  
 jlee@strucklove.com

11 LAW OFFICE OF ETHAN H. NELSON  
 12 Ethan H. Nelson, CA Bar #262448  
 4 Park Plaza, Suite 1025  
 13 Irvine, California 92614  
 Tel.: (949) 229-0961  
 14 Fax: (949) 861-7122  
 ethannelsonesq@gmail.com

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**



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 March 23,  
 17 2020, I served the following document(s):

18  
 19 **DEFENDANT’S REPLY IN SUPPORT OF REQUEST FOR**  
 20 **SUPPLEMENTAL BRIEFING 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:** per Court Order, submitted  
 25 electronically by CM/ECF to be posted to the website and notice given to all  
 26 parties that the document(s) has been served.

27  
 28  
 29 LAW OFFICE OF ROBERT L. TEEL  
 30 Robert L. Teel  
 31 1425 Broadway, Mail Code: 20-6690  
 32 Seattle, WA 98122  
 33 Telephone: (866) 833-5529  
 34 Facsimile: (855) 609-6911  
 35 Email: lawoffice@rlteel.com  
 36 Attorney for Plaintiffs

37  
 38  
 39 FOLEY & LARDNER LLP  
 40 Nicholas J. Fox  
 41 11988 El Camino Real, Suite 400  
 42 San Diego, CA 92130  
 43 Telephone: (858) 847-6700  
 44 Facsimile: (858) 792-6773  
 45 Email: nfox@foley.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

FOLEY & LARDNER LLP  
Eileen R. Ridley  
Alan R. Ouellette  
555 California Street, Suite 1700  
San Francisco, CA 94104-1520  
Telephone: (415) 434-4484  
Facsimile: (415) 434-4507  
Email: eridley@foley.com  
aouellette@foley.com

FOLEY & LARDNER LLP  
Geoffrey M. Raux  
111 Huntington Avenue  
Boston, MA 02199-07610  
Telephone: (617) 342-4000  
Facsimile: (617) 342-4001  
Email: graux@foley.com

*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 March 23, 2020, at Chandler, Arizona.

s/ Nicholas D. Acedo