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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 REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION** Date: June 18, 2020 Time: 1:30 PM Courtroom: 4D 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.

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17
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19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. CoreCivic Did Not Waive Its Personal Jurisdiction Challenge to the National Forced Labor Class 1

II. Plaintiffs Failed to Present "Significant Proof" of a Classwide Policy of Forced Labor 4

III. The Class Period for the CA Forced Labor Class Should Be Narrowed 5

IV. The Court Should Clearly Define the Scope of the Forced Labor Classes 6

V. The CA Labor Class Should Not Be Certified 7

VI. Conclusion 10

The standard for reconsideration is high, but it is not insurmountable, and the grounds advanced by CoreCivic are proper. CoreCivic has not simply rehashed arguments already rejected by the Court. Instead, it has brought to the Court's attention arguments and/or evidence that it believes the Court either misapprehended or did not address in its Order. These are legitimate grounds for reconsideration. *See Primacy Eng'g, Inc. v. ITE, Inc.*, 2019 WL 2059668, at *3 (S.D. Cal. May 9, 2019). Although CoreCivic has also challenged some rulings on the basis of clear error, some of which it never had the opportunity to address because Plaintiffs did not make the argument in their Motion, that is also an appropriate basis for reconsideration. *See Farr v. Paramo*, 2018 WL 1156445, at *1 (S.D. Cal. Mar. 2, 2018). CoreCivic appreciates the time the Court devoted to the Order. But as the Court recognized at oral argument, these are difficult issues. Their complexity is all the more reason to ensure that every aspect has been considered and addressed. Plaintiffs' Response is largely unhelpful, ignoring many of CoreCivic's challenges and filling that void with condescension or prior arguments that the Court did not adopt. That proves there is more to resolve.

I. CoreCivic Did Not Waive Its Personal Jurisdiction Challenge to the National Forced Labor Class.

1. Plaintiffs first urge the Court not to consider CoreCivic's challenge to its personal-jurisdiction ruling because the Motion for Reconsideration stated that it was seeking reconsideration of the "Order certifying the CA Forced Labor, National Forced Labor, and CA Labor Law Classes (Dkt. 179)," and CoreCivic challenged personal jurisdiction in its Motion for Judgment on the Pleadings. (Dkt. 188 at 11.) This is frivolous. The Court issued a single Order—Dkt. 179—that ruled on both Plaintiffs' Motion for Class Certification (*id.* at 10–58) *and* CoreCivic's Motion for Judgment on the Pleadings (*id.* at 8–10). CoreCivic's timely filed Motion for Reconsideration specifically challenges the Court's personal-jurisdiction ruling in that Order. (Dkt. 181 at 10–15.)

Plaintiffs admit they lodged this "objection" in anticipation that CoreCivic could appeal an adverse ruling pursuant to Rule 23(f). But whether the personal-jurisdiction ruling is "inextricably intertwined" with class certification for purposes of appellate jurisdiction is not a question for this Court, nor does it render CoreCivic's Motion for Reconsideration improper. It merely reflects Plaintiffs' concern that the Ninth Circuit will follow the Fifth and D.C. Circuits should CoreCivic appeal.

2. Plaintiffs next argue that CoreCivic "effectively foreclosed reconsideration on the waiver issue" because it conceded at oral argument that the issue is "one of discretion" and, therefore, the Court's finding of waiver cannot be deemed clearly erroneous. (Dkt. 188 at 13.) This argument lacks merit. CoreCivic has consistently maintained that a personal-jurisdiction challenge to the putative class members' claims is *not* available until and unless the class is certified. (*See* Dkt. 140 at 7–9; Dkt. 159 at 40:20–23.) At oral argument, CoreCivic merely argued—in the alternative—that the existence of district court cases finding both waiver and non-waiver *at the least* provides the Court the discretion to side with those that found no waiver. (Dkt. 159 at 41:3–8.) In other words, the mixed bag foreclosed a "hard-and-fast" waiver rule. (*Id.*) More importantly, the Court addressed only CoreCivic's primary argument and simply disagreed, ruling that the defense *was* available. (Dkt. 179 at 9:14–10:24.) It did not exercise any discretion.

3. On the merits, Plaintiffs merely repeat their arguments and the Court's analysis that CoreCivic had a sufficient *factual* basis—the allegations in the Complaint—to raise a personal-jurisdiction defense in its Rule 12(b) Motion to Dismiss.[1] (Dkt. 188 at 13:19–14:10 & n.8., 16:3–10.) They avoid entirely,

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[1] Plaintiffs rhetorically ask "why the defense was 'unavailable' for CoreCivic to raise in its Rule 12(b) motion but at the same time was 'available' for CoreCivic to preserve in its Answer." (Dkt. 188 at 14:11–15:5.) But they answer that question themselves: "a defense can be preserved even if it is not yet ripe to adjudicate." (*Id.* at 16:19.) Plaintiffs also take the position that, even though a personal-jurisdiction challenge in a Rule 12(b) motion is premature, a defendant must still raise the

however, the crux of CoreCivic's argument that, until and unless the class is certified, there is no "*legal* basis" to raise the defense, and therefore it was not "available" at that time for purposes of Rule 12(g)(2). *See Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 964 (D.C. Cir. 2016) (emphasis added). Their avoidance is telling for two reasons: (1) they concede that neither the Court's Order nor *McCurley* and its progeny have addressed this argument; and (2) they have no substantive rebuttal.

Plaintiffs also concede that *Cruson v. Jackson National Life Insurance Co.*, 954 F.3d 240 (5th Cir. 2020), squarely supports CoreCivic's argument (*see* Dkt. 188 at 17:1–3), but argue that the Court should not follow it for two reasons (*id*. at 17:3–18:8). Neither is convincing. They first contend that *Cruson* is not binding. (*Id*. at 17:5–10.) Obviously, the Court is not bound by *Cruson*, but Plaintiffs do not dispute that *Cruson* relied on and applied binding principles espoused by the Supreme Court and the Ninth Circuit. (*See* Dkt. 181 at 14:7–15:7.)

Plaintiffs then disagree with *Cruson*'s premise—that putative class members are not parties to a lawsuit for purposes of personal jurisdiction until the class is certified—and complain that "unnamed class members in a *certified* class" are considered parties for other purposes. (Dkt. 188 at 17:11–18:8 & n.11–12, emphasis added.) They further contend: "[n]either CoreCivic nor *Cruson* provide a sound reason why non-resident, unnamed Class Members *should* be considered 'parties' for purposes of challenging personal jurisdiction at the class certification stage, even though they are *not* considered parties for other purposes." (Dkt. 188 at 17:19–18:3, emphasis added.) Plaintiffs appear to be confused. CoreCivic argues (and *Cruson* agrees) that putative class members are *not* parties for purposes of challenging personal jurisdiction. The cases Plaintiffs cite—holding that class

defense in such a motion to be able to preserve it in an answer or raise it in a later motion. (Dkt. 188 at 16:3–17; id. at 15:10–12.) But it makes no sense to require a defendant to prepare and file a futile motion to dismiss simply to preserve that defense in the litigation.

members in *certified* class actions are considered parties for some purposes—are inapposite. (Dkt. 188 at 17 n.11.) The cases they cite for the proposition that class members in *putative* class actions are not considered parties for other purposes are *consistent* with *Cruson* (*id.* at n.12). *Cruson* stands for the proposition that putative class members are *not* parties for purposes of personal jurisdiction at the class certification stage because it is merely a *putative* class. That class members *are* considered parties only once a class *is* certified is precisely the point.[2]

II. Plaintiffs Failed to Present "Significant Proof" of a Classwide Policy of Forced Labor.

1. Plaintiffs do not address at all CoreCivic's argument that the text of the Sanitation and Hygiene Policy contradicts the Court's ruling that it requires *all* detainees to clean common living areas (Dkt. 181 at 19:15–21:19). Rather, they repeat the Court's analysis. (Dkt. 188 at 29:12–30:12.) Nor do they address CoreCivic's argument that the text of the Detainee Handbook contradicts the Court's ruling that detainees may be coerced to clean these areas under threat of punishment. (Dkt. 181 at 24:12–27:12.) Plaintiffs' silence is further proof that the Court misinterpreted those Policies, *and* it supports CoreCivic's argument that there is not "significant proof" of a policy of forced labor.[3]

2. Plaintiffs also do not confront CoreCivic's contention that the Court impermissibly placed the burden on *CoreCivic* to *disprove* Plaintiffs' interpretation of the policies. (Dkt. 181 at 16:13–19:9, 22:12–24:11.) Rather, they argue evidence that the Court did *not* accept the first time in a misguided attempt to bolster its

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[2] The remainder of Plaintiffs' argument addresses whether CoreCivic waived its personal-jurisdiction defense through its litigation conduct and whether the Court has specific jurisdiction over the putative class claims arising outside California. (Dkt. 188 at 15:15–16:2, 18:9–20:2 & n.13.) CoreCivic has thoroughly addressed these arguments and incorporates them here. (*See* Dkt. 117–1; Dkt. 140 at 9–20; Dkt. 171, 175, 176, 177; Dkt. 181 at 15:13–17 & n.2.)

[3] Plaintiffs do not embrace the Court's reliance on Subsection C of the Sanitation and Hygiene Policy ("OTHER AREAS"), and thus concede that they do not rely on it for their claims. (Dkt. 179 at 41; Dkt. 181 at 21:20–22:11.)

ruling. (Dkt. 188 at 30:24–32:4.) Their acquiescence demonstrates that the evidence relied on by the Court was not "significant proof" of a classwide policy.[4]

3. Regarding the resolution of disputed facts, Plaintiffs maintain that they cannot be resolved at this stage, citing *Negrete v. ConAgra Foods, Inc.*, 2019 WL 1960276 (C.D. Cal. 2019). But *Negrete* relied on *Staton v. Boeing Company*, 327 F.3d 938 (9th Cir. 2003), which was rejected by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *See also Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 543–44 (9th Cir. 2013); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011). Plaintiffs do not confront *Wal-Mart*, *Wang*, or *Ellis* on this point.[5]

III. The Class Period for the CA Forced Labor Class Should Be Narrowed.

Plaintiffs do not respond at all to the substance of CoreCivic's argument that the CA Forced Labor Class must be narrowed to include only those who were detained at a CoreCivic California facility between May 31, 2010 and the present. (Dkt. 181 at 27:13–28:15.) They contend that the Court already addressed this issue (Dkt. 188 at 28 n.18), but the Court has only concluded that the Class cannot go further back than January 1, 2006, because that is when the California TVPA was enacted (Dkt. 38 at 29:13–19). CoreCivic's argument is that the Class must be further narrowed to May 31, 2010, because of the California TVPA's seven-year

[4] The evidence Plaintiffs repeat has been controverted. (*See* Dkt. 118 at 10–14 & 8.) The Voluntary Work Release requires only that detainees "maintain" the common living area, i.e., clean up after themselves, not others (*see* Dkt. 118 at 11:4–13 & cited Exhibits); Plaintiffs have provided no evidence that detainees have access to post orders (Dkt. 85-28), or that they or any other detainees have ever seen the post orders they now rely on; the only discipline for Voluntary Work Program ("VWP") detainee workers who are absent or tardy is removal from the Program (Dkt. 118 at 17:19–19:8; Dkt. 118-5, ¶¶ 31, 34); and VWP workers are not subject to discipline such as segregation for refusing to work (*see* Dkt. 118-8 at 55–57 ["they wouldn't be disciplined for … refusing to work, or not coming to work. They would just be -- at a maximum, they would be removed from that work – work detail."].)

[5] Plaintiffs try to distinguish the facts of *Wal-Mart* (Dkt. 188 at 28:3–29:11), but the distinctions do not detract from the propositions that matter here—Plaintiffs bear the burden to present "significant proof" that the policies exist, and the Court must resolve factual disputes necessary to determine whether Rule 23 has been satisfied. *Id*. at 350–51, 353–55; *see also Wang*, 737 F.3d at 543–44.

statute of limitations. (Dkt. 118 at 24:25–25:6; Dkt. 181 at 28:2–15.) Plaintiffs assert that this argument "is more suitable for consideration as a dispositive motion after Plaintiffs are afforded discovery on this issue" (Dkt. 188 at 28 n.180), but they do not explain why more discovery is necessary. This is a legal question that will help define and limit the scope of discovery.

IV. The Court Should Clearly Define the Scope of the Forced Labor Classes.

As Plaintiffs noted in their Response, the parties disagree on the scope of the Forced Labor Classes. Plaintiffs maintain that these classes include both VWP and non-VWP detainees who have cleaned any area outside of their personal living area under threat of discipline. (Dkt. 184 at 4:28–5:7; Dkt. 188 at 31 n.20.) CoreCivic disagrees in two respects. First, these classes should include only non-VWP workers. Although the proposed class definition includes detainees who were "paid or unpaid" (Dkt. 84 at 1–2), detainees in the VWP work voluntarily and therefore do not work "under threat of punishment." (Dkt. 118 at 17:19–19:8; Dkt. 179 at 41:17–42:21.) The Court also refused to certify allegations that detainees were coerced to participate in the VWP because they were deprived basic necessities. (Dkt. 179 at 13:7–16:4.)

Second, Plaintiffs' Motion for Class Certification sought certification of these classes based solely on Subsection A of the Sanitation and Hygiene Policy—maintenance of the "COMMON LIVING AREAS." (*See* Dkt. 84-1 at 13:3–14:10; Dkt. 111-6.) Similarly, Plaintiffs' declarations recited allegations of forced cleaning in only the common living areas. (*See* Dkt. 84-3, ¶¶ 18–21; Dkt. 84-4, ¶¶ 14–17.) They did not allege that they were forced to clean any areas outside their living unit, e.g., in administrative offices, the library, the chapel, the dining hall, or outside. Without "significant proof" of a practice that forced detainees to clean areas outside the common living area, the claims cannot extend to those areas.

Clarification now is critical, not only to define the scope of discovery in this case, but also to determine the viability of similar class actions across the country.

For example, in *Barrientos v. CoreCivic*, 18-cv-00070–CDL (M.D. Ga.), detainees at the Stewart Detention Center have brought a federal TVPA claim and seek class certification of nearly identical allegations. Those plaintiffs and putative class members, however, maintain that their suit is not entirely duplicative because the National Forced Labor Class in this case covers only "[c]leaning of the common living areas." (Exhibit 1.) Their lawsuit, they maintain, includes VWP detainees who cleaned both common living areas and areas outside the common living area, and performed other work. (*Id.*) A similar class action in the Western District of Texas is also pending. *See Gonzalez v. CoreCivic, Inc.*, 18-cv-00169 (W.D. Tex.). Accordingly, the Court should modify the CA Forced Labor Class definition to include "all non-VWP detainees who (i) were detained at a CoreCivic facility located in California between May 31, 2010 and the present, (ii) cleaned the common living areas, and (iii) performed such work under threat of discipline." It should modify the National Forced Labor Class definition to include "all non-VWP detainees who (i) were detained at a CoreCivic facility between December 23, 2008 and the present, (ii) cleaned the common living areas, and (iii) performed such work under threat of discipline."

V. The CA Labor Class Should Not Be Certified.

1. Plaintiffs do not defend the Court's reliance on *Hernandez v. City of El Monte* to excuse their failure to analyze commonality and predominance for each of its Labor Law claims. (Dkt. 181 at 28:17–29:8.) Nor do they defend the Court's decision to allow Claim Nine to be certified. (*Id.* at 29:9–18.)

2. Plaintiffs incorrectly argue that *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), "has no application" to their "wage-and-hour claims" and does not require them to prove that individual damages can be reliably measured through classwide proof. Although *Comcast* involved an antitrust case, the Supreme Court explained that the case "provided no occasion for … discussion of substantive antitrust law" because its opinion was based on a "straightforward application of

class-certification principles." *Id*. at 34. It then held that a district court may not "certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Id*. at 32 n.4, 34. Here, Plaintiffs failed to disclose any method for calculating damages on a classwide basis, much less a reasonable and reliable method—especially in light of CoreCivic's counterclaims for unjust enrichment. Instead, they insufficiently argued that predominance exists simply because the class members' claims challenge the same policy or practice and will prevail or fail in unison. (Dkt. 84-1 at 29; Dkt. 127 at 17.) Plaintiffs' sole focus on liability while completely disregarding their requirement to provide—at the class certification stage—a method to reliably measure damages based upon class-wide proof is fatal.

Contrary to Plaintiffs' assertion, *Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150 (9th Cir. 2016), and *In re POM Wonderful, LLC*, 2014 WL 1225184, at *2 (C.D. Cal. Mar. 25, 2014), did not circumscribe *Comcast*. They simply stand for the unremarkable proposition that individual damages calculations alone do not defeat certification, and the plaintiffs' proposed method must show that damages stemmed from the defendants' conduct. CoreCivic does not dispute this. But that does not in any way narrow *Comcast*'s requirement to prove predominance through a reasonable and reliable damages model. Indeed, the Ninth Circuit has consistently held since *Comcast* that plaintiffs are not relieved of their burden at the class certification stage to present a reliable damages model. *See*, *e.g.*, *Cole v. Gene by Gene, Ltd.*, 735 F. App'x 368, 369 (9th Cir. 2018); *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017); *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 970 (9th Cir. 2013).

Moreover, in *Vaquero* and *In re POM*, the plaintiffs did propose a reliable model for calculating damages class-wide. *See Vaquero*, 824 F.3d at 1153; *In re POM Wonderful LLC*, 2014 WL 1225184, at *2. But here, Plaintiffs neither

proposed a reliable method for measuring individual damages based on class-wide proof, nor does the record enable to court to do so through a reliable method. Thus, the CA Labor Law Class cannot be certified. *See Ward v. Apple Inc.*, 784 F. App'x 539, 540–41 (9th Cir. 2019) ("The plaintiffs here have done even less than the *Comcast* plaintiffs: Instead of providing an imperfect model, they have provided only a promise of a model to come.").

Plaintiffs note that the cases CoreCivic cited in support of the proposition that courts consistently deny certification in the absence of a reliable damages model were not wage-and-hour cases, but they fail to show why that matters. The need to establish that damages can be calculated based on class-wide proof does not turn on the substantive law. Indeed, the requirement of a reliable damages model to prove predominance has been applied in wage-and-hour cases both before and after *Comcast*. *See*, *e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013); *Bernstein v. Virgin Am., Inc.*, 2018 WL 3349135, at *8 (N.D. Cal. July 9, 2018); *Ontiveros v. Safelite Fulfillment, Inc.*, 2017 WL 6043078, at *10–11 (C.D. Cal. Oct. 16, 2017); *Smith v. Ceva Logistics U.S., Inc.*, 2010 WL 11506874, at *12 (C.D. Cal. Sept. 27, 2010).

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016), does not save Plaintiffs from their failure of proof. Although, under the specific facts in *Tyson*, the Supreme Court held that an expert's study filled an "evidentiary gap created by the employer's failure to keep adequate records," it maintained: "This is not to say that all inferences drawn from representative evidence in an FLSA case are 'just and reasonable.' … Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked."[6] *Id.* at 1040, 1048–49.

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[6] Plaintiffs continue to argue that CoreCivic willfully failed to keep adequate records. Not true. The records they seek do not exist because no court has ever held that detainees participating in the VWP are "employees" under California law.

Although Plaintiffs now argue that additional discovery on the merits will result in their ability to propose a damages model, they have already had the benefit of class discovery, and were required to propose such a model at the class certification stage. *Comcast*, 569 U.S. at 36. Even so, Plaintiffs still have not pointed to anything to support such a model. Chief Topasna's statements regarding the maximum number of hours for certain shifts are insufficient to show the number of hours that detainees actually worked. That Plaintiffs now seek discovery of records regarding actual shift hours and believe that "CoreCivic possess this information," their discovery requests do not negate the fact such records do not exist. But even if they did exist, Plaintiffs still have not shown how damages can be determined through an objectively reasonable and reliable sampling method, as *Tyson* requires. Their inability to do so is fatal to their ability to prove predominance under Rule 23(b)(3).

Plaintiffs last argue that CoreCivic misconstrued *Aldapa v. Fowler Packaging Co.*, 323 F.R.D. 316 (E.D. Cal. 2018), where the court found that averaging hours was impermissible to determine whether the employer complied with minimum wage requirements. But they miss the important point that damages in a wage-and-hour case must be based on the number of hours that the employee actually worked rather than an average, especially where there are wide variances among the class. Plaintiffs also completely disregard the other cases CoreCivic cited that expressly rejected the use of averages to determine class members' damages because it will result in a windfall to some while undercompensating others. (Dkt. 181 at 32:18–33:13.)

VI. Conclusion.

For these additional reasons, the Court should grant CoreCivic's Motion for Reconsideration.

Dated: June 11, 2020

By s/ Nicholas D. Acedo

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EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

WILHEN HILL BARRIENTOS, MARGARITO VELAZQUEZ GALICIA, and SHOAIB AHMED individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CORECIVIC, INC.,

Defendant.

Civil Action No. 4:18-cv-00070-CDL

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO LIFT THE STAY

Defendant CoreCivic, Inc. ("CoreCivic") asks the Court to continue the stay until the "fate" of the class certification decision in *Owino v. CoreCivic*, 3:17-cv-01112 (S.D. Cal.), is certain. Doc. 50, at 11. In the alternative, Defendant asks the Court to take the extraordinary step of ordering Plaintiffs to amend their Complaint or grant CoreCivic leave to file another Rule 12 motion.[1] The Court should reject CoreCivic's attempt to further delay this lawsuit. The class certification decision in *Owino* does not justify a continuance of the stay because Plaintiffs' putative Forced Labor Class covers a broader set of individuals at Stewart Detention Center ("Stewart"), challenges different policies and schemes, and seeks different relief than the *Owino* National Forced Labor Class. Further, CoreCivic's proposed stay pending the outcome of its appeals in *Owino* (including a not-yet-filed Rule 23(f) petition) is inappropriate because its duration is too indefinite, and it will unnecessarily inject delay and uncertainty into this

[1] Plaintiffs address CoreCivic's Motion to Order an Amended Complaint or Grant Leave to File a Rule 12 Motion (Doc. 49) in their separately filed Opposition to that Motion.

litigation. Finally, CoreCivic has not met its burden to justify continuing the stay because the hardship it claims it will suffer pales in comparison to the harm that Plaintiffs and the putative class will suffer if their attempt to end ongoing, abusive practices in Stewart is further delayed. For all the following reasons, the Court should grant Plaintiffs' Motion to Lift the Stay.[2]

ARGUMENT

I. The Court Should Lift the Stay

The Court stayed these proceedings until resolution of "any application for interlocutory appeal." *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305, 1313 (M.D. Ga. 2018). CoreCivic does not dispute that the original basis for the stay no longer exists, but rather argues a novel ground for continuing the stay: the class certification proceedings in *Owino*. As the party "seeking [the] stay" CoreCivic "bears the burden of justifying the resulting delay." *Sturgis Motorcycle Rally, Inc. v. Mortimer*, No. 2:14-CV-00175-WCO, 2015 WL 11439078, at *6 (N.D. Ga. June 11, 2015) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). "When ruling on a motion to stay pending the resolution of a related case in another forum, district courts must consider both the scope of the stay and the reasons given for the stay." *Id.* (quoting *Lipford v.*

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[2] CoreCivic asks the Court to reject Plaintiffs' Reply because Plaintiffs "failed to meaningfully confer on this issue." Doc. 50, at 12 n.6. CoreCivic is essentially asking the Court to sanction Plaintiffs, but any sanctions require a showing of bad faith, which CoreCivic has not alleged nor could it prove. *See Merial Ltd. v. Velcera*, Inc., No. 3:11-CV-157 CDL, 2012 WL 2880843, at *2 (M.D. Ga. July 13, 2012). Plaintiffs sought CoreCivic's position on their Motion to Lift the Stay twice over the course of three weeks before filing the motion, and CoreCivic declined to provide one. *See* Doc. 50-4, at 3-6. The Parties engaged in a substantive back and forth about the motion as required by the local rules. *See id.*; L.R. Standards of Conduct 8(a). Sunday night after the *Owino* court issued its class certification decision, CoreCivic requested Plaintiffs' counsel's position on "a continuance of the stay/[its] Answer deadline" based on entirely separate issues. *Id.* at 4. Plaintiffs agreed to meet and confer with CoreCivic about its proposed "motion/course of action." *Id.* at 2. The resulting discussion was about CoreCivic's motion for alternative relief. *See* Doc. 49, at 1 n.1 (discussing the Parties' conferral about the motion). Far from engaging in bad faith, Plaintiffs' counsel fulfilled their conferral requirements with respect to Plaintiffs' and CoreCivic's motions.

Carnival Corp., 346 F. Supp. 2d 1276, 1278 (S.D. Fla. 2004); *see also Ortega Trujillo v. Conover & Co. Comm., Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000). CoreCivic has failed to meet its burden to justify the reason for and the indefinite scope of the continued stay.

A. The *Owino* Class Certification Order Does Not Justify the Stay

CoreCivic claims the *Owino* class certification order requires a stay of these proceedings because, if the order is upheld, the *Owino* National Forced Labor Class will "subsume[]" Plaintiffs' proposed Forced Labor Class. Doc. 50, at 9. CoreCivic is incorrect. Plaintiffs' putative class differs from the *Owino* class in three key ways: (1) Plaintiffs' class covers a broader group of individuals at Stewart; (2) Plaintiffs challenge different CoreCivic policies and schemes; and (3) Plaintiffs seek different relief. *See* Table, Ex. A. Because the two classes differ in scope, legal issues, and remedies, they are not duplicative, and a stay is unwarranted.

1. Plaintiffs' Class is Broader at Stewart than the *Owino* Class

Far from being "subsumed" by the *Owino* National Forced Labor Class, Plaintiffs seek to certify a broader class of individuals at Stewart than the *Owino* certified class. Plaintiffs' proposed Forced Labor Class is defined as "All civil immigration detainees who performed work for CoreCivic at Stewart in the 'Volunteer Work Program' within the past ten years, up to the date the class is certified." Doc. 1 at ¶94.[3]

The certified *Owino* National Forced Labor Class is defined as "[a]ll ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008 and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the ICE PBNDS, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid." Doc. 50-2, at 12.

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[3] This Court ruled that Plaintiffs' forced labor claims are limited to CoreCivic's conduct occurring after December 23, 2008. *Barrientos*, 332 F. Supp. 3d at 1312.

As evident from the class definitions, the *Owino* class is expressly limited to cleaners whereas Plaintiffs' class covers all individuals who participated in the "Voluntary Work Program" (VWP) at Stewart. CoreCivic's VWP at Stewart involves many non-cleaner job assignments, including barber, commissary, intake worker, laundry worker, library worker, sally port/chemical porter, and recreation/gym worker. Doc. 1 at ¶29. Those workers prepare, serve, and cook daily meals for over 2,000 individuals; provide barber services; perform clerical work; and wash laundry of other detained individuals, among other tasks. *Id.* ¶30. Any ancillary cleaning they perform is not the core of their assignment. All such workers fall outside the *Owino* class. Indeed, because Plaintiffs Barrientos, Ahmed, and Velazquez all worked as kitchen workers, not cleaners, they too are left out. *Id.* ¶62, 78, 86. It is clear from the face of the class definitions that the *Owino* class does not subsume Plaintiffs' proposed class.

2. The *Owino* National Forced Labor Class Challenges a Different Policy Than Plaintiffs' Forced Labor Class

Nor are the two classes substantively duplicative, as CoreCivic claims, because the *Owino* National Forced Labor Class challenges a different CoreCivic policy under the Trafficking Victim's Protection Act ("TVPA") than Plaintiffs' proposed Forced Labor Class.

The *Owino* National Forced Labor class challenges CoreCivic's Sanitation and Hygiene Policy and related discipline policies, which require individuals to clean the common living areas of the detention center pursuant to CoreCivic's under threat of punishment.[4] Doc. 50-2, at 39. CoreCivic's Sanitation and Hygiene Policy requires individuals "to perform the daily cleaning routine of the common area,' including trash removal, sweeping and mopping, cleaning and

[4] Copies of those policies were filed under seal in *Owino*, however, CoreCivic's motion for reconsideration includes portions of the challenged Sanitation and Hygiene Policy. *See* Def.'s Mot. to Reconsider, *Owino v. CoreCivic*, 3:17-cv-01112 (S.D. Cal. Apr. 15, 2020), ECF No. 181 at 8-9, 11-14 (attached as Exhibit B). Unless otherwise specified, page citations refer to internal pagination where applicable and otherwise to the PDF page number.

scrubbing of bathroom facilities, and wiping off of furniture." *Id.* at 40. The *Owino* court concluded that plaintiffs "have demonstrated for purposes of class certification that **[CoreCivic] implemented common sanitation and discipline policies that together may have coerced detainees to clean areas of Defendant's facilities** beyond the personal housekeeping tasks enumerated in the ICE PBNDS." *Id.* (emphasis added); *see also id.* at 33-34, 39-42 (analyzing CoreCivic's policies). Even CoreCivic confirms in its motion for reconsideration that the *Owino* plaintiffs' "remaining forced-labor theory is based solely on their allegation that all detainees are required to 'clean' the 'common living areas.'" *See* Ex. B at 8. The *Owino* class definition, the *Owino* court's order, and CoreCivic's own briefing all make clear that the *Owino* challenge is limited to CoreCivic's Sanitation and Hygiene Policy and related discipline policies.

Plaintiffs do not challenge CoreCivic's Sanitation and Hygiene Policy; rather, they challenge two CoreCivic policies related to the VWP. First, they challenge CoreCivic's policy of withholding or threatening to withhold basic necessities from individuals detained at Stewart to force them to perform labor in the VWP. Doc. 1 at ¶¶36-47. The *Owino* plaintiffs sought certification of a "basic necessities" class that was similar to Plaintiffs' class, but the court declined to certify that class because the plaintiffs did not allege it in their complaint. *See* Doc. 50-2, at 15. Second, Plaintiffs challenge CoreCivic's policy of forcing individuals who are in the VWP to continue to work under threat of punishment, including solitary confinement, criminal prosecution, transfer to less safe and unsanitary housing quarters, and revocation of access to the commissary where they must buy the basic necessities that CoreCivic refuses to provide. Doc. 1 at ¶¶48-60. Both of these challenged policies apply to all individuals who participate in the VWP, regardless of the job they were assigned to perform. Plaintiffs allege each policy separately amounts to serious harm or threat of harm under the TVPA. *Id.* at ¶108(a), (b).

Critically, the second challenged policy does not just apply to cleaners and/or those who were forced to clean common living areas under the Sanitation and Hygiene Policy.

CoreCivic cherry picks a paragraph from the *Owino* plaintiffs' amended complaint to present a dated and overly-broad characterization of the *Owino* forced labor class claim. *See* Doc. 50, at 9 (claiming the *Owino* plaintiffs are alleging that "CoreCivic forced, coerced, and used Plaintiffs and others to work for no pay, cleaning the 'pods' where they were housed, and cleaning, maintaining, and operating other areas of the CoreCivic detention facilities under threat of punishment, including lockdown and solitary confinement"). CoreCivic omits the fact the *Owino* plaintiffs significantly narrowed their class definition since the filing of their amended complaint from "all civil immigration detainees who performed Forced Labor uncompensated work" to "all detainees . . . who cleaned areas . . .", and the *Owino* court ultimately certified the latter definition. *Compare* Doc. 50-3, at ¶30, *with* Doc. 50-2, at 12. In its motion for reconsideration, CoreCivic acknowledges that the *Owino* National Forced Labor Class is limited to individuals who cleaned the common areas. Ex. B at 7-10. CoreCivic's strategy of taking a contrary (and inaccurate) position here should be rejected.

Plaintiffs' Forced Labor Class claim thus not only covers more individuals at Stewart than the *Owino* class, but also seeks to establish the unlawfulness of two policies that the *Owino* certified class does not challenge. Plaintiffs will rely on different evidence to prove their allegations related to CoreCivic's deprivation scheme and its policy of forcing VWP participants to work under threat of punishment. And even though there might be overlap in the evidence to establish the existence, uniformity, and application of CoreCivic's discipline policies, Plaintiffs will still need evidence regarding CoreCivic's use of housing transfers to punish those who do not work because *Owino* contains no allegations about housing. CoreCivic's claim that the two

classes' TVPA claims are "duplicative" is simply wrong and should be rejected.[5]

3. Plaintiffs Seek a Different Remedy Than the *Owino* Class Members Seek

The two class actions are also not duplicative because they seek different remedies. The *Owino* National Forced Labor Class is certified under Fed. R. Civ. P. 23(b)(3), not (b)(2), to pursue damages only. Doc. 50-2, at 11-13, 22. Here, Plaintiffs seek certification of the Forced Labor Class under Fed. R. Civ. P. 23(b)(2) and (b)(3) and seek both damages and injunctive and declaratory relief. Doc. 1 at ¶93. Two class actions cannot be duplicative when they seek different remedies. *See Durbin v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1551 (11th Cir. 1986) ("[A] suit is duplicative of another suit if the parties, issues and **available relief** do not significantly differ between the two actions.") (emphasis added); *McColligan v. Vendor Res. Mgmt*, No. 5:18-cv-160, 2019 WL 1051188, at *3 (M.D. Ga. Mar. 5, 2019).

CoreCivic glosses over these key differences in the two classes to justify its sweeping request to continue the stay. CoreCivic's request should be rejected, and the stay should be lifted.

4. CoreCivic's Only Legal Basis for Continuing the Stay Is Claim Splitting, but There Is No Risk of Claim Splitting Here

CoreCivic appears to rely on the doctrine of claim splitting, but that doctrine is inapplicable here. Claim splitting applies when a plaintiff maintains "two separate actions involving the same subject matter, at the same time, in the same court, against the same defendant." *Rumbough v. Comenity Capital Bank*, 748 F. App'x 253, 255 (11th Cir. 2018); *see*

[5] Plaintiffs are also entitled to discovery on their unjust enrichment claim even if there is overlapping discovery. The federal rules provide no exception for discovery of relevant evidence that is also relevant to a separate lawsuit. *See* Fed. R. Civ. P. 26(b); *see also McCleod v. Nat'l R.R. Passenger Corp.*, No. CV413-057, 2014 WL 1616414, at *3 (S.D. Ga. Apr. 22, 2014) (noting that the Rule 26(b) standard for relevance in discovery is "quite liberal," and evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable" (quoting *United States v. Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002)).

also O'Connor v. Warden, Fla. State Prison, 754 F. App'x 940, 941-42 (11th Cir. 2019) (concluding that district court erred in dismissing lawsuit as duplicative). As discussed above, the Plaintiffs and the class members in *Owino* and this lawsuit are not identical, and the two class actions challenge different policies and seek different remedies in different courts.

The cases CoreCivic relies on are distinguishable because they all involve claim splitting. In *Vanover*, for example, the court upheld the district court's dismissal of the plaintiffs' second-filed lawsuit because, although they added two different claims, the second case had identical parties and its claims arose out of the same challenged collection effort by the defendant company. *Vanover v. NCO Fin. Servs., Inc*., 857 F.3d 833, 842–43 (11th Cir. 2017). Similarly, the court in *Greene* ruled claim splitting barred the second action because the parties were the same, the two cases involved many commons questions of law and fact, the plaintiffs admitted the cases were "virtually identical," and the plaintiffs sought the same relief in both cases. *See Greene v. H & R Block E. Enterprises, Inc.*, 727 F. Supp. 2d 1363, 1367–68 (S.D. Fla. 2010).

The other cases that CoreCivic cites are also irrelevant because they involve individual plaintiffs who filed second lawsuits in the same court to avoid jurisdiction problems and to add additional claims that the district court had previously not allowed them to add. *See Oliney v. Gardner,* 771 F.2d 856, 859-60 (5th Cir. 1985) (holding that filing a second, identical suit with new facts about diversity jurisdiction prior to dismissal of first suit for lack of subject matter jurisdiction was an attempt to circumvent complaint amendment rules); *Curtis v. Citibank N.A.*, 226 F.3d 133, 137-39 (2d Cir. 2000) (holding that plaintiffs' second suit alleging new claims was duplicative because the court had already denied their motion to add the new claims to their first suit). The fact that there is potentially some overlap between the *Owino* National Forced Labor Class and Plaintiffs' putative Forced Labor Class is not the result of any attempt to manipulate

judicial processes or circumvent procedural rules. Thus, because there is no claim splitting here, there is no reason to continue the stay pending the not-yet-filed *Owino* appeal.

Even if the Court finds some of Plaintiffs' forced labor claims are duplicative of those certified as a class in *Owino*, CoreCivic's stay request should still be rejected. "A successful motion to stay requires more than some symmetry between the issues in one case and another." *Sturgis Motorcycle Rally, Inc.*, 2015 WL 11439078, at *6. As demonstrated above, there are significant differences in the forced labor claims of the two cases, and these claims will persist regardless of whether the *Owino* order is upheld. Even CoreCivic acknowledges that Plaintiffs have forced labor claims that are unaffected by *Owino*. *See* Doc. 50, at 11 n.5 (noting that Plaintiffs' Complaint raises other allegations and claims not subject to CoreCivic's proposed dismissal). Further, the *Owino* decision has no bearing on Plaintiffs' unjust enrichment claim.

At bottom, even if the *Owino* class certification order is upheld, that decision "would still leave quite a bit of work to be done in this" case. *Sturgis Motorcycle Rally, Inc.*, 2015 WL 11439078, at *6 (denying defendant's motion to stay pending the outcome of a similar lawsuit even when that lawsuit would have some preclusive effect on the case). CoreCivic's attempt to delay the inevitable should be denied.

B. The Hardship that CoreCivic's Proposed Indefinite Stay Will Cause the Plaintiffs Far Outweighs Any Harm to CoreCivic

CoreCivic does not justify its request for its proposed indefinite stay. CoreCivic suggests this case should be stayed pending the outcome of its current and future appeals of the *Owino* class certification order. Without the benefit of a clear timeline, or even the certainty of knowing whether and when the Rule 23(f) petition will be filed, the stay is too open-ended, and should be denied on those grounds. *Ortega Trujillo*, 221 F.3d at 1264 (overturning stay as too "indefinite" because its end hinged on the outcome of another case).

Nor does CoreCivic make a compelling claim of hardship in the event the stay is not continued. CoreCivic's only basis for hardship is that it will have to expend resources litigating some of Plaintiffs' claims that might, according to CoreCivic, ultimately be dismissed. This flimsy basis for a stay should be rejected. *Sturgis Motorcycle Rally, Inc.*, 2015 WL 11439078, at *6 ("While a stay *could* lead to reduced discovery for part of defendants' case, such a contingent harm is not sufficiently compelling to authorize a stay."). Tacitly conceding its claim of hardship is weak, CoreCivic cynically uses the current COVID-19 global pandemic (and Plaintiffs' counsel's willingness to be flexible on deadlines as a result) to bolster its argument that this case should be stayed. Doc. 50, at 12. But this Court has not stayed all civil cases as a result of the pandemic, and CoreCivic gives no reason why it should be afforded special treatment.[6] CoreCivic claims it is defending against COVID-related lawsuits, but it does not cite to any such cases where it is actually a defendant. In any event, a large corporation like CoreCivic cannot plausibly justify a stay based on the fact that there are multiple lawsuits pending against it.

Meanwhile, Plaintiffs have alleged violations of the TVPA stemming from ongoing and extremely troubling conditions at Stewart. Plaintiffs are not only seeking damages but are also seeking to put an end to these conditions via their request for injunctive and declaratory relief. Plaintiffs have been waiting over two years since they filed this lawsuit seeking to prevent forced labor at Stewart to litigate these claims and secure relief. If the stay is not lifted, Plaintiffs will be forced to put their claims on ice for an uncertain duration. Plaintiffs are victims of CoreCivic's forced labor; they deserve their day in Court.

CONCLUSION

For all the forgoing reasons, the Court should grant Plaintiffs' Motion to Lift the Stay.

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[6] *See* May 1, 2020 Standing Order, https://www.gamd.uscourts.gov/sites/gamd/files/general-ordes/Standing%20Order%20Extending%20Jury%20Trial%20Moratorium.pdf

Dated: May 11, 2020

Respectfully submitted,

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EXHIBIT A

Table of Differences Between the Owino National Forced Labor Class and the Barrientos Proposed Forced Labor Class

Table of Differences Between the *Owino* National Forced Labor Class and the *Barrientos* Proposed Forced Labor Class

TYPE OF DISTINCTION	*OWINO* NATIONAL FORCED LABOR CLASS	*BARRIENTOS* PROPOSED FORCED LABOR CLASS
Class Definition	All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008 and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the ICE PBNDS, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid. Doc. 50-2, at 12.	All civil immigration detainees who performed work for CoreCivic at Stewart in the Volunteer Work Program between December 23, 2008 and the date the class is certified. Doc. 1 at ¶94; *Barrientos v. CoreCivic, Inc.,* 332 F. Supp. 3d 1305, 1312 (M.D. Ga. 2018)
Type of Work Covered by Class	Cleaning of the common living areas in CoreCivic's immigrant detention centers. Doc. 50-2, at 39.	All work performed as part of the Voluntary Work Program at Stewart, including preparing, cooking, and serving meals; washing dishes; cleaning the kitchen and cafeteria before and after meals; performing clerical work for CoreCivic; providing barber services to detained immigrants; scrubbing bathrooms, showers, toilets, and windows; cleaning and maintaining CoreCivic's on-site medical center; cleaning patient rooms and medical staff offices; sweeping, mopping, stripping, and waxing floors; washing detained immigrants' laundry; cleaning intake areas and solitary confinement units; and cleaning and maintaining recreational areas. Doc. 1 at ¶30.
Challenged Policy	CoreCivic's Sanitation and Hygiene Policy and related discipline policies. Doc. 50-2, at 33-34, 39-42.	(1) CoreCivic's policy of depriving detained individuals of basic necessities to coerce them to join the VWP; and (2) CoreCivic's policy of punishing or threatening to punish individuals in the VWP who refuse to work (or are perceived as refusing to work). Doc. 1 at ¶¶36-60.
Detained Immigrants at Stewart Who Would be Covered	Individuals who performed work, either paid or unpaid, cleaning the common living areas at Stewart. Doc. 50-2, at 12.	All Voluntary Work Program participants, including individuals who worked in the following types of jobs: Administration Porter; Barber; Commissary; Hallway Porter; Intake Worker; Kitchen Worker; Laundry Worker; Library Worker; Medical Porter; Night Floor Crew; Pod Porter; Recreation/Gym Worker; Sally port/Chemical Porter; Shower Porter; Unit Law Library Helper; Visitation Porter. Doc. 1 at ¶29.
Relief Sought	Damages. Doc. 50-2, at 11-13, 22.	Damages, injunctive relief, and declaratory relief. Doc. 1 at ¶93.

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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

CERTIFICATE OF SERVICE

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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 June 11, 2020, I served the following document(s):

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION 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 June 11, 2020, at Chandler, Arizona.

s/ Nicholas D. Acedo