

The Honorable Robert J. Bryan

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

Case No.: 3:17-cv-05806-RJB

**DEFENDANT'S MOTION FOR
RECONSIDERATION OF ORDER (DKT.
322) AND, IN THE ALTERNATIVE, TO
REOPEN DISCOVERY AND MOVE FOR
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:
Date: October 23, 2019

1 The GEO Group, Inc. ("GEO") respectfully moves for reconsideration of the Court's
 2 October 9, 2019 Order (Dkt. 322) ("Order") regarding GEO's motion for summary judgment
 3 based on intergovernmental immunity. In its September 24, 2019 Order (Dkt. 306), the Court
 4 invited the parties to "respond to point out errors, if any," with its Proposed Order (Dkt. 306-
 5 1). GEO's responsive filing identified no errors because there were none. (Dkt. 320).

6 In its Order, the Court stated that it was denying summary judgment because
 7 "[m]aterial issues of fact remain regarding the proper comparators for determination of
 8 whether the State discriminates against the Defendant in the State's proposed application of
 9 the Minimum Wage Act." Dkt. 322 at 1. In response, GEO now points the Court's attention
 10 to **evidence in the record** showing "[b]oth the State and GEO operate detention facilities
 11 for civilly detained individuals" and "[b]oth operate Voluntary Work Programs" not subject
 12 to the minimum wage (Order; Proposed Order, p. 1:14-15, 8:1-5, n.3). GEO moves for
 13 reconsideration because the factual record is amply developed to support the Proposed
 14 Order's legal conclusions. Below are citations to the State's previously filed sworn testimony
 15 and evidence regarding State prison and civil detention work programs that are voluntary
 16 and do not follow the Minimum Wage Act ("MWA").

17 Additionally, in July 2019 and prior to the United States' filing of its Statement of
 18 Interest (Dkt. 290) ("Statement of Interest"), the Court denied GEO the opportunity for
 19 further discovery on these issues. (Dkt. 243). Thus, to the extent the Court is not willing to
 20 reconsider the Order, GEO moves to reopen discovery for the limited purpose of developing
 21 the record on its intergovernmental immunity defense and for an opportunity to move for
 22 summary judgment on intergovernmental immunity prior to trial.

23 **A. Motion for Reconsideration**

24 **1. Standard of Review**

25 Local Civil Rule 7(h)(1) authorizes reconsideration upon "a showing of manifest error
 26 in the prior ruling." This Court has explained, "'manifest error' is 'an error that is plain and
 27 indisputable, and that amounts to a complete disregard of the controlling law or the credible

1 evidence in the record." *Casteel v. Charter Comm's, Inc.*, No. 3:13-cv-5520, at *1 (W.D.
 2 Wash. Dec. 1, 2014). GEO respectfully submits this standard is met because the Court did
 3 not enter the Proposed Order despite the clear and undisputed "credible evidence in the
 4 record" supporting the Proposed Order's legal findings.

5 **2. Undisputed Facts¹**

6 The State operates a Special Commitment Center ("SCC") for sex offender civil
 7 detainees. RCW § 71.09, *et seq.* The State established – through a sworn declaration filed
 8 months *before* the filing of the Statement of Interest and the Court's Proposed Order – the
 9 SCC² operates a voluntary work program ("Program is Non-Compulsory," no one is
 10 "compelled to participate," and participation "is voluntary" (Dkt. 220, State Decl., para. 3;
 11 Dkt. 220-1, Policy 214, p. 5, para. 1)) and does not follow the MWA (Dkt. 220, State Decl.,
 12 ¶ 3; Dkt. 220-1, p. 5, ¶ 1). For program participants, "[p]ay rates range between \$1-3/hour".
 13 *Id.*

14 The existing factual record is also sufficiently developed with regard to the State's
 15 prison system. The State also established via sworn testimony and evidence prior to the
 16 filing of the Statement of Interest and the Court's Proposed Order that Washington's
 17 Department of Corrections' prisoner work program is voluntary ("voluntary," potential
 18 participants must express a "voluntary interest") (Dkt. 220-12, p. 3, § III; p. 5, § III(A)(6))
 19 and does not follow the MWA because it pays less than minimum wage (pay ranges: \$0.65-

22 _____
 23 ¹ The undisputed facts in Section 2 below were not only in the record before the filing of the Statement of
 24 Interest, but are also supported by the State's own declarations filed in support of its October 4, 2019 Response
 25 to the Court's Proposed Order (Dkt. 308) when intergovernmental immunity was directly at issue. *See* Decl. of
 26 Byron Eagle, Dkt. 309, ¶¶ 2, 3, and 8 (affirming SCC operates a voluntary work program that pays detainees
 between \$1-\$3 per day); Decl. of Debra Eisen, Dkt. 312, ¶¶ 4, 5, and 9 (confirming the Washington DOC
 contracts with private contractors, **including GEO**, for the detention of Washington prisoners outside the state
 and authorizes the payment of \$2.00 per day for work performed under the facility's volunteer work program).

27 ² In the State's June 10, 2019 response to GEO's second motion to compel discovery on details of the State's
 prison and detention center work programs (Dkts. 215-216 (with exhibits)), the State argued it had already
 provided sufficient information and filed therewith a supporting declaration providing the undisputed, sworn
 testimony and evidence cited herein (Dkts. 219-223 (with exhibits)).

1 \$2.70/hour (Dkt. 220-12, p. 7-9, §§ IV(B)(1)-(3), D(1)-(2), E(1)-(2), (3)). The State
2 provided evidence of work programs at two specific prisons.

3 **Airway Heights Corrections Center** ("Airway"). (State Decl., Dkt. 220, ¶¶ 9-11;
4 Dkts. 220-7, 220-9.) Airway's work program is voluntary ("voluntary") (State Decl., Dkt.
5 220, ¶ 11; Dkt. 220-9, p. 3, § III)), participants must have "expressed voluntary interest"
6 (State Decl., Dkt. 220, ¶ 11; Dkt. 220-9, p. 6, § III(A)(6)), and payment is \$0.30-2.60/hour
7 (State Decl., Dkt. 220, ¶ 9; Dkt. 220-7, p. 2-5; State Decl., Dkt. 220, ¶ 11; Dkt. 220-9, p. 8-
8 10, §§ IV(C)(1)-(3), IV(E)(1)-(2), IV(F)(1)-(2), (4)).

9 **Cedar Creek Corrections Center** ("Cedar"). (State Decl., Dkt. 220, ¶ 12; Dkt. 220-
10 10.) Cedar's work program is voluntary ("voluntary") (State Decl., Dkt. 220, ¶ 12; Dkt. 220-
11 10, p. 5, § III), participants must have "expressed voluntary interest" (State Decl., Dkt. 220,
12 ¶ 12; Dkt. 220-10, p. 5, § III(A)(6)), and payment is \$0.55-\$2.60/hour (State Decl., Dkt.
13 220, ¶ 12; Dkt. 220-10, p. 7-9, §§ IV(C)(1)-(3), IV(E)(1)-(2), IV(F)(1)-(2), (4)).

14 Finally, the existing factual record is also well developed regarding the State's
15 reliance on RCW § 72.68.040 to contract with "private companies in other states" for the
16 detention of prisoners convicted of a felony "in the courts of [Washington] and sentenced to
17 a term of imprisonment in a [Washington] correctional institution." RCW § 72.68.040.
18 Again, long before the filing of the Statement of Interest and the Court's Proposed Order,
19 GEO established via sworn testimony and evidence the Washington Department of
20 Correction's fully executed 2015 contract with GEO for the housing of Washington
21 prisoners in GEO's North Lake Correctional Facility in Michigan. (Dkt. 107, Decl. of Joan
22 K. Mell, para. 8; Dkt. 107-7, Washington DOC Contract No. K10825, p. 4, §§ 3.05 and
23 4.05)) Pursuant to Washington's contract with GEO, the work program was voluntary
24 (Mell Decl., Dkt 107-7, § 4.05) and the Washington state prisoners, called the "WDOC
25 Offenders", were eligible to participate in the facility's "Offender Work Program" for \$2.00
26 per day for work assignments of six hours or more. (Mell Decl., Dkt. 107-7, § 3.05).

3. Legal Rulings

The Court's legal conclusion in the Proposed Order was that based on new case law, *U.S. v. California*, 921 F.3d 865 (9th Cir. 2019) and *Dawson v. Steager*, 586 U.S. ___, 139 S.Ct. 698 (2019), when analyzing intergovernmental immunity in the immigration context, a federal contractor (GEO) is considered the same as the federal government (Immigration and Customs Enforcement ("ICE")). (Proposed Order.) Since GEO and ICE stand in the same shoes, the proper comparator for intergovernmental immunity purposes is the State of Washington itself. (*Id.* at p. 8:1-5.) The Court's Order does not alter this correct legal conclusion, but simply states the Court is not satisfied the existing factual record supports a ruling in GEO's favor. (Order.) And whether the proper comparator is the State's SCC (civil detainees) or prisons, there is no dispute the factual record the Court needed to rule in GEO's favor exists and is identified above.

B. Motion to Reopen Discovery and Move for Summary Judgment

In the alternative, if the Court determines the undisputed evidence in the record is insufficient, GEO respectfully requests the Court reopen discovery on GEO's intergovernmental-immunity defense and allow GEO to file a pretrial dispositive motion based on that further-developed record.

1. Standard

Fed. R. Civ. P. 16(b) provides a case management schedule can be modified upon a showing of good cause and by leave of the district judge. The good cause standard primarily considers the diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

2. Reopening Discovery

Courts consider six factors when deciding whether to reopen discovery: (1) is trial imminent; (2) will the non-moving party be prejudiced; (3) was the moving party diligent; (4) was the need for additional discovery foreseeable in light of the time allowed for discovery; (5) is the discovery likely to lead to relevant evidence, and (6) is the request

1 opposed. *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995),
2 *cert. granted in part*, 519 U.S. 926 (1996), *vacated on other grounds*, 520 U.S. 939 (1997).
3 This analysis is in the Court's discretion. *Id.* All but one factor weigh in favor.

4 First, trial is not imminent. It is set for March 2, 2020. (Dkt. 217.) There is sufficient
5 time for limited discovery (and summary judgment briefing, as addressed below).

6 Second, the State will not be prejudiced by being required to produce records and
7 submit to other necessary discovery related to its prison and civil detention work programs
8 necessary for the Court's analysis of the critical issue of intergovernmental immunity.

9 Third, GEO diligently pursued discovery. GEO served written discovery on the
10 State's prison and detention work programs, determined the State's responses were
11 insufficient, and moved to compel. (Dkts. 113, 114 (with exhibits), 118-120 (same), 125,
12 131). The Court granted the motion and the State served further responses. (Dkts. 133, 215.)
13 The responses were insufficient and GEO moved to compel again. (Dkts. 215-216 (with
14 exhibits), 219-223 (same), 225-226 (same)). The Court denied the second motion –
15 foreclosing further development of the record on this (now) clearly relevant issue. (Dkt.
16 243.)

17 Fourth, there was no foreseeability of the need for this discovery. Neither the Court
18 nor the parties could have anticipated that after the Court entered its orders denying GEO's
19 motion for summary judgment on intergovernmental immunity (Dkt. 162 (Dec. 10, 2018)),
20 there would be two 2019 cases making clear the defense remains at issue (Proposed Order,
21 Dkt. 306-1 (citing *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *Dawson v.*
22 *Steager*, 586 U.S. ___, 139 S. Ct. 698 (2019)). Since intergovernmental immunity appeared
23 to no longer be at issue, further discovery into the gravamen of the fate of this case – the
24 State's prison and civil detention work programs – incorrectly appeared unwarranted.

25 Fifth, the discovery will lead to relevant evidence as stated by the Court in the Order.
26 If the Court concludes – after review of the evidence in the record cited above – that the
27 factual record is not sufficiently developed, the only way to fill the gap is for the parties to

1 engage in discovery related to the State's work programs as detailed in the Court's Proposed
2 Order (Dkt. 306-1) and Order (Dkt. 322) that the Court previously denied GEO from
3 pursuing. (Order, Dkt. 243.)

4 The only factor weighing against granting this motion is the State's anticipated
5 opposition. This, standing alone, is insufficient.

6 **3. Motion for Summary Judgment**

7 GEO seeks summary judgment review based on a further developed record. Trial
8 should not occur without these steps occurring first. *Smith v. Ardew Wood Prods, Ltd.*, No.
9 C07-5641, 2008 WL 2275541, *2 (W.D. Wash. June 3, 2008) ("Defendant is entitled to the
10 opportunity to conduct discovery in support of [its] affirmative defenses.")

11 **C. Additional Evidence**

12 The Court did not consider GEO's supplemental evidence (Proposed Order, p. 2:5-7
13 (addressing GEO's filings at Dkt. 203-305)) and it is unclear if the Court considered the
14 State's supplemental evidence (Order (not addressing the State's filings at Dkts. 208-318,
15 319)). *See* footnote 1, *supra*. If the Court considered the State's evidence despite not
16 considering GEO's evidence, this would be in error. Clarification, and possible
17 reconsideration, are needed.

18 **CONCLUSION**

19 GEO respectfully asks the Court to reconsider its Order, rule that intergovernmental
20 immunity requires dismissal, and enter dismissal and judgment on the State's MWA and
21 unjust enrichment claims. In the alternative, GEO requests the Court reopen discovery for
22 further development of the record on the defense and to set a new deadline for GEO to move
23 for summary judgment based thereon.

24 Respectfully submitted, this 23rd day of October, 2019.

25 By: s/ Colin L. Barnacle

26 **AKERMAN LLP**

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PROOF OF SERVICE

I hereby certify on the 23rd day of October, 2019, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER (DKT. 322) AND, IN THE ALTERNATIVE, TO REOPEN DISCOVERY AND MOVE FOR SUMMARY JUDGMENT** via the Court's CM/ECF system on the following:

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