

The Honorable Robert J. Bryan

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

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

STATE OF WASHINGTON,

 Plaintiff,

 v.

THE GEO GROUP, INC.,

 Defendant.

CIVIL ACTION NO. 3:17-cv-05806-RJB

STATE OF WASHINGTON’S REPLY
IN SUPPORT OF MOTION TO
COMPEL PARTIALLY
UNREDACTED LETTER AND
RELATED FINANCIAL
CALCULATIONS

NOTE ON MOTION CALENDAR:
September 4, 2020

I. INTRODUCTION

Nothing in GEO's belated opposition cures the fact that GEO has withheld responsive, non-privileged financial discovery for years, notwithstanding orders of this Court and the Ninth Circuit. GEO's own calculations of the value of work detainees perform at the NWDC is financial information Washington has long sought. GEO again seeks to avoid producing this information by accusing Washington of delay, downplaying the testimony of its own Chief Financial Officer (CFO), whom GEO disclosed for the first time six months after discovery closed, and asserting the information is not relevant or responsive to Washington's requests for all documents containing "valuation of the work performed [in] the Voluntary Work Program at the NWDC from 2005 to present" or "per diem rate calculations and models" involving the VWP and labor costs at the NWDC. Because good cause exists for Washington's motion, the Court should once again order GEO to produce the requested financial documents: GEO's underlying financial calculations of the value of detainee work at the NWDC and a partially un-redacted form of GEO's Letter to ICE in which those calculations were disclosed.

II. ARGUMENT

A. New Evidence Obtained in CFO Brian Evans' Deposition Constitutes Good Cause

GEO's primary response is to blame Washington for the timing of this dispute, ECF No. 401 at 3, 5, 6, 8-9, and ignore that GEO had been ordered to produce this financial information long ago. *See* ECF No. 133; ECF No. 296; ECF No. 336. There is good cause for the Court to consider Washington's motion now because new evidence was revealed in the recent court-ordered deposition of GEO's late-disclosed witness, CFO Brian Evans.¹ *See* ECF No. 396 at 6-8. *See also* Fed. R. Civ. P. 16(b)(4); *Jasnosz v. J.D. Ott Co.*, No. C09-09552JLR, 2011 WL 3563345, at *3 (W.D. Wash. Aug. 12, 2011) (new evidence is good cause to modify schedule).

In Mr. Evans' June 2020 deposition, Washington first learned of the CFO's personal

¹ Since GEO had not disclosed Mr. Evans as a person with knowledge until the parties' exchanged pretrial statements more than six months after discovery closed, the Court ordered that Mr. Evans could only be named as a trial witness if Washington was given a chance to depose him. ECF No. 396 ¶ 22, Ex. J at 9:25-10:7.

1 involvement in conducting a financial analysis relevant to Washington’s unjust enrichment
 2 claim. Previously, GEO had failed to disclose that the calculations existed and obfuscated the
 3 truth of what was redacted when Washington independently discovered the existence of GEO’s
 4 Letter to ICE and produced it to GEO near the close of discovery.² ECF No. 396 at 3-5; ECF
 5 No. 171. GEO had represented that GEO’s Letter to ICE only “estimates legal costs for
 6 defending various lawsuits,” and that the redacted portion of the letter at issue here was not
 7 GEO’s own analysis, but “a summary of the relief *requested by Plaintiffs* (in the aggregate).”
 8 ECF No. 396 at 4; ECF No. 397 ¶ 15, Ex. F (emphasis added). Washington could not test these
 9 representations, as GEO had failed to disclose Mr. Evans during discovery. ECF No. 357 at 17.

10 In deposition, Mr. Evans directly contradicted GEO’s prior representations that GEO’s
 11 Letter to ICE contained no relevant information. *First*, Mr. Evans testified that he, and the team
 12 he supervised, calculated the value of detainee labor at the NWDC and the two other facilities
 13 with detainee labor claims; they calculated the amount it would cost if the work now done by
 14 detainees for \$1 a day “was all done by civilian employees,” paid at prevailing wage. ECF No.
 15 397 ¶ 23, Ex. K at 114:19-117:7; 101:20-23; 116:3-117:7; 117:21-118:22. In particular, Mr.
 16 Evans’ financial analysis considered what it would take, in a facility of the size of the NWDC,
 17 to employ full-time workers from the community to conduct the work presently done in the VWP
 18 by detainees, and applied wage determination job descriptions and rates to that work. *Id.* at
 19 110:8-113:16. *Second*, Mr. Evans testified that this financial analysis was included in GEO’s
 20 Letter to ICE, which GEO’s Chief Executive Officer communicated to ICE as the cost of
 21 complying with Plaintiffs’ detainee wage demands, *id.* at 114:19-116:2, following the sentence:
 22 “We have conducted an estimation of the costs necessary to achieve compliance with the
 23 plaintiffs.” *Id.* at 116:14-117:3. *Third*, Mr. Evans clarified that the redacted content includes data
 24

25 ² GEO notes that the FOIA document has Bates Stamp numbers from 2018, falsely implying Washington
 26 possessed the document for a year before production. ECF No. 401 at 9 n.8. As explained before, Washington did
 not itself make the FOIA request, but provided GEO’s Letter to ICE to GEO on June 4, 2019 after receiving it from
 a third party, and produced the full set of FOIA documents within the discovery period. ECF No. 397 ¶¶ 5, 7.

1 for the three facilities facing litigation, including the NWDC. *Id.* at 116:14-117:3.

2 On August 3, 2020, after receiving the deposition transcript to confirm this new evidence,
3 Washington revived its request for a partially un-redacted copy of GEO's Letter to ICE and the
4 underlying financial calculations. ECF No. 397 ¶ 24, Ex. L. At the LCR 37 conference on August
5 7, 2020, GEO again refused to produce the documents and, for the first time, asserted privilege.
6 ECF No. 397 ¶¶ 25-28. Washington filed its motion less than two weeks later.

7 Mr. Evans' testimony confirms that GEO withheld responsive discovery previously
8 ordered to be produced and directly contradicts GEO's prior representations in LCR 37
9 conferences upon which Washington relied to hold off in seeking a motion to compel. *See* ECF
10 No. 396 at 5; ECF No. 397 ¶ 20. Good cause exists to consider Washington's motion now.

11 **B. GEO's Calculations Are Relevant to Washington's Unjust Enrichment Claim**

12 Having shown good cause, the Court should order GEO to produce the partially un-
13 redacted GEO's Letter to ICE and its underlying financial analysis because they are relevant to
14 Washington's unjust enrichment claim, are responsive to Washington's discovery requests, and
15 should have been produced in accordance with the Court's prior orders. *See* ECF No. 133; ECF
16 No. 296; ECF No. 336. GEO's arguments that the redacted analysis in GEO's Letter to ICE "is
17 not relevant to the State's (discovery) requests," "is based upon a *hypothetical cost* if litigation
18 nationwide were to be successful," *see* ECF No. 401 at 8 (emphasis added), and that there was
19 no "valuation of work performed" by detainee workers, ECF No. 401 at 10, are meritless.

20 *First*, GEO concedes its CFO's admission that "there was some analysis done at some
21 point regarding. . . advising the government on the cost of what the labor would look like,
22 potentially, if it was all done by civilian employees." ECF No. 401 at 7. As such, GEO cannot
23 escape the fact that it that undertook a financial analysis of the market value of detainee work
24 performed in the VWP from the perspective of calculating the *replacement cost* of that work
25 were it to be done by civilian employees paid prevailing wages. This analysis is an element of
26 Washington's unjust enrichment claim, as well as the fair market value approach to calculating

1 its remedy. *Young v. Young*, 191 P.3d 1258, 1262, 1265 (Wash. 2008). Further, the financial
 2 analysis is responsive to Washington’s discovery. *See, e.g.*, ECF No. 133 at 9-10 (RFP No. 43
 3 requires GEO to produce “documents that contain financial analysis, financial models, ... and
 4 valuation of the work performed, or other assessments of the VWP at the NWDC.”)

5 *Second*, GEO’s suggestion that the analysis is only “hypothetical” should also fail. ECF
 6 No. 401 at 10. Mr. Evans testified that the financial calculations done in 2018 involved an
 7 adjusted model of the per diem rates GEO would charge ICE if detainee workers were replaced
 8 with civilian employees. ECF No. 397 ¶ 23, Ex. K at 102:19-23. The Court has compelled GEO
 9 to produce all documents related to “per diem rate calculations and models related to GEO
 10 Group’s NWDC Contract(s) from 2005 to the present, including . . . ‘Voluntary Work Program’
 11 costs and expenses; labor costs and payroll expenses (excluding Voluntary Work Program)”.
 12 ECF No. 133 at 10 (RFP No. 52, as modified). Therefore, while these revised per diem rate
 13 calculations have not been implemented, they have been calculated, and should be produced.

14 *Finally*, GEO attempts to avoid its discovery obligations by asserting that the redacted
 15 portion of GEO’s Letter to ICE contains only aggregated data not delineated by facility. *See,*
 16 *e.g.*, ECF No. 401 at 3-4, 8. Even if true, that financial information, and how GEO calculated it,
 17 is relevant because the aggregated data *contains* the NWDC data GEO has been ordered to
 18 produce regarding valuation of detainee labor and per diem rate calculations and models. The
 19 Court should compel it, as well as the financial calculations related to the NWDC itself.

20 **C. The Court Has Not Excluded GEO’s Calculations of the Value of Detainee Labor**

21 GEO also stretches the Court’s Orders regarding GEO’s motions in limine (MIL) in an
 22 attempt to gloss over its own discovery failure. GEO’s MIL No. 3 sought to exclude all evidence
 23 of GEO’s attorneys’ fees and costs of litigation. ECF No. 355 at 6. Washington did not oppose
 24 the request regarding fees and costs, ECF No 361 at 6-7, and the Court granted GEO’s MIL No.
 25 3 “for exclusion of evidence related to GEO’s legal fees, including any request for compensation
 26 for legal fees sent to ICE.” *See* ECF No. 374; ECF No. 397 ¶ 21, Ex. J at 11:3-5. The Court did

1 not, however, exclude evidence related to GEO's calculations of the value of work performed.
2 *Id.* Washington raised concern that GEO may try to use this ruling to exclude otherwise relevant
3 evidence, such as GEO's Letter to ICE, *see* ECF No. 361 at 6-7, but the Court did not reach that,
4 stating it "[didn't] know what kind of side issue that might be, but it is not something that we
5 need to get into." ECF No. 397 ¶ 21, Ex. J at 11:5-8. Similarly, GEO's MIL No. 5, to exclude
6 evidence that GEO is involved in other lawsuits, was presented by GEO without mention of
7 GEO's Letter to ICE. *See* ECF No. 355 at 8. Again, the Court granted the general motion, subject
8 to offers of proof, without reaching this dispute. ECF No. 397 ¶ 21, Ex. J at 11:23-25. In short,
9 the Court has never ruled on the admissibility of GEO's underlying financial calculation to come
10 into compliance with Plaintiffs' fair wage demands or the portion of GEO's Letter to ICE at
11 issue here. ECF No. 397 ¶ 21, Ex. J at 11.

12 **D. No Privilege Exists for Financial Calculations GEO Provided to ICE**

13 GEO has not established any privilege to bar production of a partially un-redacted version
14 of GEO's Letter to ICE or the underlying financial calculations. GEO admits it did not previously
15 claim this information as privileged or provide a privilege log; it merely says it had no such
16 obligation. ECF No. 401 at 10. GEO nonetheless attempts to avoid the glaring absence of a
17 necessary element for all claims of privilege—the work product or communications of an
18 attorney—by claiming GEO's Letter to ICE is “a letter to ICE, its client, with whom it discussed
19 this lawsuit.” ECF No 401 at 11. While the financial calculations may have been generated
20 because of a communication between GEO's counsel and its CFO, and the content of those
21 conversations may be privileged, *cf.* ECF No. 401 at 13, the calculations are not. Work-product
22 privilege does not allow withholding of “relevant and non-privileged facts [that] remain hidden
23 in an attorney's file.” *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). And when GEO *disclosed*
24 the calculations to ICE, a third party, it lost any alleged privilege. *See* ECF No. 396 at 10-12.

25 The cases GEO cites to evoke the work product privilege, and sidestep its disclosure to
26 a third party, are unpersuasive. Instead, they affirm that protected work product be of an *attorney*

1 prepared “in anticipation of litigation” and that the disclosure be to *seek legal advice*. *See, e.g.*,
2 *Hausman v. Holland Am. Line-U.S.A.*, No. CV11-1308 BJR, 2015 WL 8327934, at *1 (W.D.
3 Wash. Dec. 9, 2015) (“work-product doctrine ... serves to protect written materials that lawyers
4 prepare in anticipation of litigation”) (quotation omitted); *In re Superior Nat’l Ins. Grp.*, 518
5 B.R. 562, 577 (Bankr. C.D. Cal. 2014) (common interest in bankruptcy preserves privilege if
6 “sharing was necessary to accomplish the privilege holder's purpose in seeking legal advice”);
7 *Microban Sys., Inc. v. Skagit Nw. Holdings, Inc.*, No. C15-932-MJP, 2016 WL 7839220, at *1
8 (W.D. Wash. Aug. 17, 2016) (common interest over attorney opinion and advice pursuant to
9 confidentiality agreement). GEO fails to prove the calculations were *attorney* work product,
10 prepared in anticipation of litigation, or shared to seek legal advice with the expectation of
11 confidentiality. Instead, GEO’s letter and calculations were a business strategy to notify ICE of
12 GEO’s future contract position if litigation fails, ECF No. 401 at 13, and GEO’s one-way effort
13 to plea for ICE’s involvement. *Id.*

14 GEO also fails to establish evidence of a common defense strategy required to invoke
15 the common interest doctrine, which allows “attorneys for different clients pursuing a common
16 legal strategy to communicate with each other.” *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129
17 (9th Cir. 2012); *Regents of Univ. of Cal. v. Affymetrix, Inc.*, 326 F.R.D. 275, 279 (S.D. Cal.
18 2018). This privilege fails at the outset because there is no communication between an *attorney*
19 and a party with a common interest. Also, contrary to GEO’s assertion, ECF No. 401 at 11, the
20 Court’s prior rulings are *consistent* with binding authority cited by Washington that common
21 interest communications must be in accordance with an agreement or joint defense strategy. ECF
22 No. 243 at 6-7; ECF No. 396 at 10. GEO’s privilege fails for lack of evidence of a joint strategy
23 in accordance with a written or unwritten agreement between GEO and ICE in May 2018.

24 III. CONCLUSION

25 For the foregoing reasons, Washington requests that the Court order GEO to produce a
26 partially un-redacted version of the GEO Letter to ICE and its underlying financial calculations.

1 Dated this 4th day of September 2020.

2 Respectfully submitted,

3 ROBERT W. FERGUSON
4 Attorney General of Washington

5 *s/ Andrea Brenneke*

6 MARSHA CHIEN, WSBA No. 47020
7 ANDREA BRENNEKE, WSBA No. 22027
8 LANE POLOZOLA, WSBA No. 50138
9 PATRICIO A. MARQUEZ, WSBA No. 47693
10 Assistant Attorneys General
11 Office of the Attorney General
12 800 Fifth Avenue, Suite 2000
13 Seattle, WA 98104
14 (206) 464-7744
15 marsha.chien@atg.wa.gov
16 andrea.brenneke@atg.wa.gov
17 lane.polozola@atg.wa.gov
18 patricio.marquez@atg.wa.gov
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 4th day of September 2020 in Seattle, Washington.



CAITILIN HALL
Legal Assistant

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