

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

**THE GEO GROUP, INC.'S REPLY IN
SUPPORT OF MOTION FOR
RECONSIDERATION OF ORDER
GRANTING STATE OF
WASHINGTON'S MOTION TO
COMPEL PARTIALLY UNREDACTED
LETTER AND RELATED FINANCIAL
CALCULATIONS (DKT. 409)**

NOTE ON MOTION CALENDAR:

Date: October 22, 2020

I. INTRODUCTION

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2 The evidence before the court establishes that the redacted figures within Exhibit 365,
3 a letter to ICE, are work product, and the work product protection was not waived when those
4 numbers were shared with ICE. ICE maintained the confidentiality of the figures, declining to
5 disclose the numbers. Further, the underlying calculations were *never* disclosed so their
6 protection is without question. Indeed, the Court in *Menocal* recently maintained the work
7 product protections of the exact calculations at issue here, concluding that those documents
8 were created in furtherance of the potential settlement of pending litigation. Brian Evans
9 similarly testified in his deposition that the calculations were related to the instant lawsuit.
10 ECF 399 at 4. As a non-lawyer, he was not sure if those conversations were “privileged or
11 whatnot,” *id.*, but explained that all of the conversations were with general counsel. ECF 402-
12 2 at 8. The undersigned submitted a declaration with GEO’s motion to reconsider further
13 explaining the settlement purpose of the underlying calculations. ECF 420. Likewise, the plain
14 text of the letter states that the calculations were performed *because of* litigation, by
15 attempting to estimate the potential costs associated with “class action *lawsuits filed by the*
16 *Plaintiffs: State of Washington* [et. al.]” ECF 362-1 (Trial Exhibit 365) (emphasis added).
17 Finally, as explained by Dana Eismeier, who was counsel for GEO at the time the numbers
18 were created, the numbers were created only for purposes of possible settlement. ECF 422-1
19 at 4.

20 Yet, the State declines to address the evidence before it and provide this Court with
21 any analysis as to how, considering the evidence, the documents are not protected by the work
22 product doctrine. Instead, the State argues “there is no evidence the redacted portion of the
23 GEO Letter to ICE and the underlying financial calculation were done ‘because of litigation,’
24 reveal any attorney legal advice or mental impressions, or were produced at the direction of
25 the attorney as a part of GEO’s litigation defense.” ECF 423 at 5. This argument is not
26 plausible in light of the evidence before this Court. Because the evidence clearly belies the
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1 State’s position, this Court should grant GEO’s motion to reconsider and find that the work
2 product protections apply.

3 II. ARGUMENT

4 A. The State Concedes that Documents Created “Because of” Litigation are 5 Protected by the Work Product Doctrine.

6 In its opposition, the State concedes that documents created “because of” litigation
7 are covered by the work product doctrine. ECF 423 at 5. It further agrees with GEO that the
8 test for determining whether a document constitutes work product is whether it was (1)
9 prepared for litigation or possible litigation; and (2) prepared by a party or that party’s
10 representative. *Id* at 4. Here, GEO produced evidence that that the document was created
11 exclusively for litigation (or, at a minimum, “because of” litigation). Mr. Evans, at the
12 direction of counsel, performed an assessment of the claims in this case and others. ECF 401
13 at 6-7 (providing excerpts of Mr. Evans’ testimony explaining counsel’s role in directing the
14 calculations related to the present litigation). These calculations were performed in
15 furtherance of settlement discussions in front of a federal magistrate judge in Colorado. ECF
16 362-1 (Trial Exhibit 365). As the Judge in *Menocal* explained, parties “produce a lot of
17 numbers for me in a settlement conference that you never intend to see the light of day
18 because you’re doing it just for purposes of discussion and negotiation.” ECF 422-1 at 5.
19 Accordingly, the information at issue is clearly protected by the work product doctrine. *See*
20 *also* ECF 422 (noting that the *Menocal* court found the information to be privileged with the
21 same testimony from Mr. Evans before it).

22 B. The State’s Assertions are Belied by the Evidence.

23 In its Motion, the State misrepresents the evidence to fit its theory, rather than
24 addressing the evidence and explaining why it should prevail. In so doing, it fails to present a
25 colorable basis for disclosure. More specifically, in explaining why the calculations were not
26 undertaken “because of” litigation, the State argues that Mr. Evans made clear the calculations
27 were “*not* undertaken in relation to litigation.” ECF 423 at 7. Yet, the *very testimony the State*

1 *cites* from Mr. Evans clearly states the opposite: “I think *in connection with these lawsuits*
 2 there has been an evaluation” ECF 423 at 8 (emphasis added). In addition to mentioning
 3 the instant lawsuit, Mr. Evans also referenced prospective litigation by GEO as the impetus
 4 for the calculations: “[i]f for some reason plaintiffs are successful in their claim, then we’re
 5 going to make a claim against the federal government” *Id.*; *see also* ECF 422-1
 6 (referencing the same testimony from Mr. Evans). Despite the State’s arguments to the
 7 contrary, an indemnification claim provides a clear basis for an anticipated lawsuit.

8 Similarly, the State argues that GEO failed to submit any evidence that the letter,
 9 Exhibit 365, was related to anticipated or ongoing litigation. This argument borders on
 10 specious. The letter was sent following a settlement conference where both sides in *Menocal*
 11 determined that ICE’s involvement would further settlement. ECF 422-1 at 3-4. To that end,
 12 the letter at issue *explicitly references* the instant litigation (as well as other cases filed across
 13 the country), details the “rapidly increasing costs in defending these lawsuits,” provides an
 14 estimate of the potential costs if Plaintiffs were to succeed, and implores the Department of
 15 Justice *to take over defense* of the lawsuits. ECF 362-1 (Trial Exhibit 365). Indeed,
 16 eliminating all references to litigation (or its associated costs) leaves only the introduction and
 17 conclusion. Put simply, the letter was drafted and sent *because of* litigation. Furthermore, the
 18 evidence makes clear that the letter was the result of a settlement conference, leaving no doubt
 19 about its relationship to litigation. ECF 422-1; ECF 420.

20 Finally, the State argues in a footnote that it was unaware of any suggestion that GEO
 21 should involve ICE in settlement. This, too, is inaccurate. Just recently the State participated
 22 in settlement discussions following GEO’s receipt of the letter attached as Exhibit A.¹ The
 23 State indicated during those discussions that it was aware of the *Nwauzor* Plaintiffs’
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26 ¹ GEO has redacted all information other than that which makes plain that *Nwauzor* Plaintiffs (whose claims
 27 have been consolidated with those here) initiated those discussions by asking GEO to involve ICE. The
 redactions serve to avoid the disclosure of any information that is protected by Fed. R. Civ. P. 408. Upon request
 of the Court, GEO will submit an unredacted copy for *in camera* review.

1 communication to GEO. That communication explicitly asked GEO to communicate with
2 ICE. *See* Exhibit A.

3 **C. GEO Did Not Waive Work Product Protection.**

4 GEO did not waive its work product protection as it relates to May 2018 letter to ICE
5 (ECF 362-1) or the underlying documents. “Unlike attorney-client privilege, attorney work-
6 product protection is not automatically waived upon disclosure to third parties.” *California*
7 *Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 645 (E.D. Cal. 2014).
8 Accordingly, such disclosure generally “does not waive the work product immunity unless it
9 has substantially increased the opportunities for potential adversaries to obtain the
10 information.” Wright, Miller, Kane & Marcus, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.);
11 *Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1022 (D. Ariz. 2020). Thus,
12 disclosing information to a third-party with a common interest does not waive the work
13 product privilege. *See California Sportfishing Prot. All.*, 299 F.R.D. at 646 (collecting cases).

14 Here, GEO provided the letter at issue to ICE, noting their common interests in the
15 lawsuits related to ICE’s Voluntary Work Program. ECF 362-1. In it, GEO provided an
16 estimate of possible costs of compliance should Plaintiffs succeed in their lawsuit. *Id.* This did
17 not waive the work product immunity. When GEO sent the letter to ICE, it did not increase
18 the opportunity for adversaries to obtain the information. This is borne out by the fact that
19 Plaintiffs did not receive an unredacted copy of the letter from ICE. To the contrary, when
20 ICE released the document at issue, it maintained redactions on the exact portion which GEO
21 seeks to maintain redaction—indicating the parties’ common expectation of confidentiality.
22 Thus, the disclosure did not waive the work product doctrine.

23 Further, at *no point* did GEO ever produce the calculations to ICE—precluding any
24 possible claim of waiver. ECF 420. Accordingly, even if this Court were to find that GEO
25 waived its work product privilege as to the letter (which ICE has never provided to Plaintiffs
26 in an unredacted form), Plaintiffs cannot establish waiver as to the calculations, which were
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1 never shared with ICE or any other third-party (other than verbally to the Magistrate Judge in
2 *Menocal* as part of a settlement conference in the midst of litigation).

3 Plaintiffs also argue that Mr. Evans waived the privilege in his declaration during his
4 deposition. This is not so. Mr. Evans did not provide any information about the calculations at
5 issue as he could not recall them, explaining any testimony would be a mere guess. ECF 399
6 (108:7-10, 106:8-13). He further explained he did not have access to related records to refer
7 back to. *Id.* (106:18). Instead, he provided general information to the State about the fact of
8 his discussions with Counsel and the general topic of the same. Counsel for GEO also asserted
9 many objections to privilege, while also allowing for basic inquires about the time, place, and
10 methods of communication with counsel. This cannot reasonably be construed as a waiver.

11 Finally, the State argues that GEO waived privilege by not placing the document in a
12 privilege log. The Ninth Circuit has squarely rejected a *per se* waiver rule when documents
13 are not identified in a privilege log. *See Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court*
14 *for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005). To date, this Court has not ruled that
15 the documents at issue were responsive to Plaintiffs discovery requests and should have been
16 included in a privilege log. GEO maintains that the documents are not relevant to Plaintiffs'
17 discovery requests. Accordingly, GEO has not waived its privilege of the underlying
18 documents.

19 **D. The Court did Not Address The Specific Discovery Requests at Issue.**

20 As GEO pointed out in its motion for reconsideration, the Court did not address the
21 specific discovery requests at issue. *See* ECF 419 at 5. Rather, it broadly found that the
22 information the State seeks is potentially discoverable without addressing the specific
23 arguments as to relevance and timeliness raised by the parties.² In arguing that the Court's

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25 ² Indeed, the Court's *sua sponte* determination that the State's motion did not seek to reopen discovery under
26 Fed. R. Civ. P. 16 is important. The Court recently denied GEO's Motion for In Camera Review (ECF 403) as
27 untimely, despite the State's motion being styled the same way and brought under the same procedural posture.
ECF 418; *see also* ECF 396 (request from the state to modify the scheduling order and re-open discovery). In its
Order, this Court concluded that the motion which sought to unredact a document previously disclosed in

1 ruling was clear and related to the Parties' briefing, the State was similarly unable to identify
2 which of its discovery requests were determined by this Court to require production of the
3 documents at issue. ECF 423, 10-11. This is because there is no clarity on this issue. The
4 Court did not so rule. Accordingly, reconsideration is warranted.

5 Under Rule 26, a party need only disclose information it “may use to support its
6 claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(ii). GEO does not intend to use Exhibit 365
7 to support its claims and defenses, and to the contrary, has sought to limit its use at trial. *See*
8 ECF 375. Thus, the document is not subject to disclosure under Rule 26(a). Under Rule
9 26(b)(1), “unless limited by court order” a party may obtain discovery regarding any
10 *nonprivileged matter*. Here, the State is limited by both court order and the fact that the
11 information sought is protected by the work product doctrine. This Court previously limited
12 the universe of information which the State could obtain from GEO in this case. ECF 133.
13 None of those categories of information included calculations related to the potential costs of
14 compliance in this case, let alone in other cases pending across the country. Thus, there is no
15 basis under Rule 26(b) for disclosure of the documents at issue.

16 Moreover, as discussed in GEO’s initial motion, the documents the State seeks are
17 not relevant to its prior discovery responses and therefore there is no obligation to disclose the
18 same under Rule 26(e). The State never propounded a discovery request seeking GEO’s
19 assessment of the potential ramifications of this case and others pending across the country.
20 Thus, GEO was not obligated to supplement its discovery responses with the information at
21 issue here.

22 Finally, should the Court reject GEO’s clear evidence that the documents at issue are
23 protected by the work product doctrine (which it should not), it should accept the State’s own
24 assertions as true: “[the calculations at issue,] of the cost of future-looking operational and
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27 discovery (the *exact same* relief the State sought in its motion) was untimely because it was an attempt to
“reopen discovery.” ECF 418. Had the Court addressed the State’s motion as initially drafted, rather than as
reframed, it would have inevitably reached the same result as it did for GEO’s motion: that it was untimely.

1 staffing changes **ha[ve] nothing to do** with . . . **detainee wage cases**, which seek
2 disgorgement of unjust enrichment and payment of back minimum wages.” ECF 423 at 9.
3 Thus, under the State’s own reasoning, the information they seek is **not relevant** to the claims
4 in this detainee wage case and should not be disclosed.

5 In sum, the Court should grant GEO’s motion to reconsider for the foregoing reasons
6 and enter an order that Exhibit 365 and its underlying calculations are protected by the work
7 product privilege.

8 Respectfully submitted, this 22nd day of October, 2020.

9 By: s/ Adrienne Scheffey

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PROOF OF SERVICE

I hereby certify on the 22nd day of October, 2020, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **THE GEO GROUP, INC.’S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING STATE OF WASHINGTON’S MOTION TO COMPEL PARTIALLY UNREDACTED LETTER AND RELATED FINANCIAL CALCULATIONS (DKT. 409)** via the Court’s CM/ECF system on the following:

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EXHIBIT A



July 22, 2020

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Re: *Nwanzor, et al., v The GEO Group, Inc.*, No. 3:17-cv-05769-RJB (W.D. Wash.)

Dear Colin:

I write on behalf of the Named Plaintiffs and Certified Class in *Nwanzor* to initiate a conversation about potential settlement of this case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Class plaintiffs do not believe it is in the long-term interests of ICE or GEO to have a federal judge (or three) rule [REDACTED]

Because of plaintiffs' likelihood of success on the merits and the risk to GEO (and ICE) [REDACTED]

Class plaintiffs understand that it may be difficult, if not impossible, to make progress in settlement without involving ICE in those discussions, given the nature of the contracting relationship at issue. We invite you to share this letter, and our observations, with ICE. If ICE remains reluctant to involve itself in a negotiation, class plaintiffs recommend [REDACTED]

[REDACTED]

[REDACTED]

Sincerely,

A handwritten signature in black ink that reads "R. Andrew Free". The signature is written in a cursive, slightly slanted style.

R. Andrew Free, Esq.