

I. INTRODUCTION

GEO filed new—and incomplete—information pertaining to the *Menocal v. GEO* case in the District of Colorado as “supplemental authority” in support of its Motion for Reconsideration. ECF No. 422. GEO did so late in the afternoon on the day Plaintiff State of Washington filed its responsive brief, ECF No. 423, and then relied on that belated filing in its subsequent Reply. *See* ECF No. 424 at 2-4. Washington provides this Notice of Supplemental Authority pursuant to W.D. Wash. LCR 7(n), and files the documents below, to ensure the Court has a complete and accurate record upon which to make its decision.

II. SUPPLEMENTAL AUTHORITY

A. The *Menocal* Court’s Order Compelling Unredacted GEO Letter to ICE

As discussed below, the *Menocal* Court found that GEO’s Letter to ICE, the same letter at issue here, was discoverable and ordered GEO to produce it in unredacted form on October 1, 2020. *Menocal v. GEO Group, Inc.*, No.1:14-cv-02887-JLK-MEH, ECF No. 328 (D. Colo. Oct. 1, 2020). A true and correct copy of the Order is attached as Exhibit A.

B. Complete Excerpts of *Menocal* Hearing Transcript re: GEO’s Letter to ICE

In its effort to fight this Court’s Order that it disclose both GEO’s Letter to ICE in partially unredacted form and the underlying financial calculations of what it would cost GEO to replace detainee labor at the NWDC with civilians, as testified to by Mr. Evans, ECF No. 409, GEO filed a partial transcript of the Discovery Hearing in *Menocal*, as “supplemental authority” in this case. ECF No. 422, ECF No. 422-1 (including only pages 15-17 of that transcript). GEO then used that partial transcript in its Reply to claim that the *Menocal* Court withheld the same documents at issue in Washington’s motion on the basis of work product and Federal Rule of Evidence 408. *See* ECF No. 424 at 2-4.

Because GEO’s briefing suggests the opposite of what the *Menocal* Court actually ruled and GEO did not produce the complete excerpts of the hearing transcript as part of its “supplemental authority,” ECF No. 422-1, Washington attaches the full excerpts of the transcript

1 of the hearing held before the Honorable Magistrate Judge Hegarty in the *Menocal* case. A true
2 and correct copy is attached as Exhibit B. As reflected in the transcript, the *Menocal* Court
3 specifically addressed GEO's *waiver* of work product and Federal Rule of Evidence 408
4 protections by GEO's voluntarily producing GEO's Letter to ICE to the federal government.
5 *See, e.g.*, Ex. B (*Menocal* Hearing Transcript) at 18 ("So if this were a document created by GEO
6 for purposes of providing information to me [as settlement judge], it just is not discoverable.
7 However, the different issue is: Do you waive that by voluntarily re-producing that information
8 in a disclosure to the United States Government, and how didn't you waive it?").

9 Further, the *Menocal* Court ordered GEO to produce GEO's Letter to ICE unredacted.
10 On the other hand, the transcript and the Court's Minute Order nowhere reflect that the Plaintiffs
11 in *Menocal* sought production of the underlying calculations and there is no oral ruling or written
12 order denying any such request. That is because the discovery dispute in *Menocal* focused on
13 the letter alone, and its responsiveness to Plaintiffs' RFP No. 40 that requested communications
14 with ICE. *See, e.g.*, Ex. A (Minute Order ordering production of the "document in question,"
15 which was "a letter from GEO to ICE," because it is discoverable); Ex. B at 6 (at issue is "actually
16 a letter, and I have a copy here if Your Honor does not. It's a letter to ICE from GEO..."), at 7
17 (arguing GEO's Letter to ICE is responsive "to our request number 40, which requested all
18 documents referring to and/or relating to communication between Defendant and ICE"), at 10
19 ("I believe that this letter also said ICE..."), and at 25-26 (GEO's counsel responds to Plaintiffs
20 need for GEO's "ultimate numbers" unredacted in the letter by stating "I don't know that *this*
21 *letter* in itself would be helpful in Plaintiffs' efforts"). *Cf.* ECF No. 396 at 8-9 (underlying
22 financial calculations are responsive to Washington's discovery requests).

23 Nor is there any evidence the *Menocal* Court had the benefit of all of the briefing from
24 Washington, or the detailed testimony from Mr. Evans related to the calculations performed
25 regarding the NWDC facility, that justifies production of those calculations in this case. As one
26 example, the *Menocal* Court was not presented with the separate argument, made by Washington

1 here as it relates to the NWDC calculations, that GEO waived any work product over the
2 financial calculations by permitting Mr. Evans to testify at length in deposition as to the method
3 he undertook to calculate the cost of replacing detainee workers with civilian labor at the NWDC
4 and by permitting him to testify to his estimate of the final results. *See* ECF No. 423 at 9-10;
5 ECF No. 399 at 8-9.

6 Finally, the *Menocal* transcript reveals no independent factual basis to claim work
7 product protection over GEO's financial calculations related to the NWDC at all—as the NWDC
8 is not at issue in the *Menocal* litigation, and calculations related to the NWDC would not have
9 been prepared for settlement of *Menocal* or presented to any *Menocal* settlement judge. In short,
10 the *Menocal* Court's ruling supports Washington in that it found GEO's Letter to ICE, and the
11 final results of the financial calculations contained therein, are not work product protected and
12 are discoverable.

13 Dated this 23rd day of October 2020.

14 Respectfully submitted,

15 ROBERT W. FERGUSON
16 Attorney General of Washington

17 *s/ Andrea Brenneke*

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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 23rd day of October 2020, in Seattle, Washington.



CAITILIN HALL
Legal Assistant

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NOTICE OF SUPPLEMENTAL AUTHORITY
EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Michael E. Hegarty

Civil Action No: 14-cv-2887-JLK-MEH
Courtroom Deputy: Christopher Thompson

Date: October 1, 2020
FTR: Courtroom A 1002

Parties:

ALEJANDRO MENOCA, et al.,

Plaintiff,

v.

GEO GROUP, INC., THE,

Defendant.

Counsel:

Rachel Dempsey
Michael Scimone
Adam Koshkin

Adrienne Scheffey
Dana Eismeier
Michael Ley (by phone)

**COURTROOM MINUTES
DISCOVERY CONFERENCE**

Court in session: 2:07 p.m.

Court calls case. Appearances of counsel. The parties meet and discuss discovery disputes with the Court's rulings made on the record. Timothy Jafek of the United States Attorney's Office appears on behalf of the United States.

Discussion held regarding discovery disputes related to Plaintiffs untimely responses to Defendant's discovery requests and whether the document in question, a letter from GEO to ICE, is discoverable pertaining to Plaintiff's interrogatory 40.

ORDERED: The document in question is discoverable and the Court will not enter a ruling at this time as to the supplemental discovery issue, as stated on the record.

Court in recess: 3:02 p.m. Hearing concluded.

Total in-court time: 00:55

*To obtain a transcript of this proceeding, please contact Patterson Transcription Company at (303) 755-4536 or AB Court Reporting & Video, Inc. at (303) 629-8534.

NOTICE OF SUPPLEMENTAL AUTHORITY
EXHIBIT B

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UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

ALEJANDRO MENOCA, MARCOS	.	Case No. 14-cv-02887-JLK-MEH
BRAMBILA, GRISEL	.	
XAHUENTITLA, HUGO	.	
HERNANDEZ, LOURDES ARGUETA,	.	
JESUS GAYTAN, OLGA	.	
ALEXAKLINA, DAGOBERTO	.	
VIZGUERRA, DEMETRIO VALERGA,	.	
on their own behalf and on	.	
behalf of all others	.	Alfred A. Arraj Courthouse
similarly situated,	.	901 19th Street
	.	Denver, CO 80294
Plaintiffs,	.	
	.	
vs.	.	
	.	
THE GEO GROUP, INC.,	.	
	.	
Defendants.	.	
	.	October 1, 2020
.....	.	2:07 p.m.

**TRANSCRIPT OF PROCEEDINGS HELD BEFORE THE HONORABLE
MICHAEL E. HEGARTY, UNITED STATES MAGISTRATE JUDGE**

APPEARANCES:

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	By: Rachel W. Dempsey*
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*By phone.

1 Appearances continued:

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13 Court Recorder:

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901 19th Street
Denver, CO 80294

15 Transcription Service:

AB Litigation Services
216 16th Street, Suite 600
Denver, CO 80202
(303) 296-0017

18 Proceedings recorded by electronic sound recording;
19 transcript produced by transcription service.
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1 (Time noted: 2:07 p.m.)

2 THE COURT CLERK: All rise. Court is now in
3 session.

4 THE COURT: Please be seated.

5 Call in the case that may outlive me, number 14-
6 cv-2887, Alejandro Menocal et al. versus GEO Group, Inc.

7 For the Plaintiff, please make your appearance.

8 MS. DEMPSEY: This is Rachel Dempsey with Outten &
9 Golden for the Plaintiff. And I'm hear with my colleague on
10 the phone, Adam Koshkin, also with Outten & Golden for the
11 Plaintiff. And Mike Scimone, who is also with Outten &
12 Golden for the Plaintiff.

13 THE COURT: Thank you. And in the courtroom for
14 the defense, please?

15 MS. SCHEFFEY: Adrienne Scheffey on behalf of
16 Defendant The GEO Group, and I'm here with Akerman. Also
17 here is Dana Eismeier from Burns Figa, also on behalf of The
18 GEO Group.

19 THE COURT: Thank you. Let's see. And this is
20 something we don't need the United States on, I assume?

21 (No response)

22 THE COURT: Oh, you're here. I mean, give me some
23 credit. I can't recognize you except for maybe the beard
24 hanging underneath that mask.

25 Okay, so who wants to take the lead here?

1 MS. SCHEFFEY: Which issue do you prefer we start
2 with?

3 MS. DEMPSEY: I'm sorry, Your Honor. I'm having a
4 little bit of trouble hearing you.

5 THE COURT: I said who wanted to take the lead. I
6 just asked anybody who wants to take the floor, please
7 proceed.

8 MS. SCHEFFEY: GEO is prepared to begin. We're
9 here for two issues today.

10 The first of which are Plaintiffs' untimely
11 discovery responses that were served after the close of
12 discovery after summary judgment motions had been briefed,
13 and that were inconsistent with prior deposition testimony.

14 The second of which is Plaintiffs are seeking a
15 document that they believe should have been produced in
16 response to one of their discovery requests.

17 GEO has reviewed the document. It was not
18 responsive to any of the search terms. GEO does not believe
19 it's responsive anyway.

20 And, additionally, it is work product. It was a
21 document that was created in connection with a settlement
22 conference that was before this Court in 2018.

23 THE COURT: And that's how they became aware of
24 it, was that --

25 MS. SCHEFFEY: Plaintiffs became aware of it

1 because they -- there is -- it's not exactly clear in their
2 briefing. But there was a FOIA request in 2018 that was
3 made. That's what all of the documents on the FOIA say. ICE
4 produced the document, but redacted the information that GEO
5 would also have maintained the redactions on.

6 THE COURT: Okay. So --

7 MS. DEMPSEY: Your Honor, if I may, I actually
8 need to correct that.

9 We became -- Plaintiff became aware of this
10 document because it was subject to a FOIA request in a
11 different case. We actually didn't become aware of it until
12 a separate case when it became at issue in that other case.

13 So we did not -- it was not -- we learned of it
14 from a different case. We did not receive it through a FOIA
15 request.

16 THE COURT: I'm sorry, you received it in
17 discovery?

18 MS. DEMPSEY: It was filed on the docket in the
19 GEO versus Washington State case, which was how we received
20 it, because it was publicly filed there.

21 THE COURT: Filed by whom?

22 MS. DEMPSEY: By, I believe, the State of
23 Washington.

24 THE COURT: Okay. Well, so I guess with regard to
25 that document, we need to discuss, I suppose, whether it's

1 responsive? Is that the first thing we need to decide?

2 MS. SCHEFFEY: Yeah. I think the first question
3 would be whether it's responsive and whether there is any
4 justified reason for raising it at this point.

5 THE COURT: Okay. Now, so we only need to discuss
6 that because you're resisting its production?

7 MS. SCHEFFEY: Yes, Your Honor.

8 THE COURT: Okay. So my understanding, then, it's
9 an analysis of additional amount of funds the Government
10 would have to pay if the work presently performed by
11 detainees were performed instead by employees. Is that
12 accurate?

13 MS. SCHEFFEY: It's actually a letter, and I have
14 a copy here if Your Honor does not. It's a letter to ICE
15 from GEO, and the last sentence is "we urgently implore DOJ
16 to take over the defense of these lawsuits and reimburse GEO
17 for its costs."

18 So our description of it would be it is a letter
19 to ICE asking them to get involved in this lawsuit, and
20 others. The redacted portion contains an assessment of the
21 potential liability that was conducted by GEO so that ICE
22 could make --

23 MS. DEMPSEY: And I would just -- I would disagree
24 a little bit with the characterization of the redacted
25 portion. The testimony of Brian Evans, which, again, is also

1 from that Washington State case, he testified that the
2 calculations were performed because GEO intended to make a
3 claim against the Government for any payments that GEO was
4 found liable for under the voluntary work program, which
5 would be the basis for an action against ICE for an equitable
6 adjustment.

7 THE COURT: Well, the letter that she just talked
8 about is generally a precursor to a demand. It's a nice
9 opening way to say "will you go ahead and take this over?"

10 But it could turn into a demand for reimbursement
11 or indemnification, I guess, at some point.

12 In any event, tell me why -- tell me which request
13 it is responsive to.

14 MS. DEMPSEY: So, responses to our request number
15 40, which requested all documents referring to and/or
16 relating to communication between Defendant and ICE,
17 including, but not limited to, reports, alerts, memoranda,
18 and/or emails, that refer or relate to the use of detainee
19 labor at any GEO-owned or GEO-operated facility.

20 So I think just on the plain terms of that
21 request, it's pretty clearly responsive.

22 And the request was subsequently -- Plaintiff
23 subsequently clarified that the request was limited to
24 communications about detainee labor relating to contracts and
25 operation after October 22, 2004.

1 Again, I think the document pretty clearly falls
2 within those parameters because it is about the contracts
3 that are in place currently and were in place during the
4 class period.

5 And potential changes to those contracts and/or
6 equitable adjustments and obligations that arise under those
7 contracts.

8 THE COURT: Subject to that being a very broad
9 request, it sounds like it falls within the ordinary meaning
10 of the request. Do you disagree? And, if so, why?

11 MS. SCHEFFEY: Yes, Your Honor. So we -- prior
12 counsel, I should say, negotiated search terms and custodians
13 to identify documents that were responsive to that request.

14 The custodians were sent to Mr. Koshkin, Mr.
15 Scimone, and Ms. Dempsey, on May 2, 2019, by prior counsel,
16 Patrick McCabe. They were agreed upon, as were the search
17 terms.

18 This document is not responsive to both the
19 custodians and the search terms.

20 THE COURT: Okay. So that I wouldn't necessarily
21 agree or disagree with. I'm wondering how relevant that is,
22 though.

23 Are you saying that Plaintiffs' counsel agreed
24 that the only documents that would be produced would be
25 pursuant to those search terms and no other effort would be

1 made at any time to look for documents that might be
2 responsive to the request?

3 MS. SCHEFFEY: No. It was my understanding that
4 they would review those that they thought were comprehensive
5 because of the process that was about four months that they
6 went through in crafting these search terms, and that they
7 would come back if they found out about anything that was
8 insufficient, or if they identified another document that
9 they thought should have fallen within that.

10 THE COURT: Right. But do you believe the
11 Defendant's obligation was only to look for documents that
12 were responsive to those search terms, not responsive to the
13 actual request? That's what you're saying?

14 MS. SCHEFFEY: I think that it was our obligation
15 to review the documents that hit on those search terms if
16 other documents, let's say in different searches, were
17 responsive to those requests, I think we also would have had
18 an obligation to produce those.

19 But even then, I wouldn't have seen this document
20 as responsive. It doesn't --

21 THE COURT: No, no, nobody is throwing stones at
22 you, at least I'm not throwing any. All I'm asking is: Do
23 you agree that this document would fall within the terms of
24 that request, not what you subsequently agreed would be the
25 search terms pursuant to that request, but do you agree that

1 it appears to fall within the request itself?

2 MS. SCHEFFEY: Yeah. So I would agree it appears
3 to fall within the first broad request.

4 THE COURT: Right.

5 MS. SCHEFFEY: But I think the more narrow request
6 about GEO's contracts with ICE, because this isn't discussing
7 any of the contracts, and there were two separate letters set
8 before that that did discuss the contract, that it doesn't
9 fall within that.

10 THE COURT: So what would be the source of ICE's
11 obligation to either come in and take over the case, or
12 indemnify, if it wasn't contract?

13 MS. SCHEFFEY: Yeah, so without giving too much
14 away, I believe that this letter also said ICE, you know, by
15 showing its numbers, we believe that if this applies to the
16 GEO facilities, it's also going to apply to call ICE
17 facilities, so we think you have an interest in this.

18 THE COURT: No, no, I know. But you just said
19 this was part of the letter from ICE to -- from GEO to ICE.

20 MS. SCHEFFEY: Right.

21 THE COURT: And you said it was GEO asking ICE to
22 take this case over.

23 MS. SCHEFFEY: Yes.

24 THE COURT: And you were relying on that request
25 just because you thought ICE would be nice guys, or because

1 you thought there was a legal obligation for ICE to do so?

2 MS. SCHEFFEY: I think it was both. Maybe I
3 wouldn't say because ICE would be nice guys, but I think both
4 there was a question about whether they had some sort of duty
5 under the contract, but also more of an interest in the
6 policies that are being litigated, because they could affect
7 many facilities outside of GEO's control.

8 THE COURT: I agree.

9 MS. SCHEFFEY: But ICE might want the right
10 result.

11 THE COURT: Very well said. But at least in part
12 GEO would have been relying on contract language to believe
13 that ICE should come in and do something. So, therefore,
14 again, literally, this communication is about a contract
15 between ICE and GEO. Right?

16 MS. SCHEFFEY: Yeah, I think under that I would
17 have to agree, Your Honor.

18 THE COURT: Okay. So I've got to find that it's
19 if not responsive sounds relevant unless protected by some
20 privilege or otherwise should not be discoverable.

21 Are you relying on anything in that regard?

22 MS. SCHEFFEY: Yeah. So we believe that the
23 redacted portion, it was redacted by ICE, but this is the
24 same redaction we would have made, is work product because --

25 THE COURT: Can I see the redaction? Do you have

1 a side-by-side for the redacted and non-redacted?

2 MS. SCHEFFEY: I did not bring the non-redacted,
3 but I could have someone email it to your Chambers if you
4 want.

5 THE COURT: Does the redacted show -- is it
6 completely blacked out?

7 MS. SCHEFFEY: It shows everything except for the
8 numbers that are blacked out.

9 THE COURT: Let me go ahead and take a look at
10 that. Maybe I -- do I have it as part of your submission?

11 MS. SCHEFFEY: You do.

12 THE COURT: I do. Okay.

13 MS. SCHEFFEY: But you could still --

14 THE COURT: Okay, never mind. Is it June 1, 2018?

15 MS. SCHEFFEY: Yep.

16 THE COURT: All right. And it only has amounts,
17 right?

18 MS. SCHEFFEY: Yes.

19 THE COURT: Okay. And so what relevance is it --
20 if you're ever involved in insurance cases, for example, that
21 there's lots of reasons why somebody might talk about
22 potential exposure, these are maybe reserves that an
23 insurance company has, or things like that, that aren't
24 really relevant to the case. What is relevant is what the
25 damages are, not what GEO thinks they might be.

1 And so what's the relevance of those numbers?

2 MS. DEMPSEY: Your Honor, I think the relevance of
3 those numbers is that, as Mr. Evans described them in his
4 deposition, they reflect the sort of calculation of the
5 amount of -- the number of employees that GEO would have to
6 hire in order to replace detainee labor.

7 And that is sort of the crux of the unjust
8 enrichment claim. I think that --

9 THE COURT: Well, they would address what GEO
10 thinks might be the number, right?

11 MS. DEMPSEY: They would. So, and yes, they would
12 address what GEO thinks might be the number. We have expert
13 testimony as to what we think might be the number, but GEO
14 has made clear that they're going to challenge that expert
15 testimony based on what they think might be the number.

16 THE COURT: Right.

17 MS. DEMPSEY: And so evidence to that is relevant
18 to the case and to calculating damages.

19 THE COURT: So really the only reason you want it
20 is credibility, because they are going to give you an
21 eventual number, it sounds like, either by attacking yours
22 and substituting their own, or by putting forth an expert
23 with their own number. They are going to give you a number.

24 And you might want to say "hey, you said it was
25 this when you're talking to the Government, but now you're

1 saying it's this." That's the only possible relevance I can
2 see is you're testing the credibility of some eventual number
3 that they will give you.

4 Let me ask the defense counsel: Are you going to
5 put forward a position as to this is the number of employees
6 this would take to cover the work done by inmates?

7 MS. SCHEFFEY: I'm not sure that's what we would
8 put forward. I mean, it's a little complicated because the
9 numbers here are dollar amounts. I can represent that to
10 you. You know, looks at this, ICE, this is the potential
11 dollar amount that it will cost you to handle it.

12 THE COURT: So you don't in any of these blacked
13 out sections talk about numbers that potential FTEs,
14 employees, or whatever?

15 MS. SCHEFFEY: No, Your Honor. It only includes
16 dollar amounts.

17 THE COURT: Okay.

18 MS. SCHEFFEY: For 12 facilities, and then for all
19 of ICE's facilities.

20 THE COURT: Which would take some significant
21 explaining to do on how you got there, which is not contained
22 in these documents, and so they would want you to actually go
23 back and recreate stuff that you did, that's potentially work
24 product.

25 MS. SCHEFFEY: Yes, Your Honor, that's where it

1 goes.

2 THE COURT: Okay.

3 MS. SCHEFFEY: And just to clarify, their experts
4 have not provided dollar numbers. They have provided numbers
5 of employees they think it would take to perform certain
6 tasks. So these aren't really even apples and oranges. Any
7 attack we would have would be on their analysis of, you know,
8 it takes 10 people to clean a table, as opposed to 2 people
9 to clean the table.

10 THE COURT: Okay. But articulate specifically why
11 you're redacting. Every single reason why you're redacting.

12 MS. SCHEFFEY: Yeah. So the numbers that were
13 created and put in here are based on the assessment that GEO
14 did to participate in the settlement conference in front of
15 this Court in May 2018.

16 THE COURT: So you produced them at my request to
17 advise me of your position so I could determine what a
18 reasonable settlement would be?

19 MS. SCHEFFEY: Yes, Your Honor. And Dana was
20 here, so I might actually turn it over to him. But yes, my
21 understanding is they put them together for the settlement
22 conference, and then there was an agreement that ICE was
23 necessary.

24 THE COURT: Okay. So you'll have to speak into a
25 microphone.

1 MR. EISMEIER: The settlement conference was on
2 May 2nd, as you'll recall. At that time, you were only
3 acting in the capacity as a settlement judge.

4 And at that conference, without going into what
5 was said, you know, attorney-client, but it was all by saying
6 we're going -- nothing will happen without ICE.

7 And one of the issues that went on through May, as
8 you know, that conference stayed open for some time to decide
9 whether ICE could get involved and whether that would work.

10 So GEO's position is: It went back, and only
11 because of the settlement conference, generated numbers which
12 were based upon obviously calculations that would have been
13 only within GEO, in response to the settlement conference.

14 But for that settlement conference, we wouldn't be
15 having this discussion about this document today.

16 THE COURT: Okay. So why isn't this covered by
17 Rule 408?

18 MR. EISMEIER: From GEO's point of view, it is.
19 It isn't just privilege. It's also 408. So there are layers
20 here.

21 THE COURT: Okay.

22 MS. DEMPSEY: And I would just point the Court to,
23 again, to the testimony of Brian Evans, who was GEO's CFO.
24 He was obviously under oath when he gave that testimony, and
25 he did not say in any way that these calculations were

1 prepared related to settlement.

2 It was, and I quote, "to calculate what the
3 Government could owe us if the Court decided unfavorably
4 against us, because we have a claim under the law against the
5 federal Government for implementing their program."

6 And I can point you to the page number where he
7 gives that testimony. But I think that's entirely consistent
8 with what Mr. Eismeier is representing.

9 THE COURT: Right. But if it was done in
10 connection -- directly connected to an effort to settle the
11 case in front of a judicial officer, and done at my
12 suggestions that they come up with a number to help me be
13 educated and negotiate a settlement, and that's the purpose
14 of it, it's straight up 408 as far as I can see.

15 MS. DEMPSEY: Well, so, for one thing, this is the
16 first time you've heard this argument. And again --

17 THE COURT: No, it's not an argument. I was the
18 first one to mention 408 because it screams 408 if it was
19 produced as part of a settlement effort that I engaged in.
20 This is pretty pedestrian stuff that happens all the time.

21 And you produce a lot of numbers for me in a
22 settlement conference that you never intend to see the light
23 of day, because you're doing it just for purposes of
24 discussion and negotiation, and not for purposes of using it
25 in the litigation.

1 MS. DEMPSEY: Right. That makes sense. Thank
2 you. Thank you for clarifying.

3 Again, though, the testimony that we have from
4 GEO, who is the people that actually created these numbers,
5 was that it was not that it was for settlement. It was that
6 it was for an equitable adjustment, and what the sort of
7 potential exposure in the case was.

8 I would note that the part of the letter that we
9 have, we have most of the letter, and no where does it say
10 that this is a settlement-related communication.

11 So I just don't -- I think that representation is
12 contradicted by a lot of the evidence that we have.

13 THE COURT: Okay. So if this were a document
14 created by GEO for purposes of providing information to me,
15 it just is not discoverable.

16 However, the different issue is: Do you waive
17 that by voluntarily re-producing that information in a
18 disclosure to the United States Government, and how didn't
19 you waive it?

20 MS. SCHEFFEY: Yeah. So we pointed in our
21 statement to -- I apologize. *Martin v. Monfort*, which is 150
22 F.R.D. 172 (D. Colo. 1993). And in that case, in-house
23 counsel received kind of an inquiry from DOL indicating that
24 the Department of Labor was looking into off-the-clock work
25 that was happening at the facility.

1 That in-house counsel then directed certain
2 employees to conduct a study of how long people were spending
3 doing certain tasks.

4 Based on that study, in-house counsel wrote a
5 letter to the DOL saying "we don't think you're right," you
6 know, "from our calculations, it's much less than that."
7 Some sort of aggregate number.

8 And the Court found that that remained protected,
9 because the studies were work product because the in-house
10 counsel directed them to be done, and that because she didn't
11 disclose the underlying study, just kind of an aggregate
12 position, it wasn't waived, because there was no reason to
13 believe the DOL in that case.

14 THE COURT: The underlying study wasn't waive.

15 MS. SCHEFFEY: They also, I believe, and I would
16 have to double check, I believe they also said that the
17 letter didn't waive anything.

18 THE COURT: That's a pretty important difference.

19 MS. SCHEFFEY: Yeah. I would have to -- I don't
20 have it in my notes.

21 THE COURT: So I can understand the underlying
22 study. I need to know whether the Court actually found that
23 there was no waiver by providing it to the United States
24 Government, because, as you know, documents that end up in
25 the hands of the United States Government are generally

1 subject to production under FOIA.

2 MS. DEMPSEY: Your Honor, I would also just
3 clarify that *Monfort* is about a dispute between only the
4 United States Government and the producing party. So the
5 numbers were sort of by definition in the letter to the
6 United States Government. Those were the only two parties
7 involved.

8 I think this case is much closer to the *In Re*
9 *Quest* case where the person seeking the discovery was a third
10 party, like us, that was not involved in the communication.

11 THE COURT: No, no, I think the better distinction
12 there is: In that case, a private business was trying to
13 avoid either criminal or civil liability in dealing directly
14 with a Government agency that was investigating them. There
15 might be privileges associated with that because in that
16 situation it was the conduct of the United States Government
17 that required the private business to create information and
18 respond back.

19 I'm not sure that's the case here. This sounds
20 like a voluntary disclosure as a means of persuasion by the
21 private business in reaching out and initiating the contact
22 with the United States Government.

23 So there's a distinction there. I would have to
24 take a look at that. I'm just inclined to believe that this
25 might have been at least a waiver with regard to the actual

1 numbers, although maybe not the underlying calculations. But
2 I would have to --

3 MS. DEMPSEY: Your Honor, I would just clarify.
4 The Court in *In Re Quest* actually found that even under the
5 circumstances in that case, that there had been a waiver and
6 that the information provided to the Government was
7 discoverable.

8 THE COURT: I don't know how it's not discoverable
9 here, because you voluntarily, without request from the
10 United States Government, provided information to them.
11 That's generally subject to disclosure under FOIA.

12 Mr. Jafek is here from the United States
13 Attorney's Office. Would you come forward, Mr. Jafek?

14 MS. SCHEFFEY: And if I may just note --

15 THE COURT: Yes.

16 MS. SCHEFFEY: -- the FOIA -- it was requested
17 through a FOIA request, and the Government marked it B4,
18 which is confidential or privileged information.

19 THE COURT: Okay, so they refused to produce it?

20 MS. SCHEFFEY: Yeah, they have refused to produce
21 it.

22 THE COURT: What is that exception, please?

23 MS. SCHEFFEY: B4. I do not have it in front of
24 me.

25 THE COURT: Mr. Jafek, do you know what B4

1 exception is?

2 MR. JAFEK: I don't. It sounds like confidential
3 business information.

4 THE COURT: Okay.

5 MR. JAFEK: It sounds like that's what --

6 MS. SCHEFFEY: Yeah. I looked it up, and it said
7 confidential or privileged on there.

8 THE COURT: Sure. Is there a protective order in
9 this case?

10 MS. SCHEFFEY: Yes, Your Honor.

11 THE COURT: Okay. So we can effectively deal with
12 the issue of the confidential nature of the business
13 information because it couldn't be disclosed outside of the
14 confines of the litigation without permission from the Court
15 if it was under a confidentiality or protective order.

16 So --

17 MS. SCHEFFEY: But I just think, you know, because
18 the Government also didn't disclose it, that does say
19 something about they held it confidential, as well, and work
20 product doctrine does make a distinction between when you
21 disclose something to a third party that is likely to re-
22 disclose it, as opposed to someone who will keep that
23 information confidential, which is exactly what the
24 Government did here.

25 THE COURT: Right. Yeah. I wouldn't have guessed

1 it was likely the Government was going to keep it
2 confidential, because they are pretty open book, you know,
3 except when they have that exception.

4 MS. SCHEFFEY: Yeah.

5 THE COURT: Because the Court holds their feet to
6 the fire on those all the time.

7 MS. SCHEFFEY: Yeah.

8 THE COURT: But I guess I'm wanting to understand,
9 again, the need for this, I suppose, from the Plaintiffs?

10 MS. DEMPSEY: So, again, we have provided
11 estimates as to what we believe the benefit from using
12 employees is in this case.

13 And we know the discovery period is over. We had
14 disclosed an expert, and GEO has not disclosed an expert. So
15 we have no information from them at all on what they
16 understand the unjust enrichment to be.

17 And, of course, they are going to challenge our
18 expert. And so we have a need to be able to, you know, to
19 the extent we're able to, be able to anticipate what those
20 challenges are and be able to respond to them.

21 I think this is pretty clearly within the bounds
22 of reasonable discovery.

23 THE COURT: And so do you anticipate that defense
24 will put on a witness, although not expert, but maybe a
25 business person within the corporation who has responsibility

1 for budget or that sort of thing, who would opine -- who
2 would put some information forward that either challenges
3 Plaintiffs' calculations and/or puts forward an approximate
4 defense calculation of what the level of damage is?

5 MS. SCHEFFEY: Yeah. So what we've briefed
6 already, and this is before Judge Kane, but our position is
7 that there is no unjust enrichment because every time GEO
8 gets a new employee, it gets to add a Government permissible
9 profit fee to each employee between 10 and 15 percent.

10 So Mr. Evans will testify that he believes that
11 regardless of the number of employees, the more employees you
12 say you need, the more profit to GEO. So this isn't a matter
13 of GEO minimizing its profits.

14 THE COURT: I know, but do you plan to address in
15 any manner the Plaintiffs' calculations as to damages?

16 MS. SCHEFFEY: Yes, Your Honor. And I think this
17 is why it's a little confusing not having those documents in
18 front of me. And I apologize for not bringing them.

19 But Plaintiffs' calculations for damages come from
20 two experts who, based on the square footage of the facility
21 and the tasks performed, estimate how many employees it would
22 take. But they don't attach dollar amounts to those
23 estimates.

24 I do think that based on their own methodologies
25 and some other things that we think weren't quite consistent

1 in their reports, we might bring challenges to those experts.
2 But that wouldn't necessarily be in the form of something one
3 of our witnesses would testify to other than "we have this
4 many people, and this is how it gets done correctly."

5 THE COURT: Right.

6 MS. DEMPSEY: So to clarify, we -- I think it's
7 probably sort of self-evident that the number of employees
8 you have to pay is a part of the calculation -- of the
9 ultimate damages calculation.

10 There are different possible rates that we will
11 apply to the number of employees that we've identified in our
12 expert reports in order to reach the ultimate number, but
13 obviously that isn't -- the number of employees is sort of
14 one of the inputs.

15 And, again, GEO has already made very clear that
16 they are going to challenge the underlying assumptions in
17 that report.

18 And to the extent that sort of GEO's ultimate
19 numbers, say, is bigger than ours or is comparable to ours or
20 is much smaller than ours, that provides us with useful
21 information in terms of what their fact rebuttals are going
22 to be, because they have made it very clear that they are
23 going to challenge the assumptions that went into our expert
24 reports.

25 MS. SCHEFFEY: And, Your Honor, if I may briefly

1 respond?

2 THE COURT: Well, tell me the case number first
3 that you're referring to.

4 MS. SCHEFFEY: For which one?

5 THE COURT: The citation to that F.R.D. case.

6 MS. SCHEFFEY: Oh. 150 F.R.D. 172.

7 THE COURT: 150?

8 MS. SCHEFFEY: F.R.D. 172.

9 THE COURT: Thanks.

10 MS. SCHEFFEY: And I just want to briefly respond.
11 I don't know that this letter in itself would be helpful in
12 Plaintiffs' efforts, because it is an aggregate for all 12
13 GEO facilities. It doesn't break it down.

14 THE COURT: Yeah. I'm sure they're going to say
15 it's not up to you to decide what's helpful to them, or not.
16 That's usually something that Plaintiffs' counsel is not
17 willing to give over to defense counsel to decide.

18 But I want to look at this case.

19 MS. SCHEFFEY: Okay.

20 THE COURT: So I can see what it says, and not
21 that it's dispositive unless I wrote it, and I didn't write
22 it, because it's too old for me.

23 MS. SCHEFFEY: No. You've cited it before,
24 though, and I have one of yours relying on it as giving me
25 the standard. 2015 W.L. 5915415, where you treated it

1 favorably.

2 THE COURT: Okay. So I think I might ask more
3 questions about that, but at the moment I'm sufficiently
4 apprised pending my reading of that case, which is going to
5 be brought out to me.

6 What's the next issue?

7 MS. SCHEFFEY: The next issue is Plaintiffs'
8 untimely discovery responses.

9 THE COURT: Go ahead.

10 MS. SCHEFFEY: So we had discovery close on August
11 14th by agreement of the parties. All of summary judgment
12 was briefed by August 17th per the deadline. Decertification
13 was filed --

14 THE COURT: You mean the initial briefs?

15 MS. SCHEFFEY: Yeah, initial briefs filed a little
16 bit later that week. And in early September, so September
17 1st through September 14th, we got supplemental discovery
18 responses to GEO's requests from March that changed
19 Plaintiffs' allegations, and contradict their own deposition
20 testimony.

21 More specifically, each of the Plaintiffs
22 answering in their own capacity in a response that
23 specifically states that they understand that GEO is seeking
24 -- let me look at the quote.

25 THE COURT: Well, let me ask you this: Clearly

1 you agree -- you have to agree that parties are always under
2 a continuing obligation to supplement responses to discovery,
3 even up to the time of trial.

4 MS. SCHEFFEY: Yes, Your Honor, with new
5 information. Yes.

6 THE COURT: Or if information was wrong. I mean,
7 if they know something different than what they said, aren't
8 they under an obligation to correct it?

9 MS. SCHEFFEY: Yes, Your Honor. And this cannot
10 be that, because they both say they see a PowerPoint that
11 replaced the video in these responses, and a video that
12 didn't -- wasn't in use at the time that they were there, and
13 they unequivocally testified that they did not recall a
14 video.

15 So to now say they suddenly recall that they were
16 threatened by that video, and that it was a type of
17 immigration harm, at a minimum we need to re-depose them.

18 THE COURT: You mean the same people who are
19 saying they were unaware of a video now say they were aware
20 of a video?

21 MS. SCHEFFEY: Yes, Your Honor. And so --

22 THE COURT: Same person?

23 MS. SCHEFFEY: For example, this --

24 MR. KOSHKIN: Your Honor, this is Adam Koshkin on
25 behalf of the Plaintiffs. That's not quite right.

1 I think some of this confusion comes from the fact
2 that GEO issued a vague and compound interrogatory, which we
3 objected to at the time.

4 The interrogatory asks for all facts that you
5 allege a certain prong of the PVPA. And so since this is a
6 class action, we read that to seek all facts that we would
7 present at trial on behalf of the class.

8 GEO later asked us to provide individual
9 responses, but ultimately didn't revise the interrogatory to
10 clarify that "you" meant any of the individuals and not the
11 class.

12 So the response isn't inconsistent. The
13 testifying witnesses testified to their experience and what
14 they saw and what happened to them, and this document was in
15 use earlier in the class period. But because the operative
16 responses were -- you know, per the meet and confer, the
17 operative responses, we responded on behalf of each
18 Plaintiff. We supplemented those because those were the
19 operative responses.

20 THE COURT: Do you have a side-by-side for me so I
21 can compare the two?

22 MS. SCHEFFEY: Yes, Dana has them. And, Your
23 Honor, just so you know, the responses themselves say
24 "Plaintiffs respond to this interrogatory based on the
25 understanding it seeks acts that were directly experienced by

1 the individual named Plaintiffs based on GEO's
2 representations."

3 And I myself had a significant conferral with Mr.
4 Scimone about this in that we were seeking the facts, because
5 while it is easy to allege that something is class wide, GEO
6 has the right to conduct discovery and find out if all of the
7 Plaintiffs experienced it, only some of them, and then file
8 motions as to that effect.

9 THE COURT: So are you saying that because of this
10 new information, it changes something you would have filed in
11 summary judgment?

12 MS. SCHEFFEY: Yes, Your Honor, and
13 decertification, because it effectively brings a brand new
14 class wide claim saying that all Plaintiffs experienced the
15 same reaction to a video that none of the named Plaintiffs
16 remembered seeing.

17 THE COURT: Okay.

18 MS. SCHEFFEY: And it's contrary to their motion
19 that says we're challenging solitary confinement.

20 THE COURT: So point out the conflict to me
21 directly, please. I have the documents in front of me.

22 MS. SCHEFFEY: Yeah. It's going to be
23 interrogatory 43.

24 THE COURT: So I'm looking at both -- well, give
25 me the names of the documents I'm going to be looking at.

1 MS. SCHEFFEY: Did you give him each of them?

2 MR. EISMEIER: Each one.

3 MS. SCHEFFEY: Why don't you just -- I have Mr.
4 Menocal's in front of me.

5 THE COURT: Okay, and I have him.

6 MS. SCHEFFEY: So his sixth supplemental set of
7 interrogatories.

8 THE COURT: Okay.

9 MS. SCHEFFEY: If you'll go to number -- what did
10 you say?

11 MR. EISMEIER: Page 6.

12 MS. SCHEFFEY: Page 6.

13 THE COURT: Okay, I'm there.

14 MS. SCHEFFEY: Okay. So previously he had said
15 that Menocal responds to this interrogatory --

16 THE COURT: Wait. Are you talking -- what
17 interrogatory?

18 MS. SCHEFFEY: It's 43.

19 THE COURT: Okay. And then --

20 MS. SCHEFFEY: Page 6 he answers.

21 THE COURT: It's the red underline?

22 MS. SCHEFFEY: The red underlined is the newly
23 added information.

24 THE COURT: Okay. And then I'm looking at --

25 MS. SCHEFFEY: The black text was previously

1 there.

2 THE COURT: Let me find Menocal's previous.

3 MS. SCHEFFEY: You can see it by just seeing the
4 red underlined. That's what was added.

5 THE COURT: Okay. Hold on.

6 (Pause)

7 THE COURT: Okay. But where does he disclaim
8 knowledge of it?

9 MS. SCHEFFEY: So in his deposition he testified
10 "did you see an orientation video when you arrived at the GEO
11 facility?" "No, sir, I don't recall seeing a video. I
12 recall seeing a handbook, a rule book, but I don't recall
13 seeing a video."

14 THE COURT: What page, please?

15 MS. SCHEFFEY: So that was his deposition
16 transcript. Did you bring that?

17 MR. EISMEIER: No, I didn't.

18 MS. SCHEFFEY: I didn't bring it. No.

19 MR. KOSHKIN: Your Honor, while we're looking at
20 these responses, I would also just point you towards the
21 objection that Plaintiffs made to this interrogatory. It is
22 -- we've incorporated the objection to interrogatory number
23 39, which specifically deals with the ambiguity in the term
24 "you" and what GEO was referring to with the term
25 "Plaintiff."

1 So to the extent that GEO is arguing that this
2 particularly is stating that this Plaintiff recalls or
3 alleges, I would just refer you back to the objection that we
4 made there. It's on page 3 of the document that I'm looking
5 at. I don't know for sure --

6 THE COURT: But are you saying that you weren't
7 responding in these interrogatories on behalf of the person
8 named Alejandro Menocal personally?

9 MR. KOSHKIN: Well, were responding on behalf of
10 him and on behalf of the class. GEO asked us to issue
11 individual responses on behalf of each named Plaintiff.

12 We had originally, in April of 2020, issued a
13 response, sort of a general on behalf of the class response.
14 GEO asked us to issue subsequent individual responses, so the
15 operative responses to the interrogatories at the time we
16 supplemented them to add this document were the ones on
17 behalf of the individual class members.

18 MR. LEY: Your Honor, this is Michael Ley on
19 behalf of the GEO Group.

20 I just might have something to add here, because I
21 participated in the conferrals.

22 A couple of quick facts that may help your
23 analysis.

24 The first one being: GEO issued 9 sets of written
25 discovery. One to each of the named Plaintiffs. It wasn't

1 like there was one set of discovery issued that said "you."
2 There were 9 sets specifically addressed to each of the class
3 representatives.

4 Second, these second supplemental responses that
5 came in, like the earlier interrogatory responses that came
6 in, were separately verified by the individual class
7 representatives to whom the interrogatories were issued.

8 THE COURT: Well, in any event, the first sentence
9 in this paragraph says that Plaintiff Menocal responds, so
10 I'm going to take that at face value.

11 Read the deposition testimony, please?

12 MS. SCHEFFEY: Yeah. "Okay. Did you see an
13 orientation video when you arrived at the GEO facility?"
14 "No, sir. I don't recall seeing a video. I recall seeing a
15 handbook, a rule book, but I don't recall seeing a video."

16 THE COURT: Okay. Now, how is his response
17 contradictory to that?

18 MS. SCHEFFEY: Yeah. So if you look at the red
19 portion, they say "Plaintiff alleges that GEO communicated
20 this information in the detainee orientation video, the audio
21 for which contained the statement that failure to respect the
22 property of other detainees in the institution may result in
23 disciplinary action taken against you, and that could have a
24 negative effect on your case before the Government. So the
25 best rule is to stay out of trouble during your stay here."

1 THE COURT: I'll repeat my question: How does
2 that contradict his testimony?

3 MS. SCHEFFEY: If he didn't see a video, how could
4 he recall that this information was communicated to him?

5 THE COURT: He doesn't say that he recalled it
6 was. Read it carefully.

7 MS. SCHEFFEY: Right. But it's saying -- he
8 responds to it by saying GEO knowingly caused him to believe
9 that refusal to comply --

10 THE COURT: Wait a minute. I don't see that.

11 MS. SCHEFFEY: The black part starts with --
12 because it's an addition, --

13 THE COURT: Okay.

14 MS. SCHEFFEY: -- GEO knowingly caused him to
15 believe that the disciplinary infractions, including refusal
16 to comply with GEO's house, could have adverse consequences
17 in his immigration proceedings.

18 THE COURT: So that was already issued before the
19 discovery deadline?

20 MS. SCHEFFEY: Yes, and then we --

21 THE COURT: The black was.

22 MS. SCHEFFEY: The black was. And then we took
23 his deposition, and we concluded this was conclusory, we had
24 our evidence.

25 THE COURT: Right. So I do not read this red as

1 stating he's aware of the video personally. He was probably
2 informed by counsel that that video exists, and so he's
3 regurgitating the allegations of the Plaintiff class and
4 himself, but not every allegation in the complaint.

5 MS. SCHEFFEY: This isn't in the complaint, Your
6 Honor.

7 THE COURT: It's personally known by the Plaintiff
8 himself. He can make allegations, I believe, on -- what term
9 do lawyers usually use. On understanding and belief.

10 MS. SCHEFFEY: Upon information and belief.

11 THE COURT: Information and belief.

12 MS. SCHEFFEY: Yeah. But then we get to
13 investigate those and discover those. This wasn't in the
14 complaint, Your Honor. This is a brand new claim that hasn't
15 been in their summary judgment --

16 THE COURT: Well, let me ask Plaintiffs' counsel
17 directly. Is it your understanding Plaintiff Menocal recalls
18 a video of this nature?

19 MR. EISMEIER: No, Your Honor, it's not our
20 understanding that he does. The comment that you made just
21 now about the sort of nature of pleading and class
22 representative is accurate.

23 And furthermore, this is not a new claim. You
24 know, as GEO mentioned in its statement, you know, the stress
25 of solitary confinement are sort of the main portion of our

1 claim.

2 But the PVPA also, you know, makes illegal a
3 scheme or a pattern and practice on these sort of threats,
4 and this all falls within that. So it's all within the
5 claims that we've been litigating this entire time.

6 And, you know, this information, the part about
7 the abuse of legal process, this is in our interrogatory
8 responses all the way back to April, as well.

9 THE COURT: So I just don't see -- I mean, I don't
10 -- I'm not reading it the way you are, and they've just
11 represented that he cannot testify a recollection of the
12 video.

13 What the cite is, though, is to GEO MAN 56575.
14 What is GEO MAN 56575?

15 MS. SCHEFFEY: Right. So that's a video script
16 that was for a -- essentially they had a script that was read
17 into a VHS -- a recorder that was played on VHS for a very
18 narrow portion of the class.

19 THE COURT: Did they accurately quote that script
20 in this?

21 MS. SCHEFFEY: They accurately quote that. But
22 the problem is, Your Honor, is that they have now submitted
23 this same response under each Plaintiff, creating a new class
24 allegation we never got to do discovery on.

25 They never let us ask about the immigration

1 proceedings. They declined to respond to questions about
2 immigration status in prior discovery responses.

3 THE COURT: Well, let me ask this question to the
4 Plaintiffs' counsel: Do you know whether any of your class
5 representatives would have a personal recollection of
6 watching that video and the contents of it?

7 MR. KOSHKIN: We don't know. We're still
8 discussing with GEO to get -- nail down the time period that
9 the video was in use.

10 But to be clear, GEO's 30(b)(6) witness has
11 testified about this video, about -- there's testimony saying
12 exactly what Ms. Scheffey just said about how the video was a
13 script that was read into a VHS that was shown to detainees
14 during -- and she placed it in the class period, you know, in
15 her deposition testimony.

16 So this isn't some, you know, document that has
17 come out of the woodwork. This is a document that GEO
18 produced, that's GEO's custodial information that it produced
19 years ago, that's been asked about at depositions and GEO's
20 30(b)(6) witness.

21 THE COURT: I understand. But what it be your
22 educated guess that none of your folks will have a direct
23 memory of this video?

24 MR. KOSHKIN: As we understand the timing of
25 everything, you're correct, none of our witnesses would have

1 a direct recollection because none of them were in the
2 facility at the time.

3 THE COURT: Okay. So the bigger issue, then, is
4 not that this is a contradiction, this is a new sub-theory of
5 liability, and it's unfairly prejudicial. Is that what
6 you're saying?

7 MS. SCHEFFEY: Yes, Your Honor.

8 THE COURT: And although I accept the
9 representation that this has been in the production a long
10 time -- by the way, when was 56575 produced?

11 MS. SCHEFFEY: It was November 2017.

12 THE COURT: November 2016?

13 MS. SCHEFFEY: 2017.

14 THE COURT: 2017. Okay. So --

15 MR. KOSHKIN: That's my understanding, as well.

16 THE COURT: Is there any place prior to these
17 responses, these supplemental responses to discovery, where
18 you disclosed that this was part of your theory of the case?

19 MR. KOSHKIN: Yes, Your Honor. Prior to the
20 deposition of GEO's 30(b)(6) witness, we identified a list of
21 documents and policies that we wanted to ask her about. This
22 document was included in that list, and is an exhibit to her
23 deposition.

24 We also, in the very first set of responses to
25 these interrogatories in April of 2020, we identified this

1 sort of sub-theory about the abuse of legal process. That
2 was in those interrogatory responses.

3 THE COURT: As I'm reading this, I'm going to have
4 to maybe disagree a little bit with the defense.

5 I don't see this as a new theory at all. The
6 theory is: If you don't do what GEO says, it could have
7 adverse consequences. That's already in the black that's the
8 prior response.

9 All that second sentence does is give an example
10 of when -- of the proof that they're going to use to support
11 the allegation.

12 And unless asked for in discovery directly,
13 neither of you has to show every piece of evidence you're
14 going to rely on until it's time to exchange exhibits.

15 So I'm not sure I get your drift here.

16 MR. EISMEIER: Here's the drift, Your Honor.
17 Going back to the original motions to Judge Kane having to do
18 with certification, the question was, under the TDPA you have
19 to show a threat of force.

20 The threat of force throughout this case to Judge
21 Kane and as mentioned by the Tenth Circuit, is that if you
22 refuse to clean your dormitory area, you can be sent to
23 solitary confinement, otherwise known as segregation.

24 That is the class-wide allegation that formed the
25 basis for this case.

1 Now that's being sent -- keep in mind segregation
2 for refusal to clean. Now, after the discovery cutoff, after
3 dispositive motions are filed, this new allegation comes out
4 about a whole different threat, which is: In this
5 orientation video, it's not about refusal to clean. It's
6 about we may mess up -- if you don't follow the rules. Not
7 cleaning. The rules. We may mess up your immigration
8 proceedings.

9 And at that point, everything is done. We've
10 never heard this theory before. It's a back door way to
11 amend the complaint to include a class-wide allegation that
12 was never part of this case, or at least never specifically
13 part of this case.

14 THE COURT: So heretofore you thought that the
15 damages arose solely from the threat to --

16 MS. SCHEFFEY: If I may use --

17 THE COURT: -- put in solitary confinement, and
18 now you're understanding that the damages also arise from the
19 threat of you may be kicked out of this country quicker than
20 you want if you don't play ball.

21 MR. EISMEIER: Yes. And it isn't just what we
22 believe. This comes from Plaintiffs themselves.

23 MS. SCHEFFEY: Plaintiffs' own summary judgment
24 brief started with "this lawsuit challenges two policies
25 developed and implemented by the GEO Group by its ICE

1 contract detention facility in Aurora, Colorado."

2 "First, Plaintiffs allege that pursuant to an
3 internal policy called the housekeeping unit sanitation
4 policy, GEO compelled detainees at the Aurora facility to
5 perform necessary janitorial work, without pay, by
6 threatening anyone who tried to refuse a solitary
7 confinement."

8 "Second, Plaintiffs allege" --

9 THE COURT: Hold on. But threatening can have
10 lots of different aspects to it.

11 MS. SCHEFFEY: Right. But it says "by threatening
12 anyone who tried to refuse with solitary confinement." It's
13 limited to "with solitary confinement."

14 THE COURT: Oh, okay. Sorry, I didn't hear that.
15 Go ahead.

16 MS. SCHEFFEY: Yeah. "By threatening anyone who
17 tried to refuse with solitary confinement." And "second,
18 Plaintiffs allege that GEO unjustly enriched itself by paying
19 detainees only \$1.00 a day to perform much of the other work
20 necessary to run the facility."

21 THE COURT: So you're saying they haven't even
22 raised this theory in any brief?

23 MS. SCHEFFEY: Yes, Your Honor.

24 THE COURT: But if they haven't and they don't,
25 what's the beef?

1 MS. SCHEFFEY: Well, Your Honor, our concern is
2 that we have filed summary judgment and decertification, and
3 that this is going to be used to --

4 THE COURT: Hold on. Hold on. Do you intend to
5 raise this aspect, this potential adverse immigration
6 consequences, in any briefing before the Court prior to a
7 trial?

8 MR. KOSHKIN: Yes, Your Honor, we do.

9 THE COURT: So hold on. Why didn't you raise it
10 in your initial brief?

11 MR. KOSHKIN: Your Honor, we haven't filed our
12 initial brief in the current round of summary judgment. The
13 brief that Ms. Scheffey was reading from was our motion for
14 summary judgment on GEO's affirmative derivative sovereign
15 immunity defense, a separate issue from the one that we plan
16 to use it on.

17 THE COURT: Hold on.

18 MR. KOSHKIN: And, again, GEO has been --

19 THE COURT: Hold on. Hold on. What did you just
20 read from?

21 MS. SCHEFFEY: I read from Plaintiffs' motion for
22 summary judgment. What Mr. Koshkin is talking about is a
23 response to GEO's motion for summary judgment.

24 THE COURT: I understand. If you put that element
25 of harm in your motion for summary judgment, why didn't you

1 put this element of harm?

2 MR. KOSHKIN: Again, Your Honor, GEO has been
3 aware of this.

4 THE COURT: No, no, no. You're not answering my
5 question. You can say that after you answer my question.

6 MR. KOSHKIN: Oh, I apologize. We don't -- that
7 brief is not about the harm that occurred in this case. That
8 motion was about the degree to which ICE directed the conduct
9 of that issue in the case, and not the actual harm that was
10 caused.

11 So these allegations that we're discussing right
12 now about this sort of abuse of legal process weren't
13 necessary relevant to the DSI motion.

14 GEO has --

15 THE COURT: Hold on. Read that again. What
16 paragraph is that in, and under what kind of a theory?

17 MS. SCHEFFEY: It's the introduction to their
18 motion for summary judgment.

19 THE COURT: Okay.

20 MS. SCHEFFEY: To try and dismiss GEO's defense,
21 which would obviously also, if GEO had the opportunity, apply
22 to the threat of immigration harm.

23 And it says: "This lawsuit challenges two
24 policies developed and implemented by the GEO Group."

25 THE COURT: Hold on. So you heard that. Your

1 words were "this lawsuit challenges" these things. Are you
2 now expanding that? Yes or no. Are you going to remain with
3 your theory of what this lawsuit challenges? That's the
4 question I have for you.

5 MR. KOSHKIN: Your Honor, this isn't an expansion
6 of the theory. We allege that GEO's housing unit sanitation
7 policy, which involved various threats to coerce detainees
8 into cleaning areas of the dorm outside of what's allowed
9 under ICE rules.

10 We allege that that violates the TVPA.

11 THE COURT: All right, I don't need to hear
12 anymore. There's nothing I can do for you. This relates to
13 whether an issue is before the Court. This doesn't relate to
14 discovery anymore.

15 And I promise you I only have authority up to this
16 line. I cannot go a centimeter about that line.

17 And I think you're into the line -- above the line
18 where it's going to be Judge Kane -- it's still Judge Kane,
19 isn't it?

20 MS. SCHEFFEY: Yes, Your Honor.

21 THE COURT: Judge Kane who decides whether the
22 theory is precluded. So I don't think this is a discovery
23 issue at all. This is a dispositive issue.

24 For me to say a theory is excluded would be
25 dispositive in my world. It would have to be by a report and

1 recommendation, because any ruling that a Magistrate Judge
2 makes on referral that actually bars something from coming in
3 front of the District Judge is what we call in our world
4 dispositive, and we can only do it by recommendation.

5 So the best I could do for you is issue a big dog
6 recommendation, and you guys issue humongous briefs, where
7 you might as well do that in the first place in front of
8 Judge Kane.

9 And so what I think would be the appropriate
10 procedure is if they try to raise this -- first of all, you
11 know you can't raise matters for the first time in a reply
12 brief. So if they tried to raise it in a reply brief on that
13 motion for summary judgment, and didn't mention it in their
14 opening brief, then that violates the rules of briefing.

15 So black letter law in the Tenth Circuit on that.

16 If they do it in response to your motion for
17 summary judgment, then you'll just have to in your reply
18 state that that's a theory that's never been discovered,
19 never been briefed, never been the subject of any analysis,
20 and they've waived it, or whatever argument you can come up
21 with.

22 But I think this is beyond my pay grade. Okay.

23 MS. SCHEFFEY: And, Your Honor, just so I'm clear,
24 my research shows that this might be subject to a Rule 37
25 motion because it was raised for the first time in a

1 discovery response.

2 Would that be something we would file with Judge
3 Kane, and then if he referred it to you, you would handle it?

4 THE COURT: Well, no, that's something you file,
5 period.

6 MS. SCHEFFEY: Yeah.

7 THE COURT: Any motion you file, you don't file it
8 before me or Judge Kane. You file it in the case.

9 MS. SCHEFFEY: Yeah.

10 THE COURT: Every single motion. I mean, even if
11 you know it's going to be mine, you just file it with the
12 Court. And then in order for it to become mine, there is a
13 specific referral after that entry that says "this is
14 referred to the Magistrate Judge."

15 So if he thinks it's something that belongs to me,
16 he will let me know. But as you may know, Judge Kane uses
17 Magistrate Judges sparingly, and it would be extremely
18 unusual for a Magistrate Judge to reach out and do something
19 that might affect what's presented at trial, because that's
20 his prerogative.

21 So if you do file such a motion, he may refer it
22 to me, he may not, but that's his decision. Okay?

23 MS. SCHEFFEY: Okay.

24 MR. EISMEIER: Your Honor, could I ask a question?

25 THE COURT: Yes.

1 MR. EISMEIER: Essentially what we're -- the
2 reason that we're here is because this was raised in our
3 opinion for the first time in a discovery response. And you
4 understand that.

5 THE COURT: Yes.

6 MR. EISMEIER: And so this isn't about excluding
7 evidence at trial. At trial is what Judge Kane gets to
8 decide, or the Article III Judge, and we understand that.

9 THE COURT: Right.

10 MR. EISMEIER: But to the extent -- the reason
11 we're here, in large part, is because this was raised at the
12 time we didn't get to ask any of the deponents that we did --

13 THE COURT: That I can handle. That I can handle.
14 Okay?

15 MR. EISMEIER: And so one of the issues is because
16 this was raised in a discovery response after the discovery
17 deadline, we now didn't get to ask Mr. Menocal, or all of the
18 other people who signed these things, we didn't get to ask
19 them about "did you see this? Did you consider this a
20 threat?"

21 Because if they don't consider it a threat, it's
22 not anything. So therefore, our concern is not just that
23 it's a new theory, but we've been deprived the ability to do
24 discovery.

25 THE COURT: Right. And so my remedy for that

1 would be this, and Plaintiffs' counsel please listen
2 carefully.

3 Number one: I would give the Plaintiffs' counsel
4 a chance to represent to you in writing that each of the
5 named representatives, anybody you've taken a deposition of,
6 would each testify that they do not recall seeing the video.

7 They probably can't say they never saw it, because
8 that might be a lie. All they can say is "we have no
9 recollection of this video." Therefore, it wouldn't have had
10 an impact -- who knows if wouldn't have had impact.

11 But, you know, their knowledge of it might have an
12 impact now because they've been informed after the fact "this
13 is what that video said." They were probably dozing off
14 during the time it was shown to them, if it was shown to
15 them.

16 So if they acknowledge that they have no
17 recollection, each of them, about the video, I think you have
18 all you need.

19 If they don't do that, then you get to depose each
20 one at Plaintiffs' expense. Okay?

21 MR. EISMEIER: Thank you.

22 THE COURT: All right. And as to the other
23 matter, after reading the opinion provided to me, that did
24 rely very heavily on investigation by a federal agency
25 presents more than a remote respect of future litigation and

1 provides reasonable grounds for anticipating litigation.

2 This is not what we have here. Unfortunately, we
3 have you reaching out to the United States rather than
4 responding to a threat from the United States.

5 So I think they are fundamentally differently
6 situated. I think you've waived at least what's in that
7 letter. You have not waived the underlying analysis and work
8 product.

9 You don't have to do Plaintiffs' work for them,
10 but you would have to disclose information that you freely
11 provided without compulsion to the United States Government.

12 That's my view of it. Okay?

13 MS. SCHEFFEY: Okay.

14 THE COURT: All right.

15 MS. SCHEFFEY: Thank you, Your Honor.

16 THE COURT: All right. What else do we have?

17 MS. SCHEFFEY: That's it, Your Honor, I think.

18 THE COURT: Okay. Anything else from the
19 Plaintiffs?

20 MS. DEMPSEY: No, that's it, Your Honor. Thank
21 you.

22 THE COURT: Mr. Jafek, thank you for coming in.

23 MR. JAFEK: Sure. Thank you.

24 THE COURT: Take care, everyone.

25 MS. SCHEFFEY: Thank you, Your Honor.

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THE COURT: All right. Bye.

MR. KOSHKIN: Thank you, Your Honor.

MR. EISMEIER: Thank you.

THE COURT: Bye.

(Time noted: 3:02 p.m.)

* * * * *

CERTIFICATE

I, RANDEL RAISON, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my ability.



October 13, 2020

Randel Raison