

The Honorable Robert J. Bryan

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UGOCHUKWU GOODLUCK
NWAUZOR, FERNANDO AGUIRRE-
URBINA, individually and on behalf of all
those similarly situated,

Plaintiffs,

v.

THE GEO GROUP, INC., a Florida
corporation,

Defendant.

No. 17-cv-05769-RJB

**PLAINTIFFS’ NOTICE REGARDING
PROPOSED ORDER IN STATE OF
WASHINGTON V. THE GEO GROUP,
INC.**

Plaintiffs respectfully submit this Notice on behalf of themselves and the certified class to provide their position regarding the Court’s Proposed Order, ECF No. 306-1, in *State of Washington v. The GEO Group, Inc.*, No. C17-5806-RJB. Plaintiffs oppose dismissal of their action based on the Court’s unsigned order without a prior opportunity to complete discovery. Briefing on summary judgment has not yet commenced in this action. *See* ECF No. 174 (“All other deadlines remain unchanged.”). Discovery remains ongoing. Plaintiffs have not yet had the opportunity to present arguments in response to GEO’s intergovernmental immunity defense, and the position of the United States. Consequently, issuing a dispositive ruling in this

1 action without affording Plaintiffs notice and an opportunity to be heard would be improper.
2 See Fed. R. Civ. P. 56(f) (“After giving notice and a reasonable time to respond, the court
3 may....”) (emphasis added). See also *Albino v. Baca*, 747 F.3d 1162, 1176-77 (9th Cir. 2014)
4 (quoting *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993) (“Reasonable notice
5 implies adequate opportunity to develop the facts on which the litigant will depend to oppose
6 summary judgment.”)).

7
8 Upon completion of fact discovery in accordance with this Court’s Scheduling Order,
9 ECF No. 146, Plaintiffs will present the Court with additional evidence showing genuine
10 disputes of material fact that foreclose summary judgment on the legal arguments made by
11 GEO and the United States in *Washington v. GEO*. The evidence Plaintiffs anticipate obtaining
12 and submitting in support of their opposition to summary judgment on the basis of
13 intergovernmental immunity will demonstrate that the Statement of Interest of the United
14 States contains *post hoc* rationalizations adopted in the course of litigation after significant
15 lobbying by The GEO Group. This evidence will bear directly on the degree of deference the
16 Court should show to the Statement of Interest in this matter and whether the factual and legal
17 positions adopted at the eleventh hour by DOJ represent a complete and accurate view of the
18 agency’s position and are entitled to the presumption of regularity.

19
20 Among other evidence, Plaintiffs have already obtained roughly 4,000 pages of federal
21 agency records documenting that GEO and ICE engaged in a “statement of interest initiative”
22 that dates back at least two years, raising questions about why DOJ did not file a Statement of
23 Interest until now, whether the government’s position has shifted over that time, and whether
24 there was a rational, relevant basis for the shift in the government’s position. See Exhibit A,
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1 Email from ICE Associate Legal Advisor, June 20, 2017, ICE Freedom of Information Act
2 (“FOIA”) Response 2018-ICLI-00052-3034-36; Ex. B, Email from ICE Associate Legal
3 Advisor dated July 24, 2017, ICE FOIA Response 2018-ICLI-00052-5439; Ex. C, Email from
4 ICE Associate Legal Advisor dated June 6, 2018, ICE FOIA Response 2018-ICLI-00052-
5 2739; Ex. D, Email from ICE Associate Legal Advisor dated September 12, 2018, with
6 attachments “Statements of Government Interest in Wash v. GEO et al. (1.24.18).pdf” and
7 “VWP Factual Background (July 2018).docx”, ICE FOIA Response 2018-ICLI-00052-3040.
8

9 Relatedly, ICE has repeatedly refused to grant GEO’s requests for equitable
10 adjustments to its detention contracts, including the NWDC contract, seeking as much as \$20
11 million in additional payments from ICE to GEO for litigation costs the company incurred that
12 are associated with this and related detainee labor cases. Ex. E, Letter from GEO Executive
13 David Venturella to Acting ICE Director Thomas Homan dated February 14, 2018, ICE FOIA
14 Response 2018-ICLI-00052-2751-55; Ex. F, Email from ICE Associate Legal Advisor dated
15 July 23, 2018 with attachments, ICE FOIA Response 2018-ICLI-00052-6053-61; Ex. G, Letter
16 from GEO CEO George Zoley to ICE Acting Deputy Director Peter Edge dated May 30, 2018,
17 ICE FOIA Response 2018-ICLI-00052-3404; Ex. H, Letter from ICE Acting Deputy Director
18 Peter Edge to GEO CEO George Zoley dated July 9, 2018, ICE FOIA Response 2018-ICLI-
19 00052-6062.
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21
22 The agency’s rationale and legal basis for denying GEO’s requests under federal
23 contracting laws bears directly on DOJ’s factual assertions regarding the NWDC, the identity
24 of interest between GEO and the federal government, and the comparability of the VWP to the
25 State of Washington’s labor programs for civilly detained persons, as well as the amount of
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1 deference, if any, the Court should afford DOJ and its claims concerning intergovernmental
2 immunity.

3 In sum, evidence exists raising questions as to the procedural regularity, accuracy, and
4 consistency of the representations in DOJ's Statement of Interest. Plaintiffs require additional
5 time to follow that evidence where it leads and secure testimony from ICE about it. As the
6 Supreme Court recently observed:
7

8 We are presented, in other words, with an explanation for agency action that
9 is incongruent with what the record reveals about the agency's priorities and
10 decisionmaking process. . . . The reasoned explanation requirement of
11 administrative law, after all, is meant to ensure that agencies offer genuine
12 justifications for important decisions, reasons that can be scrutinized by
13 courts and the interested public. Accepting contrived reasons would defeat
14 the purpose of the enterprise.

15 *Department of Commerce v. New York*, --- U.S. ----, Case No. 18-966, Slip Op. at 33
16 (Jun. 27, 2019). *See also* Note, The Presumption of Regularity in Judicial Review of the
17 Executive Branch, 131 Harv. L. Rev. 2431 (2018), available at
18 [https://harvardlawreview.org/2018/06/the-presumption-of-regularity-in-judicial-review-of-](https://harvardlawreview.org/2018/06/the-presumption-of-regularity-in-judicial-review-of-the-executive-branch/)
19 [the-executive-branch/](https://harvardlawreview.org/2018/06/the-presumption-of-regularity-in-judicial-review-of-the-executive-branch/) (last visited Oct. 4, 2019).

20 Finally, this filing serves as notice of Plaintiffs' intent to seek leave to amend their
21 complaint to include a claim of unjust enrichment. Plaintiffs have informed GEO of their intent
22 to file such motion and will file it no later than October 18, 2019.

23 DATED this 4th day of October, 2019.

24 LAW OFFICE OF R. ANDREW FREE

25 /s/ R. Andrew Free
26 Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED: October 4, 2019 at Nashville, Tennessee

/s/ R. Andrew Free

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