THREE BRANCHES LAW. PLLC

BY E-MAIL: (b)(6);(b)(7)(C)

June 14, 2018

(b)(6);(b)(7)(C)
Associate Legal Advisor
Government Information Law Division
Office of Principal Legal Advisor
U.S. Immigration and Customs Enforcement

(b)(6);(b)(7)(C)
Assistant U.S. Attorney for ICE
U.S. Department of Justice

RE: *Touhy* Notification for Subpoenas
State v. The GEO Group, Inc., U.S. District Court, W.D. WA, No. 3:17-cv-05806 RJB
Ugochukwu Goodluck Nwauzor v. GEO, U.S. District Court, W.D. WA, ECF NO.: 3:17-cv-05769 RJB (formerly styled *Chao Chen v. The GEO Group, Inc.*)

Dear (b)(6);(b)(7)(C and (b)(6);(b)(7)(C)

This letter is in response to your June 12, 2018 letter regarding the subpoenas for the depositions served on (b)(6);(b)(7)(C) and Matthew Albence through your office. In your letter you invite a request for testimony and documents pursuant to 6 C.F.R. §§ 5.41-5.49 and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Please let this letter serve as The GEO Group, Inc.'s ("GEO") request for testimony to include authentication and explanation of documents in the above-referenced actions.

I have attached copies of the complaints in both actions, each of which involve the Northwest Detention Center ("NWDC"), ICE's Contract Detention Facility in Tacoma, Washington. GEO manages the NWDC pursuant to a contract with your agency. The *Nwauzor* plaintiffs and the State of Washington both allege, *inter alia*, that your contracting partner, GEO, is the "employer" of detainees who participated in ICE's required Voluntary Work Program ("VWP"), and that the detainees who GEO's "employees" under state minimum wage laws. The *Nwauzor* plaintiffs seek to certify a class of detainees seeking back wages for their VWP participation. The State of Washington seeks a declaratory order that GEO employs detainees, an injunction compelling payment of state minimum wage, and restitution under state law for GEO's alleged "unjust enrichment" by failure to pay a "fair wage," in the form of "disgorgement." Detainees in similar cases brought against GEO have made such claims, under the laws of Colorado and California.

The complaints interpret ICE's statutory directives and policies, as well as ICE's and GEO's contract for the NWDC in ways that profoundly conflict with past practices, federal law and what ICE and GEO contemplated as contracting partners. For example, both complaints

(b)(6);(b)(7)(C) 1019 REGENTS BLVD, (b)(6);(b)(7)(FIRCREST, WA 98466 P (b)(6);(b)(7)(C)
(b)(6);(b)(7)(C)

allege that "GEO's contract with ICE requires GEO to comply with state and local laws." *See Nwauzor* Complaint at ¶ 4.3; *State of Washington* Complaint at ¶ 3.11. The plaintiffs claim that this means that ICE requires GEO to pay a minimum wage set by Washington state law to VWP participants as GEO's "employees." Clearly, GEO and ICE never contemplated that the VWP would create an employment relationship with detainees or that the states in which ICE chooses to operate federal detention facilities would be bound by state minimum wage laws for VWP participation.

GEO has briefed the Court in both *Nwauzor* and *State of Washington* on GEO's understanding of the relevant laws and policies and the facility contract requirements. Based on the relevant statutes and policies and guidance from opinions of the General Counsel of your predecessor agency, the Immigration and Naturalization Service, GEO has taken the position that detainees at the NWDC are not GEO's "employees." *See* INS General Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities*, Gen. Counsel Op. No. 92-8, 1992 WL 1369347 (Feb. 26, 1992). GEO has also taken the position that the allowance of $1 per day per detainee, the rate at which ICE reimburses GEO under the CDF agreement, is fully authorized by ICE, and is lawful based on Congressional enactments, agency legal opinions, and policies that GEO is required to follow as a contractor. *See, e.g.*, 8 U.S.C. § 1555(d); INS, *Your CO 243-C Memorandum of November 15, 1991; DOD Request for Alien Labor*, Gen. Counsel Op. No. 92-63, 1992 WL 1369402 (Nov. 13, 1992) (citing 93 Stat. at 1042); INS General Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities*, Gen. Counsel Op. No. 92-8, 1992 WL 1369347, *1-2 (Feb. 26, 1992); Performance Based National Detention Standards, § 5.8.

GEO has acted in reliance upon this guidance and authority in carrying out its contract with ICE. However, preliminary court rulings show the district court inviting the submission of evidence for its consideration on future dispositive motions. Transcripts from the district court hearings in these proceedings are attached together with the court's orders. This evidence includes both oral testimony and written discovery. Plaintiffs in both cases have requested documents that GEO, pursuant to its contractual obligations with ICE, is not allowed to release without prior ICE approval.

GEO cannot speak for ICE. GEO is requesting the opportunity to depose the individuals served in order that the agency may state and defend its contract terms that incorporate ICE - PBNDS for VWP participation at specified rates. GEO expects the witnesses will testify that ICE pays detainees at $1.00 per day for VWP participation in federally owned and operated facilities and that ICE oversight of GEO shows that ICE administered the VWP at the NWDC in a manner that conforms with its expectations. In addition, these officials would likely agree that the judicial creation of an employment relationship between GEO and detainees would certainly impact ICE contract negotiations with GEO and may otherwise result in unintended consequences of significance to ICE. While GEO recognizes (but does not necessarily agree with) ICE's concerns or objections such as attorney-client privilege, protection of the agency deliberative process, or asserted burdens on the agency, GEO needs admissible evidence pertaining to ICE's express interest in this litigation and whether ICE allows employment of detainees by GEO to defend this litigation. Here are some exemplary questions:

1. How does ICE administer the VWP at facilities that ICE operates directly? Does ICE consider itself to be detainees' "employer" and the detainees ICE's "employees" under federal law or under the law of the state where the facility is located? Do ICE's policies apply differently to its contractors? If so, how and why or why not?

2. What does ICE pay detainees for VWP work at facilities that ICE operates directly? What is the authority for paying that amount? Does it exceed $1 per day per detainee, and what is the process for paying a rate higher than $1 per day? Does ICE consider itself subject to state minimum wage laws for VWP participation? Do ICE's policies apply differently to its contractors? If so, how so and why or why not?

3. Is a contractor operating an ICE processing center expected to administer the VWP at the facility under ICE's standards? How does ICE promulgate PBNDS and what effect does ICE give its own standards? Why? Does the contractor act within ICE's authorization by paying detainees $1 per day for VWP participation, as non-employees?

4. Does ICE affirm or reject the above-referenced INS legal opinions that detainees are not "employees" of the facilities and the facilities do not become their "employers" by virtue of VWP participation? Does ICE affirm or reject the above-referenced INS legal opinions that the authority and directive to pay an allowance to detainees for VWP participation derives solely from Congress? Has ICE ever taken the position that an employment relationship between detainees and GEO exists under state law, and that state minimum wage law, rather than Congress, controls the rate of pay. Why or why not?

5. In ICE's view, could ICE allow its contractors to lawfully employ detainees to participate in the VWP? Why or why not? Does ICE have practical concerns about the existence of an employment relationship between detainees and contractors? Has ICE considered alternatives to VWP, such as ICE or its contractors hiring local non-detained persons to perform work currently carried out under the VWP? Why or why not?

Additionally, ICE likely has its own view on what documents are relevant to supporting its views on whether VWP participants have an employment relationship with ICE detention facilities (whether ICE-operated SPCs, or contractor operated CDFs or IGSAs), and what the lawful pay rate is for VWP participation.

The official information in ICE's testimony and supporting documentation are directly relevant to GEO's defense of the plaintiffs' claims in the above-referenced lawsuits. The questions seek answers about ICE's view of the relevant contractual requirements, the agency's understanding of its own policies and authority under federal law, and the agency's view about the competing demands of state law as they relate to the VWP. As you are aware, GEO would prefer that ICE participate in defending this litigation, allowing it to state its own positions as a litigant. Because ICE has not yet done so, a request for deposition is reasonable and necessary to enable the Court, GEO, the plaintiffs, and the general public to understand the factual and legal basis for the agency's practices.

Compliance with the subpoenas is warranted under 6 C.F.R. § 5.48. The depositions and documents are not unduly burdensome to ICE or inappropriate. This is a one-day deposition of persons who can speak on behalf of the agency. GEO expects to conduct its examination in one day, June 25, 2018, beginning at 9:00 a.m. and 1:00 p.m. Eastern time in Washington D.C. before a court reporter and videographer. The depositions are scheduled as noted at the law firm of Holland & Knight 800 17th Street N.W. Ste 1100 Washington DC 20006. The witness fees and mileage were served with the subpoenas. ICE can state its understanding of its legal framework and policies and how they apply to the plaintiffs' claims without compromising attorney-client privilege or limits on disclosure. As a contractor required to adhere to ICE's policies, such as the PBNDS, GEO needs to understand ICE's view of the plaintiffs' claims as they relate to federal law and ICE's policies. This is a matter of public interest, not private interest. GEO operates federal detention facilities that house detainees in the federal government's custody according to federal standards. GEO needs to know the agency's position to enable it not only to defend against current and potential lawsuits that challenge GEO's performance of ICE's policies through state law, but also needs to understand ICE's position to respond to constant attacks in the media and from public figures, such as the Attorney General of Washington. DHS's and ICE's interests are clearly at stake: the allegations brought against GEO for its administration of the VWP are implicitly directed at ICE's own policies, and similar suits may be brought against ICE for its own administration of the VWP. DHS's and ICE's mission to carry out its federal mandates under immigration law, including detention of aliens, is put in question by the plaintiffs and their competing demands under state law. The claims are likely to have a significant financial impact on both DHS, ICE and its contractors, to undermine ICE's ability to implement uniform detention facility operations by subjecting various facilities to different state wage or unjust enrichment laws, and to limit DHS's and ICE's options for operating detention facilities through contracting partnerships with private entities. Class action and attorney general-led challenges to ICE's own directives, policies and contracting practices are directly related to the agency's mission and the importance of the agency's statement of its views outweighs any minimal burdens in appearing for deposition.

Time is of the essence. The depositions must proceed swiftly to meet the class certification deadlines set by the court. In *Nwauzor*, plaintiffs must move for class certification by June 21st and GEO must respond shortly thereafter.

Your consideration in this regard is appreciated. Do not hesitate to contact me in the event you have additional questions.

Very truly yours,
III BRANCHES LAW, PLLC

(b)(6);(b)(7)(C)

Local Counsel for GEO

cc: Client

Exhibit A

Complaint

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, v. THE GEO GROUP, INC., Defendant.	NO. COMPLAINT

I. INTRODUCTION

1.1 The State of Washington files this action against Defendant The GEO Group, Inc. ("Defendant" or "GEO") to enforce Washington's minimum wage laws and to remedy the unjust enrichment that results from Defendant's long standing failure to adequately pay immigration detainees for their work at the privately owned and operated Northwest Detention Center ("NWDC").

1.2 The enforcement of minimum wage laws is of vital and imminent concern to the people of Washington as the minimum wage laws protect Washington workers and create employment opportunities.

1.3 Each year Washington sets an hourly minimum wage, and employees protected by Washington's minimum wage laws must be paid at least the set hourly minimum wage.

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1.4 Defendant pays detainees $1 per day for work they perform at NWDC. This is a violation of Washington's minimum wage laws, and the practice of paying detainee workers $1 per day has unjustly enriched Defendant.

PLAINTIFF, the State of Washington, for its causes of action against Defendant GEO, alleges as follows:

II. JURISDICTION AND VENUE

2.1 The Attorney General is authorized to commence this action pursuant to RCW 43.10.030(1).

2.2 Subject matter jurisdiction is proper in this Court pursuant to RCW 2.08.010, RCW 7.24.010, and RCW 7.24.020 because this is an action alleging state law violations and seeking declaratory and injunctive relief.

2.3 Jurisdiction and venue are proper in this Court pursuant to RCW 4.12.020 and RCW 4.12.025 because work performed by detainees occurs at NWDC, which is located in Pierce County, and because this matter arises from Defendant's business practices and transactions at NWDC.

III. PARTIES

PLAINTIFF STATE OF WASHINGTON

3.1 The Attorney General is the chief legal adviser to the State of Washington. The Attorney General's powers and duties include bringing enforcement actions to ensure compliance with Washington laws.

3.2 The Washington State Department of Labor and Industries is a state agency dedicated to the safety, health, and security of Washington's 2.5 million workers. The Department of Labor and Industries enacts rules and operates enforcement programs that help ensure compliance with the State's wage laws.

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3.3 Washington has a quasi-sovereign interest in protecting the health, safety, and well-being of its residents which includes protecting its residents from harms to their own and Washington's economic health.

3.4 Washington's interest in preventing and remedying injuries to the public's health, safety, and well-being extends to all of Washington's residents, including individuals who suffer indirect injuries and members of the general public.

3.5 The enforcement of minimum wage laws is of preeminent concern to the people of Washington. The Legislature enacted minimum wage laws to protect Washington workers and safeguard "the immediate and future health, safety and welfare of the people of the state." RCW 49.46.005(1).

3.6 Washington set the below minimum wages for 2005-2017:

January 1, 2017	$11.00	January 1, 2010	$8.55
January 1, 2016	$9.47	January 1, 2009	$8.55
January 1, 2015	$9.47	January 1, 2008	$8.07
January 1, 2014	$9.32	January 1, 2007	$7.93
January 1, 2013	$9.19	January 1, 2006	$7.63
January 1, 2012	$9.04	January 1, 2005	$7.35
January 1, 2011	$8.67		

See http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp (last visited September 18, 2017).

DEFENDANT

3.7 Defendant GEO is a for-profit business operating in Washington.

3.8 Since 2005, Defendant GEO has owned and operated NWDC, which is located at 1623 E. J Street, Tacoma, Washington.

3.9 NWDC is a private immigration detention center that has the capacity to house approximately 1,575 individuals.

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3.10 Defendant GEO contracts with U.S. Immigration and Customs Enforcement ("ICE") for the detention of adult civil detainees, who are awaiting resolution of their immigration matters. GEO has contracted with ICE to provide this service at NWDC since 2005.

3.11 GEO's contract with ICE requires GEO to comply with state and local laws and codes when it operates NWDC.

IV. ALLEGATIONS

4.1 Defendant relies upon detainee labor to operate NWDC.

4.2 Detainees perform a wide range of work at NWDC including preparing, cooking, and serving food to the detainee population; operating NWDC's laundry service; cleaning living areas and bathrooms; and regularly painting walls and buffing floors.

4.3 ICE's 2011 Performance Based National Detention Standards require Defendant to pay detainees at least $1 per day for their labor.

4.4 For most work detainees perform at NWDC, Defendant pays detainees $1 per day for their labor regardless of the number of hours worked.

4.5 For some work detainees perform at NWDC, Defendants do not pay detainees $1 per day, and instead "pay" detainees in snack food such as chicken, potato chips, soda, and/or candy.

4.6 Detainees are "employees" protected by Washington's minimum wage laws.

4.7 Defendant is an "employer" for purposes of Washington's minimum wage laws.

4.8 Defendant does not pay detainee workers the state minimum wage for work they perform at NWDC.

4.9 Since 2005, GEO receives and has received the benefit of having necessary work done at NWDC without bearing the financial burden of paying the minimum wage to those who perform such work.

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V. FIRST CAUSE OF ACTION

(Violation of Washington's Minimum Wage Law)

5.1 Plaintiff realleges and incorporates by reference herein all the allegations of paragraphs 1.1 through 4.9.

5.2 RCW 49.46.020 requires every employer to pay the hourly minimum wage "to each of his or her employees" who is covered by Washington's minimum wage laws.

5.3 Detainees work for Defendant and perform many of the functions necessary to keep NWDC operational including preparing and serving food to detainees, cleaning common areas, and operating the laundry.

5.4 Defendant pays detainees $1 per day for work performed at NWDC.

5.5 The current hourly minimum wage in Washington is $11.00 per hour.

5.6 Defendant violates RCW 49.46.020 when it pays detainees who work at NWDC $1 per day instead of the hourly minimum wage.

VI. SECOND CAUSE OF ACTION

(Unjust Enrichment)

6.1 Plaintiff realleges and incorporates by reference herein all the allegations of paragraphs 1.1 through 5.6.

6.2 Defendant operates NWDC as a for-profit business.

6.3 Defendant utilizes detainee labor to operate NWDC.

6.4 Defendant does not pay adequate compensation to detainees for their work.

6.5 Defendant benefits by retaining the difference between the $1 per day that it pays detainees and the fair wage that it should pay for work performed at NWDC.

6.6 It is unjust for the Defendant to retain the benefit gained from its practice of failing to pay adequate compensation to detainees for the work they perform at NWDC.

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VII. PRAYER FOR RELIEF

Wherefore, the State of Washington prays that the Court:

7.1 Declare that detainees who work at NWDC are "employees" as defined by RCW 49.46.010(3);

7.2 Declare that Defendant is an "employer" of detainee workers at NWDC as defined by RCW 49.46.010(4);

7.3 Declare that Defendant and must comply with RCW 49.46.020 for work performed by detainees at NWDC;

7.4 Enjoin Defendant from paying detainees less than the minimum wage for work performed at NWDC;

7.5 Find and declare that Defendant has been unjustly enriched by its practice of failing to adequately pay detainee workers for their labor at NWDC;

7.6 Order Defendant to disgorge the amount by which it has been unjustly enriched;

7.7 An award of reasonable attorneys' fees and costs that the State incurs in connection with this action; and

7.8 Award such additional relief as the interests of justice may require.

DATED this 20th day of September 2017

ROBERT W. FERGUSON
Attorney General

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Exhibit B

Class Action Complaint

The Honorable Robert J. Bryan

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 FIRST AMENDED CLASS ACTION COMPLAINT FOR DAMAGES

I. NATURE OF ACTION

1.1. Plaintiffs bring this class action on behalf of all civil immigration detainees who performed work for The GEO Group, Inc. ("GEO") at its Northwest Detention Center ("NWDC") in Tacoma, Washington at any time during the three years prior to the filing of the initial complaint in this action and thereafter.

1.2. Plaintiffs seek to recover wages under the Washington Minimum Wage Act ("MWA"), RCW 49.46, *et seq.*, as well as other damages allowable under state law, for the wages that GEO denied them and the class they represent.

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II. JURISDICTION AND VENUE

2.1. This Court has jurisdiction of Plaintiffs' claims pursuant to 28 U.S.C. § 1332(d). The class that Plaintiffs propose to represent includes more than 100 members, one or more members of the putative class are citizens of a foreign state or a different State than Defendant, and the amount in controversy in the matter exceeds the sum of $5,000,000.

2.2. Venue is proper in this district because all or a substantial part of the relevant acts and omissions alleged herein took place in Pierce County in the Western District of Washington.

III. PARTIES

3.1. Plaintiff Ugochukwu Goodluck Nwauzor resides in Kent, Washington, and was detained at NWDC in Tacoma, Washington, from approximately February 2016 until January 2017. Mr. Nwauzor is a citizen of Nigeria, but was granted asylum by the United States in approximately January 2017.

3.2. Plaintiff Fernando Aguirre-Urbina resides at NWDC in Tacoma, Washington, where he has been detained since around September 2012. Mr. Aguirre-Urbina is a citizen of Mexico.

3.3. Defendant GEO is a for-profit corporation incorporated under the laws of Florida and transacting business in Pierce County, Washington. GEO is an employer under the MWA.

IV. FACTUAL ALLEGATIONS

4.1. GEO is a for-profit corporation providing correctional, detention, and community reentry services. GEO's 2016 revenues were over $2 billion, and its stock is

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publicly traded on the New York Stock Exchange.

4.2. Since 2005, GEO has owned and operated NWDC, which is a 1,500 bed immigration detention facility in Tacoma, Washington.

4.3. GEO contracts with the U.S. Immigration and Customs Enforcement ("ICE") for the detention of adult civil detainees, who are awaiting resolution of various immigration matters. GEO's contract with ICE requires GEO to comply with state and local laws.

4.4. Rather than hire from the local workforce, GEO relies upon captive detainee workers to clean, maintain, and operate NWDC.

4.5. GEO's NWDC Detainee Handbook describes detainee work assignments as including kitchen and laundry work, as well as recreation/library/barber and janitorial services. The Handbook refers to these various tasks as "work" and a "job," and references "wages earned" by detainee "workers."

4.6. The detainee workers are "employees," and GEO is an "employer" under Washington's minimum wage laws. GEO employed and continues to employ the detainee workers by engaging, suffering, or permitting them to work on its behalf.

4.7. For all of the labor they perform, GEO pays each detainee worker only $1 per day, regardless of the number of hours they worked.

4.8. In some cases, GEO does not pay detainee workers at all, compensating them instead with more and better food than the facility's standard fare.

4.9. GEO does not pay and has not paid detainee workers the state minimum wage for the hours they worked at NWDC.

4.10. Plaintiffs have performed work for GEO at NWDC and have not been paid the state minimum wage for the work they performed.

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4.11. The current hourly minimum wage in Washington is $11.50 per hour.

4.12. GEO's pay policies violate Washington minimum wage laws.

V. CLASS ALLEGATIONS

5.1. Plaintiffs seek to represent all civil immigration detainees who perform or have performed work for GEO at NWDC at any time during the three years prior to the filing of the initial complaint in this matter and thereafter.

5.2. This action is properly maintainable as a class action under Fed. R. Civ. P. 23(a) and (b)(3).

5.3. Pursuant to Rule 23(a)(1), the class as described is so numerous it is impracticable to join all of the class members as named Plaintiffs.

5.4. Pursuant to Rule 23(a)(2), there are common questions of law and fact including, but not limited to, whether (a) GEO is an "employer" under the MWA, (b) the detainee workers are "employees" under the MWA, and (c) whether GEO violated the MWA by failing to pay detainee workers the statutory minimum wage.

5.5. Pursuant to Rule 23(a)(3), the named Plaintiffs' claims are typical of the claims of all class members and of GEO's anticipated defenses to their claims.

5.6. The named Plaintiffs will fairly and adequately protect the interests of the class as required by Rule 23(a)(4).

5.7. Pursuant to Rule 23(b)(3), class certification is appropriate here because questions of law or fact common to members of the class predominate over any questions affecting only individual members and because a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

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VI. LEGAL CLAIM

VIOLATION OF THE WASHINGTON MINIMUM WAGE ACT

6.1. Plaintiffs and the proposed class members are "employees" under RCW 49.46.010(3).

6.2. Defendant is an "employer" within the meaning of RCW 49.46.010(4).

6.3. Defendant's practice of paying subminimum wages to Plaintiffs and the proposed class members violates RCW 49.46.020.

6.4. Plaintiffs and the proposed class have been harmed by Defendant's practice of paying subminimum wages, and they are entitled to damages in amounts to be proven at trial.

VII. RELIEF REQUESTED

In light of the above, Plaintiffs pray that the Court grant them the following relief:

1. Certify this case as a class action;

2. Damages for lost wages in amounts to be proven at trial;

3. Attorneys' fees and costs pursuant to RCW 49.46.090 and RCW 49.48.030;

4. Prejudgment interest; and

5. Such other relief as is just and proper.

DATED this 13th day of June, 2018.

SCHROETER GOLDMARK & BENDER
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that 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 at Seattle, Washington this 13th day of June, 2018.

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Exhibit C

VRP Motion to Dismiss Hearing

Exhibit D

WA Order Denying Motion to Dismiss

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 ORDER ON GEO'S MOTION TO DISMISS COMPLAINT

THIS MATTER comes before the Court on Defendant The GEO Group, Inc.'s Motion to Dismiss Complaint. Dkt. 10. The Court has considered Defendant's motion, Plaintiff State of Washington's Response, Defendant's Reply, the Complaint, and the remainder of the file herein. Dkts. 1-1, 17, 18. The Court also considered oral argument held in open court on November 20, 2017.

This case centers on the compensation of detainees at the Northwest Detention Center, a facility Defendant operates in Tacoma, Washington, under a contract with United States Immigration and Customs Enforcement (ICE), a division of the Department of Homeland

Security. Defendant uses detainees to assist in operating the facility under a Voluntary Work Program, and in exchange for their work, Defendant compensates detainees $1 per day.

Plaintiff filed this[1] action "to enforce Washington's minimum wage laws and to remedy the unjust enrichment" from Defendant's "long standing failure to adequately pay immigration detainees[.]" Dkt. 1-1 at ¶1.1. Defendant's Fed. R. Civ. P. 12(b)(6) motion seeks dismissal on four primary grounds: (1) the State's claims are preempted by federal law, (2) the State lacks authority to bring this lawsuit, (3) the State fails to state a claim for unjust enrichment and violations of the Washington Minimum Wage Act, and (4) the State's unclean hands and laches bar relief. Dkt. 10.

I. BACKGROUND

A. The Complaint.

The following facts alleged in the Complaint are taken as true for purposes of Defendant's motion.

Defendant is a private corporation that has owned and operated the Northwest Detention Center, a 1,575 bed facility, since 2005. Dkt. 1-1 at ¶¶3.8, 3.9. ICE contracts with Defendant for the detention of adult detainees awaiting resolution of immigration matters. *Id.* at ¶3.10 Defendant relies upon detainees for a wide range of services, including laundry service, cleaning general living spaces, buffing floors, and painting. *Id.* at ¶4.2. Defendant compensates detainees at $1 per day, but Defendant has in some cases alternatively compensated detainees with more or better food. *Id.* at ¶¶4.4, 4.5. Since 2005 Defendant has received the benefit of this $1 per day labor without the financial burden of paying the State minimum wage, currently set at $11 per hour. *Id.* at ¶¶3.6, 4.9.

[1] *See* companion case, *Chen v. The GEO Group, Inc.*, No. 3:17-cv-5769 (W.D.Wash. Sept. 26, 2017).

The Complaint alleges that Plaintiff has a "quasi-sovereign interest in protecting the health, safety, and well-being of [Washington] residents [ ] includ[ing] . . . harms to their own and Washington's economic health." Dkt. 1-1 at ¶¶3.3, 3.4. Further, it is alleged, "[t]he enforcement of minimum wage laws is of preeminent concern to the people of Washington," and "[t]he Legislature enacted minimum wage laws to protect Washington workers" as well as to "safeguard 'the immediate and future health, safety and welfare of the people of the state.' *Id.* at ¶3.5, citing RCW 49.46.005(1).

The Complaint alleges two causes of action, unjust enrichment and violations of Washington's Minimum Wage Act. Dkt. 1-1 at ¶¶5.1-6.6. Plaintiff seeks an order requiring Defendant to disgorge its unjust enrichment from the failure to adequately pay detainees. *Id.* at ¶¶7.5, 7.6. Plaintiff also seeks declaratory relief that Defendant is an "employer" that must comply with the State's minimum wage laws when managing detainee-workers, who are "employees," and injunctive relief that Defendant be enjoined from paying detainee-workers less than the State minimum wage. *Id.* at ¶¶7.1-7.4.

B. Extra-pleadings.

Defendant operates the Northwest Detention Center by "a complex statutory, regulatory, and contractual relationship" with ICE. Dkt. 10 at 9. The contract central to the Defendant-ICE relationship ("the Contract"[2]) sets out terms for a ten-year operation of the facility. Dkt. 19 at 47. The Contract requires of Defendant, *inter alia*, that "[d]etainee labor shall be used in accordance with the detainee work plan developed by the Contractor, and will adhere to the ICE PBNDS [Performance-Based National Detention Standards] on Voluntary Work Program." *Id.* at 86. *See*

[2] Only a redacted version of the Contract has been considered, because the full contract, which redacts pricing information, is not part of the record. *See* Dkt. 19. Whether the Contract should be sealed, redacted, or produced in full is the subject of a pending motion. Dkt. 20.

also, *id.* at 49. Further, "the detainee work program shall not conflict with any other requirements of the contract and must comply with all applicable laws and regulations." *Id.*

The Voluntary Work Program articulates standards, *inter alia*, prohibiting discrimination, accommodating disabilities, limiting work to "8 hours daily, 40 hours weekly," and compensating detainees. 2011 Performance-Based National Detention Standards, Section 5.8, Voluntary Work Program, available online at http://www.ice.gov/detention-standards/2011/ (last accessed Dec. 3, 2017). The detainee compensation provision of the Voluntary Work Program states:

> Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy. The compensation is at least $1.00 (USD) per day. The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released.

Id.

II. STANDARD UNDER FED. R. CIV. P. 12(B)(6)

Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if

doubtful in fact)." *Id.* at 555. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

Where a state law claim is preempted by federal law, dismissal may be granted under Fed. R. Civ. P. 12(b)(6). *E.g., Cleghorn v. Blue Shield of Cal.*, 408 F.3d 1222, 1225 (9th Cir. 2005) (affirming dismissal of state law claims preempted by ERISA).

III. PREEMPTION

A. Preemption generally.

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land[,] . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, or (3) obstacle/conflict preemption. *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016). "Regardless of the type of preemption involved—express, field or conflict—the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.*

Analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This presumption applies in "all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotations and citations omitted). "[L]abor standards fall[] within the traditional police power of the State." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). *See also*, RCW 49.46.005(a). The party seeking to set aside state law bears the burden to show preemption. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 634 (2011).

B. Express preemption.

Express preemption applies where Congress explicitly states its intent to preempt state law in the language of a statute. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Where Congress has expressed an intent to preempt state law, the scope of the preemption is determined by examining congressional intent, beginning with the legislative text, "which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Courts also consider the "statutory framework," as well as the "structure and purpose of the statute as a whole." *Lohr*, 518 U.S. at 486 (1996). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (internal quotations and citations omitted).

Defendant points to §1324a(h)(2) of the Immigration Reform and Control Act (IRCA) as expressly preempting the State minimum wage provision. Dkt. 10 at 20; Dkt. 18 at 7-9. Through IRCA, Congress created "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002); §1324a(a). The sole preemption provision under IRCA, §1342a(h)(2), prevents state and local governments from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." §1324a(h)(2).

At issue is how broadly to define the term "sanction" under §1324a(h)(2). According to Defendant, the term should be broadly construed to include disgorgement, particularly because a finding that Defendant is an "employer" would expose Defendant to liability for double damages and attorneys fees. Dkt. 18 at 14. Plaintiff argues that because employing unauthorized aliens is the act that IRCA sanctions, only state laws imposing sanctions for that conduct fall within IRCA's express preemption clause. Dkt. 17 at 23, citing to *Chamber of Commerce of the U.S. v.*

Whiting, 563 U.S. 582, 600 (2011) (holding that "IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others.")

Both parties agree that §1324a(h)(2) is an express preemption statute. There are no other express preemption provisions under IRCA, so the key question is what Congress intended for §1324a(h)(2) to preempt. Section 1324a(h)(2) prohibits states from imposing civil or criminal sanctions "upon those who employ . . . unauthorized aliens[.]" Put differently, states cannot penalize employers for employing unauthorized aliens. Even if, as Defendant argues, the provisions of the Washington Minimum Wage Act are construed as "sanctions," they would not be imposed on account of employers hiring unauthorized aliens, but rather because of the failure to pay the prevailing minimum wage. *See* RCW 49.46.020. Indeed, the Washington Minimum Wage Act nowhere mentions immigration status, aliens, or any related term. *See* RCW 49.46 *et seq*. Section 1324a(h)(2) does not preempt the State minimum wage provision.

In defense of its view that the term sanction should interpreted broadly to include lost wages, attorneys fees, and costs, Defendant relies on *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010). Dkt. 18 at FN 41. In *Edmondson*, the court analyzed an Oklahoma statutory scheme (now-repealed) that "subject[ed] employers to cease and desist orders, reinstatement, back pay, costs, and attorneys' fees" for hiring unauthorized aliens, concluding that "[s]uch impositions . . . fall within the meaning of §1324a(h)(2) sanctions." *Id.* (emphasis added). *Edmondson* is inapposite. Even if *Edmondson* was binding precedent, analysis of the term "sanction" was done in the context of a preliminary injunction, with focus on the likelihood—and not the actual merits—of whether the Oklahoma law would be preempted. More importantly, the mention of back pay was dicta and had no bearing on the holding of the case. The court focused on the attempt by the Oklahoma legislature to create a work authorization

program that excluded unauthorized aliens from employment, which falls squarely within what §1324a(h)(2) precludes states from doing.

Defendant has not shown that the State minimum wage provision is expressly preempted.

C. Field preemption.

"States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. U.S.*, 567 U.S. 387, 399 (2012). Congressional intent to displace state law can be inferred from either "a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws," or where "a framework of regulation [is] so pervasive . . . that Congress left no room for the States to supplement it[.]" *Id.*, citing to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(internal quotations omitted). "The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Hillsborough Cty, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985). "Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive," but rather, courts consider "evidence [of] a desire to occupy a field completely." *R.J. Reynolds Tobacco Co. v. Durham Cnty.,* 479 U.S. 130, 149 (1986).

Defendant argues that "uniformity of detention programs" is a dominant federal interest precluding enforcement of the State minimum wage laws. Dkt. 10 at 22. Defendant cites to *Arizona*, 567 U.S. at 402, but *Arizona* nowhere identified uniformity of detention programs as a dominant federal interest. *See id.* at 402-03 ("with respect to the subject of alien registration, Congress intended to preclude States from complementing the federal law, or enforcing additional or auxiliary regulations[.]") Defendant's argument further misses the mark by defining

the pertinent area of regulation as detention programs. Recent Ninth Circuit precedent has emphasized "the importance of delineating the pertinent area of regulation with specificity before proceeding with the field preemption inquiry." *Nat'l Fed'n of the Blind*, 813 F.3d at 734. Here, the pertinent area of regulation for examination is detainee wages.

Defendant argues that through IRCA Congress created a pervasive framework of regulation intended to displace State law. Dkt. 10 at 20, 21. The most to be gleaned about congressional intent for a framework regulating detainee wages at the expense of State law can be found in 8 U.S.C. §1555(d). Section 1555(d) authorizes congressional appropriations for "payment of allowances [to detainees] . . . for work performed," but payment is limited to "such rate as may be specified from time to time in the appropriation Act involved." §1555(d) (emphasis added). Under this section, Congress arguably speaks to detainee wages when Congress appropriates payment of allowances to detainees for work performed, but although §1555(d) is still in effect, Congress has not specified any rate for detainee work since fiscal year 1979. At that time, Congress appropriated funds for "payment of allowances (at a rate not in excess of $1 per day) . . . for work performed." PL 95–431 (HR 12934), PL 95–431, Oct. 10, 1978, 92 Stat 1021 (emphasis added). At least since fiscal year 1979, Congress has abandoned direct appropriations for payment of allowances, despite its awareness of how to do so. *See, e.g.,* Consolidated Appropriations Act, 2016, PL 114-113, December 18, 2015, 129 Stat 2242, 2497. From the text of §1555(d), Defendant has not shown that Congress intended to preempt state law regarding detainee wages.

Defendant has offered no satisfactory explanation for the congressional silence since 1979 other than to make general representations about congressional delegation of authority to ICE to create a comprehensive regulatory scheme, e.g., through the Voluntary Work Program.

Dkt. 18 at 15. The Voluntary Work Program is an ICE policy with no preemptive force at law. As argued in the companion case, if ICE intended the Voluntary Work Program to preempt state law on the issue of detainee wages, ICE would need to follow at least two sets of requirements. ICE, like all federal agencies, is subject to Executive Order 13132, which requires agencies to follow specific rules when intending to preempt state law through agency policy. Federalism, 64 FR 43255, E.O. 13132 (1999). For agency policy to have the force of law, agency rule-making processes must also approach at least the spirit of Administrative Procedure Act (APA) formalities. *See United States v. Mead*, 533 U.S. 218 (2001) and its progeny. Defendant has made no showing that ICE made efforts to observe either set of requirements when creating the Voluntary Work Program, so the ICE policy should not be viewed as a comprehensive regulatory scheme with the legal force to preempt state law.

In summary, Congress has not chosen to occupy the field of detainee wages. There is no showing that Congress intended for its general appropriations after 1979 to delegate to ICE the authority to preempt state law as to detainee wages. ICE policy on detainee wages, specifically, the Voluntary Work Program, does not show a clear agency intent to preempt state law, where there is no showing that ICE attempted to observe formalities that underlie its authority to do so.

Defendant has not shown that the State minimum wage provision is field preempted.

D. Conflict/obstacle preemption.

Conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements," and obstacle preemption exists "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Defendant argues that the State's

minimum wage provision is preempted by both conflict and obstacle preemption. Dkt. 10 at 23, 24.

On conflict preemption, Defendant argues in its Reply that IRCA, which prohibits the hiring of unauthorized aliens, and the State's minimum wage provision, which would require Defendant to treat detainee-workers as "employees" deserving the State minimum wage, are in conflict, making it impossible for Defendant to comply with both. Dkt. 18 at 16. "[H]iring virtually any detainee" would violate IRCA, Defendant opines. *Id*. Defendant's conflict preemption argument is premature, because it relies on factual determinations about the status of detainees. Defendant has challenged the pleadings under Fed. R. Civ. P. 12(b)(6), which means that the Court must resolve the motion based on allegations in the Complaint. *See* Dkt. 1-1.

Regarding obstacle preemption, Defendant points to the obstruction of several federal objectives and purposes: increased costs to ICE, and, ultimately taxpayers; a "balkanized patchwork" of state laws; and the undermining of ICE's authority to care for detainees and enforce the Contract. Dkt. 10 at 23, 24; Dkt. 18 at 16. Defendant's obstacle preemption argument is also premature, because addressing whether the federal objectives and purposes will be obstructed would require resolution of factual determinations far beyond the pleadings.

In sum, the conflict/obstacle preemption issues may become ripe at summary judgment or at trial, but at present factual issues abound that preclude a decision based on the pleadings, and before discovery. Defendant has not shown that the State minimum wage provision is conflict or obstacle preempted.

Admittedly, at first blush the issue of preemption would seem to favor Defendant, given the long history of federal legislation and agency action in the area of immigration detention generally. After peeling back the rhetoric and examining the actual statutes and regulations, on

the issue of detainee wages, an area of traditional state prerogative, the Court cannot find evidence of congressional intent—either express or implied—sufficient to overcome the presumption against preemption. Defendant's motion to dismiss based on preemption should be denied.

IV. AUTHORITY OF THE STATE OF WASHINGTON TO BRING LAWSUIT

The doctrine of *parens patriae* allows states to bring suit on behalf of their citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 600-01 (1982). "States are not normal litigants for the purposes of invoking federal jurisdiction," and have interests and capabilities beyond those of an individual by virtue of their sovereignty. *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 1454 (2007). States can bring actions *in parens patriae* where there they have (1) a quasi-sovereign interest, (2) an interest apart from the interests of private parties, and (3) injury to a sufficiently substantial segment of their population. *Id.* at 607.

A. Quasi-sovereign interest.

Quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace." *Snapp*, 458 U.S. at 602. Put differently, "[a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* There is no "exhaustive formal definition nor a definitive list of qualifying interests," but quasi-sovereign characteristics "fall into two general categories[,]" one relevant here, "a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id.* at 607.

Applied here, Plaintiff's quasi-government interest falls under the health and well-being category recognized by *Snapp*. Within that category, Plaintiff seeks to enforce the State minimum wage laws to "protect Washington workers," which includes both detainee-workers

and Washington resident-workers. *See* Dkt. 1-1 at ¶¶3.3, 3.4, 3.5. This purpose is consistent with the legislative purpose found in the preamble to the State Minimum Wage Act, to "encourage employment opportunities within the state," RCW 49.46.005, whereas Defendant's alleged failure to observe the State minimum wage has allegedly enriched Defendant at the expense of detainee-workers and Washington resident-workers *See Id.* ¶¶3.5, 4.1, 4.2, 4.4, 4.9.

B. Interest apart from the interests of private parties.

"[T]o maintain [a *parens patriae*] action, the State must articulate an interest apart from the interest of particular parties, *i.e.*, the State must be more than a nominal party." *Snapp*, 458 U.S. at 607. Here, the State is more than a nominal party, because its alleged interests extend beyond the individual interest of the parties. This becomes evident by comparing outcomes between this case and the companion case if the respective plaintiffs were to prevail. In this case, beyond seeking disgorgement for unjust enrichment, Plaintiff also seeks declaratory relief, that Defendant is an "employer" that must pay the State minimum wage to detainee-workers who are "employees," and injunctive relief enjoining Defendant from paying detainee-workers less than the State minimum. Dkt. 1-1 at ¶¶7.1, 7.2, ¶7.4. By comparison, the plaintiff in the companion case, Mr. Chao Chen, has not—and could not—seek injunctive relief, because he is no longer detained. Plaintiff has a distinct interest as a sovereign and is not a nominal party.

C. Injury to sufficiently substantial segment of Washington population.

There are no "definitive limits on the proportion of the population . . . that must be adversely affected by the challenged behavior." *Snapp*, 458 U.S. at 607. The Complaint alleges an injury to a sufficiently substantial segment of the State. It is alleged that since 2005 Defendant has simultaneously housed up to 1,575 individuals at the Northwest Detention Center and that compensating detainee-workers below the State minimum wage effects both detainee-workers

and workers in the general population. *See* Dkt. 1-1 at ¶¶3.5, 3.9. A more exact, quantifiable number of adversely affected proportion of the population should not be required at this stage.

Defendant argues that Washington's citizens have rejected the idea that federal detainees should be "supported at taxpayer expense" and points to a 2007 ballot initiative. Dkt. 10 at 5. The initiative, which Defendant represents received more than 60% approval from voters, apparently addressed the applicability of the State minimum wage to state inmates. Support for the initiative, Defendant argues, shows that the current vast majority of Washington residents reject the applicability of the State minimum wage to civil detainees at a federal facility. Defendant extends its argument beyond the pleadings, and the initiative did not address federal detainees. This argument lacks merit.

D. *Parens patriae* challenge brought under Fed. R. Civ. P. 12(b)(6).

Defendant brings its challenge to Plaintiff's *parens patriae* authority under Fed. R. Civ. P. 12(b)(6). Dkt. 18 at 9. *Parens patriae* is a doctrine that originated from concerns about standing. *See Snapp*, 458 U.S. at 600-07. *See also*, *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017). Framing *parens patriae* as a Fed. R. Civ. P. 12(b)(6) issue lacks support at law. Defendant cites two cases as authority to bring its *parens patriae* challenge under Fed. R. Civ. P. 12(b)(6), *In re TFT-LCD (Flat Panel) Antitrust Litig*., 2011 WL 3475408, at *6 (N.D. Cal. 2011), and *Confederated Tribes of Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187 (E.D. Wash. 2011). Dkt. 10 at 4; Dkt. 18 at 9. In both cases, a cursory glance at the opinions' structure and organization could lend credence to Defendant's approach. Upon closer examination, language used in the courts' analysis does not suggest that either court intended to analyze *parens patriae* under Fed. R. Civ. P. 12(b)(6), but rather shows consideration of the pleadings' sufficiency as to standing. *See id*. *See also*, *Harris*, 847 F.3d at 656. However, even if

framing *parens patriae* as a Fed. R. Civ. P. 12(b)(6) issue did not lack support at law, analyzing the State's *parens patriae* authority through the lens of the pleadings' plausibility would not, in this case, result in dismissal. *See discussion above*.

In sum, Plaintiff has authority to bring this case as *parens patriae*. Defendant's motion to dismiss challenging Plaintiff's authority to bring this lawsuit should be denied.

V. FAILURE TO STATE A CLAIM

A. Unjust enrichment.

Defendant makes three primary arguments attacking the plausibility of the unjust enrichment claim.

Defendant first attacks the unjust enrichment claim because of the failure to allege that detainees' work is involuntary. Dkt. 10 at 29. Defendant represents that the two elements for an unjust enrichment claim are that (1) the enrichment of the defendant is unjust, and (2) the plaintiff is not a mere volunteer, Dkt. 10 at 29, citing to *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165 (1989). It is not clear that "involuntariness" is an element to an unjust enrichment claim. *Compare Lynch*, 113 Wn.2d at 165; *Young v. Young*, 164 Wn.2d 477, 485 (2008). Assuming that "involuntary" must be alleged in the pleadings, the Court can infer that detainees' participation was involuntary from the alleged circumstances, where detainees are housed at a private immigration detention center, Defendant has compensated detainees at $1 per day since 2005, regardless of hours worked, and Defendant has financially benefited from the work without the financial burden of paying the State minimum wage. Defendant argues that the Voluntary Work Program cannot be involuntary because it is voluntary by design, a conclusion that Defendant says is reinforced by a waiver signed by detainees affirming their voluntary participation. *Id*. This reasoning relies upon factual findings beyond the scope of the pleadings.

Defendant's second argument avers that the Complaint fails to allege that detainees had a reasonable expectation of receiving compensation at the State minimum wage. Dkt. 10 at 29, 30. Defendant provides no authority for "reasonable expectation" to be an essential allegation to the pleadings, *see id.*, nor is the undersigned of aware of any. *See Young*, 164 Wn.2d at 484-85. Absent this authority, the reasonableness of the parties' expectations is a fairness issue that cannot be decided on a Fed. R. Civ. 12(b)(6) motion.

Finally, Defendant argues that the unjust enrichment claim fails to state a claim because it is not alleged that the State has conferred a benefit on Defendant. Dkt. 10 at 29, 30; Dkt. 18 at 17. Defendant cites to *State v. Am. Tobacco Co., Inc.*, No. 96-2-15056-8-SEA, 1996 WL 931316, at *8 (Wash. Super. Nov. 19, 1996), which is not analogous. In *Am. Tobacco Co.*, the State sought common law damages for itself for "increased public health costs" due to a tobacco company's alleged failure to assume duties owed to protect public health. *Id.* In this case, Plaintiff does not seek damages on behalf of itself, but rather brings this action *in parens patriae* for Washington residents and workers, including detainees, who conferred a benefit on Defendant by working at compensation below the State minimum wage. *See* Dkt. 1-1 at ¶¶3.5, 39.

Defendant's motion to dismiss the cause of action for unjust enrichment for failure to state a claim should be denied.

B. Violations of the Washington Minimum Wage Act.

Defendant contends that the Complaint fails to state a claim for violations of the Washington Minimum Wage Act because detainees are not "employees" under Washington law. Dkt. 10 at 24-28. The Washington Minimum Wage Act defines "employee" generally as "any individual employed by an employer," subject to an enumerated list of exceptions. RCW

49.46.010(3). Defendant argues that detainees fall under an exception, subsection (3)(k), which excepts from the general definition, "Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution[.]" RCW 49.46.010(3)(k). Defendant also argues that, when interpreting the statute, the Court should look to Fair Labor Standards Act (FLSA) precedent.

Beginning with the statute itself, it is plain that the definition excepts residents of "state . . . detention" facilities, not federal facilities. *See* RCW 49.46.010(3)(k). The Northwest Detention Center is a federal detention facility and thus does not fall under the exception. This conclusion is reinforced by Washington law narrowly construing exceptions in favor of the employee. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870 (2012).

Anticipating this result, Defendant urges an expansive interpretation of the exception to extend to federal detainees. (This is an ironic request, because elsewhere Defendant argues that the State deliberately omitted federal detainees from the statutory exception because it would be "outlandish" for the State to include them. Dkt. 10 at 28.) Defendant urges this Court to follow *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) and *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass.App.Ct. 1124, 2017 WL 2274618 (Mass. App. Ct. May 24, 2017). *Menocal* and *Whyte* considered the application of state minimum wage laws of Colorado and Massachusetts, respectively, to federal detainees. Both cases rely on *Alvarado Guevara v. Immigration & Naturalization Serv.*, 902 F.2d 394 (5th Cir. 1990), which considered whether FLSA applies to federal detainees. *But see Hale v State of Ariz.*, 967 F.2d 1356, 1362-63 (9th Cir. 1992), *on* reh'g, 993 F.2d 1387 (9th Cir. 1993) (leaving open the possibility that FLSA could apply to incarcerated inmates).

Neither *Menocal*, *Whyte*, nor *Alvarado* is binding precedent, and in this Court's view, extending the logic of *Alvarado* to interpret this State's statutory exception to include federal detainees moves beyond interpretation to legislation. In the absence of binding authority, the undersigned should respectfully decline the invitation to add to the statute. At least based on the pleadings, it is plausible that the Plaintiff, arguably, comes within the State definition of "employee," and is not subject to any existing statutory exception.

Defendant's motion to dismiss the cause of action for violations of the Minimum Wage Act for failure to state a claim should be denied.

VI. UNCLEAN HANDS AND LACHES

Defendant summarily urges dismissal of the unjust enrichment cause of action on the equitable grounds of unclean hands and laches. Defendant makes two primary arguments: first, Plaintiff acts in bad faith to enforce the State minimum wage, because State law expressly excepts residents of state, county, or municipal detention facilities from the same protections, and the State operates and benefits from programs similar to the Voluntary Work Program; and second, the State's L&I division, the government entity statutorily-authorized to enforce the State Minimum Wage Act, has never initiated any wage enforcement actions against Defendant, despite its knowledge of the Voluntary Work Program and no excuse for its delay. Dkt. 10 at 31, 32.

Both arguments reach far beyond the scope of a Fed. R. Civ. P. 12(b)(6) motion. The pleadings on their own do not make a showing of unclean hands or laches sufficient for dismissal. Defendant's motion to dismiss the unjust enrichment cause of action based on unclean hands and laches should be denied.

VII. CONCLUSION

Defendant has not overcome the presumption against preemption by showing congressional intent to displace state law as to detainee wages. Defendant has not shown that Plaintiff lacks authority to proceed as *parens patriae* on behalf of Washington residents. The Complaint states a claim upon which relief can be granted for both causes of action. Dismissal under equitable doctrines of laches and unclean hands is not warranted.

THEREFORE, Defendant The GEO Group, Inc.'s Motion to Dismiss Complaint (Dkt. 10) is HEREBY DENIED.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 6th day of December, 2017.

ROBERT J. BRYAN
United States District Judge

Exhibit E

Chen Order Denying Motion to Dismiss

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHAO CHEN,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CASE NO. 3:17-cv-05769-RJB

ORDER ON DEFENDANT THE GEO GROUP, INC.'S MOTION TO DISMISS CLASS ACTION COMPLAINT FOR DAMAGES

THIS MATTER comes before the Court on Defendant The GEO Group, Inc.'s Motion to Dismiss Class Action Complaint for Damages. Dkt. 8. The Court has considered Defendant's motion, Plaintiff Chao Chen's Response, Defendant's Reply, the Complaint, and the remainder of the file herein. Dkts. 1, 15, 16. The Court also considered oral argument held in open court on November 20, 2017.

Mr. Chen was a detainee at the Northwest Detention Center in Tacoma, Washington, a facility that GEO operates under a contract with United States Immigration and Customs

Enforcement (ICE), a division of the Department of Homeland Security. GEO uses detainees, including Mr. Chen, to assist in operating the facility under a Voluntary Work Program. In exchange for their work, GEO compensates detainees $1 per day.

The Complaint alleges that Mr. Chen is entitled to compensation of $11 per hour because he is an "employee" as defined by the Washington State Minimum Wage Act. Defendant's motion seeks dismissal under Fed. R. Civ. P. 12(b)(6) under two theories: (1) State law is preempted, and (2) the Complaint fails to state a claim that detainees, including Mr. Chen, are "employees" deserving State minimum wage protections.

I. BACKGROUND

A. Facts.

1. The Complaint.

The following facts alleged in the Complaint are taken as true for purposes of Defendant's Fed. R. Civ. P. 12(b)(6) motion.

GEO, a private corporation, has owned and operated the Northwest Detention Center, a 1,500 bed ICE facility, since 2005. Dkt. 1 at ¶4.2. Northwest Detention Center detainees include Mr. Chen, who was detained pending immigration proceedings from October 2014 until February 2016. *Id.* at ¶3.1. Mr. Chen is a citizen of the People's Republic of China, but has been a lawful permanent resident of the United States since the 1980s. *Id.* at ¶3.1. GEO relies upon detainees for its grounds maintenance, cooking, laundry, cleaning, and other services. *Id.* at ¶¶4.4, 4.5. GEO has compensated detainees, including Mr. Chen, at $1 per day. *Id.* at ¶¶4.7, 4.8. GEO has in some cases alternatively compensated detainees with more and better food. *Id.*

Washington's minimum wage is $11 an hour. Dkt. 1 at ¶4.11. The Complaint alleges that Mr. Chen is entitled to compensation at that rate. *Id.* at ¶4.11.

The Complaint seeks damages for lost wages, fees, and costs[1] on behalf of a proposed class, including Mr. Chen and others similarly situated. Dkt. 1 at ¶6.4.

2. *Extra-pleadings.*

The Contract and Voluntary Work Program.

According to Defendant, GEO operates the Northwest Detention Center by "a complex statutory, regulatory, and contractual relationship" with ICE. Dkt. 8 at 8. *See* Dkt. 1-1 at ¶4.3. The contract central to the GEO-ICE relationship ("the Contract"[2]) sets out terms for a ten-year operation of the facility. Dkt. 19 at 47. The Contract requires of GEO, *inter alia*, that "[d]etainee labor shall be used in accordance with the detainee work plan developed by the Contractor, and will adhere to the ICE PBNDS [Performance-Based National Detention Standards] on Voluntary Work Program." *Id.* at 86. *See also*, *id.* at 49. Further, "the detainee work program shall not conflict with any other requirements of the contract and must comply with all applicable laws and regulations." *Id.*

The Voluntary Work Program articulates standards, *inter alia*, prohibiting discrimination, accommodating disabilities, limiting work to "8 hours daily, 40 hours weekly," and compensating detainees. 2011 Performance-Based National Detention Standards, Section 5.8, Voluntary Work Program, available online at http://www.ice.gov/detention-standards/2011/ (last accessed Nov. 30, 2017). The detainee compensation provision of the Voluntary Work Program states:

> Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy. The compensation is at least $1.00 (USD) per day. The

[1] *Compare to* the companion case, *State of Washington v. The GEO Group Inc.*, Cause No. 3:17-cv-05806-RJB, Dkt. 1-1 at 7 (seeking injunctive and declaratory relief and an award for unjust enrichment).

[2] Only a redacted version of the Contract has been considered, because the full contract, which redacts pricing information, is not part of the record. *See* Dkt. 19. Whether the Contract should be sealed, redacted, or produced in full is the subject of a pending motion. Dkt. 20.

> facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released.

Id.

Irrelevant information.

Defendant highlights facts surrounding the criminal conviction forming the basis for removal proceedings against Mr. Chen. Dkt. 8 at 9. These details are not relevant to resolving Defendant's motion.

B. Defendant's Motion to Dismiss.

Defendant seeks dismissal under Fed. R. Civ. P. 12(b)(6) on two grounds, preemption and failure to state a claim. Concerning preemption, Defendant argues that the State's minimum wage provision is preempted by (1) express preemption, through 8 U.S.C. §1324a(h)(2), a provision of the Immigration Reform and Control Act (IRCA), (2) field preemption, because Congress has occupied the field of immigration detention, which includes regulating detainee pay, and (3) conflict/obstacle preemption, because requiring GEO to follow the State's minimum wage creates a clear conflict between state and federal law and frustrates ICE purposes and objectives. Dkt. 8 at 15-22. Defendant argues, in the alternative, that the Complaint fails to state a claim that detainees, including Mr. Chen, are "employees" deserving State minimum wage protections. *Id.* at 23-29.

II. STANDARD UNDER FED. R. CIV. P. 12(B)(6)

Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not

need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

Where a state law claim is preempted by federal law, dismissal may be granted under Fed. R. Civ. P. 12(b)(6). *E.g., Cleghorn v. Blue Shield of Cal.*, 408 F.3d 1222, 1225 (9th Cir. 2005) (affirming dismissal of state law claims preempted by ERISA).

III. PREEMPTION

A. Preemption generally.

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land[,] . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, or (3) obstacle/conflict preemption. *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016). "Regardless of the type of preemption involved—express, field or conflict—the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.*

Analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This presumption applies in "all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal

quotations and citations omitted). "[L]abor standards fall[] within the traditional police power of the State." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). *See also*, RCW 49.46.005(a). The party seeking to set aside state law bears the burden to show preemption. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 634 (2011).

B. Express preemption.

Express preemption applies where Congress explicitly states its intent to preempt state law in the language of a statute. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Where Congress has expressed an intent to preempt state law, the scope of the preemption is determined by examining congressional intent, beginning with the legislative text, "which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Courts also consider the "statutory framework," as well as the "structure and purpose of the statute as a whole." *Lohr*, 518 U.S. at 486 (1996). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (internal quotations and citations omitted).

Defendant points to §1324a(h)(2) of the Immigration Reform and Control Act (IRCA) as expressly preempting the State minimum wage provision. Dkt. 8 at 16; Dkt. 16 at 7-9. Through IRCA, Congress created "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002); §1324a(a). The sole preemption provision under IRCA, §1342a(h)(2), prevents state and local governments from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." §1324a(h)(2).

At issue is how broadly to define the term "sanction" under §1324a(h)(2). According to Defendant, the term should be broadly construed to include lost wages, attorneys fees, and costs for minimum wage violations. Dkt. 8 at 16; Dkt. 16 at 8, citing to RCW 49.46.20, RCW 49.46.090, and RCW 49.46.100. Plaintiff acknowledges that the term is undefined and argues that the term refers to a "penalty or coercive measure," whereas the Washington Minimum Wage Act only provides a remedy of monetary damages for back pay and related costs. Dkt. 15 at 11, 12. Plaintiff also argues that because employing unauthorized aliens is the act that IRCA "sanctions," only state laws imposing sanctions for that conduct fall within IRCA's express preemption clause. *Id.*

Both parties agree that §1324a(h)(2) is an express preemption statute. There are no other express preemption provisions under IRCA, so the key question is what Congress intended for §1324a(h)(2) to preempt. Section 1324a(h)(2) prohibits states from imposing civil or criminal sanctions "upon those who employ . . . unauthorized aliens[.]" Put differently, states cannot penalize employers for employing unauthorized aliens. Even if, as Defendant argues, the provisions of the Washington Minimum Wage Act are construed as "sanctions," they would not be imposed on account of employers hiring unauthorized aliens, but rather because of the failure to pay the prevailing minimum wage. *See* RCW 49.46.020. Indeed, the Washington Minimum Wage Act nowhere mentions immigration status, aliens, or any related term. *See* RCW 49.46 *et seq*. Section 1324a(h)(2) does not preempt the State minimum wage provision.

In defense of its view that the term sanction should interpreted broadly to include lost wages, attorneys fees, and costs, Defendant relies on *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010). Dkt. 18 at FN 41. In *Edmondson*, the court analyzed an Oklahoma statutory scheme (now-repealed) that "subject[ed] employers to cease and

desist orders, reinstatement, back pay, costs, and attorneys' fees" for hiring unauthorized aliens, concluding that "[s]uch impositions . . . fall within the meaning of §1324a(h)(2) sanctions." *Id.* (emphasis added). *Edmondson* is inapposite. Even if *Edmondson* was binding precedent, analysis of the term "sanction" was done in the context of a preliminary injunction, with focus on the likelihood—and not the actual merits—of whether the Oklahoma law would be preempted. More importantly, the mention of back pay was dicta and had no bearing on the holding of the case. The court focused on the attempt by the Oklahoma legislature to create a work authorization program that excluded unauthorized aliens from employment, which falls squarely within what §1324a(h)(2) precludes states from doing.

Defendant has not shown that the State minimum wage provision is expressly preempted.

C. Field preemption.

"States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. U.S.*, 567 U.S. 387, 399 (2012). Congressional intent to displace state law can be inferred from either "a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws," or where "a framework of regulation [is] so pervasive . . . that Congress left no room for the States to supplement it[.]" *Id.*, citing to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(internal quotations omitted). "The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Hillsborough Cty, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985). "Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive," but rather, courts

consider "evidence [of] a desire to occupy a field completely." *R.J. Reynolds Tobacco Co. v. Durham Cnty.,* 479 U.S. 130, 149 (1986).

Defendant does not cogently articulate a dominant federal interest that would preclude enforcement of State minimum wage laws, *see* Dkt. 8 at 17-19; Dkt. 16 at 9-11, so analysis should focus on ascertaining congressional intent within a framework of regulation. Recent Ninth Circuit precedent has emphasized "the importance of delineating the pertinent area of regulation with specificity before proceeding with the field preemption inquiry." *Nat'l Fed'n of the Blind*, 813 F.3d at 734. Here, the pertinent area of regulation is detainee wages.

Defendant has assembled a hodgepodge of federal statutes and argues that Congress intends to regulate the field of immigration detention generally, including detainee wages. *See* Dkt. 16 at FN16, citing 8 U.S.C. §§1103, 1225, 1226, 1226a, 1231, 1324a, 1555(d). Surveying the authority from Defendant, it cannot be said, with any degree of clarity, that Congress intends to occupy the field of detainee wages. At best, Defendant has highlighted general sources of authority for ICE agency action, but as discussed below, ICE has not created a regulatory scheme preempting state law through its policies, including the Voluntary Work Program. These statutes do not together show that Congress intends detainee wages to be part of IRCA's "harmonious whole." *Arizona*, 567 U.S. at 401.

The most to be gleaned about congressional intent to occupy the field of detainee wages can be found in 8 U.S.C. §1555(d). Section 1555(d) authorizes congressional appropriations for "payment of allowances [to detainees] . . . for work performed," but payment is limited to "such rate as may be specified from time to time in the appropriation Act involved." §1555(d) (emphasis added). Under this section, Congress arguably speaks to detainee wages when Congress appropriates payment of allowances to detainees for work performed, but although

§1555(d) is still in effect, Congress has not specified any rate for detainee work since fiscal year 1979. At that time, Congress appropriated funds for "payment of allowances (at a rate not in excess of $1 per day) . . . for work performed." PL 95–431 (HR 12934), PL 95–431, Oct. 10, 1978, 92 Stat 1021 (emphasis added). At least since fiscal year 1979, Congress has abandoned direct appropriations payment of allowances, despite its awareness of how to do so. *See, e.g.,* Consolidated Appropriations Act, 2016, PL 114-113, December 18, 2015, 129 Stat 2242, 2497. From the text of §1555(d), Defendant has not shown that Congress intended to preempt state law regarding detainee wages.

Defendant has offered no satisfactory explanation for the congressional silence since 1979, other than to make general representations about congressional delegation of authority to ICE[3]. Congress could delegate the authority to create a framework regulating detainee wages to ICE, but Defendant has not made this showing. The question remains then, where the $1 per day detainee wage rate comes from, if not from Congress, and the only answer is the Voluntary Work Program. However, the Voluntary Work Program is an ICE policy with no preemptive force at law.

If ICE intended for the Voluntary Work Program to preempt state law on the issue of detainee wages, ICE would need to follow at least two sets of requirements, which it has failed to do. First, as Plaintiff points out, ICE, like all federal agencies, is subject to Executive Order 13132, which requires agencies to follow specific rules when intending to preempt state law through agency policy. Dkt. 15 at 16; Federalism, 64 FR 43255, E.O. 13132 (1999). Second, for agency policy to have the force of law, agency rule-making processes must approach at least the spirit of Administrative Procedure Act (APA) formalities. *See United States v. Mead*, 533 U.S.

[3] But Defendant appears to forgo this argument in Reply, *see* Dkt. 16 at 10 ln. 21.

218 (2001) and its progeny. Defendant has made no showing that ICE made efforts to observe either set of requirements when creating the Voluntary Work Program. The policy's transience is highlighted by defense counsel's oral acknowledgement that ICE could modify the Voluntary Work Program at any time without notice. The Voluntary Work Program should not be viewed as a regulatory scheme with the legal force to preempt state law.

In summary, Congress has not chosen to occupy the field of detainee wages. There is no showing that Congress intended for its general appropriations after 1979 to delegate to ICE the authority to preempt state law as to detainee wages. ICE policy on detainee wages, specifically, the Voluntary Work Program, does not show a clear agency intent to preempt state law, where there is no showing that ICE attempted to observe formalities that underlie its authority to do so.

Defendant has not shown that the State minimum wage provision is field preempted.

D. Conflict/obstacle preemption.

Conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements," and obstacle preemption exists "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Defendant argues that the State's minimum wage provision is preempted by both conflict and obstacle preemption.

On conflict preemption, Defendant argues that IRCA, which prohibits the hiring of unauthorized aliens, and the State's minimum wage provision, which would require GEO to treat detainee-workers as "employees" deserving the State minimum wage, are in conflict, making it impossible for GEO to comply with both. Dkt. 8 at 8; Dkt. 16 at 11. "Hiring virtually any detainee" would violate IRCA, Defendant opines. *Id.* at 12. Plaintiff contests Defendant's representation that GEO could not abide by both IRCA and the State's minimum wage

provisions and represents that "many" detainees could work lawfully within IRCA's constraints. Dkt. 15 at 17-19.

Defendant's conflict preemption argument is premature, because it relies on factual determinations about the status of detainees. Defendant has challenged the pleadings under Fed. R. Civ. P. 12(b)(6), which means that the Court must resolve the motion based on allegations in the Complaint. *See* Dkt. 1.

Defendant's obstacle preemption argument is wandering and opaque, *see* Dkt. 8 at 20-22; Dkt. 16 at 11-13, but Defendant appears to point to several federal objectives and purposes that may be obstructed: increased costs to ICE, and, ultimately taxpayers; a "balkanized patchwork" of state laws; and the undermining of ICE's authority to care for detainees. *Id.*

Defendant's obstacle preemption argument is also premature, because addressing whether the federal objectives and purposes will be obstructed would require resolution of factual determinations far beyond the pleadings.

In sum, the conflict/obstacle preemption issues may become ripe at summary judgment or at trial, but at present factual issues abound that preclude a decision based on the pleadings, and before discovery. Defendant has not shown that the State minimum wage provision is conflict or obstacle preempted.

Admittedly, at first blush the issue of preemption would seem to favor Defendant, given the long history of federal legislation and agency action in the area of immigration detention generally. After peeling back the rhetoric and examining the actual statutes and regulations, on the issue of detainee wages, an area of traditional state prerogative, the Court cannot find evidence of congressional intent—either express or implied—sufficient to overcome the

presumption against preemption. Defendant's motion to dismiss based on preemption should be denied.

IV. FAILURE TO STATE A CLAIM

Defendant contends that the Complaint fails to state a claim because detainees are not "employees" under Washington law. The Washington Minimum Wage Act defines "employee" generally as "any individual employed by an employer," subject to an enumerated list of exceptions. RCW 49.46.010(3). Defendant argues that detainees fall under an exception, subsection (3)(k), which excepts from the general definition, "Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution[.]" RCW 49.46.010(3)(k).

Beginning with the statute itself, it is plain that the definition excepts residents of "state . . . detention" facilities, not federal facilities. *See* RCW 49.46.010(3)(k). The Northwest Detention Center is a federal detention facility and thus does not fall under the exception. This conclusion is reinforced by Washington law narrowly construing exceptions in favor of the employee. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870 (2012).

Anticipating this result, Defendant urges an expansive interpretation of the exception to federal detainees. (This is an ironic request, because elsewhere Defendant argues that the State deliberately omitted federal detainees from the statutory exception because it would be "outlandish" for the State to include them.) Defendant urges this Court to follow *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) and *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass.App.Ct. 1124, 2017 WL 2274618 (Mass. App. Ct. May 24, 2017). *Menocal* and *Whyte* considered the application of state minimum wage laws of Colorado and Massachusetts, respectively, to federal detainees. Both cases rely on *Alvarado Guevara v. Immigration &*

Naturalization Serv., 902 F.2d 394 (5th Cir. 1990), which considered whether the Fair Labor Standards Act (FLSA) applies to federal detainees. *But see Hale v State of Ariz.*, 967 F.2d 1356, 1362-63 (9th Cir. 1992), *on* reh'g, 993 F.2d 1387 (9th Cir. 1993) (leaving open the possibility that the FLSA could apply to incarcerated inmates).

Neither *Menocal*, *Whyte*, nor *Alvarado* is binding precedent, and in this Court's view, extending the logic of *Alvarado* to interpret this State's statutory exception to include federal detainees moves beyond interpretation to legislation. In the absence of binding authority, the undersigned should respectfully decline the invitation to add to the statute.

In conclusion, Defendant's motion to dismiss for failure to state a claim boils down to the argument that the legislature intended to do something it did not do, or that it should have done something that it did not do. This Court should not re-write legislation. At least based on the pleadings, it is plausible that the Plaintiff, arguably, comes within the State definition of "employee," and is not subject to any existing statutory exception.

V. CONCLUSION

Defendant has not overcome the presumption against preemption by showing congressional intent to displace state law as to detainee wages. The Complaint states a claim upon which relief can be granted, because it is plausible that Plaintiff is an "employee" under Washington law.

THEREFORE, Defendant The GEO Group, Inc.'s Motion to Dismiss Class Action Complaint for Damages (Dkt. 8) is HEREBY DENIED.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 6th day of December, 2017.

ROBERT J. BRYAN
United States District Judge

Exhibit F

VRP Motion Hearing

Exhibit G

WA Order Denying Rule 19 Motion to Dismiss

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 ORDER ON DEFENDANT THE GEO GROUP INC.'S MOTION FOR ORDER OF DISMISSAL BASED ON PLAINTIFF'S FAILURE TO JOIN REQUIRED GOVERNMENT PARTIES, OR, ALTERNATIVELY, TO ADD REQUIRED GOVERNMENT PARTIES

THIS MATTER comes before the Court on Defendant The GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties, Or, Alternatively, to Add Required Government Parties. Dkt. 51. The Court has reviewed the motion, all documents filed in support and opposition, and the remainder of the file herein, and considered oral argument on April 24, 2018.

GEO seeks dismissal for Plaintiff State of Washington's failure to join the Department of Homeland Security and an agency thereof, Immigration and Customs Enforcement (collectively,

"ICE"). *See* Dkt. 51 at FN1. As discussed below, dismissal should be denied because ICE is neither a necessary nor an indispensable party. The case can proceed in equity and good conscience. Furthermore, the public rights exception applies, suspending traditional joinder under Fed. R. Civ. P. 19.

I. BACKGROUND

GEO moves to dismiss for failure to join under Fed. R. Civ. P. 12(b)(7) following the initial pleadings, but before the completion of discovery. Failure to join may be raised at any stage. *McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984); *CP Nat. Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911-12 (9th Cir. 1991). *See* Fed. R. Civ. P. 12(h)(2). Facts recited are derived either from the Complaint or from a contract incorporated by the Complaint and relied upon by the parties. Dkts. 1-1, 16-2, 19.

GEO is a private corporation that has owned and operated the Northwest Detention Center (NWDC), a 1,575 bed detention facility, since 2005. Dkt. 1-1 at ¶¶3.8, 3.9. GEO operates the NWDC based on a contract with ICE ("the GEO-ICE Contract"). Dkts. 16-2, 19. GEO takes care of immigration detainees awaiting resolution of immigration matters and relies on detainees for a wide range of services under the Voluntary Work Program (VWP) required by the contract. *Id.* at ¶¶3.10, 4.2. GEO compensates detainees at $1 per day. *Id.* at ¶1.4.

The State initiated this action under the theory that the GEO-ICE Contract at least allows for, if not requires, GEO to compensate detainees working in the VWP commensurate with the State Minimum Wage Act (MWA). Dkt. 1-1 at ¶¶3.3, 3.4, 5.1-6.6. The State alleges that GEO has been unjustly enriched by compensating detainees below that required by the Washington Minimum Wage Act (MWA). In support of its theory, the State primarily relies on three terms of the GEO-Ice Contract: (1) GEO must compensate detainees participating in the VWP "*at least*

$1 per day" under the "ICE/DHS Performance Base [*sic*] [National] Detention Standards" (PBNDS), expressly incorporated by the contract; (2) GEO must operate according to the "most current . . . constraints," including "applicable federal, state and local labor laws and codes"; and (3) where the contract conflicts with "all applicable federal state and local laws and standards . . . the most stringent shall apply." Dkt. 16-2 at 8; Dkt. 19 at 46-48, 56.

GEO rejects the State's theory and maintains that the GEO-ICE Contract prohibits GEO from acting as an 'employer' to detainees working in the VWP. In support of its theory, GEO relies on the history, custom, and practice of the VWP and on an itemized "services/supplies" description for the "Detainee Volunteer Wages for the Volunteer Program" found in the GEO-ICE Contract. Dkt. 19 at 9. The description specifies that "[r]eimbursement for this line item will be at the actual cost of $1.00 per day per detainee" and that the "Contractor [GEO] shall not exceed the amount shown without prior approval" by ICE. *Id.* GEO also relies on provisions of the contract describing background and clearance procedures and practices for hiring "employees," such as use of E-Verify and the prohibition of employing "illegal or undocumented aliens." *Id.* at 72-75. GEO argues that paying MWA rates to detainees working in the VWP would violate the GEO-ICE Contract.

Acknowledged by both parties are GEO-ICE Contract terms allowing GEO to request contract pricing modifications and obliging GEO to indemnify ICE against all claims arising out of GEO's operation of the NWDC. Dkt. 19 at 56, 105, 106, 367.

The State brings this case to defend its "quasi-sovereign interest," alleging that GEO has been unjustly enriched by compensating detainees $1 per day and violating the MWA. Dkt. 1-1 at ¶¶3.3, 3.4, 5.1-6.6. The State seeks (1) an order requiring GEO to disgorge its unjust enrichment from compensating detainees below the State minimum wage; (2) declaratory relief,

for GEO to be declared an "employer" subject to the MWA when managing detainee "employees"; and (3) injunctive relief, for GEO to be enjoined from paying detainees less than the State minimum wage. *Id.* at ¶¶7.1-7. The Complaint names GEO as the sole defendant. *Id.* at 4, 5.

In the instant motion, GEO seeks dismissal for the State's failure to join ICE. GEO requests in the alternative that the State be required to add ICE as a defendant.

II. DISCUSSION

A. Organization of Discussion.

The Discussion addresses the following, in sequence: whether ICE must be joined as a necessary and indispensable party under Rule 19, §§II(B)(1)-(3); whether the public rights exception applies, §II(C); and whether GEO's alternative request for relief should be granted, §II(D).

B. Joinder under Rule 19.

Joinder is governed by Fed. R. Civ. P. 19, a rule that imposes a three-step inquiry:

1. Is the absent party "necessary" under Rule 19(a)?
2. If so, is it feasible to order joinder of the absent party?
3. If joinder is not feasible, is the party "indispensable" under Rule 19(b) such that in "equity and good conscience" the suit can proceed short of dismissal?

Salt River Project Agr. Imp. and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012). Rule 19 analysis is "a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002).

1. Is ICE a necessary party under Rule 19(a)?

Rule 19(a)(1) provides:

> (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> >
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > >
> > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

a. Fed. R. Civ. P. 19(a)(1)(A).

The Court can accord complete relief among existing parties. *See* Fed. R. Civ. P. 19(a)(1)(A). All relief sought—disgorgement, declaratory relief, and injunctive relief—can be obtained from GEO without ICE.

GEO argues that complete relief cannot be obtained among existing parties because the day rate of $1 is fixed by ICE and cannot be adjusted without ICE's consent. Dkt. 51 at 12. To bolster its conclusion, GEO cites two provisions of the GEO-ICE Contract, an opinion letter by the Department of Defense, and 8 U.S.C. § 1555(d). *Id.* at FN 35, 36. The first page of the contract cited, page eighty-two (82), simply incorporates the PBNDS. *See* Dkt. 19 at 9. The second page of the contract cited, page nine (9), includes a clause that describes "reimbursement" of $114,975 for the "Detainee Volunteer Wages for the Detainee Work Program . . . at the actual cost of $1.00 per day per detainee," and GEO "shall not exceed the amount shown without prior approval" by ICE. *Id.* The clause can be interpreted in at least two ways: In GEO's view, ICE's reimbursement rate is also limit on detainee rate of pay; in the State's view, ICE's reimbursement rate limits the amount reimbursed to GEO but does not limit the detainee rate of pay. Interpretation of this clause remains an open question.

Next, GEO relies on a 1992 opinion letter issued by the General Counsel to the Department of Defense on the issue of whether "aliens may perform general labor at the Naval Air Facility, so long as performance is voluntary . . . not unduly hazardous, and the aliens remain in [DHS] custody." Dkt. 51 at FN 35, 36. *Your CO* 243-C Memorandum of November 15, 1991; DOD Request for Alien Labor, 1992 WL 1369402, at *2. How this opinion, which makes no mention of the MWA, should influence interpretation of the GEO-ICE Contract, remains an open question.

Finally, GEO cites 8 U.S.C. § 1555(d), which provides that congressional appropriations for immigration service expenses "shall be available for payment of . . . (d) payment of allowances (at such a rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody . . . for work performed[.]" *Id.* The Court previously commented that "although § 1555(d) is still in effect, Congress has not specified any rate for detainee work since fiscal year 1979." Dkt. 29 at 9.

The Court is reluctant to delve into contract interpretation prior to the completion of discovery, except to find that, at present, GEO has not shown that there cannot be complete relief among the parties, because its argument is premised on only one of multiple plausible interpretations of the GEO-ICE Contract.

GEO analogizes this case to *Dawavendewa*, arguing that "[w]hen a plaintiff sues one party to a contract over actions that relate to that contract, the absent contracting party is a required party." Dkt. 51 at 9. In *Dawavendewa*, the Ninth Circuit concluded that complete relief could not be accorded to the plaintiff, "[e]ven if ultimately victorious," because judgment in plaintiff's favor would put the defendant "between the proverbial rock and a hard place—comply

with the injunction prohibiting the hiring preference policy or comply with the [Navajo Nation] lease requiring it." *Dawavendewa*, 276 F.3d at 1155.

In this case, at least arguably, no such 'rock and a hard place' exists, because the State's theory points to the likelihood of harmony between GEO's contractual obligation and complying with the MWA. Under the State's theory, the plausibility of which the Court previously addressed, *see* Dkt. 29, whether detainees are "employees" is a fact-driven question informed by whether GEO acts like an "employer" under the MWA. *See* Dkt. 53 at 17-20. For the same reason *Dawavendewa* can be distinguished, GEO's reliance on *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005), fails. In this case, at least arguably, no such impossible predicament precludes complete relief among existing parties exists.

b. Fed. R. Civ. P. 19(a)(1)(B)(i) and (ii).

ICE does not have a legally protected interest in this case. *See* Fed. R. Civ. P. 19(a)(1)(B)(i) and (ii).

At least as of March 7, 2018, when members of Congress sent a letter to ICE, ICE has had general knowledge of the litigation. Dkt. 52 at 5. Furthermore, by contract, GEO is apparently required to notify ICE of this case within five days of its filing. Dkt. 19 at 57. It is undisputed that ICE has not appeared in this case, the related class action case, or any similar cases. ICE has not asserted any interest in the case. GEO has speculated that an increase in detainee wages could result in a contract modification regarding reimbursement from ICE to GEO. That points only to a potential financial interest. However, "The interest must be more than a financial stake, and more than speculation about a future event." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990).

Because ICE does not have an interest in the case, it is not a necessary party under either subsection (i) or (ii) of Fed. R. Civ. P. 19(a)(1)(B). However, assuming ICE that has an interest in the case, resolving the case does not necessarily impair or impede ICE's ability to protect its interest, under subsection (i), and does not leave GEO subject to inconsistent obligations, under subsection (ii).

Considering subsection (i), it appears that GEO has not argued that the 'impair or impede' subsection applies. *See* Dkt. 51 at 9-14; Dkt. 56 at 9-13. GEO made no mention of subsection (i) at oral argument. The Court observes that the State does not seek relief to set aside or modify the GEO-ICE Contract. Furthermore, if the State prevails, GEO could still comply with the GEO-ICE Contract, because any judgment would not invalidate or set aside the contract. *See Dawavendewa*, 276 F.3d at 1157; *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 881 (9th Cir. 2004).

Considering subsection (ii), whether ICE's absence leaves GEO subject to inconsistent obligations, GEO's showing is insufficient. *See* Fed. R. Civ. P. 19(a)(1)(B)(ii). GEO argues that two inconsistent obligations would result if the State prevails. GEO first points to the outcome if GEO is required to compensate detainees at or above the State minimum wage, rather than at $1 per day. Dkt. 56 at 10. Such an outcome, in GEO's view, does not reflect the intent of the contractor and author of the contract, ICE, but if ICE's opinion is ambiguous, "ICE should be in the case to explain its view[.]" *Id.* at 10. A need for ICE's evidence does not make its joinder necessary.

GEO also points to the outcome if GEO is declared an "employer" of detainee "employees." According to GEO, such a declaration would conflict with terms of the GEO-ICE Contract, which requires GEO to perform pre-suitability employment checks and hire only

lawful permanent residents and U.S. citizens and persons with the requisite (lack of) criminal arrests. Dkt. 56 at 10. If GEO is violating its contract with ICE, that appears to be beyond the issues raised by the Complaint.

Both outcomes described by GEO presuppose that the MWA cannot be reconciled with other contractual and legal obligations, but as discussed above, the State's theory points to the likelihood of harmony. The Court need not belabor the point, particularly because this Order makes no final finding on the correct interpretation of the GEO-ICE Contract.

In sum, the Court finds that ICE is not a necessary party under Rule 19(a).

2. Is it feasible to join ICE?

Federal agencies are protected from suit, except where Congress has spoken. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). According to GEO, Congress has not waived the federal agency's sovereign immunity and ICE has not itself consented to be sued. Dkt. 51 at 14, 15. The State has not made any showing to the contrary, where it argues in a footnote only that "the doctrine of sovereign immunity would not preclude GEO from impleading DHS/ICE as a third party for purposes of declaratory and injunctive relief" when challenging a final agency action under the Administrative Procedure Act. Dkt. 53 at FN 8 (emphasis added). The State's footnote does not address the feasibility of joinder as to all claims here.

For purposes of this motion, the Court assumes that it is not feasible to join ICE.

3. Is ICE an indispensable party under Rule 19(b)?

ICE is not a necessary party, but to complete the analysis, the Court should assume that it is a necessary party and cannot feasibly be joined. Then the Court should consider whether ICE is an indispensable party. A party is "indispensable" for Rule 19(b) purposes if the action should proceed "in equity and good conscience," considering the following non-exhaustive factors:

- The extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- The extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
- Whether a judgment rendered in the person's absence would be adequate; and
- Whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *White v. Univ. of California*, 765 F.3d 1010, 1027-28 (9th Cir.2014).

The first factor, prejudice, weighs heavily in favor of the State. ICE suffers no more prejudice as an absent party than if it participates. The State does not seek relief from ICE, and, assuming an outcome in favor of the State, the GEO-ICE Contract will remain intact. ICE is fully capable of protecting itself. The prejudice to GEO is no more than if ICE participates.

The next factor, lessening prejudice with mitigating measures, favors neither party because there is no prejudice to ICE, and, as GEO acknowledges, there are no mitigating measures available. Dkt. 51 at 16.

The final two factors favor the State. Again, assuming the State's theory of the case prevails, the State will have obtained its remedy with the GEO-ICE Contract unchanged and without prejudice to ICE. On the other hand, if the case were dismissed for the failure to join ICE, the State would be left without a legal remedy.

Equity and good conscience, in light of these four factors, weigh in favor of the case proceeding, rather than its dismissal. ICE is not an indispensable party under Rule 19(b).

C. Public Rights Exception.

Where a "suit falls within the public rights exception to traditional joinder rules . . . [absent parties] are not indispensable parties." *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). "In a proceeding . . . narrowly restricted to the protection and enforcement of *public*

rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.*, citing *Nat'l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363 (1940) (emphasis in original). Although "[t]he contours of the public rights exception have not been clearly defined," the exception applies at least where the litigation both (1) "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right[,]" and (2) does not "destroy the legal entitlements of the absent parties." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). *See also*, *White*, 765 F.3d at 1028.

In this case, the public rights exception applies. As elaborated at oral argument, the State seeks to vindicate public rights guaranteed by the MWA on behalf of detainees, non-detainee residents of the State of Washington, and other businesses competing in the marketplace. The State seeks no relief that would alter any legal rights of ICE.

D. GEO's request in the alternative.

GEO seeks, alternative to dismissal, that the Court require the State, not GEO, to add ICE as a named defendant. Dkt. 51 at 6:21, 17:29. This appears to be a throwaway argument, because GEO abandoned the argument in its nearly-identical motion subsequently filed in the related case. *Chen v. The GEO Group Inc.*, W.D. Wash. Cause No. 17-5769, Dkt. 51. If the Court requires the State to add ICE as a defendant, as GEO requests, ICE may not be subject to be sued, as GEO acknowledges, potentially leaving GEO as the sole defendant in the case, which triggers the Rule 19(b) "equity and good conscience" indispensable analysis. ICE is not an indispensable party and the case in equity and good conscience should proceed without ICE. GEO's alternative request for the State to be required to add ICE as a named defendant should be denied.

E. Conclusion.

In summary, ICE is not a necessary or an indispensable party under Rule 19. The public rights exception applies. Dismissal for non-joinder is not warranted. GEO's motion should be denied.

This Order makes no finding as to whether GEO could add ICE as a third party defendant.

* * *

THEREFORE, it is HEREBY ORDERED that The GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties, Or, Alternatively, to Add Required Government Parties (Dkt. 51) is DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 26th day of April, 2018.

ROBERT J. BRYAN
United States District Judge

Exhibit H

Chen Order Denying Rule 19 Motion to Dismiss

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHAO CHEN,

Plaintiff,

v.

THE GEO GROUP INC.,

Defendant.

CASE NO. 3:17-cv-05769-RJB

ORDER ON DEFENDANT THE GEO GROUP INC.'S MOTION FOR ORDER OF DISMISSAL BASED ON PLAINTIFF'S FAILURE TO JOIN REQUIRED GOVERNMENT PARTIES

THIS MATTER comes before the Court on Defendant The GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties. Dkt. 51. The Court has reviewed the motion, all documents filed in support and opposition, and the remainder of the file herein, and considered oral argument on April 24, 2018.

Defendant seeks dismissal for Plaintiff Chao Chen's failure to join the Department of Homeland Security and an agency thereof, Immigration and Customs Enforcement (collectively, "ICE"). *See* Dkt. 51 at FN1. As discussed below, dismissal should be denied because ICE is

neither a necessary nor an indispensable party. The case can proceed in equity and good conscience.

I. BACKGROUND

Defendant moves to dismiss for failure to join under Fed. R. Civ. P. 12(b)(7) following the initial pleadings, but before the completion of discovery. Failure to join may be raised at any stage. *McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984); *CP Nat. Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911-12 (9th Cir. 1991). *See* Fed. R. Civ. P. 12(h)(2). Facts recited are derived either from the Complaint or from a contract incorporated by the Complaint and relied upon by the parties. Dkts. 1, 19, 45-3.

GEO is a private corporation that has owned and operated the Northwest Detention Center (NWDC), a 1,500 bed detention facility, since 2005. Dkt. 1 at ¶¶4.1, 4.2. GEO operates the NWDC based on a contract with ICE ("the GEO-ICE Contract"). Dkts. 19, 45-3. GEO takes care of immigration detainees awaiting resolution of immigration matters and relies on detainees for a wide range of services under the Voluntary Work Program (VWP) required by the contract. *Id.* at ¶¶4.5. GEO compensates detainees at $1 per day. *Id.* at ¶4.7.

Plaintiff initiated this action under the theory that the GEO-ICE Contract at least allows for, if not requires, GEO to compensate detainees working in the VWP at least the minimum wage required by with the State Minimum Wage Act (MWA). Dkt. 1 at ¶¶4.10-4.12. In support of its theory, Plaintiff primarily relies on three terms of the GEO-Ice Contract: (1) GEO must compensate detainees participating in the VWP "*at least* $1 per day" under the "ICE/DHS Performance Base [*sic*] [National] Detention Standards" (PBNDS), expressly incorporated by the contract; (2) GEO must operate according to the "most current . . . constraints," including "applicable federal, state and local labor laws and codes"; and (3) where the contract conflicts

with "all applicable federal state and local laws and standards . . . the most stringent shall apply." Dkt. 19 at 46-48, 56; Dkt. 45-3 at 8.

Defendant rejects Plaintiff's theory and maintains that the GEO-ICE Contract prohibits GEO from acting as an 'employer' to detainees working in the VWP. In support of its theory, Defendant relies on the history, custom, and practice of the VWP and on an itemized "services/supplies" description for the "Detainee Volunteer Wages for the Volunteer Program" found in the GEO-ICE Contract. Dkt. 19 at 9. The description specifies that "[r]eimbursement for this line item will be at the actual cost of $1.00 per day per detainee" and that the "Contractor [GEO] shall not exceed the amount shown without prior approval" by ICE. *Id.* Defendant also relies on provisions of the contract describing background and clearance procedures and practices for hiring "employees," such as use of E-Verify and the prohibition of employing "illegal or undocumented aliens." *Id.* at 72-75. GEO argues that paying MWA rates to detainees working in the VWP would violate the GEO-ICE Contract.

Acknowledged by both parties are GEO-ICE Contract terms allowing GEO to request contract pricing modifications and obliging GEO to indemnify ICE against all claims arising out of GEO's operation of the NWDC. Dkt. 19 at 56, 105, 106, 367.

The Complaint requests the following relief: class certification, damages for lost wages, costs, fees, and interest. Dkt. 1 at 5. GEO is the sole defendant named. *Id.* at ¶3.2.

In the instant motion, Defendant seeks dismissal for Plaintiff's failure to join ICE.

II. DISCUSSION

A. Joinder under Rule 19.

Joinder is governed by Fed. R. Civ. P. 19, a rule that imposes a three-step inquiry:

1. Is the absent party "necessary" under Rule 19(a)?

2. If so, is it feasible to order joinder of the absent party?

3. If joinder is not feasible, is the party "indispensable" under Rule 19(b) such that in "equity and good conscience" the suit can proceed short of dismissal?

Salt River Project Agr. Imp. and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012). Rule 19 analysis is "a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002).

1. Is ICE a necessary party under Rule 19(a)?

Rule 19(a)(1) provides:

> (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

a. Fed. R. Civ. P. 19(a)(1)(A).

The Court can accord complete relief among existing parties. *See* Fed. R. Civ. P. 19(a)(1)(A). All relief sought by Plaintiff can be obtained from GEO without ICE.

Defendant argues that complete relief cannot be obtained among existing parties because the day rate of $1 is fixed by ICE and cannot be adjusted without ICE's consent. Dkt. 51 at 12. To bolster its conclusion, Defendant cites two provisions of the GEO-ICE Contract, an opinion letter by the Department of Defense, and 8 U.S.C. § 1555(d). *Id.* at FN 35, 36. The first page of the contract cited, page eighty-two (82), simply incorporates the PBNDS. *See* Dkt. 19 at 9. The

second page of the contract cited, page nine (9), includes a clause that describes "reimbursement" of $114,975 for the "Detainee Volunteer Wages for the Detainee Work Program . . . at the actual cost of $1.00 per day per detainee," and GEO "shall not exceed the amount shown without prior approval" by ICE. *Id.* The clause can be interpreted in at least two ways: In Defendant's view, ICE's reimbursement rate is also limit on detainee rate of pay; in Plaintiff's view, ICE's reimbursement rate limits the amount reimbursed to GEO but does not limit the detainee rate of pay. Interpretation of this clause remains an open question.

Next, Defendant relies on a 1992 opinion letter issued by the General Counsel to the Department of Defense on the issue of whether "aliens may perform general labor at the Naval Air Facility, so long as performance is voluntary . . . not unduly hazardous, and the aliens remain in [DHS] custody." Dkt. 51 at FN 35, 36. *Your CO* 243-C Memorandum of November 15, 1991; DOD Request for Alien Labor, 1992 WL 1369402, at *2. How this opinion, which makes no mention of the MWA, should influence interpretation of the GEO-ICE Contract, remains an open question.

Finally, Defendant cites 8 U.S.C. § 1555(d), which provides that congressional appropriations for immigration service expenses "shall be available for payment of . . . (d) payment of allowances (at such a rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody . . . for work performed[.]" *Id.* The Court previously commented that "although § 1555(d) is still in effect, Congress has not specified any rate for detainee work since fiscal year 1979." Dkt. 28 at 9.

The Court is reluctant to delve into contract interpretation prior to the completion of discovery, except to find that, at present, Defendant has not shown that there cannot be complete

relief among the parties, because its argument is premised on only one of multiple plausible interpretations of the GEO-ICE Contract.

Defendant analogizes this case to *Dawavendewa*, arguing that "[w]hen a plaintiff sues one party to a contract over actions that relate to that contract, the absent contracting party is a required party." Dkt. 51 at 9. In *Dawavendewa*, the Ninth Circuit concluded that complete relief could not be accorded to the plaintiff, "[e]ven if ultimately victorious," because judgment in plaintiff's favor would put the defendant "between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the [Navajo Nation] lease requiring it." *Dawavendewa*, 276 F.3d at 1155.

In this case, at least arguably, no such 'rock and a hard place' exists, because Plaintiff's theory points to the likelihood of harmony between GEO's contractual obligation and complying with the MWA. Under Plaintiff's theory, the plausibility of which the Court previously addressed, *see* Dkt. 28, whether detainees are "employees" is a fact-driven question informed by whether GEO acts like an "employer" under the MWA. For the same reason *Dawavendewa* can be distinguished, GEO's reliance on *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005), fails. In this case, at least arguably, no such impossible predicament precludes complete relief among existing parties exists.

b. Fed. R. Civ. P. 19(a)(1)(B)(i) and (ii).

ICE does not have a legally protected interest in this case. *See* Fed. R. Civ. P. 19(a)(1)(B)(i) and (ii).

At least as of March 7, 2018, when members of Congress sent a letter to ICE, ICE has had general knowledge of the litigation. Dkt. 52 at 5. Furthermore, by contract, GEO is apparently required to notify ICE of this case within five days of its filing. Dkt. 19 at 57. It is

undisputed that ICE has not appeared in this case, the related class action case, or any similar cases. ICE has not asserted any interest in the case. Defendant has speculated that an increase in detainee wages could result in a contract modification regarding reimbursement from ICE to GEO. That points only to a potential financial interest. However, "The interest must be more than a financial stake, and more than speculation about a future event." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990).

Because ICE does not have an interest in the case, it is not a necessary party under either subsection (i) or (ii) of Fed. R. Civ. P. 19(a)(1)(B). However, assuming that ICE has an interest in the case, resolving the case does not necessarily impair or impede ICE's ability to protect its interest, under subsection (i), and does not leave GEO subject to inconsistent obligations, under subsection (ii).

Considering subsection (i), it appears that Defendant has not argued that the 'impair or impede' subsection applies. *See* Dkt. 51 at 9-14; Dkt. 56 at 9-13. Defendant made no mention of subsection (i) at oral argument. The Court observes that Plaintiff does not seek relief to set aside or modify the GEO-ICE Contract. Furthermore, if Plaintiff prevails, GEO could still comply with the GEO-ICE Contract, because any judgment would not invalidate or set aside the contract. *See Dawavendewa*, 276 F.3d at 1157; *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 881 (9th Cir. 2004).

Considering subsection (ii), whether ICE's absence leaves GEO subject to inconsistent obligations, Defendant's showing is insufficient. *See* Fed. R. Civ. P. 19(a)(1)(B)(ii). Defendant argues that two inconsistent obligations would result if Plaintiff prevails. Defendant first points to the outcome if GEO is required to compensate detainees at or above the State minimum wage, rather than at $1 per day. Dkt. 56 at 10. Such an outcome, in Defendant's view, does not reflect

the intent of the contractor and author of the contract, ICE, but if ICE's opinion is ambiguous, "ICE should be in the case to explain its view[.]" *Id.* at 10. A need for ICE's evidence does not make its joinder necessary.

Defendant also points to the outcome if GEO is declared an "employer" of detainee "employees." According to Defendant, such a declaration would conflict with terms of the GEO-ICE Contract, which requires GEO to perform pre-suitability employment checks and hire only lawful permanent residents and U.S. citizens and persons with the requisite (lack of) criminal arrests. Dkt. 56 at 10. If GEO is violating its contract with ICE, that appears to be beyond the issues raised by the Complaint.

Both outcomes described by Defendant presuppose that the MWA cannot be reconciled with other contractual and legal obligations, but as discussed above, Plaintiff's theory points to the likelihood of harmony. The Court need not belabor the point, particularly because this Order makes no final finding on the correct interpretation of the GEO-ICE Contract.

In sum, the Court finds that ICE is not a necessary party under Rule 19(a).

2. Is it feasible to join ICE?

Federal agencies are protected from suit, except where Congress has spoken. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). According to Defendant, Congress has not waived the federal agency's sovereign immunity and ICE has not itself consented to be sued. Dkt. 51 at 14, 15. Plaintiff has not made any showing to the contrary, where it argues, by incorporating a footnote, only that "the doctrine of sovereign immunity would not preclude GEO from impleading DHS/ICE as a third party for purposes of declaratory and injunctive relief" when challenging a final agency action under the Administrative Procedure Act. Dkt. 62 at 3;

State of Washington v. The GEO Group Inc., W.D.Wash. Cause No. 17-56580, Dkt. 53 at FN 8 (emphasis added). The footnote does not address the feasibility of joinder as to all claims here.

For purposes of this motion, the Court assumes that it is not feasible to join ICE.

3. Is ICE an indispensable party under Rule 19(b)?

ICE is not a necessary party, but to complete the analysis, the Court should assume that it is a necessary party and cannot feasibly be joined. Then the Court should consider whether ICE is an indispensable party. A party is "indispensable" for Rule 19(b) purposes if the action should proceed "in equity and good conscience," considering the following non-exhaustive factors:

- The extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- The extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
- Whether a judgment rendered in the person's absence would be adequate; and
- Whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *White v. Univ. of California*, 765 F.3d 1010, 1027-28 (9th Cir.2014).

The first factor, prejudice, weighs heavily in favor of Plaintiff. ICE suffers no more prejudice as an absent party than if it participates. Plaintiff does not seek relief from ICE, and, assuming an outcome in favor of Plaintiff, the GEO-ICE Contract will remain intact. ICE is fully capable of protecting itself. The prejudice to Defendant is no more than if ICE participates.

The next factor, lessening prejudice with mitigating measures, favors neither party because there is no prejudice to ICE, and, as GEO acknowledges, there are no mitigating measures available. Dkt. 51 at 16.

The final two factors favor Plaintiff. Again, assuming Plaintiff's theory of the case prevails, Plaintiff will have obtained its remedy with the GEO-ICE Contract unchanged and

without prejudice to ICE. On the other hand, if the case were dismissed for the failure to join ICE, Plaintiff would be left without a legal remedy.

Equity and good conscience, in light of these four factors, weigh in favor of the case proceeding, rather than its dismissal. ICE is not an indispensable party under Rule 19(b).

B. Conclusion.

In summary, ICE is not a necessary or an indispensable party under Rule 19. Dismissal for non-joinder is not warranted. Defendant's motion should be denied.

This Order makes no finding as to whether Defendant could add ICE as a third party defendant.

* * *

THEREFORE, it is HEREBY ORDERED that The GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties (Dkt. 51) is DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 26th day of April, 2018.

ROBERT J. BRYAN
United States District Judge