

1 Department of Homeland Security and U.S. Immigration and Customs Enforcement (collectively
2 “ICE”) and the Washington State Department of Labor & Industries (“L & I”). Dkt. 183. GEO
3 moves for a delay in the motion for summary judgment’s consideration to complete discovery.
4 Dkt. 188. For the reasons provided below, GEO’s motion to delay consideration of the motion
5 (Dkt. 188) should be denied, and the State’s motion (Dkt. 183) should be granted. GEO’s
6 affirmative defenses of laches, unclean hands, and failure to join necessary parties, should be
7 dismissed.

8 I. RELEVANT FACTS AND PROCEDURAL HISTORY

9 A. FACTS

10 GEO is a private corporation that has owned and operated the NWDC, a 1,575-bed detention
11 facility in Tacoma, Washington, since 2005. Dkt. 156, at 8-9. GEO operates the NWDC based on
12 a contract with ICE. Dkts. 16-2, and 19. Under this contract, GEO provides “detention
13 management services including the facility, detention officers, management personnel,
14 supervision, manpower, training certifications, licenses . . . equipment, and supplies” for
15 immigration detainees awaiting resolution of immigration matters. Dkt. 19, at 49. GEO is also
16 required by the contract to manage a Voluntary Work Program (“VWP”). Dkt. 19, at 86.
17 Detainees who participate in the VWP collect and distribute laundry, prepare and serve food,
18 clean, paint interior walls, and use electric shears to cut hair. Dkt. 184-1, at 8-19. GEO pays
19 detainees who participate in the VWP at \$1 per day. Dkt. 156, at 10. In accord with the contract
20 with ICE, GEO agreed to comply with “[a]pplicable federal, state and local labor laws and
21 codes.” Dkt. 19, at 48.

22 B. PROCEDURAL HISTORY

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1 On September 20, 2017, the State filed this case in Pierce County, Washington Superior
2 Court. Dkt. 1-1. The Complaint maintains that the GEO-ICE Contract at least allows for, if not
3 requires, GEO to compensate detainees working in the VWP commensurate with the State
4 MWA. *Id.*, at ¶¶3.3, 3.4, 5.1-6.6. The State alleges that GEO has been unjustly enriched by
5 compensating detainees below that required by state law. *Id.* In its “quasi-sovereign interest,”
6 the State makes a claim against GEO for unjust enrichment, and seeks: (1) an order requiring
7 GEO to disgorge its unjust enrichment from compensating detainees below the minimum wage,
8 (2) declaratory relief that GEO is an “employer” subject to the MWA when managing detainee
9 employees, and (3) injunctive relief for GEO to be enjoined from paying detainees less than the
10 minimum wage. *Id.*

11 In its Answer, GEO makes a counterclaim for unjust enrichment, seeks declaratory and
12 injunctive relief, and asserts thirteen affirmative defenses. Dkt 34.

13 On February 28, 2018, GEO’s counterclaim for unjust enrichment was dismissed. Dkt. 44.
14 Further, State’s motion to strike the affirmative defenses of laches, unclean hands, failure to join
15 L & I and ICE (all three of which are the subject of the present motion), and ripeness,
16 justiciability, and a portion of the offset defense, was denied without prejudice; no finding was
17 made as to the affirmative defense of preemption. *Id.* The remaining affirmative defenses were
18 stricken. *Id.*

19 On April 26, 2018, GEO’s motion to dismiss for failure to join ICE was denied. Dkt. 58.
20 The Order found that ICE was not a necessary or indispensable party to the case. *Id.* Complete
21 relief could be accorded to the parties in the case and ICE did not have a legally protected
22 interest. *Id.* GEO’s alternative motion, that ICE be added as a defendant was also denied. *Id.*

23 C. PENDING MOTIONS

1 The State now moves for summary judgment on the affirmative defenses of laches, unclean
2 hands, and failure to join ICE and L & I. Dkt. 183. GEO responds and moves, pursuant to Rule
3 56 (d), that the motion for summary judgment should either be denied, or its consideration
4 deferred until the close of discovery. Dkt. 188. It argues that even if the motion is considered
5 now, it should be denied because there are issues of fact as to the affirmative defense of laches,
6 unclean hands and the failure to join ICE. *Id.* In reply, the State argues that the motion should
7 be considered now, and that the motion should be granted. Dkt. 193.

8 **II. DISCUSSION**

9 **A. SUMMARY JUDGMENT STANDARD**

10 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
11 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
12 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party is
13 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
14 showing on an essential element of a claim in the case on which the nonmoving party has the
15 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
16 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
17 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
18 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
19 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56 (d). Conversely, a genuine dispute over a
20 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
21 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
22 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
23 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

1 The determination of the existence of a material fact is often a close question. The court
2 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
3 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
4 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
5 of the nonmoving party only when the facts specifically attested by that party contradict facts
6 specifically attested by the moving party. The nonmoving party may not merely state that it will
7 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
8 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
9 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not
10 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

11 **B. MOTION TO DEFER MOTION FOR SUMMARY JUDGMENT UNDER FED. R.**
12 **CIV. P. 56 (d)**

13 Under Fed. R. Civ. P. 56 (d):

14 If a nonmovant shows by affidavit or declaration that, for specified reasons, it
15 cannot present facts essential to justify its opposition [to a motion for summary
16 judgment], the court may: (1) defer considering the motion or deny it; (2) allow
17 time to obtain affidavits or declarations or to take discovery; or (3) issue any other
18 appropriate order.

19 “A party seeking additional discovery under Rule 56 (d) must explain what further discovery
20 would reveal that is essential to justify its opposition’ to the motion for summary judgment.”
21 *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018)(*cert. denied*, 139 S. Ct. 1222
22 (2019)(*internal quotation marks and citation omitted*). “In particular, the requesting party must
23 show that: (1) it has set forth in affidavit form the specific facts it hopes to elicit from further
24 discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose
summary judgment.” *Id.* (*internal quotation marks and citation omitted*).

1 GEO's motion to deny as premature, or delay consideration of, the motion for summary
2 judgment until discovery is complete - six weeks from now - (Dkt. 188) should be denied. GEO
3 has failed to set forth "the specific facts it hopes to elicit from further discovery." The
4 information GEO states it seeks is general in nature. It has not set stated that the "facts sought
5 exist." Further, GEO has not demonstrated that the "sought-after facts are essential to oppose
6 summary judgment." Moreover, this case was filed a year and a half ago; extensive discovery
7 has already taken place. "A party seeking to delay summary judgment for further discovery must
8 state what other specific evidence it hopes to discover and the relevance of that evidence to its
9 claims." *Stevens*, at 678. GEO has failed to do so here. The motion for partial summary
10 judgment on the affirmative defenses should be considered.

11 C. AFFIRMATIVE DEFENSE OF LACHES

12 1. Applicability to the State

13 The State asserts that the laches defense should be dismissed because state enforcement
14 actions are not subject to laches. Dkt. 183. GEO argues that under *Lopp v. Peninsula School*
15 *District 401*, 90 Wn.2d 757 (1978), the public interest nature of the lawsuit alone does not bar
16 application of laches.

17 The doctrine of laches is an equitable defense. *King Cty. v. Taxpayers of King Cty.*, 133
18 Wn.2d 584, 642 (1997). "Generally, equitable defenses may not be asserted against
19 governmental entities if their application would interfere with the proper exercise of
20 governmental duties or if the act relied upon is ultra vires." *Hous. Auth. of Cty. of King v. Ne.*
21 *Lake Washington Sewer & Water Dist.*, 56 Wn. App. 589, 593 (1990)(as amended, 789 P.2d 103
22 (Wash. Ct. App. 1990); *City of Mercer Island v. Steinmann*, 9 Wn. App. 479 (Wash. Ct. App.
23 1973).

1 The affirmative defense of laches asserted here should be dismissed because the State's
2 case resulted from "a proper exercise of governmental duties." *Hous. Auth. of Cty. of King*, at 593.
3 The State filed its action to enforce Washington's minimum wage laws pursuant to Washington's
4 "quasi-sovereign interest in protecting the health, safety, and well-being of its residents." Dkt. 1-
5 1. GEO fails to provide a basis to reject the general principal that equitable defenses, like laches,
6 do not apply to the sovereign here. GEO's citation to *Lopp* is unhelpful; *Lopp* was an action by a
7 private individual who asserted that he was protecting the public interest. This is an enforcement
8 action by a state of its own state laws. *Lopp* holding, that "laches can sometimes be a bar even to
9 a public interest lawsuit," does not provide the authority to find that laches should be available to
10 bar the State's case here.

11 Even if laches were available to bar an action brought by the State to enforce state law for
12 the benefit of its residents, the affirmative defense of laches should still be dismissed in this case.

13 2. Laches

14 In Washington, a defendant asserting a laches defense must prove the following
15 elements:

16 (1) knowledge or reasonable opportunity to discover on the part of a potential
17 plaintiff that [they have] a cause of action against a defendant; (2) an
18 unreasonable delay by the plaintiff in commencing that cause of action; and (3)
19 damage to the defendant resulting from the unreasonable delay.

20 *King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 642 (1997). "In determining whether the
21 delay was inexcusable, a court may look to a variety of factors including similar statutory and
22 rule limitation periods. But the main component of the doctrine is not so much the period of
23 delay in bringing the action, but the resulting prejudice and damage to others." *Clark Cty. Pub.*
24 *Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848-49 (2000).

1 GEO has failed to point to genuine issues of material fact on its laches defense. While
2 both parties agree that the State had knowledge that it had a cause of action, at least by March of
3 2014, GEO has failed to point to issues of fact that there was an unreasonable delay in the State's
4 bringing this action. The State points to emails from local law professors and immigration
5 lawyers to the Governor's Office, to support its assertion that it became aware of GEO's VWP
6 payments of \$1 to detainees in March 2014. Dkts. 131, at 25-26. In response to this motion,
7 GEO maintains that one of its lawyers emailed a state representative in 2009 with a Detainee
8 Handbook about the NWDC as an attachment. Dkt. 188. Aside from raising concerns under
9 Washington Rule of Professional Conduct 3.7, "Lawyer As Witness," GEO makes no showing
10 that information given to a single legislator should be imputed to members of the state's
11 executive branch, the branch charged with enforcing state law. GEO has failed to show that
12 there are issues of fact as to when the State first became aware of GEO's \$1-a-day for detainee
13 workers' policy. GEO has failed to show that the length of time the State waited - three and one-
14 half years between when it had knowledge of the policy and when it filed this lawsuit - was "an
15 unreasonable delay," particularly because the undersigned has already held that no statute of
16 limitation applies to the State's action here. Dkt. 44, at 9 (*citing* RCW 4.16.160, "there shall be
17 no statute of limitation to actions brought in the name of or for the benefit of the state, and no
18 claim of right predicated upon the lassoos of time shall ever be asserted against the state").

19 Moreover, GEO fails to point to genuine issues of fact as to whether it was damaged by the
20 length of time it took the State to bring this case. GEO asserts generally that it may suffer
21 evidentiary prejudice because of the potential of lost evidence or degradation of witnesses'
22 memories. Dkt. 188. This argument is mere speculation and is insufficient to show that GEO
23 suffered prejudice. Further, GEO maintains that it was economically prejudiced due to the
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1 State's delay because it continued to contract with ICE. Dkt. 188. This does not provide
2 sufficient facts of actual prejudice. The affirmative defense of laches should be dismissed.

3 **D. AFFIRMATIVE DEFENSE OF UNCLEAN HANDS**

4 The State moves for summary judgment on GEO's affirmative defense of unclean hands.
5 GEO maintains that the State is not entitled to relief in this case because it has "unclean hands."

6 "It is well settled that a party with unclean hands cannot recover in equity." *Miller v. Paul*
7 *M. Wolff Co.*, 178 Wn. App. 957, 965 (2014). "Those who act unjustly or in bad faith are
8 deemed to act with unclean hands." *Id.* "The authorities are in accord that the 'clean hands'
9 principle does not repel a sinner from courts of equity, nor does it disqualify any claimant from
10 obtaining relief there who has not dealt unjustly in the very transaction concerning which he
11 complains." *J.L. Cooper & Co. Anchor Securities Co.*, 9 Wash.2d 45 (1941). Accordingly,
12 "[f]raud or inequity practiced against a third person, who does not complain, does not close the
13 doors of equity to a plaintiff guilty of no inequity as against a defendant." *McKelvie v. Hackney*,
14 58 Wn.2d 23, 32 (1961).

15 GEO's affirmative defense of unclean hands should be dismissed. GEO fails to point to
16 any evidence that the State's conduct in connection with GEO was reprehensible. Instead, GEO
17 focuses on the State's treatment of and payments to inmates in State facilities. The State's
18 treatment of its inmates is not relevant to GEO's affirmative defense of unclean hands against the
19 State's case, which is brought to protect the State's and its residents' rights. Furthermore, and
20 most importantly, the State's payments to inmates is based on statutory authority, which is not
21 the case with GEO's payments to detainees. The State's motion for summary judgment on this
22 affirmative defense should be granted.

23 **E. AFFIRMATIVE DEFENSE FAILURE TO JOIN ICE AND L & I**

1 The State moves for summary judgment on GEO's affirmative defense of failure to join ICE
2 and L & I as defendants. Dkt. 183. While GEO opposes the motion to dismiss the defense as it
3 relates to ICE, GEO failed to respond to the motion for summary judgment on the affirmative
4 defense of failure to join L & I. Dkt. 188. GEO argues that its affirmative defense should not be
5 dismissed because ICE is a necessary party with protectable interests at issue. *Id.*

6 The State's motion for summary judgment on these affirmative defenses should be granted.
7 GEO makes no showing that L & I is an indispensable or necessary party. Over a year ago, on
8 April 26, 2018, GEO's motion to dismiss for failure to join ICE was denied. Dkt. 58. The Order
9 found that ICE was not a necessary or indispensable party to the case. *Id.* It held that complete
10 relief could be accorded to the parties in the case and ICE did not have a legally protected
11 interest. *Id.* The reasoning of that order (Dkt. 58) is adopted here. GEO offers no basis to
12 change that decision. To the extent that GEO intends this response to be a motion for
13 reconsideration of that April 26, 2018 order, it is untimely under Local Rule W.D. Wash. 7 (h)(2)
14 and should be denied. Local Rule 7 (h)(2)(providing that motions for reconsideration "shall be
15 filed within fourteen days after the order to which it relates is filed"). GEO's affirmative defense
16 of failure to join ICE and L & I should be dismissed.

17 III. ORDER

18 Therefore, it is hereby **ORDERED** that:

- 19 • GEO's motion to defer or deny the State's motion for summary judgment
20 pursuant Fed. R. Civ. P. 56 (d) (Dkt. 188) **IS DENIED;**
- 21 • Washington's Motion for Partial Summary Judgment on the GEO Affirmative
22 Defenses (Dkt. 183) **IS GRANTED;** and

- 1 o GEO’s affirmative defenses of laches, unclean hands, and failure to join
2 necessary parties, the Department of Homeland Security and U.S.
3 Immigration and Customs Enforcement and the Washington State
4 Department of Labor & Industries, **ARE DISMISSED.**

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

7 Dated this 13th day of May, 2019.

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9 ROBERT J. BRYAN
10 United States District Judge