

# One Dollar Per Day: A Note on Recent Forced Labor and Dollar-Per-Day Wages in Private Prisons Holding People Under Immigration Law

Jacqueline Stevens  
*Northwestern University*

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# ONE DOLLAR PER DAY: A NOTE ON RECENT FORCED LABOR AND DOLLAR-PER-DAY WAGES IN PRIVATE PRISONS HOLDING PEOPLE UNDER IMMIGRATION LAW†

Jacqueline Stevens\*

## ABSTRACT

*In 2015, nine plaintiffs in Denver, Colorado filed a lawsuit in federal court against The GEO Group, Inc. (“GEO”), alleging that the work they performed for GEO, while detained under immigration laws, violated Colorado’s Minimum-Wage Order (CMWO), the federal Trafficking Victims Protection Act’s (TVPA) prohibition against forced labor, and Colorado common law barring unjust enrichment. In the wake of the federal district court allowing two out of the three charges to be heard by juries, as well as granting class certification, additional lawsuits against GEO and the prison firm CoreCivic were filed in California and Washington.*

*To assist scholars and practitioners in staying abreast of novel and fast-emerging developments, this Article provides key excerpts and analysis from recent filings in five cases: Menocal v. The GEO Group (2015), Owino v. CoreCivic (2017), State of Washington v. The GEO Group (2017), Chao Chen v. The GEO Group (2017), and Novoa v. The GEO Group (2017).*

## I. INTRODUCTION

As prisons supplanted corporal punishment in England and the colonies in the sixteenth century, the forced labor of those punished by incarceration was justified by a variety of political, economic, and religious or other supposedly moral rationales.<sup>1</sup> Emerging in a legal space

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\* Professor, Department of Political Science, Director, Deportation Research Clinic, Buffett Institute for Global Justice, Northwestern University

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<sup>1</sup> See Ryan Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213, 217 n.36 (2009) (“[c]onsidered a major reform in punishment at the time, the Walnut Street Prison required its inmates to work ‘in order to attack idleness, though to be a major cause of crime’”) (citing Stephen Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 348 (1998) and quoting William Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1161–62 (2004) (“[t]he focus

specifically designated as distinct from penal institutions, the labor of those in custody under immigration laws also has received attention since its inception.<sup>2</sup> Indeed the Supreme Court's famous 1896 decision prohibiting punitive measures based on civil immigration laws responded in particular to an 1892 statute requiring that any person of Chinese origin or descent found illegally in the United States "be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States."<sup>3</sup> The Court found the requirement of hard labor "inflicts an infamous punishment" in violation of the Fifth and Sixth Amendments.<sup>4</sup> In the decades following the ruling, Congress and the agencies overseeing the housing of people under immigration laws were mindful of this prohibition and ensured that no one in custody under immigration laws would be forced to work.<sup>5</sup>

Having attempted to distinguish certain consequences of detention under immigration law from criminal custody, Congress continued to pass legislation providing few legal protections to those in deportation proceedings.<sup>6</sup> In the 1952 Immigration and Naturalization Act, which remains the basis for much of the current U.S. Code governing detention authority under immigration laws, Congress specified that the Immigration and Nationality Service (INS) had authority to detain people under immigration laws without using hearings specified by the Administrative Procedures Act (APA) of 1946.<sup>7</sup> This portion of the statute was written to respond to a 1950 Supreme Court opinion affirming a habeas petition based on the absence of due process in deportation

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was primarily on the moral rehabilitation of the prisoner and only secondarily on the idea of having prison work defray some of the costs of incarceration").

<sup>2</sup> See *infra* Part II (showing the legal growth around and examination of immigration laws about detained immigrants and using said individuals for labor).

<sup>3</sup> Wong Wing v. United States, 163 U.S. 228, 976 (1896).

<sup>4</sup> *Id.*

<sup>5</sup> See Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, GEO. IMMIGR. L.J. 391, 398 (2015) (examining the history and actions of using immigrants for work while they are being held for the benefits of government purposes, and using plain text statutory construction to argue that those in custody under immigration laws meet the definition of "employees" in federal law entitled to the protections of worker wage and safety laws). See also S.H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1287, 1291-92 (2017) (analyzing the voluntary work program for those detained under immigration laws); Anita Sinha, *Slavery by Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1, 1 (2015) (depicting how the work programs in immigration detention facilities violate constitutional rights).

<sup>6</sup> See, e.g., Immigration and Naturalization Act of 1952, Pub. L. No. 414 (presenting legislation about immigration law and how immigrants are held in criminal custody).

<sup>7</sup> See *id.* (discussing the detaining of immigrants without hearings when they are taken into custody by the government).

proceedings.<sup>8</sup> *Wong Yang Sung* held that the recently passed APA had as its purpose to “curtail and change practices of embodying in one person or agency the duties of prosecutor and judge” and found that the APA, indeed applied to the deportation proceedings of the U.S. Immigration Service.<sup>9</sup> The Court concluded by granting the writ of habeas corpus and releasing the prisoner, because the deportation proceedings did not conform to the requirements of the APA.<sup>10</sup>

In *Marcello*, six members of the Court, in a brief paragraph, found that the immigration hearing procedures exemplified due process because many decisions were reviewable in Article III courts and noted the “special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.”<sup>11</sup>

The current litigation on behalf of respondents in ICE custody, who are forced to work for one to three dollars per day or to avoid solitary confinement or other punishment, occurs in the policy context of these earlier laws, but in an operational context that is vastly different.<sup>12</sup> The purpose of this Article is to apprise interested students, scholars, and practitioners of the most recent court filings from litigation challenging the work policies of private prisons owned and operated by The GEO Group and CoreCivic (previously “Corrections Corporation of America” and hereinafter CCA) in Colorado, California, and Washington State.<sup>13</sup>

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<sup>8</sup> See *Wong Yang Sung v. McGrath*, 339 U.S. 445, 455 (1950) (sustaining the writ of habeas corpus based on the absence of due process in deportation proceedings).

<sup>9</sup> *Id.* at 445, 454.

<sup>10</sup> See *id.* at 455; *Marcello v. Bonds, Officer in Charge, Immigration and Naturalization Service* 349 U.S. 302, 308–09 (1955) (finding that the plain text and legislative history of section 242(b) of the INA established that Congress intended to exclude deportation hearings from the APA requirements and instead create “a specialized administrative procedure applicable to deportation hearings”).

<sup>11</sup> *Id.* at 311.

<sup>12</sup> See Order Granting Motion for Class Certification under Rule 23(b)(3) & Appointment of Class Counsel under Rule 23(g) at 2, *Menocal v. GEO Corp.*, No. 1:14-cv-02887-JLK (D. Colo. Feb. 2, 2017) (describing the current litigation in *Menocal v. GEO Corp.*).

<sup>13</sup> See *id.* at 2, 8. See also Complaint with Jury Demand at 4, *Owino v. CoreCivic, Inc.*, No. 3:17-cv-1112-JLS-NLS (S.D. Cal. May 31, 2017) (alleging CoreCivic unlawfully forced detainees to operate their detention facilities); Complaint at 1–2, *Washington v. GEO Corp.*, No. 17-2-11422-2 (Super. Ct. Wash. Sept. 20, 2017) (challenging GEO Corp.’s disregard of Washington’s minimum wage laws); Class Action Complaint for Damages at 2, *Chao Chen v. GEO Grp., Inc.*, No. 3:17-cv-05769 (W.D. Wash. Sept. 26, 2017) (asserting that GEO violated Washington’s minimum wage laws by only paying detainees one dollar per day).

II. CASES

Key excerpts from motions and orders are offered to provide a brief and specific review of the competing arguments, with examples chosen from selected briefs to avoid duplication of arguments and precedents cited. All of these cases are at the pleading stage, though discovery has begun in *Menocal*.<sup>14</sup>

A. Alejandro Menocal v. GEO Group, Inc., case no. 1:14-cv-02887, U.S. District Court, Colorado. Filed 10/22/2014.

1. Class Action Complaint For Unpaid Wages and Forced Labor, Document 1, Filed 10/22/2014

The Class Action Complaint against The GEO Group, Inc., a private prison firm,<sup>15</sup> sought to compel the private prison to pay compensatory and punitive damages for unpaid wages and forced labor at its Aurora, Colorado facility.<sup>16</sup> The motion asserted that the facts common to the plaintiffs arose from their shared status as employees of GEO in whose Aurora facility they scraped and scrubbed toilets, bathrooms, showers, windows, medical facilities, patient rooms, and medical offices.<sup>17</sup> They also washed laundry for ICE residents, served meals, cut hair, prepared clothes for those arriving, prepared meals for law enforcement officials at GEO-sponsored events, completed office work for GEO, managed the law library, cleaned the solitary confinement and intake areas, deep-cleaned and readied empty areas of the facility for incoming detainees, cleaned the warehouse, maintained the facility's exterior, and landscaped the surrounding grounds.<sup>18</sup>

Plaintiffs alleged that GEO's practices constituted three violations of Colorado or federal law. First, plaintiffs argued that GEO violated the Colorado Minimum Wage Order (CMWO), which requires employers pay their employees at an hourly rate equal to or greater than the statutory minimum wage.<sup>19</sup> Second, the Complaint highlighted GEO's practice of compelling six randomly-selected detainees from each pod to clean their

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<sup>14</sup> See *Menocal*, No. 1:14-cv-02887-JLK (certifying the detainees as a class against GEO).

<sup>15</sup> See *GEO Group, Inc. Form 10-Q Filing*, (June 30, 2017), <https://www.sec.gov/Archives/edgar/data/923796/000119312517249967/d423976d10q.htm> [<https://perma.cc/ZYV8-A3Q9>] (showing that GEO Group, Inc. is a private company that runs prisons).

<sup>16</sup> See Class Action Complaint for Unpaid Wages and Forced Labor at 4, *Menocal v. GEO Grp., Inc.*, No. 1:14-cv-02887 (D. Colo. Oct. 22, 2014) (requesting damages and restitution for GEO's unlawful employment of detainees for no pay or the nominal amount of one dollar).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> *Id.* at 3.

pod each day in violation of the federal prohibition against forced labor under the TVPA.<sup>20</sup> Third, plaintiffs claimed that GEO's dollar-per-day pay policies "violate principles of justice, equity, and good conscience" thereby transgressing the Colorado common-law doctrine barring unjust enrichment.<sup>21</sup> Judge John L. Kane denied GEO's motion to dismiss the federal Trafficking Victims Protection Act (TVPA) claim and the common-law unjust enrichment claim, although he affirmed the motion to dismiss the CMWO claim.<sup>22</sup>

### III. CMWO

Judge Kane's order denying GEO's motion to dismiss cites the CMWO's definition of an "employee" as any "person performing labor or services for the benefit of an employer in which the employer may command when, where, and how much labor or services shall be performed."<sup>23</sup> But Judge Kane also acknowledged GEO's claims that "prisoners" should not count as "employees" for purposes of analysis under the Fair Labor Standards Act (FLSA) nor, by analogy, should anyone working in government custody be treated as an "employee" under the CMWO.<sup>24</sup> The order continues:

Defendants also cite a March 31, 2012 Advisory Bulletin from the Colorado Department of Labor (CDOL), which finds that inmates and prisoners are exempt from the CMWO and 'are not employees according to Colorado law.' Plaintiffs respond that the Advisory Bulletin does not apply because plaintiffs are civil immigration detainees in a private detention facility, and not prisoners in government custody. Defendant also argues that the reasoning applied in *Alvarado* to conclude that prisoners are not employees under the FLSA applies here because immigration detainees are housed by the government and do not require the minimum wage to bring up their standard of living.<sup>25</sup>

Judge Kane also indicated that the CDOL:

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<sup>20</sup> *Id.* (citing 18 U.S.C. § 1589).

<sup>21</sup> *Id.*

<sup>22</sup> See Order Denying Motion to Dismiss at 14, *Menocal v. The GEO Group, Inc.*, 320 F.R.D. 258 (D. Colo. 2014) [hereinafter Order Denying Motion to Dismiss] (stating that the judge granted in part and denied in part GEO's motion to dismiss).

<sup>23</sup> *Id.* (citing 7 COLO. CODE REGS. § 103-1:2 (2017)).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

[h]as found that the CMWO's definition of 'employee' should not apply to prisoners. In addition, because immigration detainees, like prisoners, do not use their wages to provide for themselves, the purpose of the CMWO are not served by including them in the definition of employee. [] Finally, the Fifth Circuit has held that immigration detainees are not employees under the FLSA's similar broad definition ('any individual employed by an employer') because the congressional motive for enacting the FLSA, like the CMWO, was to protect the 'standard of living' and 'general well-being' of the worker in American industry."<sup>26</sup>

The order finds that the CMWO applies to all businesses offering services to the public, but also notes that the CMWO does not apply to state hospitals, according to CDOL Advisory Bulletin 24(I), adding that the Aurora detention center's medical facility was more similar to a state-run hospital than a private business offering healthcare services to the public at large.<sup>27</sup> Judge Kane also observed that the CMWO applies to "Retail and Service" employers and consumers, and that the GEO/government relation does not fit this definition.<sup>28</sup>

#### IV. TVPA

Judge Kane's order recognized that the TVPA provides a civil cause of action against anyone who "knowingly provides or obtains the labor or services of a person by . . . means of force, threats of force, physical restraint, or threats of physical restraint."<sup>29</sup> The order highlighted the defendants' reliance on the holding in *United States v. Kozminski*, which interprets the TVPA to prohibit only "physical or legal, as opposed to psychological, coercion."<sup>30</sup> The court also rejected the inferences the defendants drew from *Channer v. Hall*, a decision, which the court understood to hold that threats of solitary confinement used to compel an

<sup>26</sup> *Id.* at 3–4 (citing *Alvarado*, 902 F. 2d at 396 (internal citation omitted)).

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *See id.* at 5–6 (explaining that CMWO covers retail and services employees and that the plaintiffs do not qualify as either).

<sup>29</sup> *Id.* at 8 (citing 18 U.S.C. § 1589(a) (2016)).

<sup>30</sup> *See Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1132 (D. Colo. 2015). *See also United States v. Kozminski*, 108 S. Ct. 2751, 2754 (1988) (a family running dairy farm was not in violation of 18 U.S.C. § 1584 when it procured work by making threats of two cognitively disabled men and discouraged them from leaving because the "reach [of 18 U.S.C. § 1584] should be limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion").

immigration detainee to perform kitchen work does not constitute a violation of the Thirteenth Amendment's prohibition against involuntary servitude.<sup>31</sup> Judge Kane distinguished the language of "involuntary servitude" at issue in *Kozminski* and *Channer* (originating in the TVPA at 18 USC § 1584 and in the Thirteenth Amendment, respectively) from the more inclusive language of § 1589, which refers to "whoever . . . obtains the labor or services of a person by . . . threats of physical restraint."<sup>32</sup> The order found that the language of § 1589 is intentionally broader than the passages interpreted in *Kozminski* and *Channer*. The order also noted that GEO failed to cite any authority supporting their claim that a "civic duty exception" should be read into the language of § 1589, nor that this exception should be applied to a for-profit prison company doing contract work for the government.<sup>33</sup>

#### V. UNJUST ENRICHMENT

The court noted that the elements of the unjust enrichment claim track those of the claim under the CMWO, which was dismissed.<sup>34</sup> Nonetheless, the order found that the plaintiffs' claim under the CMWO was distinct from their common-law unjust enrichment claim.<sup>35</sup> The remedies sought under the two legal theories were different, even though both claims alleged that GEO failed to pay fair-market wages.<sup>36</sup> "Unjust enrichment" includes profits from practices that may not violate the CMWO but are nonetheless illegal under Colorado common law.<sup>37</sup>

The basis for the potentially higher unjust enrichment claims is the Service Contract Act (SCA), which obligates firms performing work under contract with the federal government to pay "prevailing wages" for

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<sup>31</sup> See *Menocal*, 113 F. Supp. 3d at 1132. See also *Channer v. Hall*, 112 F.3d 214, 219 (5th Cir. 1997) (holding "that the federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks, and that Channer's kitchen service, for which he was paid, did not violate the Thirteenth Amendment's prohibition of involuntary servitude").

<sup>32</sup> See *Menocal*, 113 F. Supp. 3d at 1133.

<sup>33</sup> *Id.* at 1132-33.

<sup>34</sup> See *id.* at 1133 (explaining that the unjust enrichment claim is based on the CMWO claim and thus a legal remedy is available to the plaintiffs).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* ("proper measure of unjust enrichment is difference between consideration paid and fair market value of employee's services" (citing *Growth Fund Sponsors, Inc.*, 904 P.2d 1381, 1387 (Colo. App. 1995))). See also *Edwards v. ZeniMax Media Inc.* No. 12-cv-00411, 2013 WL 5420933, \*10 (D. Colo. Sept. 27, 2013) ("denying motion to dismiss unjust enrichment claim as duplicative where remedies sought were different").



specified occupations.<sup>38</sup> All of these are at levels considerably higher than the minimum wage.<sup>39</sup> GEO claimed that undocumented immigrants are not eligible for protections under the SCA.<sup>40</sup> The judge's order, however, affirmed the plaintiffs' claim that the SCA mandates the contractor (or subcontractor) to provide fringe benefits beyond those mandated by the state or federal minimum wage laws.<sup>41</sup>

The order rejected GEO's claim that the plaintiffs' suit must be thrown out under the "government contractor defense," since, GEO asserted, the dollar-per-day voluntary detainee work program was established at the behest of the federal government.<sup>42</sup> The court dismissed these arguments, and found that the contract between GEO and the federal government only establishes guidelines for reimbursement under the Detainee Work Program, and indeed:

does not prohibit Defendant from paying detainees in excess of \$1/day in order to comply with Colorado labor laws. In fact, the contract specifically contemplates that the Defendant will perform under the contract in accordance with '[a]pplicable federal, state and local labor laws and codes'; and the contract is subject to the SCA . . . .<sup>43</sup>

Based on this logic, Judge Kane rejected GEO's attempts to skirt their legal duties under the labor laws in force in Colorado.<sup>44</sup>

A. *Defendant's Motion to Reconsider*

Less than a month after Judge Kane issued an order refusing to dismiss plaintiffs' claims against GEO under the TVPA and Colorado common law, GEO's attorneys made the unusual move of asking the court

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<sup>38</sup> See Menocal, 113 F. Supp. 3d at 1133 (conveying the applicability of the SCA to contracts).

<sup>39</sup> See *id.* at 1134 (describing the added provisions that give contracted employees wage security).

<sup>40</sup> See *id.* (explaining that the defendants utilized the contractor's defense against the plaintiff).

<sup>41</sup> See *id.* (relying on state and federal minimum wage laws). See also *American Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1410 (10th Cir. 1984) (holding that the SCA "is also intended to protect service contract competitors from unfair competition by employers paying subminimum wages").

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1135.

<sup>44</sup> *Id.*

to reconsider its judgment.<sup>45</sup> The defendant's motion asserted that GEO "does not 'traffic' anyone," and admonished Judge Kane for his interpretation of the TVPA, which defendants claimed "should be rejected as 'absurd,' as that term is understood under well-established rules of statutory construction."<sup>46</sup> The defendant criticized the judge for not satisfactorily explaining why Congress might have intended the protections of the TVPA to extend to victims of forced labor working for private contractors of the U.S. government.<sup>47</sup> The defendant's motion acknowledged Judge Kane's reliance on the plain language of the TVPA, which does not refer to any exceptions to its prohibition against forced labor, although GEO argued that the court erred by hewing so closely to the plain text of the act instead of adopting the defendant's understanding of the "clear statutory statements of Congressional intent and legislative history undermining this expansive reading of Section 1589."<sup>48</sup> And GEO faulted Judge Kane for not defending his choice of the plain-text canon of statutory construction.<sup>49</sup>

The first part of the defendant's argument in the motion to reconsider was divided into two parts, the first of which argued that Judge Kane's interpretation of the TVPA violated the "absurdity" doctrine,<sup>50</sup> and the second of which argued that a "civic duty exception" should be read into the text of the TVPA.<sup>51</sup> GEO also argued that Judge Kane was wrong to place the burden of proving the applicability of a "civic duty exception" on the defendant, claiming that the plaintiffs should have to bear the burden of demonstrating why the exception did *not* apply.<sup>52</sup> The defendant concluded the first part of its argument by complaining that Judge Kane's refusal to throw out the charges against them amounted to the creation of a new statutory cause of action for damages to be brought by detainees against private detention facilities.<sup>53</sup>

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<sup>45</sup> Motion for Reconsideration of Order Denying Geo Group, Inc.'s Motion to Dismiss at 2, *Menocal v. Geo Group, Inc.*, No. 14-CV-02887-JLK (Aug. 4, 2015).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 6-9.

<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Id.* at 6-9.

<sup>50</sup> *Id.* at 10.

<sup>51</sup> Motion for Reconsideration of Order Denying Geo Group, Inc.'s Motion to Dismiss at 17-20, *Menocal*, No. 14-CV-02887-JLK.

<sup>52</sup> *Id.* at 20 ("in determining whether federal statute created an enforceable right under 42 U.S.C. § 1983, Plaintiff bore burden to show that judicially-made exceptions did not apply"). See, e.g., *Lochman v. County of Charlevoix*, 94 F.3d 248, 251 (6th Cir. 1996) (holding that to determine whether federal statute created an enforceable right under 42 U.S.C. § 1983, the plaintiff bears the burden to show that judicially-made exceptions do not apply).

<sup>53</sup> *Id.* at 23.

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GEO's second argument against the judge's order alleged an inconsistency between the judge's finding that the individuals detained were not employees under Colorado law, on the one hand, with his finding that GEO may have been unjustly enriched, on the other.<sup>54</sup> GEO argued that, since the detainees had no subjective reasonable expectations of minimum wage protections, they were therefore not entitled to expect compensation under the SCA.<sup>55</sup>

B. *Motion to Strike Defendant's Motion For Reconsideration, Document 31, filed 8/4/2015*

In responding to the defendant's "Motion to Reconsider," the plaintiffs argued that they were not legally compelled to respond to the argument point by point, since the defendant's motion was procedurally improper and brought without reference to any federal rule allowing such a motion under the circumstances.<sup>56</sup> The plaintiffs also indicated that the defendant waived any arguments that were not brought in its prior Motion to Dismiss under Federal Rule of Civil Procedure (Fed. R. Civ. P.) 12(g)(2), and that, as a result, GEO could not initiate new legal arguments in the Motion to Reconsider.<sup>57</sup> While a motion to reconsider may be permissible in cases where the law has suddenly shifted or where new facts have come to light, the plaintiffs claimed that the only change in circumstances that took place between the defendant's initial Motion to Dismiss and the subsequent Motion to Reconsider is that GEO hired new lawyers, who felt trapped by the failure of their predecessors to raise certain arguments in the initial motion and who simply wanted another, improper "bite at the apple."<sup>58</sup>

C. *Order Denying GEO's Motion to Reconsider, Document 33, filed 9/22/2015*

Judge Kane, in the Order Denying Defendant's Motion to Reconsider, pointed out that the defendant provided no evidence of any change in law or new evidence, which might have served as the legal basis to grant a

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<sup>54</sup> *Id.* at 25.

<sup>55</sup> *Id.*

<sup>56</sup> See Mot. to Strike Def's. Mot. for Recons. of Order Den. GEO Group, Inc.'s Mot. to Dismiss at 2, *Menocal v. GEO Group, Inc.*, 113 F. Supp.3d 1125 (D. Colo. 2015) (No. 1:14-cv-02887-JLK).

<sup>57</sup> See FED. R. CIV. P. 12(g)(2) ("a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.").

<sup>58</sup> See Mot. to Strike Def's. Mot. for Recons. of Order Den. GEO Group, Inc.'s Mot. to Dismiss at 2, *Menocal*, 113 F. Supp.3d 1125 (No. 1:14-cv-02887-JLK).

motion to reconsider.<sup>59</sup> Indeed, as the court noted, the defendant's motion emphasized that the interpretation of the TVPA at issue in the case "is an issue of 'first impression,'" which is to say, clearly not an area where a recent doctrinal shift has occurred.<sup>60</sup> Judge Kane also noted that GEO impermissibly introduced a new argument against the unjust-enrichment finding, which had already been waived by counsel's failure to bring the argument in its previous Motion to Dismiss, as outlined in Fed. R. Civ. P.12(h)(1).<sup>61</sup>

*D. Motion for Class Certification Under Rule 23(b)(3) And Appointment of Class Counsel Under Rule 23(g), Document 49, filed 6/6/2015*

The motion noted that the charges Judge Kane had allowed to proceed (the TVPA and unjust-enrichment claims) applied to practices through the "entire facility" that used "only one non-detainee janitor on the payroll."<sup>62</sup> In the motion, counsel for the class of Aurora-facility detainees who brought suit argued "[t]hey are GEO's captive workforce."<sup>63</sup>

The Motion for Class Certification referenced information obtained during discovery.<sup>64</sup> The motion noted that GEO's policy of requiring "comprehensive cleaning of this cell and common space . . . falls outside of ICE's Performance Based National Detention Standards (PBNDS), which limits the scope of uncompensated detainee housekeeping."<sup>65</sup> This motion also reported that this policy has applied to an estimated fifty to sixty thousand detainees based on GEO's own records.<sup>66</sup> The motion indicated that the "Detainee Handbook Local Supplement . . . informs detainees that failure to perform housing unit sanitation work is a 300-level 'High Moderate' disciplinary offense, which could subject detainees to up to 72 hours in disciplinary segregation (also known as solitary confinement) or even to criminal prosecution."<sup>67</sup>

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<sup>59</sup> Order on Mot. for Reconsideration at 2, *Menocal v. GEO Group, Inc.*, 113 F. Supp.3d 1125 (D. Colo. 2015) (No. 1:14-cv-02887-JLK).

<sup>60</sup> *Id.* at 2 (citing defendant's Motion to Reconsider).

<sup>61</sup> *See id.* (stating that the unjust enrichment claim is dismissed because it was not anticipated).

<sup>62</sup> *See* Motion for Class Certification Under Rule 23(b)(3) and Appointment of Class Counsel Under Rule 23(g) at 3, *Menocal v. Geo Grp, Inc.*, 320 F.R.D. 258 (D. Colo. 2017) (No. 1:14-cv-02887-JLK) (expressing that the detainee workers, now plaintiffs, were subjected to forced labor and only one worker was on the payroll).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 2 (articulating that during the discovery process the defendant's counsel failed to make certain documents confidential that should have been confidential because it was mandated by the protective order).

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.* at 6.

<sup>67</sup> *Id.*

In addition to the forced-work policy, plaintiffs also highlighted the commonalities among those GEO paid one dollar a day through the “Voluntary Work Program.”<sup>68</sup> The complaint pointed out that “[a]ll participants received uniform job descriptions, common to all participants in their job class,” and “executed a standardized Detainee Voluntary Work Program Agreement.”<sup>69</sup> The crux of the charge was that “GEO misled VWP participants regarding the possibility that they could negotiate for higher wages.”<sup>70</sup> It informed the detainees that

“[t]he pricing is approved by ICE. GEO does not set the pricing. ICE tells us what the daily pay is . . . .” [However, t]hese representations [are] false. In reality, the PBNDS ICE publishes sets a floor, rather than a ceiling, and requires only that “[t]he compensation is *at least* \$1.00 (USD) per day.”<sup>71</sup>

After tying the features of the program to the legal standards established for class certification, the Motion for Class Certification noted Fed. R. Civ. P. 23(g) and requested that the judge appoint the current plaintiffs’ counsel as attorneys for the class: “[c]ollectively they have invested significant time in identifying and investigating potential claims in this action . . . [m]oreover, the varied litigation experience of the team will be beneficial to the classes’ pursuit of the claims here.”<sup>72</sup>

*E. Opposition to the Motion for Class Certification, Document 51, filed 6/1/2016.*

GEO’s brief scoffed at what it characterized as plaintiffs’ “inventing a so-called ‘Forced Labor Policy,’ gratuitously invoking images of the ‘master’s whip,’ ‘slave-like conditions,’ and a ‘captive workforce’ that is ‘exploit[ed], conscripted, coerced, and under paid.”<sup>73</sup> The motion repeated prior claims that the case lacked precedent for class

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<sup>68</sup> See Motion for Class Certification Under Rule 23(b)(3) and Appointment of Class Counsel Under Rule 23(g) at 4, Menocal, 320 F.R.D. 258 (No: 1:14-cv-02887-JLK) (comparing the one-dollar-per-day pay that the Volunteer Work Program participants receive with the lack of pay that GEO gives its detainees).

<sup>69</sup> *Id.* at 8.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> See *id.* (emphasis added).

<sup>72</sup> *Id.* at 24.

<sup>73</sup> Defendant’s Opposition to Motion for Class Certification at 9, Menocal v. GEO Corp., No. 1:14-cv-02887-JLK (D. Colo. June 6, 2016).

certification.<sup>74</sup> Much of the defendant's motion reviewed the lawfulness of the program and did not speak directly to the plaintiffs' Motion for Class Certification by explaining why, having been availed of a remedy if plaintiffs could prove two charges, the attorneys should not also be able to represent a broader class that was allegedly subjected to similar violations.<sup>75</sup> For instance, the first heading of GEO's motion stated, "The Requirement That Detainees Perform Housekeeping Chores Is Lawful" and the second heading stated, "The \$1.00 Per Day Allowance Under the Federally-Authorized VWP Is Lawful."<sup>76</sup>

The defendant claimed that plaintiffs did not meet the "numerosity" requirement because they had not proven there were more than forty members who were putative class members.<sup>77</sup> The defendants argued that the "commonality" criterion was not met because GEO listed a number of other sanctions alternative to solitary confinement, but then made the "implausible assumption that each and every putative class member (assuming each detainee reviewed his or her ICE Aurora Handbook), reached the conclusion that '[r]efusal to clean [their] assigned living area,' will be penalized by '[d]isciplinary segregation' in a manner that violates Section 1589."<sup>78</sup>

GEO similarly claimed that the plaintiffs should not be allowed to have a class certified for the charge of unjust enrichment because they provided no "basis for how to assess whether this purported misrepresentation led to an unjust benefit retained by GEO [in] any particular instance."<sup>79</sup>

In refuting the third prong necessary for class certification, "typicality," the defendant asserted that only one of the named plaintiffs had submitted a declaration affirming that he had asked for higher pay or that GEO was prevented from paying him more due to ICE instructions.<sup>80</sup>

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<sup>74</sup> See *id.* at 16 (detailing the four elements to meet class certifications: (1) the class must be large; (2) question of law is similar for the whole class; (3) claims and defenses are the same; and (4) representatives of the class will protect the interests of the entire class).

<sup>75</sup> See *id.* at 15 (showing that the motion discusses Rule 23's requirements and furthers the elements of this rule).

<sup>76</sup> *Id.* at 3, 7.

<sup>77</sup> See *id.* at 18 (purporting to show that the plaintiffs did not put forth evidence to prove that the numerosity requirement had been satisfied).

<sup>78</sup> *Id.* at 21.

<sup>79</sup> Defendant's Opposition to Motion for Class Certification at 25, Menocal, No. 1:14-cv-02887-JLK (D. Colo. June 6, 2016).

<sup>80</sup> *Id.* at 29-30.

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E. *Order Granting Motion For Class Certification Under Rule 23(b)(3) and Appointment of Class Counsel Under Rule 23(g), Document 49, filed 02/27/2017*

Judge Kane granted the Motion for Class Certification.<sup>81</sup> The order stated that a class would be appropriate even though the issues in the case are new and complex.<sup>82</sup> Judge Kane set forth his standard for class certification as one that “requires *predominance* of questions of law or fact common to the class and *superiority* of the class action method.”<sup>83</sup> He thus noted that GEO’s “most compelling, but ultimately unconvincing, argument was that elements of both claims necessitate inquiries specific to each class member.”<sup>84</sup> Kane distinguished the GEO case from *Wal-Mart Stores, Inc. v. Dukes*, a precedent that appeared frequently in the defendant’s motion.<sup>85</sup> The Wal-Mart case depended on finding that supervisors nationwide were all discriminating against female employees in a similar fashion.<sup>86</sup> Judge Kane’s order stated that:

Unlike in *Wal-Mart*, GEO has a specific, uniformly applicable Sanitation Policy that is the subject of Representatives’ TVPA claim. This Policy is the glue that holds the allegations of the Representatives and putative class members together . . . creating a number of crucial questions with common answers. For example: Does GEO employ a Sanitation Policy that constitutes improper means of coercion under the forced labor statute?<sup>87</sup>

Judge Kane rejected GEO’s point that “no Representative was actually disciplined with segregation” by pointing out that “the forced labor statute includes threats, schemes, plans, and patterns as improper means of coercion.”<sup>88</sup> Kane also rejects plaintiffs’ proposal to substitute “a

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<sup>81</sup> See Order Granting Motion for Class Certification under Rule 23(b)(3); Appointment of Class Counsel under Rule 23(g) at 1, *Menocal v. GEO Corp.*, No. 1:14-cv-02887-JLK (D.Colo. Feb. 27, 2017) (granting the motion for class certification and appointment of class counsel).

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 5.

<sup>84</sup> *Id.* at 6.

<sup>85</sup> See *id.* at 8–9 (distinguishing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) from the current litigation).

<sup>86</sup> See Order Granting Motion for Class Certification under Rule 23(b)(3); Appointment of Class Counsel under Rule 23(g) at 8, *Menocal*, No. 1:14-cv-02887-JLK (discussing the reasoning the Supreme Court set forth in *Wal-Mart Stores, Inc.* when analyzing whether female employees seeking management positions were discriminated against).

<sup>87</sup> *Id.* (footnote omitted).

<sup>88</sup> *Id.* at 9.

reasonable person standard” for specific findings of subjective fear inducing compliance with the guards’ orders in all cases.<sup>89</sup> Instead, he found that:

the ‘by means of’ element can be satisfied by inferring from classwide proof that the putative class members labored because of GEO’s improper means of coercion. Representatives are correct that there is nothing preventing such an inference. I have not found and GEO has not provided any authority requiring that, for TVPA claims, causation must be proven by direct and not circumstantial evidence. Where a jury decided the individual merits of Representatives claims, it surely would be permitted to make such an inference.<sup>90</sup>

In other words, the plaintiffs only needed to prove that GEO used impermissible threats to induce labor, not that any particular detainee acted on the basis of these threats.<sup>91</sup>

Kane rejected GEO’s claim that the damages differed among putative class members, pointing out that as long as the mechanism producing the damages was similar across members, it would be possible to assess the damages separately once GEO was found liable.<sup>92</sup>

Perhaps Judge Kane’s most important defense of the decision to certify the class was his policy analysis finding that class action lawsuits are designed to support the weak in their efforts to challenge those with more money and power:

In including Rule 23(b)(3), ‘the Advisory Committee had dominantly in mind vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’ . . . In this case, the putative class members reside in countries around the world, lack English proficiency, and have little knowledge of the legal system in the United States.

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<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.* at 13.

<sup>91</sup> *See id.* (explaining that plaintiffs must only show that GEO used impermissible threats, not that any detainee actually acted in response to the threats).

<sup>92</sup> Order Granting Motion for Class Certification under Rule 23(b)(3); Appointment of Class Counsel under Rule 23(g) at 14, *Menocal*, No. 1:14-cv-02887-JLK.



It is unlikely that they would individually bring these innovative claims against GEO.<sup>93</sup>

Turning to the unjust enrichment claims, Judge Kane again explained his legal finding of commonality hung on whether GEO's "misrepresentation contributes to the context of GEO's enrichment," and not on the subjective impressions among those who agree to work for one dollar per day.<sup>94</sup> He also rejected that the "unjust" element of GEO's enrichment requires individual-level determinations.<sup>95</sup> Judge Kane found that "GEO 'has failed to explain why it would be equitable for it to retain [the benefit conferred by] some of the putative class members, but inequitable to retain [the benefit] from others.'"<sup>96</sup> Judge Kane then distinguished the facts in the GEO case from those in the precedent GEO cited, stating that, in unjust enrichment claims, "common question will rarely, if ever, predominate."<sup>97</sup> Kane pointed out that *Friedman* addressed whether each employee in 2.58 million personal unscripted transactions behaved in a similar fashion.<sup>98</sup> "Here, there is a consistent policy under which detained individuals worked and were paid the same amount."<sup>99</sup> Kane's order concluded by appointing as counsel to the class the attorneys representing the nine plaintiffs.<sup>100</sup> "Representatives' counsel . . . have uniquely relevant experience with the client base and with bringing complex claims against detention facilities."<sup>101</sup>

G. *The GEO Group, Inc.'s Petition for Permission to Appeal Class, Appellate Case: 17:701, #01019778492, filed 03/13/2017*

The motion emphasized the "two novel theories" in the case:

(1) Does a contractor operating a detention facility for the federal government compel 'forced labor' in violation of a federal human trafficking statute by requiring detainees to periodically perform housekeeping chores, when the contractor and its housekeeping policies are subject to

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<sup>93</sup> *Id.* at 15 (internal citation omitted).

<sup>94</sup> *Id.* at 17.

<sup>95</sup> *Id.* at 17-18 (discussing why the element of "unjust" should not be subject to individual determinations of fact).

<sup>96</sup> *Id.* at 18.

<sup>97</sup> *See id.* (citing *Friedman v. Dollar Thrifty Automotive Group, Inc.*, 304 F.R.D. 601 (D. Colo. 2015)).

<sup>98</sup> *Id.* (noting the problem with trying to use individual determinations to resolve the problems of a large class of persons).

<sup>99</sup> *Id.* at 19.

<sup>100</sup> *Id.* at 20-21.

<sup>101</sup> *Id.* at 20.

extensive federal contractual and regulatory requirements as well as direct federal supervision, and the housekeeping policy is both longstanding and judicially-accepted?;

and

(2) Is the contractor ‘unjustly enriched,’ and required to pay restitution for the detainees’ participation in a federally-created, sponsored and supervised voluntary work program, when the settled expectation for decades has been that participants are provided a daily allowance of \$1?<sup>102</sup>

GEO went on to acknowledge that the district court rejected GEO’s request for an interlocutory appeal.<sup>103</sup> Nonetheless, the two questions GEO put before the appellate court were not questions about the adequacy of the class, but objections that went to the merits of the legal charges themselves.<sup>104</sup>

GEO objected to the judge’s order certifying the class because:

Unjust enrichment claims under Colorado law turn on the “reasonable expectations” of the parties . . . The district court failed to require any evidence that a single detainee—much less a class—reasonably expected to receive more than the \$1 daily VWP allowance. [GEO pled for review by noting that the] “class action lawsuit for monetary relief . . . puts GEO in an acutely problematic and intolerable position of carrying out federal government directives while facing potentially massive financial harm for doing so.”<sup>105</sup>

The arguments here tracked those in their original motion to deny class certification.<sup>106</sup> GEO asserted that “the novel and indeterminate nature of the Plaintiffs’ claims creates an insurmountable barrier to class

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<sup>102</sup> Petition for Appellant to Appeal Class Certification at 1, *Menocal v. GEO Grp.*, (D. Colo. 2017) (No. 01019778492).

<sup>103</sup> *Id.* at 2.

<sup>104</sup> See *id.* at 2–3 (analyzing whether the charges levied in this case were reasonable).

<sup>105</sup> Petition for Appellant to Appeal Class Certification at 3–4, *Menocal*, (D. Colo. 2017) (No. 01019778492).

<sup>106</sup> See Defendant’s Opposition to Motion for Class Certification, *Menocal v. GEO Corp.*, No. 1:14-cv-02887-JLK (D. Colo. June 6, 2016).

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certification.”<sup>107</sup> GEO repeatedly emphasized that the novelty of the claims and the allegation that Congress did not intend to prohibit their use of detainee labor in the fashion plaintiffs alleged means that the appellate court should deny certification.<sup>108</sup> GEO again cited precedents requiring a purposive interpretation of law and not a plain reading of the text.<sup>109</sup> The appellee brief asserted that the plaintiffs’ use of a human-trafficking statute to seek damages for janitorial tasks “renders the TVPA absurd and makes certification of a class based on it impossible.”<sup>110</sup>

Engaging with the text of Judge Kane’s order, the appellees challenged the standard he used to infer the causal link between the conditions of their custody and the likelihood they would:

work for reasons other than GEO’s improper means of coercion. . . . Rather than demanding proof that the proposed classes are sufficiently cohesive to warrant adjudication by representation . . . the district court posited an unsupported social-psychological profile of the ‘climate’ of detention. . . .<sup>111</sup>

The brief challenged the unjust enrichment charge for the same reasons as previously laid out.<sup>112</sup> The specific attack on Judge Kane’s order emphasized the variation in their conditions and asserted that the court should have demanded that the plaintiffs provide a damages model.<sup>113</sup>

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<sup>107</sup> Petition for Appellant to Appeal Class Certification at 9, *Menocal v. GEO Grp.*, (D. Colo. 2017) (No. 01019778492) (citing *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir.2008)).

<sup>108</sup> *See id.* at 11 (presenting an explanation as to why the appellate court should deny certification).

<sup>109</sup> *See id.* at 10–11 (examining why a purposive reading of the text should be used rather than looking at the plain meaning). *See also* *United States v. American Trucking Ass’n, Inc.*, 310 U.S. 534, 553 (1940) (holding that the commission has no jurisdiction to regulate the qualifications or hours of service of others); *Rector, etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 517 (1892) (stating that the language within the statute did not reflect the legislative intent of the act); *United States v. Black*, 773 F.3d 1113, 1117 (10th Cir. 2014) (resembling a similar holding to the cases discussed above); *In re Busetta*, 314 B.R. 218, 227–28 (B.A.P. 10th Cir. 2004) (recognizing *Holy Trinity’s* doctrine).

<sup>110</sup> Petition for Appellant to Appeal Class Certification at 13, *Menocal*, (D. Colo. 2017) (No. 01019778492).

<sup>111</sup> *Id.* at 16 (internal citations omitted).

<sup>112</sup> *See id.* at 19–20 (explaining how the unjust enrichment charge was attacked). *See also* *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 269 (D. Colo. 2017) (furthering GEO’s argument related to the classification of the representatives).

<sup>113</sup> Petition for Appellant to Appeal Class Certification at 22, *Menocal*, (D. Colo. 2017) (No. 01019778492).

The brief concluded with policy arguments tied to whether GEO would be forced to “‘resolve the case based on considerations independent of the merits,’ such as by settlement.”<sup>114</sup> GEO stated:

[T]he district court’s novel certification of a class comprising all people detained at the Facility over the past ten years poses a potentially catastrophic risk to GEO’s ability to honor its contracts with the federal government . . . . And the skeleton of this suit could potentially be refiled against privately operated facilities across the United States, causing GEO and other contractors to defend them even though GEO firmly believes that policies give the Plaintiffs no legal claim.<sup>115</sup>

*H. Grant of Petitioner’s Appeal, #01019793218, filed 04/11//2017*

On April 11, 2017, the court granted the petitioner’s appeal: “Upon consideration of the Petition, the response, the reply, and the materials on file, we note both the complexity and difficulty of the issues presented, and we grant the Petition.”<sup>116</sup>

*I. Appellees/Plaintiffs Reply Brief, Case 17-1125, Doc 01019851249, filed 08/04/2017.*

The appellees’ reply brief repeated the arguments on which plaintiffs relied in the district court case. It also provided specific examples of forced labor.<sup>117</sup> For instance, the motion stated:

During his detention, Valerga performed work cleaning the private and common living areas, when selected for the cleaning crew by the guards, for no pay because ‘it was well known that those who refused to do that work for free were put in ‘the hole’—or solitary confinement.’ . . . A guard once threatened Valerga with being put in the hole when he protested cleaning for free . . . . Valerga also worked under the VWP from approximately October 2013 to June 2014, both working

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 23 (footnote omitted).

<sup>116</sup> The GEO Group, Inc. v. Menocal, No. 17-701 (10th Cir. Apr. 11, 2017) (order granting petition for permission to appeal class certification).

<sup>117</sup> See Brief of Plaintiffs-Appellees at 8–11, *Menocal v. The GEO Group, Inc.*, No. 17-1125 (10th Cir. Sept. 27, 2017) (providing various examples of the plaintiffs’ experiences with forced labor).

in the kitchen and stripping and waxing floors for 7–8 hours per day, five days per week. . . . Valerga received \$1 per day under the VWP regardless of the hours he worked.<sup>118</sup>

The appellees noted the deference the 10th Circuit affords district court judges in granting certification: “Recognizing the considerable discretion the district court enjoys in this area,” the Court “defer[s] to the district court’s certification if it applies the proper Rule 23 standard and its ‘decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand.’”<sup>119</sup>

The brief also challenged GEO’s “backdoor attack on the merits and purported novelty of plaintiffs’ claims.”<sup>120</sup> The plaintiffs argued that, although they believed they would win at trial, this question is not the appropriate inquiry during the appeal.<sup>121</sup>

In response to the argument that the invocation of TVPA is more broad than Congress intended, the appellees cited *United States v. Kaufman*, which held that the TVPA’s protections are broad enough “to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude.”<sup>122</sup> The motion noted that GEO’s arguments against class certification hang on fact-based allegations that require review by a jury:

By asserting that ‘no detainee was likely to have a reasonable expectation of an allowance in excess of the \$1.00 daily amount’ . . . GEO identifies another issue susceptible to class-wide proof: whether Plaintiffs must prove that they had a reasonable expectation of receiving in excess of \$1 per day to prevail on this claim.<sup>123</sup>

The brief explored *Kozminski* at length and quoted from Justice Brennan’s concurring opinion:

It is of course not easy to articulate when a person’s actions are ‘involuntary.’ In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go

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<sup>118</sup> *Id.* at 10–11.

<sup>119</sup> *Id.* at 17–18.

<sup>120</sup> *Id.* at 19.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 22 (citing 546 F.3d 1242, 1261 (10th Cir. 2008)).

<sup>123</sup> Brief of Plaintiffs-Appellees at 24, *Menocal*, No. 17-1125.

to jail. We can all agree that these choices are so illegitimate that any decision to work is ‘involuntary.’<sup>124</sup>

To GEO’s objection that class certification is inappropriate for ascertaining alleged subjective fears – each individual might respond differently – the appellees noted how circumstantial evidence could be used:

An individual detainee could rely on circumstantial evidence, including GEO’s clearly stated policies containing threats of discipline, to persuade a jury that she labored because of the threat of what would happen to her if she did not. She would not need to provide direct and individualized evidence of her mental state.<sup>125</sup>

The appellees rejected the objection to the difficulty of assessing classwide damages and referenced a number of precedents and models for calculating these.<sup>126</sup> The appellees also rejected the argument that the unjust-enrichment claims could not be pursued on a classwide basis by distinguishing the precedents involving a range of individualized business transactions with GEO’s single policy applied across the facility: “[t]he VWP was a uniform policy whose terms were non-negotiable.”<sup>127</sup> The brief concluded by refuting the relevance of the *Alvarado Guevara* case GEO cited: “[t]hat case involved Fair Labor Standards Act and constitutional claims against a purported government employer, and therefore did not address the applicability of Colorado’s unjust enrichment law to detainee labor for a private company, or the superiority of the class action mechanism to adjudicate the same.”<sup>128</sup>

*J. Reply Brief for Appellant, filed 09/01/2017*

The Reply offered a table with direct quotations from Judge Kane’s order justifying the generalizability of the claims on the left column and GEO’s empirical allegations refuting these on the right, for example:

uniformly applicable Sanitation Policy . . . is the glue that holds the allegations . . . together. There is no single, uniformly applied ‘Sanitation Policy’ that threatens detainees with serious harm for failing to help clean.

<sup>124</sup> *Id.* at 33 (quoting *United States v. Kozminski*, 487 U.S. 931, 959 (1988)).

<sup>125</sup> *Id.* at 36.

<sup>126</sup> *See id.* at 41–42 (supporting the notion that assessing classwide damages can be determined through various methods).

<sup>127</sup> *Id.* at 50.

<sup>128</sup> *Id.* at 52, n.12.

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There is a housekeeping policy, and there is a flexible discipline policy administered in various ways.<sup>129</sup>

GEO also noted that the threats to induce work vary and not all are coercive: “Even if, as Plaintiffs have claimed, the ‘choice between solitary confinement and work is no choice at all,’ surely the choice between losing movie privileges and work is a choice.”<sup>130</sup> GEO also argued that the plaintiffs did not provide specific statements from GEO guards that would induce those in GEO’s custody to believe their labor was being coerced:

These claims, even if true, provide no basis for a classwide inference that GEO coerced the labor of every, or even most of the detainees who have been housed at the Facility over the past decade. Who told Plaintiffs they would be sent to “the hole”? Were the speakers GEO officers or other detainees?<sup>131</sup>

VI. SYLVESTER OWINO AND JONATHAN GOMEZ ET AL. V. CORECIVIC, CASE NO. 3:17-CV-01112-JLS-NLS

A. *Complaint, Document 1, filed 05/31/2017*

Sylvester Owino and Jonathan Gomez are plaintiffs for a class action lawsuit against CoreCivic (formerly “Corrections Corporation of America” or CCA).<sup>132</sup> Some of the *Owino* allegations tracked those in the *Menocal* lawsuit.<sup>133</sup> Others were specific to claims viable under California law.<sup>134</sup> Of special note is that the class was not just those held in CCA’s Otay Mesa facility, which held the named plaintiffs, but two much larger classes: (1) all those who had been in CCA’s custody under immigration laws since November 2, 2004, and forced to work; and (2) all those in California who had been in CCA’s custody since November 2, 2004, and forced to work.<sup>135</sup> Whereas the *Menocal* suit stated three causes of action,

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<sup>129</sup> Reply Brief for Appellant at 6–8, *Menocal v. GEO Group, Inc.*, No. 17-1125 (10th Cir. Sept. 1, 2017).

<sup>130</sup> *Id.* at 14.

<sup>131</sup> *Id.* at 19.

<sup>132</sup> See Complaint at 1, *Owino v. CoreCivic*, No. 3:17-cv-01112-JLS-NLS (S.D. Cal. May 31, 2017) (stating the parties to the action: Owino and others of that class, and CoreCivic).

<sup>133</sup> Compare *id.* 1–2, 22 (showing the similar causes of action, including human trafficking and minimum wage laws) with Motion for Class Certification of Petitioner at 1, *Menocal v. Geo Group*, No.14-cv-02887-JLK (D. Colo. Feb. 27, 2017) (indicating the same causes of action for trafficking and wage laws).

<sup>134</sup> See Complaint at 9, 28, *Owino*, No. 3:17-cv-01112-JLS-NLS (noting the causes of action that fall specifically under California law).

<sup>135</sup> See *id.* at 9 (defining the forced labor class under federal law).

*Owino* alleged twelve.<sup>136</sup> The specific causes of action cited were: the TVPA; the California Trafficking Victims Protection Act; California's Unfair Competition Law; Failure to Pay Minimum Wage; Failure to Pay Overtime Wages; Failure to Provide Mandated Meal Periods; Failure to Provide Mandated Rest Periods; Failure to Furnish Timely and Accurate Wage Statements; Failure to Pay Compensation Upon Termination/Waiting Time Penalties; Imposition of Unlawful Terms and Conditions of Employment; Negligence; Unjust Enrichment.<sup>137</sup>

The Complaint referenced CCA's policies, but provided no specific examples of actions by CCA in violation of the laws cited.<sup>138</sup> In addition to seeking damages, the plaintiffs were also seeking to enjoin CCA from continuing its illegal practices, including using forced labor by "coercing Plaintiffs and the Class Members to perform labor and services under threat of confinement, physical restraint, substantial and sustained restriction, and solitary confinement."<sup>139</sup>

*B. Motion to Dismiss, Document 18, filed 08/11/2017*

In addition to legal analysis tracking that of GEO's motions to dismiss the *Menocal* suit, CCA also argued that "the facts plaintiffs allege are insufficient to support a claim."<sup>140</sup> The defendant added that a California law cannot be used to challenge programs connected to immigration policy, which is "exclusively a federal function."<sup>141</sup> CCA also claimed that

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<sup>136</sup> Compare Motion for Class Certification of Petitioner at 1, *Menocal*, No.14-cv-02887-JLK (discussing the three causes of action in the *Menocal* case) with Complaint at 12-32, *Owino*, No. 3:17-cv-01112-JLS-NLS (presenting the twelve causes of action brought in the *Owino* case).

<sup>137</sup> See Complaint at 13, *Owino*, No. 3:17-cv-01112-JLS-NLS (noting the first cause of action, the Trafficking Victims Protection Act); *id.* at 16 (the second cause of action is the Trafficking of Victims Protection Act under California law); *id.* at 21 (the third cause of action is Violation of California's Unfair Competition Law); *id.* at 22 (the fourth cause of action is Failure to Pay Minimum Wage); *id.* at 23 (the fifth cause of action is Failure to Pay Overtime Wages); *id.* at 24 (the sixth cause of action is the failure to provide mandated meal periods); *id.* at 25 (the seventh cause of action requires CoreCivic to give rest periods); *id.* (the eighth cause of action is the requirement to furnish wages); *id.* at 27 (the ninth cause of action is based on the Failure to Pay Compensation Upon Termination/Waiting Time Penalties); *id.* at 28 (the tenth cause of action bars imposing unlawful conditions on employees); *id.* (the eleventh cause of action is for negligence on behalf of plaintiffs individually and as a class); *id.* at 32 (the twelfth cause of action is for unjust enrichment).

<sup>138</sup> See, e.g., *id.* at 13 (complaining that the policies of CoreCivic harmed employees, but failing to list or explain any specific policies enacted by CoreCivic).

<sup>139</sup> *Id.* at 19.

<sup>140</sup> Motion to Dismiss for Respondent at 10, *Owino*, No. 3:17-cv-01112-JLS-NLS.

<sup>141</sup> *Id.* at 13.



immigration detainees do not qualify as “employees” under the labor laws of California.<sup>142</sup>

C. *Response to Motion to Dismiss, Document 22, 08/31/2017*

The motion stated that its references to CCA’s policies are adequate to meet the standards of *Iqbal* and *Twombly*, and also provided a lengthy refutation of CCA’s defense based on *Alvarado Guevara*, in particular noting that the case rested on an appropriations bill from 1978 and that the ceiling of one dollar per day does not appear in the authorizing statute of 8 U.S.C. § 1555(d):

If the shoe were on the other foot, if Congress limited the alien allowance portion of the \$266,450,000 appropriation to \$500 per day, would it be a reasonable interpretation that Defendant is required to pay that much? Hardly. What it would mean is that out of the \$266M appropriation, not more than \$500 per day could be allocated for an alien’s allowance.<sup>143</sup>

D. *Order by Judge Janis Sammartino, Document 25, filed 09/07/2017*

On her own motion, Judge Sammartino ordered she would rule on the motions without oral argument.<sup>144</sup>

VII. *STATE OF WASHINGTON V. THE GEO GROUP, INC.*

On September 20, 2017, the Attorney General, on behalf of the State of Washington, sued GEO in Washington State’s Superior Court for Pierce County.<sup>145</sup> This was the first lawsuit alleging unjust enrichment and minimum-wage law violations brought by a state government against a

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<sup>142</sup> *Id.* at 17.

<sup>143</sup> Response to Motion to Dismiss for Petitioner at 2, *Owino v. CoreCivic*, No. 3:17-cv-01112-JLS-NLS (S.D. Cal. August 31, 2017) (stating the *Twombly* and *Iqbal* standard that complaints must be facially plausible); *id.* at 23 (discussing the significance of 8 U.S.C. § 1555(d) in relation to the defendant’s argument).

<sup>144</sup> See Order Vacating Hearing at 1, *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS) (S.D. Cal. Sept. 7, 2017), EFC No. 18 (noting that the court decided on the matter without the necessary oral arguments).

<sup>145</sup> See Complaint at 1, *State of Wash. v. The GEO Group, Inc.*, No. 17-2-11422-2 (P.C. Wash. Sept. 20, 2017). See also *AG Ferguson Sues Operator of the Northwest Detention Center for Wage Violations*, WASH. ST. OFF. OF THE ATT’Y GEN. (Sept. 20, 2017), <http://www.atg.wa.gov/news/news-releases/ag-ferguson-sues-operator-northwest-detention-center-wage-violations> [<https://perma.cc/3JH4-2FGK>] (stating that on September 20, 2017, the Attorney General for the state of Washington sued GEO Group because GEO Group deprived their workers the appropriate wage for their services).

private prison firm.<sup>146</sup> The six-page complaint began by highlighting the “[d]efendant’s longstanding failure to adequately pay immigration detainees for their work at the privately owned and operated Northwest Detention Center (NWDC).”<sup>147</sup>

The complaint alleged that GEO is an “employer” and the detainees are “employees” under the minimum-wage laws of Washington.<sup>148</sup> It further alleged that GEO has garnered the benefits of paying sub-minimum wages to its captive workers to perform necessary tasks since 2005.<sup>149</sup>

The first charge the plaintiff alleged referenced Washington’s minimum wage law:

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. 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.<sup>150</sup>

For the charge of unjust enrichment, the complaint states: “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.”<sup>151</sup> 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.<sup>152</sup> The complaint sought to have the court find that the detainees are “employees” and GEO at the Northwest Detention Center an “employer” under Washington law, and to declare that the NWDC must comply with the state’s minimum wage law and “disgorge the amounts it has been unjustly enriched.”<sup>153</sup>

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<sup>146</sup> See *AG Ferguson Sues Operator of the Northwest Detention Center for Wage Violations*, *supra* note 145 (discussing how the lawsuit, whose claims assert that GEO Group violated the state of Washington’s minimum wage laws and unjustly enriched the corporation, is unique in the sense that it was brought to the court by an Attorney General).

<sup>147</sup> Complaint at 1, *The GEO Group, Inc.* (No. 17-2-11422-2).

<sup>148</sup> *Id.* at 4.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 5.

<sup>151</sup> *Id.*

<sup>152</sup> See *id.* (stating that it is unfair for the GEO corporation to financially benefit from work performed by NWDC inmates).

<sup>153</sup> See *id.* at 6 (arguing that the corporation should be subject to the state’s minimum wage laws because it is an employer and the prisoners are technically employees).

## VIII. CHAO CHEN V. THE GEO GROUP, INC.

On September 26, 2017, Chao Chen was named as the lead plaintiff in a class-action lawsuit also against GEO's NWDC.<sup>154</sup> The lawsuit alleged only violations of Colorado's Minimum Wage Order and did not allege unjust enrichment.<sup>155</sup> GEO's Motion to Dismiss, filed on October 9, 2017 claimed, among other arguments, that Washington's minimum wage law was preempted by federal immigration policy.<sup>156</sup> GEO argued that a "detainee" status under immigration law preempted claims based on an employer-employee relationship. The motion also cited *Alvarado* and drew upon the reasoning in the *Menocal* case, dismissing the claims made based on the Colorado MWO.<sup>157</sup> On December 6, 2017, Judge Bryan denied GEO's motion and, for the first time greenlighted the claims based on minimum-wage violations.<sup>158</sup> His order characterized GEO's motion as a "hodgepodge of federal statutes" and declined to follow the FLSA analysis in *Alvarado*, *Whyte*, and *Menocal*: "[I]n 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."<sup>159</sup> Remarkably, GEO filed not only an answer, but also counterclaims against Chao Chen charging *him* with unjust enrichment in an amount exceeding \$75,000.<sup>160</sup> The points in support of the counterclaims recite the elements of the GEO work program and state that "GEO provides basic necessities to all detainees," with no explanation as to why that obligates Chao Chen to pay GEO.<sup>161</sup>

## IX. RAUL NOVOA ET AL. V. THE GEO GROUP, INC., CASE NO: 5:17-CV-02514

Raul Novoa, a detainee at the Adelanto facility in California, filed a complaint against GEO on December 20, 2017, on behalf of himself and

<sup>154</sup> See Class Action Complaint for Damages at 1, Chao Chen v. The GEO Group, Inc., No. 3:17-cv-05769 (W.D. Wash. Sept. 26, 2017) (designating Mr. Chen as the lead plaintiff in the class-action lawsuit).

<sup>155</sup> See *id.* (stating that the class-action lawsuit focuses on violations of the state's minimum wage act as opposed to the corporation unjustly enriching itself through the prisoners' labor).

<sup>156</sup> See GEO's Motion to Dismiss Class Action Complaint for Damages, Chao Chen v. The GEO Group, Inc., No. 3:17-cv-05769 (W.D. Wash. Oct. 9, 2017).

<sup>157</sup> *Id.* at 25-26.

<sup>158</sup> See Order on Defendant The GEO Group, Inc.'s Motion to Dismiss Class Action Complaint for Damages, Chao Chen v. the GEO Group, Inc., No. 3:17-cv-05769 (W.D. Wash. Dec. 6, 2017).

<sup>159</sup> *Id.* at p. 14.

<sup>160</sup> See GEO's Answer and Counterclaims, Chao Chen v. The GEO Group, Inc., No. 3:17-cv-05769 (W.D. Wash. Dec. 20, 2017) at p. 8.

<sup>161</sup> *Id.* at 8-9.

others in his class.<sup>162</sup> The lawsuit points out that an immigrant rights group called Adelanto the ““deadliest detention center”” and that GEO withholds “sufficient food, water, and hygiene products” to force detainees to work so that they may purchase these necessary items from GEO.<sup>163</sup> Novoa, a legal permanent resident who earns \$15.65/hour as a construction worker and has lived in Los Angeles since age four, has been released from Adelanto since 2015.<sup>164</sup> The lawsuit is demanding not only damages for violating California’s minimum wage law, unjust enrichment under California common law, California’s unfair competition law, California’s Trafficking Victims Protection Act, and the federal statute prohibiting attempted forced labor (18 U.S.C. § 1594(a)) but also injunctive relief for the latter.<sup>165</sup>

#### X. CONCLUSION

The purpose of this Article is to summarize key legal strategies being used in new class-action litigation on behalf of those alleged to be non-citizens — the putative classes also include U.S. citizens — and who perform work for private prison firms while in their custody for *de minimis* or no pay.<sup>166</sup> However, this research prompted me to notice a discrepancy between GEO’s claims about the impact of the litigation on its business in its appellate brief and its disclosures to its shareholders that merits discussion.<sup>167</sup> GEO’s March 13, 2017, petition with the Tenth Circuit made the apoplectic assertion that allowing the Aurora class-action lawsuit to proceed would jeopardize all of GEO’s ICE contracts:

[T]he district court’s novel certification of a class comprising all people detained at the Facility over the past ten years *poses a potentially catastrophic risk to GEO’s ability to honor its contracts with the federal government*. And the skeleton of this suit could potentially be refiled against privately operated facilities across the United States, causing GEO and other contractors to defend them

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<sup>162</sup> See Complaint for Declaratory and Injunctive Relief and Damages, Raul Novoa v. The GEO Group, Inc., No. 5:17-cv-02514 (C.D. Cal. Dec. 20, 2017).

<sup>163</sup> *Id.* at 7.

<sup>164</sup> *Id.* at 9.

<sup>165</sup> *Id.* at 12, 14, 15.

<sup>166</sup> See Stevens, *supra* note 5, at 401–02 (discussing the first class-action lawsuit brought against a global prison for failing to pay the federally-mandated wage for employment).

<sup>167</sup> See The GEO Group, Inc.’s Petition for Permission to Appeal Class Certification at 1, Menocal v. GEO Grp., Inc., No. 1:14-cv-02887 (D. Colo. Mar. 13, 2017) (asking the court to look at the district court’s class certification because of the legal issues that arise from the ruling).

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even though GEO firmly believes that policies give the Plaintiffs no legal claim.<sup>168</sup>

And yet, for the period ending June 30, 2017, the company filed a public report with the Security and Exchange Commission representing the impact on GEO from the Aurora litigation as benign:

The plaintiffs seek actual damages, compensatory damages, exemplary damages, punitive damages, restitution, attorneys' fees and costs, and such other relief as the Court may deem proper. The Company intends to take all necessary steps to vigorously defend itself and has consistently refuted the allegations and claims in the lawsuit. *The Company has not recorded an accrual relating to this matter at this time, as a loss is not considered probable nor reasonably estimable at this state of the lawsuit. If the Company had to change the level of compensation under the voluntary work program, or to substitute employee work for voluntary work, this could increase costs of operating these facilities.*<sup>169</sup>

GEO is telling its shareholders that a loss "could increase costs," not that it would be unable to fill its contracts.<sup>170</sup> The two very different scenarios portrayed within months means that GEO is misleading either the Tenth Circuit or the investing public.<sup>171</sup> Furthermore, both of these representations are presumably produced by or under the supervision of GEO's Office of General Counsel.<sup>172</sup> Insofar as these are both statements produced by attorneys representing the firm who are focused on the impact of this litigation, it would appear these statements are deliberate. If this is the case, GEO could be subject to shareholder lawsuits based on

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<sup>168</sup> *Id.* at 30 (emphasis added).

<sup>169</sup> *The GEO Group, Inc., Quarterly Report Pursuant to Section 13 to 15(d) of the Securities Exchange Act of 1934 (Form 10-Q)*, (June 30, 2017), <https://www.sec.gov/Archives/edgar/data/923796/000119312517249967/d423976d10q.htm> [<https://perma.cc/YA8N-DKHG>] (emphasis added).

<sup>170</sup> *See* *The GEO Group, Inc.'s Petition for Permission to Appeal Class Certification* at 26, *Menocal v. GEO Grp.*, No. 1:14-cv-02887 (D. Colo. Mar. 13, 2017) (discussing that the company does not expect any litigation to have a negative impact on their financial condition).

<sup>171</sup> *See id.* at 23 (arguing that a class action lawsuit would jeopardize GEO's contracts and contending that a class action lawsuit would not jeopardize GEO's contracts).

<sup>172</sup> *See id.* (noting both statements made by GEO attorneys).

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the misrepresentation of the firm's financial exposure due to the *Menocal* lawsuits.<sup>173</sup>

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<sup>173</sup> *Cf. id.* (stating that the district court's holding poses a problem for GEO to honor contracts); *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 261 (D. Colo. 2017) (granting GEO's motion to dismiss the Colorado minimum wage claim).

