UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Plaintiffs-Petitioners

Defendant-Respondent

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE RULE 23(f)

for the Mi

No. 4 -0 CDL (La J.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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III. THE DISTRICT COURT'S USE OF THE INCORRECT CAUSATION STANDARD ALSO LED TO A CASCADE OF LEGAL ERRORS IN DENYING CLASS CERTIFICATION OF THE ATTEMPT, RULE 23(B)(2), AND UNJUST ENRICMENT CLAIMS.

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CERTIFICATE OF SERVICE

EXHIBIT 1

Civ. P. 23. Plaintiffs must also "demonstrate that the class is 'adequately defined and clearly ascertainable.'" *Sellers v. Rushmore Loan Mgmt. Servs., LLC*, 941 F.3d 1031, 1039 (11th Cir. 2019) (quoting *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)). Plaintiffs have the burden to prove that the class certification requirements are met. *Brown v. Electrolux*

force the detainees to keep working, including (1) a "deprivation scheme" which threatens work program participants with serious harm if they refuse to work and (2) a practice of physically restraining work program participants who refuse to work. The

In keeping with ICE's rules, Stewart work program participants are paid at least $1 per day. Their earnings are deposited into their trust accounts. Detainees may save the money, spend it in the commissary, or send it to friends or family. The Stewart commissary offers phone cards, soft drinks, snacks, condiments, limited groceries like tuna and ramen, personal care items like shampoo and toothpaste, limited clothing like t-shirts and underwear, and other items. *See, e.g.,* Pls.' Mot. Class Certification Ex. 89, 2015 Inventory Sales Report, ECF No. 213-93. To purchase items, a detainee must have money in his detainee trust fund. Detainees may receive funds from outside sources or may earn m000400000912 0 612 792 reW* nBT/F1 12 Tf1 0 0 1 136.82 410.83 Tm0

common practices at Stewart which would permit a factfinder to conclude that the food at Stewart was inadequate in both nutritional value and amount. They also submitted evidence of Stewart's practices regarding the provision of clothing and hygiene items, laundering of clothes, and housing assignments, though this evidence does not strongly support an inference that detainees were exposed to serious harm based on these practices.

Plaintiffs assert that after detainees join the work program, they are coerced to remain in the program because they are subject to physical restraint if they refuse to work. Work program participants are "expected to be ready to report for work at the required time and may not leave an assignment without permission." 2016 ICE Standards § 5.8(V)(M). They "may not evade attendance and performance standards [or] encourage others to do so." *Id.* Detainees may be removed from the work program because of unexcused absences. Pls.' Mot. Class Certification Ex. 36, Stewart Detainee Voluntary Work Program Policy § 19-100.4(H)(3), ECF No. 213-40; Trinity Servs. Grp. 30(b)(6) Dep. 419:3-5, ECF No. 233-1. Detainees who are removed from the work program can no longer earn money to purchase items at Stewart's commissary.

Refusal to work may result in discipline in addition to removal from the work program, including "lockdown" or "segregation," for refusing to work. *See* Pls.' Mot. Class Certification Ex. 38, SDC Detainee Handbook 35, ECF No. 213-42

The named Plaintiffs joined the work program to get extra food, and they remained in the program to keep getting extra food and to avoid discipline. Urbina Rojas Decl. ¶¶ 17-19, 44, ECF No. 213-79; Bermudez Gutierrez Decl. ¶¶ 20, 37, ECF No. 213-57; Hill Barrientos Decl. ¶¶ 12, 31.

II. Analysis

The claim that detainees were trapped in the work program once they signed up for it suffers from the same commonality, typicality, and predominance problems. There are several reasons why some putative class members may have wished to remain in the program voluntarily—including earning funds to buy non-essential items from the commissary

that could otherwise explain the class members' conduct. In *Menocal v. GEO Group, Inc.*, for example, the Tenth Circuit found that the detainees were subjected to a uniform policy under which detainees were threatened with physical restraint or serious harm if they refused to perform mandatory unpaid cleaning assignments. 882 F.3d 905, 916-17 (10th Cir. 2018). The Tenth Circuit further concluded that because the class members received notice of the sanitation policy's terms (including possible sanctions for refusing to clean) and performed work when they were assigned to do so, a clear inference was that the sanitation policy *caused* the detainees to work. *Id.* at 919-920. Significantly, the defendant in *Menocal* did not point to any evidence to rebut the common inference of causation. *Id.* at 921; *see also Owino v. CoreCivic, Inc.*, 60 F.4th 437, 446 (9th Cir. 2022) (considering sanitation policy similar to the one in *Menocal* and finding no abuse of discretion where the district court concluded "that a factfinder could reasonably draw a class-wide causation inference" from the uniform policy). In contrast, here, Plaintiffs did not demonstrate that the work program policies are uniformly coercive, such that no reasonable detainee would join or remain in the Stewart work program voluntarily, absent the potential for serious harm or physical restraint.[5] Thus, this is not a case like *Menocal* or

[5] To rescue their motion for class certification, Plaintiffs may argue that they are willing to assume the burden of proving at trial that the

spoliation sanctions," although Georgia law provides guidance that the Court may consider. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). Spoliation sanctions "are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Id.* The Court has "broad discretion" to impose sanctions for spoliation of evidence. *Id.* The most severe sanctions, like adverse inference instructions to the jury, "are reserved for exceptional cases, generally only those in which the party lost or destroyed material evidence intentionally in bad faith and thereby prejudiced the opposing party in an uncurable way." *Cooper Tire & Rubber Co. v. Koch*, 812 S.E.2d 256, 261 (Ga. 2018) (internal quotation marks omitted) (quoting *Phillips v.*

Plaintiffs also did not establish how they were prejudiced by CoreCivic's failure to preserve the other detention files. There is no contention that Plaintiffs would be able to establish the class certification requirements if they had access to the files. Plaintiffs' chief concern is that CoreCivic's motion to exclude one of their experts rested in part on his failure to consider enough detainee grievances and disciplinary reports. But, as discussed below, the motions to exclude the experts are moot, and the Court declines to impose spoliation sanctions based on the failure to preserve the other detention files.

II. The Parties' Motions to Exclude Experts

The parties also filed motions to strike the proposed testimony of three experts under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 590 U.S. 579 (1993).

First, CoreCivic seeks to strike Plaintiffs' psychiatrist expert, Dr. PabloBT(4)-19t,

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established on a class-wide basis using common evidence or that common issues predominate over individual ones. The Court terminates the motion to exclude Dr. Stewart (ECF Nos. 247 & 253)

Second, CoreCivic moves to strike Plaintiffs' economist expert, Steven Schwartz. Plaintiffs rely on Dr. Schwartz to establish a class-wide damages model. Because the Court concludes that the issue of causation cannot be determined on a class-wide basis, the Court finds that it need not consider whether Dr. Schwartz class-wide damages model reliably measures the damages suffered by the putative class members. The Court terminates the motion to exclude Dr. Schwartz (ECF Nos. 248 & 254).

Finally, Plaintiffs move to strike CoreCivic's psychiatric expert, Dr. Joseph Penn. The Court did not consider Dr. Penn's opinion in ruling on the motion for class certification, so the Court terminates the motion to exclude Dr. Penn (ECF Nos. 215 & 239) as moot.

CONCLUSION

For the reasons set forth above, the Court finds that Plaintiffs did not meet their burden to prove that the class certification requirements are met for the two classes they seek to certify. Accordingly, the Court denies Plaintiffs' motion for class certification (ECF Nos. 213 & 238). The Court also denies Plaintiffs' motion for spoliation sanctions (ECF Nos. 263 & 265). The motions to exclude experts (ECF Nos. 215, 239, 247, 248, 253,

254) are terminated as moot. Given the Court's ruling on class certification, the only claims remaining in this action are the individual claims of the named Plaintiffs.

IT IS SO ORDERED, this 28th day of March, 2023.

s/Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA