The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

Case No.: 3:17-cv-05806-RJB

DEFENDANT THE GEO GROUP, INC.'S MOTION FOR RECONSIDERATION OF ORDER GRANTING STATE OF WASHINGTON'S MOTION TO COMPEL PARTIALLY UNREDACTED LETTER AND RELATED FINANCIAL CALCULATIONS (DKT. 409)

NOTE ON MOTION CALENDAR:
Date: September 28, 2020

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Defendant The GEO Group, Inc. ("GEO") respectfully moves for reconsideration of the Court's September 14, 2020 Order (Dkt. 409) ("Order") granting Plaintiff State of Washington's (the "State" or "Plaintiff") Motion to Compel Partially Unredacted Letter and Related Financial Calculations (Dkt. 396).

A. Motion for Reconsideration.

Local Civil Rule 7(h)(1) authorizes reconsideration upon "a showing of manifest error in the prior ruling." This Court has explained that "'manifest error' is 'an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'" *Casteel v. Charter Comm's, Inc.*, No. 3:13-cv-5520, at *1 (W.D. Wash. Dec. 1, 2014). GEO respectfully submits this standard is met because the Court disregarded Brian Evans' testimony that the calculations were part of privileged conversations and work product—failing to even mention his testimony, which repeatedly stated all calculations were completed at the direction of counsel. This constitutes a failure to consider "credible evidence in the record."

B. Disregard of Controlling Law and Credible Evidence in The Record.

As an initial matter, this Court erred in not addressing the work product doctrine, ruling only that GEO had "not established any privilege protecting the information from disclosure." ECF 409 at 1. Yet, the work product and privilege analysis are separate and distinct, and the Court erred in not addressing the work product doctrine with specificity. *United States v. Sanmina Corp*., 968 F.3d 1107, 1120 (9th Cir. 2020). To qualify for work product protection, documents must: (1) be "prepared in anticipation of litigation or for trial" and (2) be prepared "by or for another party or by or for that other party's representative." *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004). In circumstances where a document serves a dual purpose, that is, where it was not prepared exclusively for litigation, then the "because of" test is used. *Id*. Dual purpose documents are deemed prepared because of litigation if, "in light of the nature of the

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document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Id.* In applying the "because of" standard, courts must consider the totality of the circumstances and determine whether the "'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.'" *Id.* at 908 *(quoting United States v. Adlman*, 134 F.3d 1194 (2d Cir.1998)). On the other hand, "if a document would have been created in substantially similar form in the normal course of business, the fact that litigation is afoot will not protect it from discovery." *Anderson v. Country Mut. Ins. Co.*, No. C14-0048JLR, 2014 WL 4187205, at *6 (W.D. Wash. Aug. 25, 2014).

To the extent the Court applied the correct test, it erred in disregarding clear evidence in the record that the information at issue is protected work product. GEO produced evidence, in the form of Brian Evans' deposition testimony, that the document was created exclusively for litigation (or, at a minimum, "because of" litigation). Mr. Evans, at the direction of counsel, performed an assessment of the claims in this case and others. Accordingly, the information at issue is clearly work product. ECF 401 at 6-7 (providing excerpts of Mr. Evans' testimony explaining that counsel was always present and involved in the analysis the State seeks); *see id.* at 13 ("There can be no question that the letter which contained GEO's counsel's opinion of the potential costs associated with this case is work product . . . [s]imply disclosing GEO's opinion as to the estimated costs to ICE, GEO's client, did not destroy the work-product privilege."); *See also* Decl. of Scheffey. The fact that Mr. Evans assisted with the calculations himself does not remove work product protections from the document.[1] *See MKB Constructors v. Am. Zurich Ins. Co.*, No. C13-

[1]The Court's ruling would curtail counsel from seeking mathematical assistance in any case. Under the Court's ruling, if the CFO is ever asked by counsel to perform calculations as to how certain results in litigation were to impact the company (assessments which counsel are certainly not competent to perform), those assessments would not be protected work product.

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0611JLR, 2014 WL 12029371, at *4 (W.D. Wash. July 22, 2014) (explaining that "materials prepared by non-attorneys supervised by attorneys are capable of enjoying work-product protection."); Fed. R. Civ. P. 26(b)(3) ("[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).").

Furthermore, the plain text of the letter leaves no room for doubt that the subject of the letter was pending litigation; explaining that its purpose was to address "class action lawsuits filed by the Plaintiffs." ECF 362-1 (Trial Exhibit 365). It does not provide for additional corollary topics outside of litigation. Certainly, such a letter would not have been drafted absent the pending class action litigation—as the entire contents of the letter would not have existed but for the litigation. *In re Grand Jury Subpoena*, 357 F.3d at 910 ("The documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole."). The State did not raise any evidence to the contrary. Thus, the information that was provided to the Court was clearly sufficient to establish work product protection. Indeed, in this District, courts routinely find that documents constitute work product based upon nothing more than the representations of counsel. *See e.g., Veridian Credit Union v. Eddie Bauer, LLC*, No. C17-0356JLR, 2018 WL 4027079, at *3 (W.D. Wash. Aug. 23, 2018) (finding work product protection based upon counsel's representation alone). Here, in support of GEO's privilege and work product protection claims, the Court had the majority of the letter in unreacted form and the testimony of GEO's CFO, both of which provide sufficient evidence that the information was created in connection with the instant litigation and other

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Under this rule, counsel's ability to assess a case would inherently be tied to his or her own mathematical skills. This is a bridge too far.

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litigation pending around the country. Thus, GEO provided sufficient evidence to establish its work product protection.

As a result of the Court's errors, the Court's ruling is directly contrary to Ninth Circuit precedent, which serves to "prevent exploitation of a party's efforts in preparing for litigation." *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989); *see also United States v. Sanmina Corp.*, 968 F.3d 1107, 1125 (9th Cir. 2020) ("In fact, mandating full disclosure of such protected work product under these circumstances may potentially undermine the adversary process by allowing the IRS the opportunity to litigate 'on wits borrowed from the adversary'. . ."). Here, the State seeks to exploit GEO's very assessment of this case, that would not have existed absent the State filing the case in the first instance.[2] Put differently, the calculations are not discoverable facts and data because they are work product. Thus, the Court's order is erroneous and must be reconsidered.[3]

C. The Court Erred By Not Addressing the Issues Before it.

It is a fundamental premise of our legal system that a party is entitled to notice and an opportunity to respond before a court decides an important issue against it. *Day v. McDonough*, 547 U.S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). Thus, courts should refrain from advancing theories and arguments not raised by counsel. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party

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[2] Further, as both the State and the Plaintiffs in the *Nwauzor* action (and others across the country) have requested that GEO speak with ICE to try to achieve a potential settlement, the Court's ruling (without any guidance for how it will be enforced in the future) raises serious questions about whether GEO and ICE will be able to meaningfully discuss settlement in this case, and the others pending around the country, going forward.

[3] The Court did not address the issue of waiver, but the State's argument that GEO and ICE do not share a common interest is unavailing, particularly in light of the United States' Statement of Interest seeking judgment in favor of GEO. *See* ECF 290 at 17.

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presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). Further, where the Parties raise their issues in a motion under a specific procedural posture, it is not for the Court to recast the motion as brought under a different procedural posture. *Castro v. United States*, 540 U.S. 375, 386 (2003) ("It is not the job of a federal court to create a 'better correspondence' between the substance of a claim and its underlying procedural basis.").

Here, the State explicitly sought to reopen discovery in the instant case under Fed. R. Civ. P. 16(b). *See* ECF 396. It did not seek to do so under Fed. R. Civ. P. 26(e). Further, in seeking to reopen discovery, it did so to specifically obtain documents it claimed were responsive to two of its discovery requests: Requests for Production 52 and 43. *See* ECF 396. GEO provided a comprehensive response as to why the document was not responsive to either request and why relief under Rule 16(b) was not appropriate. The Court, however, *sua sponte*, determined that the inquiry was not controlled by Rule 16(b), nor was the issue (as both parties agreed) whether the letter and underlying data were responsive to the previously served discovery requests, but rather, whether the documents were more broadly considered within the possible scope of discovery under Fed. R. Civ. P. Rule 26(b)(1).[4] ECF 409. Whether information falls within the broad scope of discovery, as opposed to whether it is responsive to a specific discovery request, are two vastly different inquires. The Court did not give GEO an opportunity to respond to the Fed. R. Civ. P. 26(e) argument not raised by the State. *See In re Marshall*, 721 F.3d 1032, 1042 (9th Cir. 2013) ("Judge Bufford may have erred in basing certain rulings on arguments not raised by the parties and without giving the parties an opportunity to respond[.]"). Thus, the ruling improperly denied GEO of an opportunity to respond. The Federal Rules make clear that even if information *could* potentially fall within the ambit of discovery in a particular case, the party seeking the

[4] The State did not reference Fed. R. Civ. P. 26(e) in its initial motion seeking relief nor in its reply.

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information must do so sufficiently under Fed R. Civ. P. 33 or 34. The State did not seek the documents at issue here in its two referenced Requests for Production (as detailed in GEO's brief) and, therefore, the documents are not subject to production. Had the state propounded different discovery responses during the pendency of discovery that sought GEO's assessment of the claims in this case, GEO would have objected. Because the State did not raise such requests, GEO did not have the opportunity to do so. Thus, by declining to rule upon the issue before it, but instead ruling *sua sponte* on legal issues not raised by the parties, the Court erred.

D. The Error Must Be Remedied Before GEO Produces the Work Product Protected Information.

The issue of GEO's privilege claims must be remedied before GEO is compelled to turn over the documents the State seeks because GEO will be unable to remedy this error at a later point in the litigation. Once "[t]he cat is already out of the bag,[] it may not be possible to get it back in." *Agster v. Maricopa Cty.*, 422 F.3d 836, 838–39 (9th Cir. 2005) (internal quotations omitted). Indeed, "[e]ven if a new trial were ordered at which the material found to be privileged was not admissible, it might be impossible to undo the effects of the disclosure with regard to the information in plaintiffs' hands and its effect on their trial strategy." *Id.* As the Ninth Circuit has made clear, "an appeal after disclosure of the privileged communication is an inadequate remedy." *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010). Because the issues here involve GEO's work product protected information, this Court should reconsider its prior Order and address the issues as set forth herein and in the parties' briefing.

CONCLUSION

For the foregoing reasons, GEO respectfully asks the Court to reconsider its September 14, 2020, Order (Dkt. 409) granting Plaintiff State of Washington's Motion to Compel Partially Unredacted Letter and Related Financial Calculations (Dkt. 396).

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Respectfully submitted, this 28th day of September, 2020.

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PROOF OF SERVICE

I hereby certify on the 28th day of September, 2020, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **DEFENDANT THE GEO GROUP, INC.'S MOTION FOR RECONSIDERATION OF ORDER GRANTING STATE OF WASHINGTON'S MOTION TO COMPEL PARTIALLY UNREDACTED LETTER AND RELATED FINANCIAL CALCULATIONS (DKT. 409)** via the Court's CM/ECF system on the following:

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