The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THE STATE OF WASHINGTON DEPARTMENT OF HEALTH, Plaintiff, v. THE GEO GROUP, INC., Defendant.	No. 3:24-cv-05029-BHS DEFENDANT'S SURREPLY MOVING TO STRIKE THE DECLARATIONS OF SOLEIL MUÑIZ AND MARY KAYE ECKMANN

Pursuant to LCR 7(g), The GEO Group, Inc. ("GEO") files this Surreply asking the Court to strike the declarations of Soleil Muñiz and Mary Kaye Eckmann filed with Plaintiffs' Reply in Support of Their Motion for Preliminary Injunction. *See* Dkt. 41 (Reply) and Dkts. 42, 43 (Reply Declarations).

Plaintiffs DOH and L&I each submitted the same two declarations with their reply briefs that raise new evidence. The Court should strike these declarations because (1) they are not responsive to any argument GEO made in its Opposition, but rather provide new evidence about alleged conditions at NWIPC without giving GEO the opportunity to respond, (2) the declarations are inaccurate and riddled with impermissible hearsay, and (3) evidence regarding alleged conditions and events at NWIPC is not relevant to the issue of whether the agencies have statutory authority to inspect NWIPC, regardless of what authority the agencies now try to rely on.

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First, the declarations contain statements regarding alleged conditions at NWICP that the agencies raise for the first time in the reply briefs. This is impermissible. *HDT Bio Corp. v. Emcure Pharms., Ltd.*, 2022 WL 3018239, at *2 (W.D. Wash. July 29, 2022) (quoting *Atigeo LLC v. Offshore Ltd., D.*, 2014 WL 239096, at *8 (W.D. Wash. Jan. 22, 2014)) ("In the Ninth Circuit new issues and evidence may not be raised in reply briefs."); *see also Kogan v. Allstate Fire & Cas. Ins. Co.*, 2017 WL 11679256, at *2 (W.D. Wash. Feb. 13, 2017) (striking declarations that "improperly presented [] new material in a reply brief"). GEO did not make any argument in its Opposition regarding the conditions at NWIPC. Rather, GEO argued that (1) the agencies lacked authority under HB 1470 (the only authority the inspectors relied upon) to inspect the facility because HB 1470 is unconstitutional, and (2) the agencies' attempt in their Complaints to cite different authority from what they actually relied on at the time of the attempted inspections is a litigation tactic the Court should reject, as whether the agencies have authority to inspect under statutes that they did not actually rely on is not ripe for review.[1] As the declarations are not responsive to arguments raised in GEO's Opposition, they are improperly raised for the first time in the reply and should be stricken. *See Enter. Mgmt. Ltd., Inc. v. Construx Software Builders, Inc.*, 2024 WL 895358, at *3 (W.D. Wash. Mar. 1, 2024) ("[A]ny evidence and argument submitted in Plaintiffs' reply or supplemental reply will not be considered by the Court if the evidence and argument was not responsive to arguments raised by Defendants in the response or supplemental response.").

Second, even if the declarations did not raise new evidence, the Court should strike them because they are based on impermissible hearsay and are inaccurate. The statements in the declarations regarding alleged conditions at NWIPC are based on reports from others, including a

[1] As explained in GEO's Opposition, in their Complaints the agencies rely on both HB 1470 and other authorities to assert their rights to inspect NWIPC. At the time the agencies attempted three of the four inspections, however, they relied only on HB 1470 as their authority. Indeed, prior to the Complaints, the only reference to an authority other than HB 1470 was a reference to WISHA in the warrant the L&I investigator presented, but even that reference is misleading because the materials submitted when applying for the warrant relied exclusively on HB 1470. *See* No. C24-5095, Dkt. 27-5.

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report from La Resistancia, an advocacy organization dedicated to the elimination of NWIPC.[2] The Court should exclude this hearsay. *See* Fed. R. Evid. 801(c), 802; *Block v. Snohomish County*, 2016 WL 69667, at *1 n.2 (W.D. Wash. Jan. 5, 2016) (striking declarations based on inadmissible hearsay); *Rolf v. United States*, 2007 WL 445449, at *2 (W.D. Wash. Feb. 6, 2007) (same). Moreover, the statements in the declarations are misleading and inaccurate. *See Neravetla v. Virginia Med. Ctr.*, 2014 WL 4094140, at *3 (striking declaration "both because it constituted new evidence submitted in a reply, and because it does not appear to accurately characterize certain facts"). For example, the declarations imply that a detainee's recent death could have been prevented by inspections. The facts of this incident and others, however, are still under investigation, and media reports on the death conflict with the declarations. *See* https://www.seattletimes.com/seattle-news/law-justice/man-who-died-at-wa-detention-site-was-in-solitary-for-years-researchers-say/ (last visited Mar. 27, 2024) ("[Mr.] Daniel, identified by immigration authorities while he was serving time in prison for a murder conviction, was identified by U.S. Immigration and Customs Enforcement as having serious mental health issues and had requested to be put in solitary confinement.").

Finally, the misleading and erroneous statements in the declarations regarding alleged conditions at NWIPC are irrelevant to whether the agencies have the authority to inspect NWIPC under any statute. As explained above, when inspectors arrived at NWIPC, they sought entry only under HB 1470. Either the agencies have authority to inspect NWIPC under HB 1470 or they do not, and alleged conditions and events at NWIPC have no bearing on this issue. Moreover, it is not clear that, even if the agencies could inspect NWIPC pursuant to the additional authorities they rely on in their Complaints, they would have the authority to investigate many of the alleged conditions discussed in the declarations. For example, it is highly doubtful that, even if true, accidentally serving a detainee food containing onions or providing meals late constitute threats to public health or workplace safety. *See GEO Grp., Inc. v. Inslee*, 2024 WL 1012888, at *26 (W.D.

[2] *See* www.laresistencianw.org (last visited Mar. 27, 2024) ("Our goal is to shut down the NWDC, and to end all detentions and deportations in Washington State.").

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Wash. Mar. 8, 2024) (Preliminary Inj. Order, No. C23-5626, Dkt. 35) ("However, the Court is not convinced that inspections 'to ensure the specific nutrition and calorie needs of each detained person are met, including any needs related to medical requirements, food allergies, or religious dietary restrictions,' RCW 70.395.050, would also be authorized under RCW 43.70.170 as inspections of conditions constituting 'a threat to the *public* health.'"). Accordingly, the declarations should be stricken because they raise evidence irrelevant to resolving the issues in this case.

For the foregoing reasons, GEO respectfully asks the Court to strike the declarations of Soleil Muñiz and Mary Kaye Eckmann.

DATED this 29th day of March, 2024.

I certify that this memorandum contains 1,050 words, in compliance with the Local Civil Rules.

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