The Honorable Benjamin H. Settle

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 3:24-cv-05029-BHS

STATE OF WASHINGTON, DEPARTMENT OF HEALTH,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

No. 3:24-cv-05095-BHS

DEPARTMENT OF LABOR AND INDUSTRIES,

Plaintiff,

v.

GEO SECURE SERVICES, LLC; THE GEO GROUP, INC.,

Defendants.

Case Nos. 3:24-cv-05029-BHS
3:24-cv-05095-BHS

THE GEO GROUP, INC.'S AND GEO SECURE SERVICES, LLC'S OPPOSITION TO PLAINTIFFS' JOINT MOTION TO CONSOLIDATE CASES

NOTED FOR HEARING DATE: MARCH 15, 2024

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

TABLE OF CONTENTS

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Federal Statutes

State Statutes

Rules

Regulations

Other Authorities

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

I. INTRODUCTION

The Court should deny Plaintiffs' motion to consolidate. It is true there is a common issue in the cases: whether HB 1470 is unconstitutional. That issue is squarely presented in a different case, *The GEO Grp., Inc. v. Inslee*, No. 3:23-cv-05626-BHS ("*GEO v. Inslee*"), in which the Court recently granted a preliminary injunction in favor of GEO, *id.* Dkt. 31. But rather than wait for a final decision in that case (which is what a party claiming to be concerned with judicial economy and orderly resolution would have done), the State of Washington—through two different agencies—decided to make multiple attempts to enter and inspect conditions at the Northwest ICE Processing Center ("NWIPC") pursuant to that new statute. When the United States Immigration and Customs Enforcement agency ("ICE") and GEO, at the express direction of ICE, denied access, the state agencies filed two separate lawsuits against GEO (not ICE), in two different superior courts, relying on different facts and different sets of statutory and regulatory authority.

The State is master of its own complaints. *Marcus v. AT&T Corp.*, 138 F.3d 46, 52 (2d Cir. 1998). The State chose to file separate suits in two different courts, relying on different statutory authority. It should not now be allowed to consolidate the cases and thereby conflate the legal and factual issues in the two cases, to the prejudice of GEO.

II. BACKGROUND

There is one dedicated federal ICE detention facility in Washington: the NWIPC in Tacoma. *GEO v. Inslee*, Dkt. 10, Amber Martin Decl. in Support of Motion for Preliminary Injunction, ¶¶ 5, 6. Defendant GEO Group Inc. ("GEO") provides secure residential housing and support services at the NWIPC pursuant to a contract with ICE. *Id.* ¶¶ 6, 7. The contract between GEO and ICE states that "Pre-clearance approvals are required for access to ICE field staff, facilities and information." *Id.* Ex. A at 45.

The State of Washington opposes the federal government's decision to contract with GEO to provide secure residential housing and support services at the NWIPC. *See* RCW 70.395.010(7) ("[I]t is the intent of the legislature to prohibit the use of private, for-profit prisons and detention facilities in the state[.]"). The State first attempted to ban such facilities through HB 1090, and

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

when that statute was struck down as unconstitutional, passed HB 1470 (mostly codified at RCW 70.395). GEO sued to have the new statute declared unconstitutional as well, and that issue is before the Court in *GEO v. Inslee,* in which this Court recently issued a preliminary injunction barring enforcement of HB 1470.

Rather than wait for the Court's ruling on the constitutionality of HB 1470/RCW 70.395, the State sent DOH inspectors to the NWIPC on November 14, 2023, and they demanded unlimited access under RCW 70.395 (and only that statute). No. 3:24-cv-05029, Dkt. 3, Aff. of Bruce Scott in Support of Notice of Removal ("Scott Aff."), ¶ 7. At the express direction of ICE, GEO denied DOH access to the NWIPC. *Id.* ¶ 8. On November 27, 2023, DOH inspectors arrived at NWIPC and again "demanded unlimited access to the facility to investigate complaints related to Medical, Food Service and Laundry pursuant to HB 1470 [RCW 70.395]." *Id.* ¶ 9. Again, at the direction of ICE, GEO denied access. *Id.* ¶ 10.

DOH filed a Complaint against GEO in Thurston County Superior Court on December 18, 2023. No. 3:24-cv-05029, Dkt. 1-1 (Ex. A to The GEO Group, Inc. Notice of Removal), at 4-15. Even though during both attempted inspections, the DOH inspectors cited only HB1470/RCW 70.395 as their authority to enter the NWIPC, DOH now claims to seek access pursuant to a different statute: RCW 43.70.170, a public health statute. *Id.* at 12-13. RCW 43.70.170 addresses investigations of "threats to public health," including "outbreaks of communicable diseases, food poisoning, and contaminated water supplies." Of course, once inside the facility, absent this Court's injunction, nothing would prevent DOH from inspecting conditions purportedly regulated by HB 1470 and issuing citations under that statute as part of the State's ongoing (and unconstitutional) attempt to interfere with the federal government's decision to contract with GEO for the provision of services at the NWIPC.

The facts surrounding L&I's attempted inspection and resulting lawsuit are different. L&I inspectors arrived at the NWIPC on December 27, 2023, and demanded access to the entire facility to perform inspections under HB 1470/RCW 70.395. No. 3:24-cv-05095, Dkt. 2, Decl. of Bruce Scott in Support of Notice of Removal ("Scott Decl."), ¶ 9. At the direction of ICE, GEO denied

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

L&I access to the NWIPC. *Id.* ¶ 11. Two days later, on December 29, 2023, inspectors from L&I returned to the NWIPC and presented a Pierce County Superior Court inspection warrant. No. 3:24-cv-05095, Dkt. 3, Decl. of Michael Knight in Support of Notice of Removal ("Knight Decl."), ¶ 3. L&I obtained this warrant *ex parte*. The warrant lacked a cause number and was directed to GEO Secure Services, LLC, not The GEO Group, Inc., which actually has the contract with ICE to provide services at NWIPC. *See* No. 3:24-cv-05095, Dkt. 1-2 (Ex. A to GEO Secure Services, LLC Notice of Removal), at 12-15. The warrant cited as authority not just the statute cited by the investigators – RCW 70.395 (HB 1470) – but also RCW 49.17 and WAC 296. *See id.* at 31-34. The Washington Industrial Safety and Health Act ("WISHA") (RCW 49.17 *et seq.*), concerns "personal injuries and illnesses arising out of conditions of employment" (RCW 49.17.010) and is intended to ensure workplaces are "free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees." RCW 49.17.060.[1] After receiving the warrant, the ICE Supervisory Detention and Deportation Officer (not GEO) advised the L&I inspectors that "ICE is denying entry into the facility and there are formal channels they may use to request a tour and once the request has been made then the request will be reviewed." Knight Decl. ¶ 7; *see also* No. 3:24-cv-05095, Dkt. 13, Second Decl. of Eric Smith in Support of Plaintiff L&I's Motion to Remand, ¶ 5 ("Despite the warrant, Ryan Jennings, ICE Supervisory Detention and Deportation Officer, refused us entry.").

L&I then filed a Complaint against GEO Secure Services, LLC[2] in Pierce County Superior Court seeking to have GEO Secure Services held in contempt and alleging that GEO Secure Services, LLC "ignored" the Court's warrant, No. 3:24-cv-05095, Dkt. 1-2 (Ex. A to GEO Secure Services, LLC Notice of Removal), at 18-29. L&I makes this accusation despite the fact that GEO Secure Services acted promptly to have the warrant quashed and was only unable to have its motion

[1] However, while L&I's Application for the Warrant asserts a "reasonable belief that workers at the Jobsite are being or have been exposed to one or more hazards because of a violation of Washington's safety and health standards, and that such workers are or have been in danger of serious injury or death," the attached declaration identifies no hazards and identifies the *sole basis* for entry as "RCW 70.395.050 [allows for] a routine, unannounced, inspection." No. 3:24-cv-05095-BHS Document 27-4, 27-5.

[2] L&I amended its complaint to add The GEO Group, Inc. as a defendant. No. 3:24-cv-05095, Dkt. 15.

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

considered because L&I did not obtain a cause number or create a case file when it obtained its warrant, resulting in the court's inability to consider GEO's motion. 3:24-cv-05095, Dkt. 32, Decl. of Harry Korrell in Support of GEO's Opposition to Plaintiff's Motion for Remand, ¶¶ 2-4. L&I's Amended Complaint misleadingly asserts that L&I "only pursues its authority [to enter and inspect] under RCW 49.17 and WAC 296." No. 3:24-cv-05095, Dkt. 15 (Amended Compl.) at 9, ¶ 13. But that is plainly not true. When L&I attempted to gain entry to the facility and was denied (the central facts on which the suit is based), the inspectors asserted only authority under HB 1470 the first time, but the warrant they presented the second time cited both HB 1470 plus RCW 49.17 and WAC 296. Moreover, later in the Amended Complaint, L&I expressly demands relief under RCW 70.395. *Id.* at 10, ¶ 30 and 11, ¶ 5.

III. ARGUMENT

A. Legal Standard.

Federal Rule of Civil Procedure 42(a) permits a district court to consolidate actions that "involve a common question of law or fact." Fed. R. Civ. P. 42(a). The inquiry is flexible. "Rule 42 does not mandate consolidation simply because two cases happen to involve common questions of law and fact." *Perez v. Gray*, No. 2:21-CV-00095-LK, 2023 WL 3568156, at *1 (W.D. Wash. May 19, 2023) (quoting *Micklesen v. Watkins & Shepard Leasing, LLC*, No. 4:13-CV-00518-REB, 2015 WL 6456552, at *1 (D. Idaho Oct. 26, 2015)). Indeed, a district court "has broad discretion under this rule to consolidate cases pending in the same district." *Investors Res. Co. v. U.S. District Court*, 877 F.2d 777, 777 (9th Cir. 1989). In deciding whether to consolidate cases, a district court "weighs the interest of judicial convenience against the potential for delay, confusion and prejudice caused by consolidation." *Su v. United States Postal Serv.*, No. 2:22-CV-01176-RJB, 2023 WL 7158820, at *2 (W.D. Wash. Oct. 31, 2023) (citation omitted).

B. Consolidation Is Inappropriate Because the Cases Raise Different Issues.

The factual and legal differences between these two cases make consolidation inappropriate. Consolidation does not further judicial convenience where cases have different facts because those facts can lead to different defenses and legal arguments, even when there are

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

identical claims at issue. *P.S. v. City of San Fernando,* No. CV 21-4918 PA (PVCx), 2022 WL 3016257, at *2 (C.D. Cal. Apr. 11, 2022); *see also Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463, 465 (S.D.N.Y. 1977) ("[T]he mere fact that two cases assert similar theories of recovery does not constitute a common question of law so as to warrant consolidation."). That is the situation here. The cases brought by DOH and L&I relate to separate actions taken by two different agencies on different dates. The DOH case is based on inspection attempts on November 14 and November 27, 2023. No. 3:24-cv-05029, Dkt. 1-1 (Ex. A to The GEO Group Inc.'s Notice of Removal), at 26-38. The L&I case relates to inspection attempts on December 27, 2023 and December 29, 2023. No. 3:25-cv-05095, Dkt. 15 (Amended Compl.) ¶¶ 13-15. The events involve different participants and witnesses. And what took place at each inspection was also different. For example, in at least one instance, an ICE agent (not GEO) told the L&I inspectors directly that ICE was denying access. Knight Decl. ¶ 7.

The two cases also present different legal questions. The only common question of law is whether RCW 70.395 is constitutional, and that issue will be decided by this Court in a separate case, *GEO v. Inslee.* This means that the practical effect of consolidation will be to combine into one case the different legal questions raised by the different statutory regimes relied upon in the separate complaints filed by DOH and L&I.

Specifically, despite initially demanding access to NWIPC under HB 1470, DOH now asserts a claim for relief under RCW 43.70.170, a public health statute concerning "threats to public health," including "outbreaks of communicable diseases, food poisoning, and contaminated water supplies." No. 3:24-cv-05029, Dkt. 1-1 (Ex. A to The GEO Group Inc.'s Notice of Removal), at 12-13. In contrast, L&I, after first demanding access under HB 1470, now invokes RCW 49.17.060, 49.17.070, and 49.17.075 of the Washington Industrial Safety and Health Act ("WISHA") and the implementing regulations in WAC 296 which concern workplace hazards that might cause serious injury or death to employees. No. 3:24-cv-05095-BHS, Dkt. 15 (Amended Compl.) ¶¶ 14-31. Unlike DOH, L&I further asserts that its enforcement of WISHA is pursuant to authority delegated by the federal government pursuant to the federal Occupational Safety and

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Health Act, 29 U.S.C. § 667(b), No. 3:24-cv-05095, Dkt. 1 (GEO Secure Services, LLC Notice of Removal), ¶ 8, which could complicate the analysis of whether a state agency has authority to insist on access to a facility controlled by a federal agency. The Court should not consolidate two cases raising separate factual and legal issues. *See Jackson v. Berkey*, No. 3:19-cv-06101-BHS-DWC, 2020 WL 1974247, at *2 (W.D. Wash. Apr. 24, 2020) (holding that consolidation was inappropriate where consolidation would cause delays and confusion because distinct issues from three cases would be embedded in one case).

C. Consolidation Would Prejudice Defendants.

Consolidation is inappropriate if it will lead to confusion or prejudice in the management or trial of a case. *Sajfr v. BBG Commc'ns, Inc.*, No. 10-CV-2341-H (NLS), 2011 WL 765884, at *2 (S.D. Cal. Feb. 25, 2011) (citing 9 Charles Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE § 2383 (1971)). Consolidating these two cases will allow the State to conflate the facts and law relevant to its two separate lawsuits, by two different agencies as detailed above, and make it more difficult for GEO to brief and support its different defenses. *Houston v. Howell*, No. 2:19-cv-01371-JAD-DJA, 2020 WL 2572528, at *7 (D. Nev. May 20, 2020) (denying motions to consolidate because consolidation is "likely to create greater confusion and make the cases even more unwieldy for both the court and the parties"). For example, L&I asserts legal authority under at least four distinct statutory provisions unrelated to HB 1470 regarding workplace hazards that might cause serious injury or death to employees, as well as a federal delegation of authority under WISHA and OSHA. Moreover, L&I sought and obtained a warrant in connection with its attempted inspection relying on, *inter alia*, these distinct statutes. Resolution of those issues may require discovery and argument regarding the scope of federal delegation under WISHA and OSHA, as well as discovery and argument regarding the scope of "employment" and "employees" under the subject statutes.

By contrast, DOH asserts legal authority under different statutes that address investigations of "threats to public health," including "outbreaks of communicable diseases." The factual and legal issues concerning the reach of this authority are, obviously, wholly distinct from those

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

presented by the authority cited by L&I. Moreover, because ICE provides all medical care at NWIPC, issues regarding alleged "threats to public health" or "outbreaks of communicable diseases" raised in the DOH suit will likely require the DOH to seek significant discovery from the United States in accordance with *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). This process can be lengthy and would likely delay resolution of the separate factual and legal issues presented by the claims of L&I. Simply stated, the facts and legal issues relevant to the application of these divergent half-dozen statutory schemes and related rules are complex, distinct, and the combined treatment of the same will likely lead to confusion.

It would be highly prejudicial if GEO is forced to defend in a single action against the panoply of distinct legal questions raised by the different statutory regimes relied upon in the separate complaints filed by DOH and L&I. *See Cleveland v. Ludwig Inst. for Cancer Res. Ltd.*, No. 19cv2141 JM(JLB), 2021 WL 2780234, at *2 (S.D. Cal. July 2, 2021) ("[W]hile the two cases have some factual similarities, [the] [p]laintiffs have alleged different causes of action in these cases, thereby presenting the court with different legal questions."); *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 807 (N.D. Cal. 1989) (likelihood of delay and confusion resulting from consolidation of two complex actions outweighed any efficiency that might be achieved through consolidation).

IV. CONCLUSION

Rather than wait for this Court to decide the constitutionality of HB 1470 in *GEO v. Inslee,* the State decided to send inspectors from two different State agencies, on different dates, to demand access under HB 1470. When they were denied access, as the State knew they would be, the State chose to file separate lawsuits, in different courts, seeking unlimited access to NWIPC, based on different legal theories. The State chose these tactics and should not now be allowed to consolidate the cases where there is significant risk that GEO will be prejudiced by the inevitable conflation of issues and facts if the cases are consolidated. Further, because of the State's tactics and legal strategy, once this Court issues a final order in *GEO v. Inslee* confirming that HB 1470 represents an unconstitutional attempt by the State to interfere with federal immigration policy,

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

there will be little left in common between the two cases. Because the two cases are based on different facts, testified to by different witnesses, and based on different legal theories, and because of the risk of prejudice to GEO, the motion to consolidate should be denied.

DATED this 11th day of March, 2024.

I certify that this memorandum contains 2,772 words, in compliance with the Local Civil Rules.

By */s/ Harry Korrell*
Harry J. F. Korrell, WSBA No. 23173
John G. Hodges-Howell, WSBA No. 42151
Davis Wright Tremaine LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
Phone: 206.622.3150
Email: harrykorrell@dwt.com
Email: jhodgeshowell@dwt.com

By */s/ Scott Schipma*
Scott Allyn Schipma (Admitted *pro hac vice*)
Joseph Negron, Jr. (Admitted *pro hac vice*)
4955 Technology Way
Boca Raton, FL 99431
Phone: 561.999.7615
Email: scott.schipma@geogroup.com
Email: jnegron@geogroup.com

Attorneys for Defendants
The Geo Group, Inc. and Geo Secure Services, LLC