Case No. 21-55221

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVESTER OWINO, ET AL.,
Plaintiffs/Appellees,

v.

CORECIVIC, INC.,
Defendant/Appellant.

On Petition for Permission to Appeal from the United States District Court
for the Southern District of California, Civil Action No. 3:17-cv-01112-JLS-NLS
The Honorable Janis L. Sammartino

ANSWERING BRIEF

FOLEY & LARDNER LLP
Eileen R. Ridley
Alan R. Ouellette
555 California Street, Suite 1700
San Francisco, CA 94104-1520
Telephone: (415) 434.4484
Facsimile: (415) 434-4507
eridley@foley.com
aouellette@foley.com

LAW OFFICE OF ROBERT L. TEEL
Robert L. Teel
1425 Broadway, Mail Code: 20-6690
Seattle, WA 98122
Telephone: (866) 833-5529
Facsimile: (855) 609-6911

Attorneys for Plaintiffs/Appellees
Sylvester Owino, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Federal Statutes

California Statutes

Federal Rules

INTRODUCTION

Through this appeal, Defendant-Appellant CoreCivic, Inc. ("CoreCivic") seeks to overturn a class certification order rooted in a robust evidentiary record, rife with documents and testimony demonstrating that CoreCivic enacted and implemented uniform policies across its private detention facilities that require detainees within the custody of Immigration and Customs Enforcement ("ICE") to perform labor under threat of discipline. In a 59-page order (the "Certification Order"), the district court considered extensive evidence of CoreCivic's systemic policies and practices, including how CoreCivic enacted policies regarding detainee labor based on common templates created by CoreCivic's corporate headquarters; how CoreCivic uniformly required detainees to clean the common living areas of CoreCivic's facilities; how CoreCivic implemented a uniform disciplinary policy to punish detainees who refuse to work; and how ICE detainees were additionally required to participate in CoreCivic's "Voluntary Work Program" by signing agreements stating that they are "volunteering" to perform labor for compensation ranging from $1.00 to $1.50 per day (significantly less that the required minimum wage for employees). CoreCivic implemented these policies without exception. As CoreCivic's own Rule 30(b)(6) witness testified, individual detention facilities have no ability to "opt out" of these policies.

Plaintiffs- Appellees Sylvester Owino and Jonathan Gomez ("Plaintiffs")

bring individual and class claims for violations of the Trafficking Victims Protection Act, 18 U.S.C. § 1589, *et seq.* ("TVPA") and the California Trafficking Victims Protection Act, Cal. Civil Code § 52.5 ("California TVPA"), violations of California labor law, and other derivative causes of action. The district court, relying on largely undisputed evidence of CoreCivic's universal policies, concluded that for three of the proposed classes, Plaintiffs meet the requirements of class certification, including significant proof of a class-wide policy of forced labor, significant proof supporting class treatment of alleged California Labor Code violations, common questions of law and fact that predominate over individualized questions, and superiority of class treatment.

Confronted with this formidable evidentiary record, CoreCivic relies on readily distinguishable authorities and its misapprehension of the requirements of Rule 23 in order to challenge the district court's exercise of discretion in granting class certification. CoreCivic's arguments fail to demonstrate that the district court's decision was erroneous, much less that it amounts to an abuse of discretion.

First, there is no merit to CoreCivic's argument that the district court was somehow not presented with "significant proof" of a class-wide policy of forced labor. The 59-page Certification Order abounds with specific references to virtually indistinguishable policies enacted at each CoreCivic facility—policies which universally require detainees to perform labor for CoreCivic, and universally

threaten detainees with discipline for failure to comply. CoreCivic's reliance on distinguishable authorities offers no basis for reversal of the district court's decision.

Similarly, the district court did not abuse its discretion in finding that Plaintiffs satisfied the requirements of commonality and predominance for the forced labor classes. In challenging these elements of class certification, CoreCivic argues that the forced labor statutes require the district court to engage in a subjective inquiry into whether each detainee actually felt coerced by CoreCivic's conduct. CoreCivic's strained interpretation, however, reads words into the forced labor statutes that do not exist. As this Court has previously confirmed, the statutes, by their plain language, consider only whether an individual would feel coerced from the "vantage point of a *reasonable* person," thereby creating predominating questions susceptible to class-wide resolution. *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011); 18 U.S.C. § 1589(c)(2).

CoreCivic also contends that the district court incorrectly ruled that CoreCivic waived personal jurisdiction challenges as to non-resident putative class members by failing to assert such objection in its first responsive pleading. Following the filing of CoreCivic's Opening Brief, this Court ruled in *Moser v. Benefytt, Inc.* that a defendant does "not have 'available' a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case." 8 F.4th 872, 877 (9th Cir. 2021). While Plaintiffs contend that *Moser* was

wrongly decided, even if the Court were to follow its ruling in *Moser*, the objection CoreCivic seeks to assert is without merit.

With respect to claims arising under California labor laws, CoreCivic seeks to benefit from its own dereliction, arguing that there is no common proof of damages due to CoreCivic's own failure to maintain detailed time records for detainees. However, under established precedent, the evidentiary gap left by CoreCivic's failure to comply with California law may be filled with representative evidence of damages. Further, the district court did not abuse its discretion in finding that other records maintained by CoreCivic, even if incomplete, could permit a trier of fact to determine the extent of damages suffered by each class member. Courts are perfectly capable of performing minimum wage calculations based on sampling and other reliable methods and routinely do so.

Finally, CoreCivic's argument that certain of Plaintiffs' California Labor Code claims are time-barred is unavailing. Wage and hour claims, if brought under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"), are subject to a four-year statute of limitations, which even CoreCivic concedes would not bar Plaintiffs' claims here.

For the reasons discussed herein, CoreCivic has not, and cannot, demonstrate that the district court's Certification Order was erroneous, let alone an abuse of

discretion sufficient to justify reversal. The district court's Certification Order should be affirmed.

COUNTER-STATEMENT OF JURISDICTION

Plaintiffs concur that this Court has jurisdiction over CoreCivic's appeal pursuant to 28 U.S.C. § 1292(e). (*See* Opening Brief ("Br.") at 1.)

COUNTER-STATEMENT OF THE ISSUES

1. Whether the district court's finding that Plaintiffs established the existence of a uniform policy of coercing detainees to perform labor under threat of discipline for purposes of the National and California Forced Labor Classes was clearly erroneous.

2. Whether the district court abused its discretion in certifying the National and California Forced Labor Classes by finding that common questions predominate over individual inquiries because the TVPA and California TVPA use an objective standard for determining coercion.

3. Whether the district court abused its discretion by deferring a ruling on the effect of the statute of limitations under the California TVPA on the California Forced Labor Class due to the presence of statutory tolling provisions that are capable of resolution based on readily available demographic information.

4. Whether the district court abused its discretion in finding that the California Labor Law Classes' alleged damages are capable of class-wide resolution

because the evidence in the record can sustain a reasonable finding as to the amount of hours worked by the trier of fact.

5. Whether the district court abused its discretion by declining to dismiss actionable claims on behalf of the California Labor Law Class for violations of the California Labor Code based on the application of the four year statute of limitations in the UCL.

6. Whether CoreCivic waived its personal jurisdiction challenges as to non-resident putative class members and, if not, whether CoreCivic's personal jurisdiction objections are meritorious.

COUNTER-STATEMENT OF THE CASE AND THE FACTS

I. Factual Background.

A. CoreCivic Is Unjustly Enriched by the Work of ICE Detainees.

CoreCivic operates detention facilities that house involuntarily incarcerated civil immigration detainees, who are detained based solely on their immigration status and have not been charged with a crime, across the United States. (12-ER-2905-06, 13-ER-3054.)

During the period of time relevant to Plaintiffs' claims, CoreCivic utilized the ICE detainees housed at its facilities as a virtually free labor force to complete "essential" work duties at their facilities. (8-ER-1750-56; *see also* 8-ER-1781-83; 8-ER-1811; 8-ER-1829.) These work duties included foundational tasks such as

kitchen services and laundry services. (*See* 5-ER-970-1.) In spite of the "essential" nature of this work, CoreCivic generally paid ICE detainees either $1 per day or nothing at all. (*See, e.g.*, 11-ER-2440-2505.) When CoreCivic experienced shortages of ICE detainees to work essential facility operations, CoreCivic had to use its own employees to perform the exact same work duties as ICE detainees in order to keep its facilities operational. (8-ER-1750, 1752-1756; 8-ER-1781-83; 8-ER-1812.) CoreCivic adopted this business model because it allowed CoreCivic to reduce the number of employees and contractors that it would have otherwise needed to hire and compensate at the prevailing wage with benefits, thereby increasing its profits. (8-ER-1781-85; 8-ER-1803-4, 8-ER-1812.)

B. CoreCivic's Standardized Policies and Practices.

1. CoreCivic's Operations Are Governed by Company-Wide Written Policies.

CoreCivic's policies regarding detainee labor are memorialized in writing and derive from templates created by its Facility Support Center's "policies and procedures department." (8-ER-1657-62.) The Facility Support Center functions as CoreCivic's "corporate office" and "headquarters." (*Id.* at 1659; 8-ER-1786.) Jason Ellis, CoreCivic's Rule 30(b)(6) witness regarding the "creation, development, review and approval, intent, implementation and meaning" of its policies "concerning work performed by detainees," confirmed that CoreCivic's facilities do

not have the ability to "opt out" if they do not "want to comply with, abide by, utilize a policy that's in place." (8-ER-1666.)

2. CoreCivic's Sanitation and Disciplinary Policies Authorize Forced Labor.

Under ICE's Performance-Based National Detention Standards ("ICE PBNDS"), ICE detainees are responsible for personal housekeeping and are required to maintain their immediate living areas in a neat and orderly manner by (1) making their beds daily, (2) stacking loose papers, (3) keeping the floor free of debris and dividers free of clutter, and (4) refraining from hanging or draping clothing, pictures, keepsakes, or other objects from beds, overhead light fixtures or other furniture. *See* ICE PBNDS, § 5.8, at 406, *available at* https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf. With the exception of these four categories, CoreCivic is prohibited from compelling ICE detainees to work at its facilities. (*Id*.) This is because ICE detainees "are not convicted criminals" and have no obligation to work (other than the basic housekeeping tasks outlined in the PBNDS manual). (*See* 13-ER-3054.)

CoreCivic, as a matter of policy, disregarded the mandates of the ICE PBNDS and compelled ICE detainees to clean the common living areas of its facilities beyond their immediate living area. CoreCivic's written policies provided that "***all*** [detainees/inmates] assigned to a unit are responsible for maintaining the ***common living area*** in a clean and sanitary manner." (9-ER-1999; 9-ER-2004; 9-ER-2009;

9-ER-2014; 9-ER-2019; 9-ER-2023; 9-ER-2030; 9-ER-2035; 9-ER-2041 (emphasis added) (collectively, the "Sanitation Policy"); *see also* 8-ER-1717-29.) Under the Sanitation Policy, "[t]he officer assigned to that unit will see that all materials needed to carry out this ***cleaning assignment*** are provided." (*Id.* (emphasis added).) Consistent with these requirements, ICE detainees "will be assigned to each area on a permanent basis to perform the daily cleaning routine of the common area." (*Id.*) The Sanitation Policy mandated that "[s]ufficient workers will be allowed to each shift so as to provide seven (7) days a week twenty-four (24) hours a day coverage" and "[w]ork details necessary for the sanitation of the unit will be assigned." (*Id.*) ICE detainees were responsible for removing trash from the common areas on a daily basis, sweeping and mopping floors, cleaning toilet bowls, sinks, showers, and furniture, and completing "any other tasks assigned by staff in order to maintain good sanitary conditions." (*Id.*)

CoreCivic obtained compliance with the Sanitation Policy by threatening ICE detainees with discipline. The threat of punishment was conveyed to ICE detainees at intake through CoreCivic's admission handbooks and the orientation process. (*See, e.g.*, 9-ER-1849; 9-ER-2089-90.) During the intake process for arriving ICE detainees, CoreCivic obtained signed acknowledgments from ICE detainees that they are "**compelled to work**" by "perform[ing] housekeeping tasks in [their] own cell **and the community living area**" of the facilities. (9-ER-1849 (emphasis

added).) The admission "handbooks" provided to ICE detainees explain that ICE detainees are subject to discipline, including being placed in solitary confinement or "disciplinary segregation,"[1] for (1) failing to "clean assigned living area," (2) failing to "obey a staff member/officer's order," and (3) engaging in "[c]onduct" that CoreCivic deemed to "disrupt[] or interfere[] with the… orderly running" of the facility. (9-ER-2089-90; *see also* 9-ER-2126-27; 10-ER-2163-65; 10-ER-2217-2220; 10-ER-2261-63; 10-ER-2319-21.)

ICE detainees were reminded of the risks of disobeying an order through CoreCivic's enforcement of its disciplinary policy in an excessively penal manner. (7-ER-1578-88; 7-ER-1589-97; 7-ER-1598-608; 7-ER-1609-19; 3-ER-413-16; 3-ER-417-21; 2-ER-347-52.) Indeed, if an ICE detainee is absent from a shift or late for a work assignment, their supervisor is required to "call the unit **to locate and summon** the inmate/resident worker" and "**[d]isciplinary action** may be taken for absences and tardiness." (10-ER-2331 (emphasis added); *see also* 10-ER-2338; 10-ER-2345.) CoreCivic's Rule 30(b)(6) witness confirmed that "any of the types of discipline is possible" when ICE detainees are assigned work duties at CoreCivic's facilities. (8-ER-1705.) In fact, as one of CoreCivic's wardens acknowledged, CoreCivic not only took a penal approach when it came to detainee punishment, the

[1] "Disciplinary segregation" refers to the punishment of isolating a detainee from the general population in a single cell. (8-ER-1827.)

general operations of its civil immigration detention centers were essentially indistinguishable from those of penal institutions. (8-ER-1805-7.)

3. CoreCivic's Policies Misclassified So-Called "Voluntary Work Program" Participants in California as "Volunteers" Rather Than "Employees."

In addition to CoreCivic's forced labor policy, CoreCivic operated a Voluntary Work Program ("VWP") at its facilities for the same purpose of increasing its profits by exploiting a captive labor pool. (8-ER-1670-71.) Relevant to the California Labor Law Class, ICE detainees worked at three CoreCivic facilities in California between January 1, 2006 and the present—Otay Mesa Detention Center, San Diego Correctional Center, and California City Correctional Facility.[2] (7-ER-1629-30.) ICE detainees "are required to sign a work agreement stating that they are volunteering to work." (8-ER-1673.) As a matter of policy, the work agreements fix the rate of compensation in the range of $1.00 to $1.50 per day. (8-ER-1836; 8-ER-1838.) The work agreements state that "[d]etainees that participate in the volunteer work program will not be permitted to work in excess of eight (8) hours daily or forty (40) hours weekly," "are required to work according to an assigned work schedule and to participate in all work related training," and may

[2] Otay Mesa Detention Center is the only CoreCivic facility in California that currently houses ICE detainees. (8-ER-1703-04.)

be removed from the VWP for "[u]nexcused absence[s] from work or unsatisfactory work performance." (*Id.*) "Detainees must adhere to all safety regulations and to all medical and grooming standards associated with the work assignment." (*Id.*) For detainees that work in the VWP, CoreCivic maintained data in its "Offender Management System" or "OMS" that identifies every ICE detainee that worked and was paid through the VWP, as well as the daily rate of payment and work assignments. (8-ER-1678; *see also* 8-ER-1735-40; 11-ER-2440-2505.)

For the shifts worked by ICE detainees at CoreCivic's California facilities, "[k]itchen workers typically work four-to-six hour shifts (either breakfast, lunch, or dinner), five days a week." (5-ER-970.) "The breakfast shift is from 3:00 a.m. to 8:30 a.m.," the "lunch shift is from 9:00 a.m. to 3:00 p.m.," the "dinner shift is from 3:30 p.m. to 9:00 p.m." (*Id.*) "Administrative porters work two shifts: day shift and night shift." (*Id.*) The day shift "typically" lasted less than four hours per day and the night shift "typically" lasted less than six hours per day. (*Id.*) ICE detainees that work outside of the facility "typically" work less than six hours per day. (*Id.*) "Laundry, commissary, and intake porkers work, on average, two to four hours a day, but no more than six hours a day." (5-ER-971.)

As a matter of policy, CoreCivic misclassified the ICE detainees who work in the VWP as "volunteers" even though CoreCivic exercised control over the wages, hours, and working conditions of the ICE detainees. *See Martinez v. Combs*, 49 Cal.

4th 35, 64 (2010) (holding that "[t]o employ" means, *inter alia*, "to exercise control over the wages, hours or working conditions."). CoreCivic's Rule 30(b)(6) representative on the topic of CoreCivic's VWP testified that CoreCivic: (1) controls the wages paid to ICE detainees, (2) is "responsible" for compensating ICE detainees who work through the VWP for their labor, (3) controls the hours and shifts worked by ICE detainees, (4) determines an ICE detainee's suitability for a job assignment, (5) determines which job an ICE detainee will work, (6) evaluates the work performance of the ICE detainees, (7) determines whether ICE detainees are complying with their work agreements with CoreCivic, (8) controls the training provided to ICE detainees, (9) provides the tools necessary for ICE detainees to complete their job assignments, (10) determines whether bonuses or other incentives will be paid, (11) supervises ICE detainees for the entire duration of their shifts, and (12) controls the decision of, and reserves the ability to, terminate an ICE detainee from a job assignment or the VWP. (8-ER-1679-80, 1685-94, 1698-99, 1700-1; *see also* 8-ER-1780-82.) In addition to satisfying the test for employment under *Martinez*, all of these factors distinguish ICE detainees that work through the VWP from CoreCivic's civilian volunteers. As CoreCivic's Rule 30(b)(6) representative confirmed, true volunteers, in contrast to ICE detainees, would not be paid—"or they wouldn't be volunteers." (8-ER-1697-98.)

As a matter of policy and practice, the ICE detainees at CoreCivic's California facilities were paid between $.75 and $1.50 per day for their work in nearly every instance. (11-ER-2440-2505.) At various points in time, CoreCivic paid "bonuses" or "incentives" for certain types of work, such as work in the kitchen. (8-ER-1674-76.) However, at no point in time did CoreCivic pay wages that remotely approximated the minimum hourly wage required by California law. (11-ER-2440-2505.) This is in spite of the fact that CoreCivic's Rule 30(b)(6) representative testified that the ICE PBNDS, which specifies that compensation for ICE detainees working through a work program must be paid "*at least* 1.00 (USD) per day,"[3] does not prohibit CoreCivic from paying ICE detainees wages that comport with California's minimum wage law. (*See* 8-ER-1692-93.) Consistent with this testimony, the district court also concluded that "the ICE regulations only set a floor, not a ceiling" and that "such guidance [is] insufficient… to exempt Plaintiffs from *Martinez*." (13-ER-3049.)

For ICE detainees that worked through the VWP, CoreCivic admitted that it failed to provide them with an itemized statement in writing showing the categories of information set forth in California Labor Code § 226(a), including (1) gross wages earned, (2) total hours worked, (3) any applicable deductions, (4) net wages earned,

[3] ICE PBNDS, § 5.8, at 405, *available at* https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf.

(5) the pay period, and (6) the applicable hourly rates in effect and the corresponding number of hours worked during the pay period. (11-ER-2433-36.)

II. Procedural History.

A. Plaintiffs' Complaint.

Plaintiffs filed their original Complaint on May 1, 2017. On June 8, 2018, CoreCivic filed its Answer to the Complaint. (12-ER-2975-3008.) In response to the Complaint's allegation that "[t]his Court has personal jurisdiction over Defendant" (13-ER-3063), CoreCivic answered, "CoreCivic admits that jurisdiction is proper in this Court." (12-ER-2977.)

On October 12, 2018, Plaintiffs filed their First Amended Complaint ("FAC"). (12-ER-2938-2974.) The FAC, as relevant here, asserts individual and class claims for violations of the TVPA; violations of the California TVPA; violations of the UCL; failure to pay minimum wage; failure to furnish timely and accurate wage statements; failure to pay compensation upon termination and waiting time penalties; imposition of unlawful terms and conditions of employment; and unjust enrichment. (12-ER-2951-2974.)

On October 26, 2018, CoreCivic answered the FAC. (12-ER 2902-2937.) CoreCivic for the first time "admit[ted] only that this Court has specific personal jurisdiction over CoreCivic as to the claims arising out of CoreCivic's California facilities," but "denie[d] that this Court has general personal jurisdiction over

CoreCivic as to the claims arising out of CoreCivic's non-California facilities." (12-ER-2904.)

B. Class Certification Order.

On April 15, 2019, Plaintiffs filed a motion for class certification. (7-ER-1533-1538.) The motion sought to certify, in relevant part,[4] the following classes:

(1) California Labor Law Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between May 31, 2013 and the present, and (ii) worked through CoreCivic's Voluntary Work Program ("VWP") during their period of detention in California.

(2) California Forced Labor Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between June 1, 2006 and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in ICE PBNDS, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid.

(3) National Forced Labor Class: All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008 and the present, (ii)

[4] The district court declined to certify Plaintiffs' proposed "California Basic Necessities Class" and "National Basic Necessities Class." Those proposed classes are not at issue in this appeal and are not discussed herein.

> worked through CoreCivic's VWP, and (iii) purchased basic living necessities through CoreCivic's commissary during their period of detention.

(7-ER-1534-35.)

After the parties filed their opposition to, and reply in support of, the motion for class certification, the district court issued an order requesting supplemental briefing on various standing issues relevant to the motion prior to oral argument. (2-ER-353-55.) Following oral argument, the district court issued additional orders requesting further supplemental briefing regarding the impact of recently decided cases on the certification motion. (1-ER-37, 43, 52, 71; 2-ER-242-43.)

On April 1, 2020, following briefing, oral argument, and multiple rounds of supplemental briefing, the district court issued a 59-page order granting Plaintiffs' Motion for Class Certification in part as to the California Labor Law Class, and in its entirety as to the California Forced Labor Class and National Forced Labor Class. (1-ER-21-79.)

1. California Labor Law Class.

As to the California Labor Law Class, the district court found that the requirements of class certification were met with respect to Plaintiffs' causes of action for failure to pay minimum wage, failure to provide wage statements for actual damages, failure to pay compensation upon termination, and imposition of

unlawful conditions of employment. (1-ER-79.) The district court found that Plaintiffs "adequately have established that they were never paid a minimum wage through the VWP program . . . and that they never received wage statements." (1-ER-48.) Similarly, Plaintiffs "established for purposes of class certification that Defendant failed to pay compensation upon termination," including failure to pay waiting time penalties,[5] and "imposed unlawful terms and conditions of employment." (1-ER-36, 48.)

The district court held that there are "common predominating questions concerning Defendant's classification of detainees participating in the VWP as volunteers and, consequently whether those detainees were paid according to

[5] CoreCivic contends in its Statement of the Case that "Plaintiffs failed to mention, much less analyze, one of their Labor claims in their motion for class certification—Count Nine (Failure to Pay / Waiting Time)." (Br. at 27.) However, the class certification motion argues that "CoreCivic did not comply with California labor law" entirely, as a matter of "uniform policy and practice," and that all of their state labor law claims should therefore be certified. (7-ER-1560.) The rights to payment of wages upon termination and waiting time penalties are derivative of the right to minimum wage under California law. *See* Labor Code § 201 ("If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."); Labor Code § 203 ("If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 [and others], any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced"). Thus, the district court did not abuse its discretion in granting class certification as to claims for wages due upon termination and waiting time penalties, both of which fundamentally arise out of the right to minimum wage under California law.

California's minimum wage statutes and regulations." (1-ER-65.) While CoreCivic failed to maintain detailed time records for the putative class, the district court found that "'[m]ethods of common proof could be devised' to determine whether detainees participating in the VWP were paid a minimum wage," including reviewing "records for days on which detainees worked," and reviewing "set schedules for the various positions held by participants in the VWP"—all of which exists and was presented to the district court. (*Id.*) For purposes of class certification, the district court found that such evidence "may allow the trier of fact to determine which participants in the VWP were paid less than the minimum wage—and by how much—based on the difference between payment received and the number of hours per shift for the position." (*Id.*)

The district court further found that there were common, predominating questions as to Plaintiffs' claims for failure to provide wage statements, failure to pay compensation upon termination, failure to pay minimum wages, and imposition of unlawful conditions of employment, for which CoreCivic did "not oppose certification" of the California Labor Law Class. (1-ER-68-70.)

2. California and National Forced Labor Classes

The district court also ruled that the requirements of class certification were met as to the California and National Forced Labor Classes. (1-ER-79.) The record before the district court was replete with CoreCivic's common sanitation and

discipline policies enacted throughout its facilities, which required that "'[a]ll detainees/inmates assigned to a unit are responsible for maintaining the common living area in a clean and sanitary manner' and that '[d]etainee/inmate workers will be assigned to each area on a permanent basis to perform the daily cleaning routine of the common area,' including trash removal, sweeping and mopping, cleaning and scrubbing of bathroom facilities, and wiping off of furniture." (1-ER-60.) These common policies further required that "'[a]ll floors will be swept and mopped on a daily basis,' '[t]oilet bowls and sinks will be cleaned daily,' '[t]he showers and floors will be mopped and scrubbed daily,' '[a]ll furniture will be dusted on a daily basis and cleaned when necessary,' '[a]ll trash will be emptied daily,' '[w]indows will be washed weekly or more often when erquired [*sic*],' '[w]alls and doors will be wiped daily,' and '[a]ll equipment will be dusted or cleaned on a daily basis.'" (1-ER-60-61.) As noted by the district court, failure to comply with these policies was punishable by "'[d]isciplinary transfer (recommended),' '[d]isciplinary [s]egregation (up to 72 hours),' '[l]oss of privileges (e.g., commissary, vending machines, movies, recreation, etc.),' '[c]hange housing,' or '[r]estrict to housing pod.'" (1-ER-62.) Based on this record, the district court found that the "uniform disciplinary policy that could reasonably be understood to have subjected detainees to discipline for failure to comply with the uniform sanitation policy," such that common questions predominate. (*Id.*)

The Certification Order also rejected CoreCivic's contention that claims under the federal and California TVPA require an "individualized, subjective inquiry" into whether each class member felt threatened. (1-ER-72.) The district court distinguished out-of-Circuit authority cited by Plaintiffs, noting that whereas *David v. Signal Int'l, LLC*, No. CIV.A. 08-1220, 2012 WL 10759668, at *21 (E.D. La. Jan. 4, 2012) involved "paid workers who in fact could leave their jobs at any time," here, the detainees "were not paid more than a dollar or two a day and were not free to come and go as they pleased" and were threatened "as a whole through Defendant's uniform disciplinary policy." (1-ER-73.) The district court further cited Ninth Circuit cases that have permitted "an inference of class-wide causation . . . where, as here, the putative class members share a large number of common attributes such that they are similarly situated." (1-ER-74-75 (citing *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 627 (9th Cir. 2020)).) Based on this reasoning, the district court held that common questions of law and fact predominate as to the National and California Forced Labor Classes. (1-ER-75 (applying same reasoning to both classes); 1-ER-68-70.)

3. Superiority of Class Treatment

As to the California Labor Law Class and both Forced Labor Classes, the district court also found that superiority of class treatment was satisfied. Plaintiffs presented evidence that "many of the putative class members have a limited

understanding of the law, limited English skills, and limited resources to devote to pursuing recovery," and that many "also fear retaliation given their uncertain immigration status or ongoing immigration proceedings." (1-ER-77.) The district court agreed, further noting that "the 'risks, small recovery, and relatively high costs of litigation' make it unlikely that plaintiffs would individually pursue their claims." (1-ER-78.) In short, the district court concluded that there is "no viable alternative method for adjudication" of the class claims. Finally, since Plaintiffs' claims for violations of the UCL, negligence, and unjust enrichment are derivative causes of action, the elements of class certification are similarly satisfied for those claims. (1-ER-76.)

Based on the foregoing, the district court certified the "California and National Forced Labor Classes in their entirety and the California Labor Law Class as to the causes of action for failure to pay minimum wage, failure to provide wage statements for actual damages, failure to pay compensation upon termination, and imposition of unlawful conditions of employment." (1-ER-79.)

C. CoreCivic's Motion for Judgment on the Pleadings

On July 11, 2019, CoreCivic filed a motion for judgment on the pleadings on the purported grounds that the district court lacks personal jurisdiction for all putative class claims arising outside of California.

This, too, was addressed in the district court's Certification Order. The district

court denied CoreCivic's motion for judgment on the pleadings on the grounds that CoreCivic "has waived any challenge to the Court's personal jurisdiction." (1-ER-29.) Critically, challenges to personal jurisdiction "are expressly waived unless a defendant timely asserts this defense in a motion to dismiss or in a responsive pleading." (*Id.*) Here, the district court found that CoreCivic "could have asserted a personal jurisdiction challenge" to the original Complaint, which alleged a nationwide class under the federal TVPA. (*Id.*) The district court ruled that, by failing to assert personal jurisdiction as a defense to the original Complaint, CoreCivic waived any such defense. (*Id.*)

D. Post-Certification Procedural History

On April 15, 2020, CoreCivic filed a motion for reconsideration of the Certification Order with respect to the certification of the California Labor Law Class, California Forced Labor Class, and National Forced Labor Class, as well as the denial of CoreCivic's motion for judgment on the pleadings. (1-ER-2-20.) In a 19-page order (the "Reconsideration Order"), the district court denied CoreCivic's motion for reconsideration in its entirety, finding that there was no clear error or any other basis for reconsideration of the Certification Order. (*Id.*)

CoreCivic subsequently filed a petition for permission to appeal the Certification Order and Reconsideration Order, which was granted by this Court on March 11, 2021. (2-ER-216.)

SUMMARY OF THE ARGUMENT

1. The district court's finding that there was "significant proof" of a class-wide policy of forced labor was not clearly error. CoreCivic's standardized Sanitation Policy assigned cleaning duties to all ICE detainees assigned to a unit at CoreCivic's facilities. These policies were enacted at all CoreCivic facilities, without room for discretion or variation. CoreCivic's reliance on *Wal-Mart* is inappropriate, as that decision considered the viability of class certification in the context of millions of discretionary employment decisions made by different managers across thousands of stores. In contrast, CoreCivic enacted uniform cleaning and disciplinary policies that were implemented in equal measure at each of CoreCivic's facilities. Based on this record of uniform policies, the district court correctly determined that Plaintiffs had presented significant proof of a class-wide policy of forced labor, which was enforced through CoreCivic's uniform disciplinary policy.

2. The district court did not abuse its discretion in finding that the requirements of commonality and predominance were satisfied as to the forced labor classes. Courts have held that where, as here, private detention facilities enact uniform policies of forced labor, the requirements of commonality and predominance are satisfied. Since detainees were assigned cleaning duties by CoreCivic and subjected to CoreCivic's "uniform disciplinary policy," the class

members' claims are sufficiently cohesive to warrant adjudication by representation, satisfying the requirements of commonality and predominance. CoreCivic's argument that the forced labor statutes require a "subjective inquiry" into each class member's state of mind is unsupported. The text of the federal TVPA and California TVPA make clear that whether an individual felt coerced is determined from the perspective of an objective, "reasonable person."

3. The district court correctly concluded in the alternative that class-wide causation could be inferred from CoreCivic's enactment and implementation of uniform cleaning and disciplinary policies at each of its facilities, under which detainees were required to work under threat of punishment. Contrary to CoreCivic's assertion that class-wide causation cannot be inferred in TVPA cases, courts have in fact held that class-wide causation and reliance can be inferred where, as here, the class members are necessarily similarly situated. This offers an additional alternative basis on which to affirm the district court's finding of commonality and predominance.

4. The district court found that CoreCivic waived personal jurisdiction challenges as to non-resident class members in the National Forced Labor Class by failing to raise the defense in its first responsive pleading. This Court has recently ruled that a defendant does "not have 'available' a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were

not yet parties to the case." *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021). Plaintiffs contend *Moser* was incorrectly decided, and that this Court should instead follow the decisions of district courts within this Circuit holding that personal jurisdiction challenges as to non-resident putative class members are waived if not raised in the first responsive pleading. However, even if the Court were to follow its ruling in *Moser*, CoreCivic does not have a viable personal jurisdiction challenge on the merits, as the *Bristol-Myers* challenge CoreCivic seeks to assert does not extend to federal question claims or class actions under Rule 23.

5. The district court did not abuse its discretion by declining to narrow the class period for the California Forced Labor Class. As confirmed by other decisions within the Ninth Circuit, it is appropriate to defer ruling on a statute of limitations defense at the class certification stage. Further merits discovery is needed to evaluate the impact of the California TVPA's statute of limitations on the class period, including merits discovery on potential tolling defenses. Thus, the district court's decision to decline ruling on a statute of limitations defense at the certification stage does not constitute an abuse of discretion.

6. The district court did not abuse its discretion in finding that the California Labor Law Classes' alleged damages are capable of class-wide resolution because the evidence in the record can sustain a reasonable finding as to the amount

of hours worked by the trier of fact. CoreCivic's argument is premised on a line of cases decided outside of the wage and hour context that require plaintiffs to show that their damages stemmed from the defendant's actions that created the legal liability. The law in this Circuit is clear that, in the wage and hour context, no such showing is necessary because the employer-defendant's actions necessarily caused the class members' injury. Here, there is no dispute that the damages suffered by the California Labor Class is the result of CoreCivic's misclassification of detainees who worked through the VWP as "volunteers" rather than "employees" under California law.

7. The district court correctly rejected CoreCivic's attempt to defeat class certification by invoking its failure to comply with California's wage statement laws. CoreCivic contends that the only permissible way of establishing class-wide damages, in the absence of complete employment records, is for individual testimony from each class member. However, Supreme Court and Ninth Circuit case law are clear that representative evidence can fill the evidentiary gap created by CoreCivic's failure to comply with its recordkeeping obligations under California law, and the district court did not abuse its discretion in determining that the evidence in the record will allow a jury to draw a reasonable inference regarding unpaid hours worked by the class members based on reports that document (1) who worked, (2) when they worked, (3) their job assignment, (4) how much they were paid, and (5)

witness testimony and declarations regarding the length of shifts for the job assignments worked. CoreCivic also overlooks the fact that the burden of proof is on CoreCivic, not Plaintiffs, to prove the precise amount of work performed due their failure to maintain timekeeping records. There is simply no merit to CoreCivic's argument that the district court abused its discretion by certifying the California Labor Law Class.

8. The district court did not abuse its discretion by certifying the California Labor Law Class as to Plaintiffs' claims for failure to provide wage statements, failure to pay compensation upon termination, failure to pay minimum wages, and imposition of unlawful conditions of employment. Gomez's claims for violations of California wage and hour law are actionable from May 31, 2013 to the present because the UCL's four year statute of limitations applies to all of the claims. As to Owino, he worked during each period of his detention at a CoreCivic facility and was released on March 9, 2015. Accordingly, all of Owino's claims for CoreCivic's violations of the Labor Code are timely based on the May 31, 2017 filing date of the original complaint. Consistent with the ruling of courts in this Circuit, the district court did not abuse its discretion by declining to adjudicate the merits of CoreCivic's self-serving argument that—based on its own admittedly incomplete and insufficient employment "records"—the last date Owino worked in the VWP was May 22, 2013.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Certifying The Forced Labor Classes and the California Labor Law Class.

A. Plaintiffs Provided "Significant Proof" of a Class-wide Policy of Forced Labor.

CoreCivic's central argument is that the district court's ruling runs afoul of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), because Plaintiffs did not present "significant proof" of a class-wide policy of forced labor. (Br. at 36.) CoreCivic's reliance on *Wal-Mart* is misplaced. *Wal-Mart* considered a proposed Title VII class of 1.5 million employees challenging discretionary decisions made by managers in 3,400 stores across the United States. *Wal-Mart*, 564 U.S. at 342-43. The plaintiffs alleged a corporate policy conferring discretion on local managers to make employment decisions. *Id.* at 339. As a result, plaintiffs attempted to "sue about literally millions of employment decisions at once," precluding a finding of commonality because "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* at 352, 355-56.

Unlike *Wal-Mart*, which involved millions of discretionary decisions by 3,400 different managers, Plaintiffs' forced labor claims are predicated on standardized written policies governing the use of detainee labor and discipline that are based on templates created by CoreCivic's "corporate office." (8-ER-1657-62, 8-ER-1667-

69; 8-ER-1786.) The policies do not authorize the use of discretion, and CoreCivic's facilities do not have the ability to "opt out" if they do not "want to comply with, abide by, utilize a policy that's in place." (8-ER-1666.) Thus, while there may have been countless answers in *Wal-Mart* to the question, "Why was I disfavored?," there is no such issue in this case. *See Parsons v. Ryan*, 754 F.3d 657, 681-82 (9th Cir. 2014). The district court properly certified the National Forced Labor Class because there is only a single answer to questions such as, "Did CoreCivic obtain labor by detainees under threat of discipline based on its written policies and practices?" *See id*. (distinguishing *Wal-Mart* from cases where plaintiffs proffer sufficient "proof of the existence of systemic policies and practices").

The record demonstrates that CoreCivic's standardized Sanitation Policy assigned cleaning duties to all ICE detainees assigned to a unit at CoreCivic's facilities. The Sanitation Policy expressly mandated that "**all** detainees/inmates assigned to a unit are responsible for maintaining the **common living area** in a clean and sanitary manner." (9-ER-1999; 9-ER-2004; 9-ER-2009; 9-ER-2014; 9-ER-2019; 9-ER-2023; 9-ER-2030; 9-ER-2035; 9-ER-2041 (emphasis added); *see also* 8-ER-1717-29.) Under the Sanitation Policy, "[t]he officer assigned to that unit will see that all materials needed to carry out this **cleaning assignment** are provided." (*Id*. (emphasis added).) ICE detainees "will be assigned to each area on a permanent basis to perform the daily cleaning routine of the common area." (*Id.*) The policy

mandated that "[s]ufficient workers will be allowed to each shift so as to provide seven (7) days a week twenty-four (24) hours a day coverage" and "[w]ork details necessary for the sanitation of the unit will be assigned." (*Id.*)

The record also establishes that CoreCivic implemented the policies exactly as stated and enforced the policies under threat of discipline. The threat of punishment was conveyed to ICE detainees at intake through CoreCivic's admission handbooks and orientation process. During the intake process for arriving ICE detainees, CoreCivic obtained signed acknowledgments from ICE detainees that they are "**compelled to work**" by "perform[ing] housekeeping tasks in [their] own cell **and the community living area**" of the facilities. (9-ER-1849 (emphasis added).) The admission handbooks provided to ICE detainees state that ICE detainees are subject to discipline, including being placed in solitary confinement or "disciplinary segregation,"[6] for (1) failing to "clean assigned living area," (2) failing to "obey a staff member/officer's order," and (3) engaging in "[c]onduct" that CoreCivic deemed to "disrupt[] or interfere[] with the… orderly running" of the facility. (*See* 9-ER-2089-90; *see also* 9-ER-2126-27; 10-ER-2163-65; 10-ER-2217-2220; 10-ER-2261-63; 10-ER-2319-21.) ICE detainees were constantly reminded of the risks of disobeying an order through CoreCivic's enforcement of its

[6] "Disciplinary segregation" refers to the punishment of isolating a detainee from the general population in a single cell. (8-ER-1827.)

disciplinary policy in an excessively penal manner. (7-ER-1578-88; 7-ER-1589-97; 7-ER-1598-608; 7-ER-1609-19; 3-ER-413-16; 3-ER-417-21; 2-ER-347-52.) For example, if an ICE detainee "does not report to work," the supervising officer is required to "call the unit **to locate and summon** the inmate/resident worker" and "**[d]isciplinary action** may be taken for absences and tardiness." (10-ER-2331; *see also* 10-ER-2338; 10-ER-2345.) CoreCivic's Rule 30(b)(6) witness[7] confirmed that "any of the types of discipline is possible" when ICE detainees are assigned work duties at CoreCivic's facilities. (8-ER-1705.) Even an infraction as minor as a detainee "not timely reporting for a shift" is subject to discipline. (*Id.*)

The district court also correctly concluded that CoreCivic's contorted interpretation of the Sanitation Policy does not defeat certification of the Forced Labor Classes. The district court did not abuse its discretion by declining to adopt CoreCivic's self-serving interpretation of the phrase "[d]etainee/inmate workers" in the Sanitation Policy to mean "detainees who works in the Voluntary Work Program." (Br. at 36-37.) In support of this argument, CoreCivic relies on declarations of its own personnel whose interpretations of the Sanitation Policy are

[7] As CoreCivic's Rule 30(b)(6) witness, the testimony of CoreCivic's Rule 30(b)(6) witness is binding on CoreCivic. *Starline Windows Inc. v. Quanex Bldg. Prod. Corp.*, No. 15-CV-1282-L (WVG), 2016 WL 4485564, at *4 (S.D. Cal. July 21, 2016) ("The testimony of a Rule 30(b)(6) designee 'represents the knowledge of the corporation, not of the individual deponents.'" (citation omitted)).

belied by their plain meaning and the Rule 30(b)(6) testimony of Mr. Ellis. The distinction that CoreCivic attempts to manufacture also overlooks the basic fact that the Sanitation Policy imposes on obligation on "all" ICE detainees to clean common living areas of the facilities and expressly refers to this obligation as a "cleaning assignment." ICE detainees, when performing their "cleaning assignment," are necessarily "detainee workers." Further, because CoreCivic obtained labor under threat of discipline as a matter of written policy, CoreCivic's forced labor practices violate both the Federal TVPA and California TVPA irrespective of whether the work is uncompensated or compensated at the rate of $1 per day. 18 U.S.C. § 1589(c)(2); Cal. Penal Code § 236.1(h)(4); (1-ER-32 (certifying the National and CA Forced Labor Classes "irrespective of whether the work was paid **or unpaid**")).

CoreCivic argues that it "only requires detainees to clean up after themselves." (Br. at 38.) This is not what the Sanitation Policy states, nor is it consistent with the fact that the Sanitation Policy requires "all" detainees to complete "cleaning assignment[s]" which—by their nature—require cleaning up after others, including removing trash from the common areas, sweeping and mopping floors, and cleaning toilet bowls, sinks, showers, and furniture. Based on this record, the district court correctly weighed the competing evidence and did not arrive at an illogical, implausible or unsupported inference from the record. *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018).

. Instead, the district court properly certified the Forced Labor Classes because CoreCivic's written policies, as well as the testimony of Mr. Ellis, establish a policy of obtaining labor under threat of discipline that may provide an eventual class-wide finding of liability. Even if CoreCivic's interpretation of its policies was correct (which it is not), that still would not "negate class certification" because the central "issue is whether the proof is amenable to class treatment." *James v. Uber Techs. Inc.*, 338 F.R.D. 123, 129 (N.D. Cal. 2021).

CoreCivic's reliance on *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 968 (9th Cir. 2020), does not assist CoreCivic. The *Davidson* plaintiff failed to present any evidence of defendant's unlawful conduct or injury to putative class members. Even the plaintiff's "own declaration d[id] not show that she suffered this injury." *Davidson*, 968 F.3d at 967. There is no such contention here. CoreCivic's citation to *Willis v. City of Seattle*, 943 F.3d 882 (9th Cir. 2019), is also inapposite. *Willis* stands for the unremarkable proposition that the "[a]llegations of individual instances of mistreatment, without sufficient evidence, do not constitute a systemic deficiency or overarching policy of wrongdoing." *Willis*, 943 F.3d at 885. In contrast to *Willis*, the record demonstrates the existence of written, uniform policies that are generally applicable to the Forced Labor Classes. As the *Willis* Court confirmed, class certification is appropriate "if the court can determine 'in one stroke' whether a single policy or practice which the proposed class members are all

subject to 'expose them to a substantial risk of harm.'" *Id*. at 885 (quoting *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014)).

CoreCivic's citation to *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952 (9th Cir. 2013) misstates the holding of that case. This Court in *Abdullah* affirmed the district court's finding that "common questions would predominate" where, as here, the plaintiff challenged a uniform policy in spite of the fact that there was conflicting testimony as to its application. *Abdullah*, 731 F.3d at 965-66. This is because the Ninth Circuit "defer[red] to the district court's decision to weigh" the conflicting evidence and that, "in light of all the evidence," the Ninth Circuit "cannot say . . . that the district court's findings of fact were 'illogical', 'implausible', or 'without support in inferences that may be drawn from the facts in the record.'" *Id*. at 966 (citations omitted). *Abdullah* compels the same outcome here.

B. Common Questions of Law and Fact Predominate Over Individual Questions Due to CoreCivic's Uniform Policy and the Objective Standard of Coercion Under the Forced Labor Statutes.

1. The District Court Did Not Abuse Its Discretion in Finding That Commonality and Predominance Were Satisfied.

The district court did not abuse its discretion in finding that common questions of law and fact predominate over individual questions. Commonality under Federal Rule of Civil Procedure 23 requires that "there are questions of law or fact common to the class." *Wal-Mart*, 564 U.S. at 349; Fed. R. Civ. Proc. 23(a)(2).

"[C]ommonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.'" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (alteration in original) (quoting *Wal-Mart*, 564 U.S. 338, 350 (2011)). Commonality "does not, however, mean that *every* question of law or fact must be common to the class." *Abdullah*, 731 F.3d at 957 (9th Cir. 2013) . Rather, "for purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do." *Wal-Mart*, 564 U.S. at 359; *Abdullah*, 731 F.3d at 957 ("[A]ll that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'") (quoting *Mazza*, 666 F.3d at 589); *Mazza*, at 589 ("commonality only requires a single significant question of law or fact"). The "common questions may center on 'shared legal issues with divergent factual predicates [or] a common core of salient facts coupled with disparate legal remedies.'" *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (alteration in original) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998). In short, the inquiry is whether resolution of a common issue will "drive the resolution of the litigation." *Id.* at 1165.

Predominance requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Tyson Foods, Inc.*

v. Bouaphakeo, 577 U.S. 442, 453 (2016) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, (1997)). The existence of individualized issues does not on its own demonstrate that individualized questions predominate over common ones. *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013).

CoreCivic challenges commonality and predominance by posing eight hypothetical questions and arguing that "[t]hese questions cannot be answered 'yes' or 'no' in one stroke as to every one of the 'several thousands' of class members." (Br. at 53.) However, none of the questions posed by CoreCivic defeat commonality and predominance—let alone establish that the district court abused its discretion. As an initial matter, CoreCivic's first, second, third, and eighth questions—(1) whether each detainee was subjectively aware of directives and discipline in the Detainee Handbooks; (2) whether anyone ever conveyed the same to each detainee; (3) whether the detainee believed he would be disciplined for non-compliance; (8) whether the detainee worked because of the threat of discipline (Br. at 50, 52)—all pertain to a "subjective" standard of coercion that does not apply under the forced labor statutes. As explained in greater detail below, these are not even relevant questions under the forced labor statutes, much less individualized questions sufficient to defeat commonality and predominance. *See infra* Part III.C.2.

Nor can CoreCivic defeat commonality and predominance by asking (4) whether the detainee was actually ordered to clean common living areas; (5) whether

the detainee obliged or refused; (6) whether the detainee was subject to discipline for refusal; and (7) whether the discipline was authorized by PBNDS.[8] (Br. at 51.) In *Novoa*, similar hypothetical questions regarding what actually happened to each detainee in each instance were rejected as insufficient to defeat class certification. *Novoa v. GEO Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2019 WL 7195331, at *16 (C.D. Cal. Nov. 26, 2019). There, the private detention facility similarly disputed commonality and predominance of forced labor claims by "pointing to factual questions that may produce answers individual to each Plaintiff." *Novoa*, 2019 WL 7195331, at *16 (discussing "(1) whether Plaintiffs were deprived of 'necessities' requiring them to work for a dollar a day; (2) whether they risked serious harm if they did not work; and (3) whether uncompensated work is required or permitted by ICE"). The *Novoa* court rejected the defendant's arguments and approvingly cited the reasoning of *Menocal*. *Id.* *Menocal*, in turn, found that a private detention facility's uniform "[p]olicy is the glue that holds the allegations of

[8] CoreCivic's reliance on *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1278 n.5 (11th Cir. 2020) is unavailing. The Eleventh Circuit's ruling in *Barrientos* did not involve a class certification motion at all, but rather a pre-certification motion to dismiss. In that limited context, the *Barrientos* court stated in dicta that "basic" disciplinary measures, on their own, do not automatically give rise to TVPA liability in all instances. Notwithstanding this dicta, the court went on to hold that CoreCivic may be liable "under the TVPA if it in fact obtains the forced labor of program participants through the illegal coercive means explicitly proscribed by the TVPA," and **denied** CoreCivic's motion to dismiss on that basis. *Id.* at 1278.

the Representatives and putative class members together, creating a number of crucial questions with common answers," such as whether the defendant "employ[s] a Sanitation Policy that constitutes improper means of coercion under the forced labor statutes" and whether the defendant "knowingly obtain[s] detainees' labor using that Policy." *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 264-65 (D. Colo. 2017) (footnote omitted), *aff'd*, 882 F.3d 905 (10th Cir. 2018). The same result is warranted here. As evidenced by the record before the district court, a detainee's refusal to comply with these policies was punishable under CoreCivic's "uniform disciplinary policy" by "'[d]isciplinary transfer (recommended),' '[d]isciplinary [s]egregation (up to 72 hours),' '[l]oss of privileges (e.g., commissary, vending machines, movies, recreation, etc.),' '[c]hange housing,' or '[r]estrict to housing pod.'" (1-ER-62.) Thus, the district court need not litigate the lawfulness of every single instance of coercion by CoreCivic. Rather, the district court need only decide whether the disciplinary measures enacted by CoreCivic as a matter of uniform practice violated the forced labor statutes. Since detainees were subjected to CoreCivic's "uniform disciplinary policy" (1-ER-62), the class members' claims are "sufficiently cohesive to warrant adjudication by representation." *Tyson Foods*, 577 U.S. at 453.

CoreCivic's inability to conjure meaningful individualized questions is unsurprising, given the robust record on which the district court found that

commonality and predominance were satisfied. The Court's factual findings were based on a thorough review of CoreCivic's sanitation and discipline policies. (1-ER-60.) Based on exhaustive review of the evidentiary record, the district court concluded that CoreCivic "instituted uniform sanitation and disciplinary policies that were applied class-wide and, taken together, may have coerced detainees under threat of discipline into performing cleaning duties beyond those permitted by ICE." (1-ER-62.)

In short, CoreCivic cannot demonstrate that the district court's findings of commonality and predominance were incorrect, let alone an abuse of discretion.

2. The TVPA and California TVPA Do Not Require a Subjective Inquiry Into Whether Each Class Member Felt Coerced.

While the district court's class certification order offers numerous grounds on which to find commonality and predominance, CoreCivic ignores these grounds and argues that class certification was inappropriate because – in CoreCivic's assessment – individualized questions predominate regarding whether each class member felt threatened or coerced by CoreCivic's conduct within the meaning of the TVPA or California TVPA. (Br. at 54-59.) In short, CoreCivic contends that the forced labor statutes require a "subjective inquiry" into each class member's state of mind. (*Id.* at 56.)

CoreCivic's argument is meritless because the plain statutory text of the TVPA and California TVPA makes clear that an objective, "reasonable person" standard is appropriate. The TVPA prohibits CoreCivic from knowingly obtaining the class members' labor "by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint." 18 U.S.C. § 1589(a)(4). The TVPA defines "serious harm" as "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a **reasonable person** of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2) (emphasis added). The Ninth Circuit in *Dann* held that "the threat, considered from **the vantage point of a reasonable person** in the place of the victim, must be 'sufficiently serious' to compel that person to remain." *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011) (emphasis added).

The California TVPA similarly forbids conduct that would cause "a **reasonable person** of the same background and in the same circumstances to perform or to continue performing labor." Cal. Penal Code § 236.1(h)(8) (emphasis added); Cal. Civ. Code § 52.5; *People v. Halim*, 14 Cal. App. 5th 632, 643 (2017). Thus, under both the TVPA and California TVPA, whether class members acted

under threat or compulsion is objective and based on how the "reasonable person" would react to CoreCivic's conduct. The district court need not delve into individualized questions of how each class member actually reacted to CoreCivic's conduct but rather apply the uniform objective standard called out in the statutory language itself.

CoreCivic misapprehends *Dann* in arguing that the "reasonable person" standard is limited to the "serious harm" element of the TVPA. (Br. at 55-56.) In support of this argument, CoreCivic cites a paragraph from *Dann* stating that serious harm is "considered from the vantage point of a reasonable person in the place of the victim," and notes that the following paragraph states that scienter is based on whether "the employer intended to cause the victim to believe that she would suffer serious harm—from the vantage point of the victim." (Br. at 56 (citing *Dann*, 652 F.3d at 1170).)

CoreCivic plucks this language out of context in order to manufacture a legal requirement where none exists. CoreCivic's selective quotation, when read in context, makes clear that "the vantage point of the victim" refers to the "reasonable person" referenced in the preceding paragraph. The paragraphs only partially cited by CoreCivic state in full:

> First, the threat of harm must be serious. Congress intended to address serious trafficking, or cases "where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten

> dire consequences by means other than overt violence." H.R.Rep. No. 106–939, at 101, 2000 U.S.C.C.A.N. at 1392–93 (Conf.Rep.). According to the statute, the threat, considered from the vantage point of a **reasonable person in the place of the victim**, must be "sufficiently serious" to compel that person to remain. *See* 18 U.S.C. § 1589(c)(2).
>
> Second, the scope of the statute is narrowed by the requirement of ***scienter***. *Calimlim*, 538 F.3d at 711–12. The jury must find that the **employer intended** to cause the victim to believe that she would suffer serious harm—from the vantage point of the victim—if she did not continue to work. While the serious harm need not be effectuated at the defendant's hand, the statute "requires that the plan be intended to cause the victim to believe that that harm will befall her." *Id.* (internal quotation marks and punctuation omitted). The linchpin of the serious harm analysis under § 1589 is not just that serious harm was threatened but that the employer intended the victim to believe that such harm would befall her.

Dann, 652 F.3d at 1170 (emphasis added).

The "vantage point of the victim" language is contained in a paragraph that solely defines the *employer's* scienter under the TVPA—not the *victim's* scienter. Reading these paragraphs together, it is clear that the "vantage point of the victim" is a shorthand reference to the preceding paragraph, which describes the "vantage point of **a reasonable person** in the place of the victim." CoreCivic's interpretation of these paragraphs would superimpose the *victim's* subjective scienter on top of an element that pertains solely to the *employer's* scienter. This is nonsensical and

redundant, particularly given that the "serious harm" element already establishes that harm is to be construed from the vantage point of the "reasonable person."

This Court's subsequent discussion of *scienter* resolves any doubt. Under the heading discussing the employer's "Evidence of Intent," this Court clarified the scienter requirement:

> While we consider each of these harms separately below, we are to ask whether, from the vantage point of **an immigrant in Peña Canal's position**, these harms—taken together—were sufficiently serious so as to compel her to remain in Dann's employ.

Dann, 652 F.3d at 1171. Thus, the Court's subsequent discussion of scienter did *not* consider the subjective vantage point of the victim, Peña Canal, but rather the objective vantage point of "an immigrant in [her] position." *Id.* This comports with the plain language of the forced labor statutes. Causation, and whether a person would feel compelled to work, is already embedded into the definition of "serious harm" under the TVPA and California TVPA. The TVPA defines "serious harm" as harm that would "compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2). The same holds true under the California TVPA. Cal. Penal Code § 236.1(h)(8) (forbidding conduct that would cause "a reasonable person of the same background and in the same circumstances

to perform or to continue performing labor"). The "reasonable person" requirement is firmly rooted in the plain text of the statute.

CoreCivic similarly misreads this Court's decision in *Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1178 (9th Cir. 2012). The Court in *Headley* recognized that "serious harm" is defined under the TVPA to mean harm sufficient to compel "a reasonable person of the same background and in the same circumstances" to perform or continuing performing labor or services. *Id.* Nothing in the Court's decision controverts this "reasonable person" requirement. While the Court ultimately found that the Church of Scientology's alleged practices were not actionable under the TVPA, it nowhere adopted a subjective standard of what constitutes serious harm. *See id.*

Courts elsewhere have agreed that under the TVPA, "[t]he question is not whether each individual felt compelled to continue her employment as a result of defendants' conduct, but whether a reasonable person of the same background and in the same circumstances would find that conduct a threat of serious harm sufficient to compel continued work." *New York State Nurses Ass'n v. Albany Med. Ctr.*, 473 F. Supp. 3d 63, 70 (N.D.N.Y. 2020) (quoting *Paguirigan v. Prompt Nursing Emp. Agency LLC*, No. 17-CV-1302, 2018 WL 4347799, *8 (E.D.N.Y. Sept. 12, 2018). "[I]ndividual consideration of the nurses' claims is not necessary to prove that

Defendant violated the TVPA under an objective reasonable person standard for purposes of obtaining equitable relief." *Id.*

CoreCivic cites *David v. Signal Int'l, LLC*, No. CIV.A. 08-1220, 2012 WL 10759668, at *21 (E.D. La. Jan. 4, 2012) for the proposition that causation under the TVPA is a subjective inquiry. (Br. at 52-53.) The reasoning of this unpublished, out-of-Circuit case is faulty and should not be adopted. *David* cited TVPA legislative history that took into account "the individual circumstances of the victims . . ., including the age and background of the victims." *David*, 2012 WL 10759668, at *19. However, the court's reasoning ignored that the "background of the victims" is already codified in the plain text of the TVPA itself. 18 U.S.C. § 1589(c). Since the TVPA already accounts for the circumstances of the victim, adding a subjective inquiry to the TVPA analysis goes beyond the plain text of the statute and what was contemplated by its drafters.[9] CoreCivic's reliance on *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 266-67 (D. Colo. 2017) for this proposition is similarly misplaced,

[9] Courts in this Circuit have granted class certification of TVPA claims because the reasonable person inquiry is not individualized. *See, e.g.*, *Novoa v. GEO Grp., Inc.*, 2019 WL 7195331, at *16 (rejecting argument that whether "a particular detainee felt compelled to participate in the VWP is 'highly individualized,'" and finding that "Plaintiffs have shown commonality and, where needed, predominance, for their TVPA and CTVPA claims"); *perm. app. denied*, 2020 U.S. App. LEXIS 2045, *1 (9th Cir. Jan. 22, 2020); *Tanedo v. E. Baton Rouge Par. Sch. Bd.*, No. LA CV10-01172 JAK (MLGx), 2011 WL 7095434, at *8 (C.D. Cal. Dec. 12, 2011); *Rosas v. Sarbanand Farms, LLC*, 329 F.R.D. 671, 689 (W.D. Wash. 2018).

as this portion of the district court's decision in *Menocal* rested on the faulty reasoning of *David*.

Further, even if *David* were binding, it would not render the district court's decision erroneous. The *David* court "d[id] not agree . . . that a § 1589 claim can never be suitable for class certification," and recognized there may cases where subjective "consent becomes irrelevant." *David*, 2012 WL 10759668, at *21. The subjective inquiry in *David* was prompted by the facts of that case, which "involve[d] paid workers who in fact could leave their jobs at any time." *Id.* The same cannot be said here, where class members were involuntarily detained in civil detention facilities and subjected to CoreCivic's "uniform disciplinary policy," obviating the need for individualized inquiries. (1-ER-62, 1-ER-73.)

In short, CoreCivic does not advance any argument warranting departure from the plain text of the forced labor statutes and the objective "reasonable person" standard set forth therein. Consistent with the text of the TVPA and California TVPA, the district court did not abuse its discretion in finding it unnecessary to litigate individualized inquiries into whether class members were subjectively coerced.

3. Alternatively, the Court Did Not Abuse Its Discretion in Finding that Class-Wide Causation Could Be Inferred.

In the alternative, the district court correctly concluded that class-wide causation could be inferred from the facts of the case. (1-ER-74-75.) There is no merit to CoreCivic's suggestion that an "inference of class-wide causation" is inappropriate in TVPA cases. (Br. at 57-58.) This Court has held that class-wide causation or reliance can be inferred where class members are similarly situated. *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020). CoreCivic attempts to distinguish *Walker* by suggesting that a class-wide inference of causation is permissible only in "UCL cases." (Br. at 57.) To the contrary, this Court has held that *particularly* in cases involving wage and hour issues, such as this one, "the employer-defendant's actions **necessarily cause**[] the class members' injury." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) (emphasis added).

This case does not compel a different result. The class members were all detained at civil detention centers operated by CoreCivic, performed labor for CoreCivic at CoreCivic facilities, and were subjected to CoreCivic's "uniform disciplinary policy," as determined by the district court's robust review of the evidentiary record. (1-ER-73; 1-ER-60.) For these reasons, the district court's findings of commonality and predominance should be affirmed.

C. The District Court Has Personal Jurisdiction Over the Claims of Non-Resident Putative Class Members.

Challenges to personal jurisdiction are waived unless raised at the first available opportunity. *See* Fed. R. Civ. P. 12(h)(1)(B)(i)–(ii) (defenses subject to waiver). CoreCivic failed to raise any challenge to the district court's personal jurisdiction in its Rule 12(b) motion to dismiss and in fact "admit[ted] that jurisdiction is proper in this Court" in its answer to Plaintiffs' complaint. (1-ER-23). CoreCivic did not move the district court on personal-jurisdiction until ***over two years*** into the litigation. (1-ER-24.) Denying CoreCivic's motion for judgment on the pleadings, the district court "conclude[d] that [CoreCivic] has waived any challenge to the Court's personal jurisdiction." (1-ER-22, 29).

Since the filing of CoreCivic's Opening Brief, this Court has ruled that, prior to class certification, a defendant does "not have 'available' a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case." *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021). Plaintiffs contend that *Moser* was wrongly decided and that, rather than following out-of-Circuit authorities, the Court should have followed district court decisions within this Circuit finding that, where a complaint raises federal claims on behalf of a putative nationwide class, personal jurisdiction challenges as to non-resident putative class members must be made in the defendant's first responsive pleading. *See, e.g.*, *McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142, 166 (S.D. Cal. 2019)

("Personal jurisdiction is a bread and butter defense to a claim for relief asserted in a pleading, including relief a plaintiff seeks on behalf of a putative class."), *class partially de-certified on other grounds*, 2020 WL 4582686 (S.D. Cal. Aug. 10, 2020); *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 851 (N.D. Cal. 2018).

Even if this Court were to follow its ruling in *Moser*, CoreCivic's personal jurisdiction challenge is without merit. CoreCivic seeks to object to the exercise of personal jurisdiction over the claims of non-resident class members based on the Supreme Court's holding in *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1776 (2017). However, *Bristol-Myers* merely held that a **state** court lacked specific personal jurisdiction over the claims of **non-class**, non-resident plaintiffs whose claims arose outside of the forum state. Since *Bristol-Myers* was fundamentally premised on the how "the Fourteenth Amendment limits the personal jurisdiction of *state* courts" (*Id.* at 1779), its holding does not extend so far as to limit the personal jurisdiction of federal courts. (*Id.* at 1784) ("the question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court"); *see also Sloan*, 287 F. Supp. 3d at 858-59 (declining to extend *Bristol-Myers* to federal question cases); *In re Packaged Seafood Prods. Antitrust Litig.*, 338 F. Supp. 3d 1079, at 1172 (same). Similarly, the holding of *Bristol-Myers* was limited to a mass tort action involving multiple plaintiffs suing in their individual capacity. *Bristol-Myers*, 137 S. Ct. 1733.

This holding was not, and should not be, extended to federal class actions under Rule 23. *See, e.g.*, *Sotomayor v. Bank of Am.*, N.A., 377 F. Supp. 3d 1034, 1037 (C.D. Cal. 2019) ("*Bristol-Myers* applies to mass tort actions, not class actions"); *In re Morning Song Bird Food Litig.*, No. 12CV01592 JAH-AGS, 2018 WL 1382746, at *5 (S.D. Cal. Mar. 19, 2018) ("declin[ing] to extend the holding of *Bristol-Myers* to this case involving a class action").

Thus, whether on grounds of waiver or on the merits, CoreCivic cannot prevail on any challenges to personal jurisdiction as to non-resident class members.

D. The District Court Did Not Abuse Its Discretion by Declining to Narrow the Class Period for the California Forced Labor Class.

The district court did not abuse its discretion by declining to narrow the class period for the California Forced Labor Class as barring claims arising on or after May 31, 2010. Courts in the Ninth Circuit routinely hold that it is appropriate to defer ruling on a statute of limitations defense at the class certification stage. *Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 567 (S.D. Cal. 2012) ("The statute of limitations is a merits determination often not suitable for resolution at the class certification stage."); *Johns v. Bayer Corp.*, 280 F.R.D. 551, 560 (S.D. Cal. 2012); *In re Northrop Grumman Corp. ERISA Litig.*, No. CV 06-06213 MMM (JCx), 2011 WL 3505264, at *12-13 (C.D. Cal. Mar. 29, 2011) (holding the court need not decide

the statute of limitations issue at the class certification stage, even if it meant no class period could be set at that time). CoreCivic does not cite to any law to the contrary.

The district court correctly held that further merits discovery is needed to evaluate the impact of the California TVPA's statute of limitations on the class period, including merits discovery on potential tolling defenses. (*See* 1-ER-13.) For example, the California TVPA, by its terms, provides that the statute of limitations is tolled where the class member was a minor while detained at CoreCivic, in which case the statute of limitation is extended to "10 years" from "the date the plaintiff attains the age of majority." Cal. Civ. Code § 52.5(c). CoreCivic's proposed limitation of May 31, 2010 could exclude timely claims in instances where CoreCivic detained minor class members before May 31, 2010. *Id.* CoreCivic's proposed limitation would also exclude timely claims by class members who were released by CoreCivic and either deported or re-detained prior to May 31, 2010. *Id.* at § 52.5(e) (providing for tolling where the trafficking victim is unable "to access services"); 52.5 (d)(1) (providing for tolling where the trafficking victim is imprisoned). Contrary to CoreCivic's argument that whether a class member's California TVPA claim is subject to a limitation period predating May 31, 2010 is an "individualized determination that defeats commonality," any inquiry regarding tolling can be resolved based on readily available demographic information about the class members, such as their date of birth, detention date(s), or release date(s).

Thus, CoreCivic's argument that the district court abused its discretion by declining to limit the California Forced Labor Class to claims arising on or after May 31, 2010 is unsupported by any authority and incorrect as a matter of law.[10]

II. The District Court Did Not Abuse Its Discretion in Certifying the California Labor Law Class.

A. The District Court Correctly Rejected CoreCivic's Argument That No Common or Reliable Method of Proving Class-wide Damages Exists.

CoreCivic relies on *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), for the proposition that Plaintiffs failed to demonstrate that damages are susceptible of

[10] The Ninth Circuit's recent decision in *Geo Grp., Inc. v. Newsom*, No. 20-56172, 2021 WL 4538668 (9th Cir. Oct. 5, 2021) does not affect the outcome of the instant appeal. That decision was limited to whether AB 32—which would have phased out private detention facilities within California, subject to certain exceptions—violated the Supremacy Clause by intruding on the federal government's right to regulate immigration and to contract with private detention facilities, or by discriminating against the federal government by creating certain exemptions for state agencies. *Id.* CoreCivic has not raised the Supremacy Clause or any other Constitutional challenge on this appeal, and the *Geo Group* is therefore not relevant to the issues herein.

Nor could CoreCivic successfully argue that the Supremacy Clause preempts application of any of the state laws at issue in this case. The result in *Geo Group* was animated by the federal government's "broad discretion over immigration detention," and the fact that "AB 32 does **not** regulate a field which the states have traditionally occupied." *Id.* at *5-6, 8 (emphasis added). The same is not true here, as regulation of forced labor and wage and hour law is not the exclusive province of the federal government, nor do the statutes at issue herein conflict with any federal law. *Arizona v. United States*, 567 U.S. 387, 400 (2012) ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'") (citation omitted).

measurement across the California Labor Law Class. In *Comcast*, an antitrust case, the Supreme Court reviewed the certification of a class of consumers in which plaintiffs offered a complex damages model to show how the customers were subject to anti-competitive prices. *Comcast*, 569 U.S. at 27. The Supreme Court reversed the class certification because the model "failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Id.* at 36. CoreCivic's reliance on *Comcast* is misplaced because this Court has "interpreted *Comcast* to mean that 'plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.'" *Vaquero*, 824 F.3d at 1154 (citing *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987-88 (9th Cir. 2015)). In other words, "[i]f the plaintiffs cannot prove that damages resulted from the defendant's conduct, then the plaintiffs cannot establish predominance." *Id.*

In *Vaquero*, as here, the defendants "argue[d] that, when damages calculations cannot be performed on a class-wide basis, predominance has not been reached." *Id.* The Ninth Circuit expressly rejected this argument because, "[i]n a wage and hour case, unlike in an antitrust class action, the employer-defendant's actions *necessarily* caused the class members' injury" because the defendant "either paid or did not pay . . . for work performed" and "[n]o other factor could have contributed to the alleged injury." *Id.* at 1155. Therefore, "[n]o such problem exists in this case[,] . . . even if

the measure of damages proposed here is imperfect" because CoreCivic cannot dispute that its admitted policy of classifying its employees as "volunteers" *caused* the California Labor Law Class' damages. *Id.*

Here, CoreCivic misclassified the California Labor Law Class members as "volunteers" rather than "employees" under California law by way of consciously chosen and generally applicable policies and practices. (8-ER-1670-73.) It is undisputed that CoreCivic did not pay members of the California Labor Law Class the minimum wage required under California law for employees. (11-ER-2440-2505.) There is no dispute that CoreCivic's conduct (the misclassification of employees as "volunteers" and failure to pay minimum wage for their labor) "necessarily caused" the injury claimed by the California Labor Law Class (deficient payment for labor provided as an employee of CoreCivic). Therefore, the "well settled" precedent of this Court that individualized damages questions do not defeat class action treatment controls. *Vaquero*, 824 F.3d at 1155; *see also James v. Uber Techs. Inc.*, 338 F.R.D. at 142 ("As with Plaintiffs' minimum wage and overtime claims, there is no dispute that Uber does not have a paid-sick-leave policy, such that *any* driver's inability to obtain sick leave necessarily '*stemmed from*' Uber's choice not to offer it" and holding that "[t]he amount of sick leave that each driver

was entitled to is an 'individualized damages' calculation that 'cannot, by itself, defeat class certification under Rule 23(b)(3).'") (citation omitted).[11]

Further, the district court correctly rejected CoreCivic's attempt to defeat class certification by invoking its failure to comply with California's recordkeeping and wage statement laws. CoreCivic contends that the only permissible way of establishing class-wide damages, in the absence of complete employment records, is for "individual testimony from each class member." (Br. at 69.) This Court has repeatedly rejected this argument in wage and hour class actions. *See Vaquero*, 824 F.3d at 1155. More importantly, the Court's determination that the "evidence [in the record] may allow the trier of fact to determine which participants in the VWP were paid less than the minimum wage—and by how much—based on the difference between the payment received and the number of hours per shift for the position" is

[11] CoreCivic's citation to cases decided outside of the wage and hour class action context demonstrates its misplaced reliance on authorities that, under *Vaquero*, have no application to Plaintiffs' claims for violations of wage and hour law. They instead focus on the question of whether the plaintiffs have proffered sufficient evidence of a causal link between the alleged unlawful conduct and injury to the putative class. *See In re MyFord Touch Consumer Litig.*, No. 13-cv-03072-EMC, 2016 WL 7734558, at *1 (N.D. Cal. Sep. 14, 2016) (automobile products defect); *Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 333 (C.D. Cal. 2015) (force-placed insurance kickback scheme); *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 120 (N.D. Cal. 2014) (coverage for mental health residential treatment); *Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK (VBKx), 2014 WL 1477400, at *1 (C.D. Cal. Apr. 15, 2014) (deceptive labelling); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at *1-2 (N.D. Cal. Jan. 7, 2014) (deceptive labelling).

supported by Supreme Court and Ninth Circuit precedent. 1-ER-65. The testimony of CoreCivic's witnesses confirm the "typical" shift lengths, and CoreCivic's records document the days worked by ICE detainees, the wages they were paid, and their job assignments. (*Id.*) Such evidence—coupled with the testimony of class members and CoreCivic personnel—will allow a jury to draw a reasonable inference regarding unpaid hours worked by the class members. The burden then shifts to CoreCivic—as the employer for the class members—to prove "the precise amount of work performed" due to its failure to comply with its statutory duty to maintain adequate employment records. *Tyson Foods*, 577 U.S. at 456.

In *Tyson Foods*, the Supreme Court reviewed the certification of a class of employees who claimed that their employer had violated wage and hour laws by failing to pay overtime compensation for time spent donning and doffing protective gear. *Id.* at 448-50. Tyson had failed to keep records of such time and it was undisputed that the class members spent *different* amounts of time donning and doffing *different* types of protective gear designed for *different* job assignments. *Id.* at 448-49. Specifically, the time spent donning ranged from around thirty seconds to more than ten minutes, and the time doffing varied from under two minutes to over nine minutes. *Id.* at 470-71. Consequently, damages awarded to the class may be distributed to persons "who did not work any uncompensated overtime." *Id.* at 446. After a jury verdict in the employees' favor, Tyson moved to decertify the class

and set aside the jury verdict, arguing that this variance made class and collective certification inappropriate. *Id.* at 450-52.

The Supreme Court affirmed the class certification. *Id.* at 454-57. Because of Tyson's dereliction of its recordkeeping duties, the Supreme Court endorsed the use of "representative evidence"—which may include testimony, video recordings, and expert studies—to establish both liability (the employee's entitlement to overtime wages by working more than 40 hours in a given week) and damages (the amount of overtime wages owed) on a class-wide basis. Representative evidence is admissible so long as it "could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action." *Id.* at 455. Further, even if "[r]easonable minds may differ" about the probative value of representative evidence in determining the "time actually worked by each employee," that question is to be resolved by the jury, *not* at the class certification stage. *Id.* at 459.

In so holding, the Supreme Court relied on its decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that "when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work," employees should not be denied "any recovery on the ground that he is unable to prove the precise extent of uncompensated work." *Tyson Foods*, 577 U.S. at 456 (quoting *Mt. Clemens*, 328

U.S. at 687). The Supreme Court held that "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* Under these circumstances, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* (alteration in original) *Mt. Clemens* also explicitly rejected the notion that allowing approximate damages in such situations would be unfair due to its imprecise nature or because employers sometimes make good-faith mistakes over what constitutes compensable "work":

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [statutory] requirements . . . . And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances . . . . In such a case "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

Mt. Clemens, 328 U.S. at 688 (citation omitted).[12]

CoreCivic's argument that the use of "averages" is impermissible in calculating wage and hour damages because they "do not compensate class members for their actual damages" is meritless. *Ridgeway v. Walmart Inc.*, 946 F.3d 1066 (9th Cir. 2020) is instructive. There, this Court upheld a jury's decision to award class-wide damages in a wage and hour class action even though "variation abounded" among the class members in terms of the length of rest breaks and uncompensated inspection time. *Ridgeway*, 946 F.3d at 1086. For example, the employees relied on representative evidence establishing a "fifteen-minute average" for unpaid inspection time even though one of the named plaintiffs testified that his inspections only "took between seven and ten minutes." *Id.* at 1087. The jury ultimately adopted the fifteen-minute inspection calculation and awarded class-wide damages based on that average. *Id.* at 1088. In affirming the damages award, the Ninth Circuit noted that "if Wal-Mart believed the testimony was not perfectly representative, its recourse was to present that argument to the jury." *Id.* at 1087.

[12] *Kamar*, which the Court cited in the Certification Order, explained that "California law requires employers to maintain timekeeping records, including the start and end times for each work period," and where an employer does not have the "required records for a claimant, then the claimant would have a relatively light burden of producing evidence of his hours before the burden shifts to the employer to produce specific evidence refuting the employees claim." *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 403 (C.D. Cal. 2008) (citing *Mt. Clemens*, 328 U.S. at 686–87).

"All that is required is enough representative evidence to allow a jury to draw a reasonable inference about the unpaid hours worked." *Id.* at 1088 (citing *Tyson Foods*, 136 S. Ct. at 1047-49). This Court found that the representative evidence proffered by the employees supported an award of class-wide damages because "many plaintiffs testified about the length of their rest breaks and inspection time" and further confirmed that, "[i]n a class action, testimony alone may serve as the basis for classwide damages." *Id.* at 1087.

CoreCivic also fundamentally misapprehends the holding of *Aldapa v. Fowler Packaging Co.*, 323 F.R.D. 316 (E.D. Cal. 2018). Specifically, CoreCivic perplexingly quotes *Aldapa* for the proposition "the district court's use of averages is unreliable" because "California's minimum wage laws require workers to be 'compensated for each hour worked.'" (Br. at 70.) However, the "averaging" referenced in *Aldapa* refers to the California appellate court's holding that employer's cannot avoid liability for failing to separately compensate employees for rest breaks under a piece-rate compensation system where the total compensation received by the employee exceeds the minimum wage based on an ***hourly average***. *Aldapa*, 323 F.R.D. at 336 ("California law also requires piece-rate employees to be separately compensated for rest-break periods at an amount not less than the minimum wage.").

In short, the Court correctly concluded that representative evidence can fill the evidentiary gap created by CoreCivic's failure to comply with California's wage statement and recordkeeping requirements. There is simply no merit to CoreCivic's argument that the district court abused its discretion by certifying the California Labor Law Class.

B. The District Court Did Not Abuse Its Discretion by Declining to Dismiss Actionable Claims for Violations of the California Labor Code.

The district court did not abuse its discretion by certifying the California Labor Law Class as to Plaintiffs' claims for failure to provide wage statements, failure to pay compensation upon termination, failure to pay minimum wages, and imposition of unlawful conditions of employment. CoreCivic concedes that Gomez's UCL claim is not time-barred. (Br. at 71.) As a result, each of Gomez's claims for CoreCivic's violations of California wage and hour law is actionable from May 31, 2013 to the present because the UCL's four year statute of limitations applies to all of the claims. *White v. Home Depot U.S.A., Inc.*, No. 17-cv-00752-BAS-AGS, 2019 U.S. Dist. LEXIS 40810, at *64 (S.D. Cal March 13, 2019) ("The limitations period applicable to wage claims is generally three years… As a practical matter, however, the limitations period is four years if the plaintiff raises a claim pursuant to California's Unfair Competition Law . . . .") (citations omitted); *Brandon v. Nat'l R.R. Passenger Corp. Amtrak*, No. CV 12-5796 PSG VBKX, 2013 WL

800265 (C.D. Cal. Mar. 1, 2013), at *3 (C.D. Cal. March 1, 2013) (holding that "[u]nder the UCL, wages are recoverable, and courts favor UCL suits over claims under statutes with shorter statutes of limitations") (citing *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 173 (2000)). The dismissal of Plaintiffs' cause of action for violations of the Labor Code would not change this result, as all of the claims are admittedly timely under the UCL's four-year statute of limitations.

As to Owino, he worked during each period of his detention at a CoreCivic facility and was released on March 9, 2015. (7-ER-1580.) Accordingly, all of Owino's claims for CoreCivic's violations of the Labor Code are timely based on the May 31, 2017 filing date of the original complaint. (13-ER-3061.) The district court did not abuse its discretion by declining to adjudicate the merits of CoreCivic's self-serving argument that—based on its own admittedly incomplete and insufficient employment "records"—the last date Owino worked in the VWP was May 22, 2013. *In re CornerStone Propane Partners, L.P.*, No. C 03-2522 MHP, 2006 WL 1180267, at *6 (N.D. Cal. May 3, 2006) ("[T]he mere fact that [plaintiff] may be vulnerable to a statute of limitations defense does not mandate a denial of class certification."); *Dibb v. Allianceone Receivables Mgmt., Inc.*, No. 14-5835 RJB, 2015 WL 8970778, at *8 (W.D. Wash. Dec. 16, 2015) ("[c]ourts have been nearly unanimous in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiff, does not preclude certification of a

class action so long as the necessary commonality and, in a 23(b)(3) class action, predominance, are otherwise present.") (alteration in original) (quoting *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 78 (E.D.N.Y. 2004). The district court's decision was particularly appropriate given that CoreCivic failed to raise this argument in its opposition to Plaintiffs' class certification motion or at the hearing on the motion. (1-ER-51-52.) Rather, CoreCivic first raised this argument in response to post-hearing supplemental briefing on issues entirely unrelated to statute of limitations issues. (*Id*. ("the Court is disinclined to resolve this issue at the class certification stage given Defendant's belated assertion of this defense and factual disputes concerning whether Mr. Owino worked during the Class Period for the California Labor Law Class").)

The district court's decision is further supported by the fact that Plaintiffs identified an additional class representative, Achiri Geh, who worked through the VWP between April 2017 and October 2019. (2-ER-348.) Even if there was some merit to CoreCivic's argument regarding Owino, the district court could have certified the classes conditioned on the substitution of Mr. Geh as a plaintiff and class representative. *Nat'l Fed'n of Blind v. Target Corp.*, 582 F.Supp.2d 1185, 1201 (N.D. Cal. 2007) (providing that if Rule 23 is satisfied, "the court may certify the class conditioned upon the substitution of another named plaintiff.") (citing *Kremens v. Bartley*, 431 U.S. 119, 135 (1977) (where named plaintiffs' claims were

determined to be moot, ordering substitution of class representatives); *Gibson v. Local 40*, 543 F.2d 1259, 1263 (9th Cir. 1976) ("In any event, failure of proof as to the named plaintiffs would not bar maintenance of the class action or entry of judgment awarding relief to the members of the class.")).

CONCLUSION

For the foregoing reasons, the district court's class certification order should be affirmed.

Dated: October 18, 2021

FOLEY & LARDNER LLP
Eileen R. Ridley
Alan R. Ouellette

/s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Plaintiffs/Appellees Sylvester Owino, et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 15,210 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f). In certifying the foregoing I have relied upon the word count of the word processing system used to prepare the brief as authorized by Fed. R. App. P. 32(a)(7)(C).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point font.

Dated: October 18, 2021

/s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Plaintiffs/Appellees Sylvester Owino, et al.

CERTIFICATE OF SERVICE

I hereby certify that we electronically filed the foregoing Answering Brief for Plaintiffs/Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on October 18, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 18, 2021

/s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Plaintiffs/ Appellees Sylvester Owino, et al.