No. 21-55221

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVESTER OWINO; JONATHAN GOMEZ,
on behalf of themselves, and all others similarly situated,

Plaintiffs-Appellees,

v.

CORECIVIC, INC., a Maryland corporation,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California,
No. 3:17-cv-01112-JLS-NLS
Hon. Janis L. Sammartino

OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant certifies that it has no parent company, and that no publicly held corporation owns 10% or more of its stock.

RESPECTFULLY SUBMITTED this 28th day of July, 2021.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees are former immigration detainees who brought a class-action lawsuit against Defendant-Appellant CoreCivic, Inc., the private operator of the facility where they were detained pending removal proceedings, alleging violations of the Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. § 1589. (13-ER-3062.) The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction over pendent state law claims under 28 U.S.C. § 1367.

The district court granted class certification on April 1, 2020. (1-ER-79.) CoreCivic timely moved for reconsideration on April 15, 2020. (Dkt. 181.) The district court denied reconsideration on January 13, 2021. (1-ER-20.) CoreCivic filed a timely petition to appeal pursuant to Federal Rule of Civil Procedure 23(f) on January 27, 2021. (2-ER-82.) This Court granted permission to appeal on March 10, 2021. (2-ER-81.) It has jurisdiction under 28 U.S.C. § 1292(e).

ISSUES PRESENTED

1. Did the district court abuse its discretion in certifying the National and California Forced Labor Classes, when:

   a. Plaintiffs did not provide "significant proof" that CoreCivic had a policy of coercing detainees to perform labor under threat of discipline, only anecdotal declarations by four detainees from one facility?

b. Individual inquiries necessary to resolve any one detainee's claim predominate over any common questions?

2. Did the district court abuse its discretion in ruling that CoreCivic waived its personal jurisdiction challenge to the non-California-facility class members' claims by failing to raise it in its Rule 12 motion to dismiss, when that defense did not exist until the National Forced Labor Class was certified?

3. Did the district court abuse its discretion in refusing to narrow the class period for the California Forced Labor Class to comport with the applicable statute of limitations?

4. Did the district court abuse its discretion in certifying the California Labor Law Class when there is no common or reliable method of proving classwide damages?

5. Did the district court abuse its discretion in refusing to narrow the scope of the California Labor Law Class to include only the claim that is not time-barred?

6. Did the district court abuse its discretion in sua sponte certifying Plaintiffs' Failure-to-Pay/Waiting-Time claim?

STATUTORY AUTHORITIES

Pertinent statutory provisions are set forth verbatim in the attached Addendum.

STATEMENT OF THE CASE

I. Factual Background.

A. ICE Detention Standards.

U.S. Immigration and Customs Enforcement ("ICE"), a division of the Department of Homeland Security, is the federal agency responsible for overseeing immigration detention, including the detention of aliens pending their removal or removal proceedings. 8 U.S.C. § 1231(g); *Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.*, 980 F.3d 109, 112 (D.C. Cir. 2020). When ICE formed in 2003, Homeland Security Act, Pub. L. No. 107-296, § 441, 116 Stat. 2135 (2002), it adopted the National Detention Standards ("NDS"), which "established consistent conditions of confinement, program operations and management expectations within [its] detention system." https://www.ice.gov/factsheets/facilities-pbnds.

In 2008, ICE revised those standards "to improve safety, security and conditions of confinement for detainees." *Id*. Those standards became known as the Performance-Based National Detention Standards ("PBNDS"). *Id*. ICE revised the PBNDS in 2011 "with the input of many ICE personnel across the nation, as well as the perspectives of nongovernmental organizations." *Id*. The revised standards were "crafted to improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, reinforce protections against

sexual abuse and assault, and increase recreation and visitation" while "maintaining a safe and secure detention environment for staff and detainees." https://www.ice.gov/detain/detention-management/2011. The PBNDS was revised again in 2016 "to ensure consistency with federal legal and regulatory requirements as well as prior ICE policies and policy statements."[1] *Id*.

1. General Detainee Cleanliness.

The PBNDS requires all detainees to "maintain a high standard of facility sanitation and general cleanliness," be "responsible for personal housekeeping," and "maintain their immediate living areas in a neat and orderly manner," including: "1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture." PBNDS §§ 1.2(V)(A), 5.8(V)(C).[2]

2. Voluntary Work Program.

The PBNDS also requires facilities to operate a Voluntary Work Program ("VWP"). *Id*., §§ 5.8(I), (V)(A). The purpose of the VWP is to reduce the negative impact of confinement through "decreased idleness, improved morale and

[1] Hereafter, references and citations to the PBNDS are to the 2016 version.

[2] The NDS requires detainees "to keep their assigned living areas clean at all times," "to keep [their] bed and immediate area clean and neat," to "avoid many of the problems associated with unsanitary living conditions," and "to maintain neat and clean living quarters." https://www.ice.gov/doclib/dro/detention-standards/pdf/handbk.pdf.

fewer disciplinary incidents." *Id*., § 5.8(II)(1), (4). *See Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997) ("[W]ork occupies prisoners' time that might otherwise be filled by mischief[.]") (citation omitted). The VWP also gives detainees a chance to "be active, break up their day, leave their unit, gain skills and training, and earn money to purchase luxury items in the commissary." (3-ER-498, ¶ 10.) Detainees who participate in the VWP must sign a "voluntary work program agreement" and are paid "at least $1.00 (USD) per day."[3] PBNDS § 5.8(V)(K). Detainee participation in the VWP is purely voluntary and a detainee can stop participating in the program at any time. *Id*., § 5.8(V)(C).

If a detainee volunteers to participate in the VWP, the PBNDS mandates that the detainee "be ready to report for work at the required time and may not leave an assignment without permission." *Id*., § 5.8(M). Detainees are also required to "perform all assigned tasks diligently and conscientiously" and "may not evade attendance and performance standards in assigned activities nor encourage others to do so." *Id*. A detainee can be removed from the VWP for "[u]nexcused absences," "unsatisfactory work performance," "disruptive behavior," "threats to security," and "physical inability to perform the essential elements of the job." *Id*., § 5.8(H), (L). A detainee may also be subject to "a removal sanction imposed by

[3] Congress authorized "allowances" for VWP participants, but "not in excess of $1 per day." 8 U.S.C. § 1555(d); Department of Justice Appropriation Act, Pub. L. No. 95-86, 91 Stat. 426 (1978).

the Institution Disciplinary Panel for an infraction of a facility rule, regulation or policy."[4] *Id*.

3. Disciplinary System.

The PBNDS sets forth a disciplinary system to "promote[] a safe and orderly living environment for detainees." *Id*., § 3.1(I). Prohibited acts are divided into four categories: Greatest, High, High Moderate, and Low Moderate. *Id*., § 3.1(V)(C). Relevant here, "[e]ncouraging others to participate in a work stoppage or to refuse to work" and "conduct that disrupts or interferes with the security or orderly operation of the facility" are High offenses; "[r]efusing to obey the order of a staff member" and "[r]efusing to clean assigned living area[s]" are High Moderate offenses; and "[b]eing unsanitary or untidy" and "failing to keep self and living area in accordance with posted standards" are Low Moderate offenses. *Id*., §§ 3.1.A(II)(A)(214), (III)(A)(306, 307), (IV)(A)(413).

Detainees who are found guilty of committing a prohibited act are subject to a range of discipline, including:

1. Initiate criminal proceedings
2. Disciplinary transfer (recommend)
3. Disciplinary segregation (up to 72 hours)
4. Make monetary restitution, if funds are available

[4] The NDS also requires facilities to operate a VWP. https://www.ice.gov/doclib/dro/detention-standards/pdf/work.pdf.

5. Loss of privileges (e.g. commissary, vending machines, movies, recreation, etc.)
6. Change housing
7. Remove from program and/or group activity
8. Loss of job
9. Impound and store detainee's personal property
10. Confiscate contraband
11. Restrict to housing unit
12. Reprimand
13. Warning

Id., §§ 3.1.A(II)(B), (III)(B), (IV)(B). High offenses are subject to sanctions 1 through 11 and 13; High Moderate offenses are subject to sanctions 1 through 13; and Low Moderate offenses are subject to sanctions 5 through 13. *Id*. However, the PBNDS requires that "any sanctions imposed shall be commensurate with the severity of the committed prohibited act and intended to encourage the detainee to conform with rules and regulations in the future." *Id*., § 3.1(II)(14). It further instructs that the "initiation of criminal proceedings" is reserved for "serious incident[s] that may constitute a criminal act" and "[d]isciplinary segregation shall only be ordered when alternative dispositions may inadequately regulate the detainee's behavior." *Id*., § 3.1(II)(3), (7). These limitations ensure that only criminal or serious prohibited acts, such as indecent exposure, theft,

counterfeiting money, and destroying property, are subject to criminal prosecution referral or disciplinary segregation.[5] *Id*., § 3.1.A(III)(A)(300, 301, 310, 322).

The United States recently reaffirmed that "[i]mmigration detention like any other detention setting, requires that a facility be able to maintain order and discipline among the detainee population. … The PBNDS reflect[s] this basic reality," and nothing in the TVPA "bar[s] an immigration detention facility from taking basic steps to maintain order in the facility in accord with the PBNDS." (6-ER-1168.) The PBNDS's disciplinary system is in place "to ensure order." (*Id*.) A strike or work stoppage poses a "serious threat to facility order." (6-ER-1169, citing *Pilgrim v. Luther*, 571 F.3d 201, 205 (2d Cir. 2009) (noting that "[w]ork stoppages are deliberate disruptions of the regular order of [a] prison" and "are plainly inconsistent with legitimate objectives of prison organization").) And personal housekeeping "'must be routinely observed in any multiple living unit' for the 'health and safety' of detainees." (6-ER-1170, quoting *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978), and citing *Hause v. Vaught*, 993 F.2d 1079, 1085–86 (4th Cir. 1993).) *See also Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1273 & n.3, 1278 n.5 (11th Cir. 2020) (recognizing that enforcing the PBNDS,

[5] The NDS also has a detainee disciplinary system. https://www.ice.gov/doclib/dro/detention-standards/pdf/handbk.pdf; https://www.ice.gov/doclib/dro/detention-standards/pdf/classif.pdf

including discipline for "[r]efusing to clean assigned living area," does not violate the TVPA).

4. ICE Detainee Handbook.

ICE's National Detainee Handbook instructs detainees to "follow all the facility's rules, regulations, and instructions," and admonishes: "If you do not follow the facility's rules, you may be subject to discipline." (6-ER-1123, 1134.) Detainees are also instructed to "[c]ooperat[e] with the staff," "keep yourself and your surroundings clean," and "keep areas that you use clean, including your living area and any general-use area that you use." (6-ER-1123, 1131.)

B. CoreCivic's Operation of ICE Detention Facilities.

Pursuant to its authority vested by 8 U.S.C. § 1231(g), ICE contracts with private entities throughout the United States for detention services. Relevant here, ICE has contracted with CoreCivic for detention services at 24 facilities in 11 States. (3-ER-494–497, ¶ 4.) Contracting entities like CoreCivic must comply with and enforce the PBNDS at their detention facilities, including offering the VWP and implementing and advising detainees of ICE's disciplinary system.[6] (3-

[6] The South Texas Family Residential Center in Dilley, Texas must follow ICE's Family Residential Standards ("FRC"). (3-ER-497, ¶ 7.) The FRC imposes similar requirements pertaining to personal housekeeping, the VWP, and discipline. *See* FRC, §§ 1.4(II), (V), 3.1, https://www.ice.gov/detention-standards/family-residential. A handful of CoreCivic's ICE detention facilities are, or were at one point, subject to the NDS. (3-ER-551–552, ¶¶ 3–4; 5-ER-860, ¶ 16; 5-ER-956, ¶ 5 n.2; 5-ER-964, ¶ 4 n.1.)

ER-497–498, ¶¶ 7, 9; 6-ER-1357–1358.) *See also* PBNDS §§ 1.2(I), 3.1(I), 5.8(I); *id*., §§ 3.1(II)(1), (V)(B) (requiring PBNDS "rules and regulations, prohibited acts, [and] disciplinary sanctions that may be imposed" to be included in the detainee handbook that is issued to each detainee upon admittance).

1. Sanitation and Hygiene Policy.

CoreCivic's Sanitation and Hygiene Policy provides a procedure for ensuring "adequate standards of housekeeping and sanitation conditions" in each facility. (9-ER-1999.) The policy sets forth different procedures for maintaining and cleaning common living areas, private living areas, and other areas of a facility. (9-ER-1999–2001.) Section A applies to common living areas ("CLA Plan"), which is "[a]ny area in the unit other than the assigned cell that is used by all detainees assigned to that unit." (9-ER-1999.) It instructs that all detainees in a unit are responsible for "maintaining" their common living area, but only VWP detainee workers are responsible for its "daily cleaning":

> A. COMMON LIVING AREAS
>
> 1. **All detainees/inmates** assigned to a unit are responsible for **maintaining** the common living area in a clean and sanitary manner. The officer assigned to that unit will see that all materials needed to carry out this cleaning assignment are provided. If additional materials are needed, the officer will contact the Unit Manager.
>
> 2. Trash will not be thrown anywhere except in the trash containers provided in each unit.

3. Towels, blankets, clothing or any personal belongings will not be left in the common area.

4. The walls in the common area will be kept free of writing.

5. **Detainee/inmate workers** will be assigned to each area on a permanent basis to perform the **daily cleaning routine** of the common area.

    a. Sufficient **workers** will be allowed to each shift so as to provide seven (7) days a week twenty -four (24) hours a day coverage.

    b. Work details necessary for the sanitation of the unit will be assigned.

6. Duties to be performed by **detainee/inmate workers**:

    a. All trash will be removed daily.

    b. All floors will be swept and wet mopped daily, and as required during the day. Offices closed on weekends and holidays are not included.

    c. All toilet bowls, sinks, and showers will be thoroughly cleaned and scrubbed daily.

    d. Furniture is to be wiped off daily.

    e. Any other tasks assigned by staff in order to maintain good sanitary conditions.

7. The unit officer will be responsible for inspecting during assigned shift and logging in the time of their inspection in the unit logbook. The logbook will be reviewed by the Shift Supervisor.

(9-ER-1999–2000, emphasis added.)

Section B applies to private living areas ("PLA Plan"). (9-ER-2000.) The PLA Plan states: "**All detainees/inmates** are responsible for **maintaining** their assigned living area in a clean and sanitary manner." (*Id*., emphasis added.) It then lists nine tasks that all "detainees/inmates" must *refrain* from doing in their "assigned living area" (e.g., no trash on the floor, no writing on the walls, no hanging clotheslines). (*Id*.) It then states: "**All detainees/inmates** will be required to perform a **daily cleaning routine** of their cells." (*Id*., emphasis added.) It then lists five cleaning tasks they must do in their cells daily (e.g., sweep, remove trash, clean windows). (*Id*.) Thus, unlike the CLA Plan, the PLA Plan requires "[a]ll detainees/inmates" to participate in the "daily cleaning routine" of their *assigned* living area. (*Id*.)

Section C applies to other areas of the facility, i.e., areas other than a unit's common living area or a detainee's assigned living area ("OA Plan"). (9-ER-2000–2001.) That Section states: "The following should be used as guidelines in assuring that good housekeeping practices are met." (*Id*.) It then lists seven guidelines: "[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 required," "[w]alls and doors will be wiped daily," and "[a]ll equipment will be dusted or cleaned on a daily basis." (*Id.*)

This Sanitation and Hygiene Policy was approved by ICE. (5-ER-956, ¶ 5; 5-ER-964, ¶ 4.)

2. Voluntary Work Program.

As it is required to do, CoreCivic offers and administers a VWP in conformance with the PBNDS. (5-ER-1108–1113; 6-ER-1359–1361.) Detainees are informed about the VWP at their orientation. (6-ER-1362.) If a detainee wants to participate, they must sign up for an available job with their unit manager or case manager. (5-ER-970, ¶ 38.) If selected, they must sign a work release that informs them they are not permitted to work more than eight (8) hours a day or more than forty (40) hours a week. (6-ER-1362, 1364, 1372–1374.) The work release complies with the PBNDS and is approved by ICE. (6-ER-1363–1364.) For most jobs, detainees are given an allowance of at least $1 per day. (*Id.*)

VWP jobs include kitchen workers, outside workers, and administrative, laundry, commissary, and intake porters. (5-ER-970–971, ¶¶ 39–42.) Different jobs have different shifts, and the number of hours worked on any given day, even for the same job, can vary from day to day. (*Id.*) For example, administrative porters "**typically** work[] **no more than** four hours [or] … six hours" a shift; outside workers "**typically** work **no more than** six hours a day"; laundry,

commissary, and intake porters work "**on average**, two to four hours a day, but **no more than** six hours a day"; and kitchen workers "**typically** work four-to-six hour shifts." (*Id*., emphasis added.)

3. CoreCivic's Supplemental Handbook.

In addition to providing each detainee a copy of ICE's National Detainee Handbook (3-ER-497, ¶ 8; 6-ER-1120–1147), CoreCivic provides its own Supplemental Detainee Handbook (9-ER-2046–2096). Like the ICE National Detainee Handbook, the Supplemental Detainee Handbook states that detainees are expected to "[o]bey all safety, security and sanitation rules, policies and procedures," "[o]bey all orders as given by staff members," and "keep [your] beds and assigned living areas clean at all times." (9-ER-2053, 2072, 2081–2082, 2084–2085.) It also instructs: "During the cleaning of the pods, return and remain inside your cell/room." (9-ER-2083.) Further, as required by PBNDS § 3.1(V)(B), the Supplemental Detainee Handbook gives notice of ICE's prohibited acts and disciplinary sanctions. (9-ER-2088–2091.) It lists, pro forma, the prohibited acts and sanctions outlined in PBNDS § 3.1.A. (*Id*.)

II. Procedural History.

A. Plaintiffs' Complaint.

Plaintiffs Sylvester Owino and Jonathan Gomez are former civil immigration detainees who alleged they were detained at the Otay Mesa Detention Center ("OMDC") in Otay Mesa, California, a facility owned and operated by

CoreCivic. (13-ER-3063–3064, ¶¶ 7–8, 10–11.) In their Complaint, Plaintiffs allege that, while they were at OMDC, they were "forced or coerced" to clean the facility under threat of punishment, including disciplinary segregation, in violation of the TVPA, 18 U.S.C. § 1589, and the California Trafficking Victims Protection Act ("California TVPA"), Cal. Penal Code § 236.1. (13-ER-3066, ¶ 16; 13-ER-3069, ¶¶ 27–29; 13-ER-3073–3081, ¶¶ 40–62.) They further allege that they participated in the VWP but were deprived of several state labor protections, including, Cal. Labor Code §§ 201–202 (compensation upon termination), 226 (wage statements), 226.7 (meal and rest periods), 432.5 (lawful conditions of employment), 510 (overtime wages), and 1194 (minimum wage), and Industrial Welfare Commission Wage Order ("WO") 5-2001. (13-ER-3083–3089, ¶¶ 71–101.) They also assert derivative claims under California's Unfair Competition Law ("California UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq., and common law claims for negligence and unjust enrichment. (13-ER-3082–3083, ¶¶ 63–70; 13-ER-3089–3095, ¶¶ 102–128.) They are seeking compensatory and punitive damages, statutory penalties, disgorgement, and restitution.[7] (13-ER-3083–3084, ¶¶ 70, 74; 13-ER-3088–3089, ¶¶ 93, 96; 13-ER-3096.)

[7] Plaintiffs also sought injunctive and declaratory relief in conjunction with their TVPA, California TVPA, and California UCL claims, but the district court ruled that they did not have standing to pursue that relief on behalf of themselves or anyone else. (1-ER-36–43.)

B. Class Certification.

Plaintiffs' Complaint also sought class certification. (13-ER-3070–3073, ¶¶ 30–39.) Relevant here, Plaintiffs moved to certify three Classes pursuant to Civil Rule of Procedure 23(b)(3): (1) National Forced Labor Class; (2) California ("CA") Forced Labor Class; and (3) California ("CA") Labor Law Class.[8] (7-ER-1534–1535.)

1. National and CA Forced Labor Classes.

Plaintiffs defined the National Forced Labor Class to include:

> All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008 and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the ICE PBNDS, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid.

(7-ER-1535.) Plaintiffs sought to certify the TVPA claim for this Class—which included "several thousands of former and current ICE detainees" (7-ER-1557–1559) detained at 24 facilities across 11 States (3-ER-494–497, ¶ 4). Plaintiffs defined the CA Forced Labor Class the same way, except they modified it to include only detainees who "were detained at a CoreCivic facility located in California between January 1, 2006 and the present." (7-ER-1354.) Plaintiffs

[8] Plaintiffs moved to certify National and California Basic Necessities Classes, which alleged that CoreCivic coerced detainees to participate in the VWP by withholding basic living necessities, but the district court did not certify either of those Classes. (1-ER-33–36.)

sought to certify the California TVPA claim for this Class, which also included "several thousands of former and current ICE detainees." (7-ER-1557–1559.)[9]

In their briefing, Plaintiffs narrowed the Forced Labor Class claims and alleged that CoreCivic had a policy of coercing detainees into cleaning *common* living areas by threatening disciplinary segregation if they refused. (7-ER-1551–1553.) To support that purported policy, Plaintiffs submitted CoreCivic's Sanitation and Hygiene Policy and pointed to the CLA Plan's language that "all detainees/inmates assigned to a unit are responsible for maintaining the common living area in a clean and sanitary manner." (*Id*.) Plaintiffs further asserted—incorrectly—that the CLA Plan requires non-VWP detainees "to perform the daily cleaning routine of the common area." (*Id*.) Plaintiffs cited to several acts that are prohibited by the PBNDS and included in CoreCivic's Supplemental Handbook—specifically: "[r]efusing to clean assigned living area[s]"; "[r]efusing to obey the order of a staff member"; and "conduct that disrupts or interferes with the security or orderly operation of the facility." (*Id*.)

[9] During the class period, there were three CoreCivic facilities in California. OMDC is currently CoreCivic's only ICE detention facility in California. (3-ER-497, ¶ 5.) The California City Correctional Facility closed in November 28, 2013, and all ICE detainees were transferred to other facilities. (*Id*.) The San Diego Correctional Facility ("SDCF") closed in October 2015, and all ICE detainees were transferred to OMDC. (*Id*.) Although Owino and Gomez avow that they were detained at OMDC, their records show that they were detained at SDCF during the relevant class periods. (Dkt. 147-1, ¶¶ 7–8.)

Plaintiffs also submitted their own declarations (two) and the declarations of two other former detainees who were detained at OMDC.[10] Owino and Gomez alleged that "there were many instances of when detainees in a living pod would have to work to clean the common areas," including occasional "deep cleans" before a "dignitary" arrived to inspect the facility, and "removing trash from the common areas of the living pods on a daily basis, sweeping and mopping floors, and cleaning toilet bowls, sinks, showers, and furniture." (7-ER-1584, ¶¶ 18–20 [Owino]; 7-ER-1593, ¶¶ 14–16 [Gomez].) They further alleged that, if they did not follow an order to clean the pod, they "could be subject to more random and frequent searches and cell tossing," "removed from the general living pod and placed in a more restrictive housing," or placed "on lockdown longer than usual, or not [allowed] to use the TV." (7-ER-1585, ¶ 23 [Owino]; 7-ER-1594, ¶ 19 [Gomez].) The other two former detainees alleged that they were "obliged to follow all the orders and instructions issued by the guards and employees of CoreCivic, including performing cleaning tasks and [sic] communal and private

[10] Plaintiffs belatedly attached two detainee declarations to their reply (3-ER-413–421), but the district court did not rely on them (1-ER-30–79). One of the declarants was a former OMDC detainee. (3-ER-414, ¶ 3 [Santibanez].) The other was a former City of Mesa detainee, not an ICE detainee and, therefore, not a member of the Class. (3-ER-418, ¶ 2 [Jones].) Plaintiffs submitted another OMDC detainee declaration in conjunction with supplemental briefing on Plaintiffs' claims for prospective relief (2-ER-348, ¶ 2 [Geh]), which the district court also did not consider in deciding class certification (1-ER-30–79).

areas without payment." (7-ER-1604, ¶ 3 [Nunez]; 7-ER-1615, ¶ 3 [Ortiz].) They also alleged that they "understood" that they could be placed in segregation if they refused to follow a staff order. (7-ER-1604, ¶ 4 [Nunez]; 7-ER-1615, ¶ 4 [Ortiz].)

CoreCivic opposed class certification of the Forced Labor Classes, raising, among others, the following arguments:

Typicality and Adequacy. For purposes of the National Forced Labor Class, Plaintiffs were detained only at one California facility. (3-ER-452.) Without knowledge of the policies or practices—and how they were implemented—at non-California facilities, they cannot say that they suffered the same or similar injury as detainees in those other facilities. (*Id*.) Indeed, their allegations about threats of punishment were based largely on what they "witnessed during [their] detentions at OMDC." (7-ER-1585, ¶¶ 23–24 [Owino]; 7-ER-1594, ¶¶ 19–20 [Gomez].) They also have no incentive to pursue a class action on behalf of detainees in facilities where they never stepped foot. (3-ER-452.)

Regarding the CA Forced Labor Class, the California TVPA has a seven-year statute of limitations. *See* Cal. Civ. Code § 52.5(c); *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 941 (N.D. Cal. 2018). Thus, the earliest that it could apply is May 31, 2010, seven years before the Complaint. (3-ER-445–446.) Neither Plaintiff can bring a claim accruing before that date; therefore, they cannot

represent a class with claims that accrued prior to May 31, 2010, much less dating back to January 1, 2006, as the Class is currently defined. (*Id*.)

Commonality and Predominance. Plaintiffs failed to provide "significant proof" that CoreCivic has a policy or practice of threatening detainees who refuse to clean common living areas with punishment. (3-ER-452–455.) The CLA Plan only requires detainees to "maintain[]" their common living area (9-ER-1999), and CoreCivic submitted eight declarations, all from CoreCivic officials responsible for or knowledgeable of the implementation and/or supervision of this Plan at seven different facilities, who avowed that it "only requires detainees to clean up after themselves" in the common living areas and "does not … require detainees to clean up after other detainees in common living areas"; only VWP detainee workers are responsible for cleaning the common living areas:

> [T]his policy only requires detainees to clean up after themselves in the common areas. For example, if a detainee spills a drink on the floor, or if something they are cooking in the microwave bubbles over, they are expected to clean up the mess, rather than leaving it for the assigned porters to clean up later.
>
> [T]his policy does not, however, require detainees to clean up after other detainees in common living areas. The only detainees who clean up messes other than those they made themselves are those detainees who volunteer to participate in the VWP and are assigned as unit porters. VWP unit porters are paid $1 per day for their participation. No other detainees are assigned jobs or required to work in or clean up the common living areas.

(5-ER-965, ¶¶ 8–9; *see also* 3-ER-486–488, ¶¶ 6–20; 3-ER-502–504, ¶¶ 6–17; 3-ER-545–547, ¶¶ 5–19; 3-ER-568, ¶¶ 19–20; 3-ER-611–613, ¶¶ 9–24; 3-ER-617–620, ¶¶ 5–20; 5-ER-859–860, ¶¶ 6–15.)

CoreCivic's Managing Directors of Operations, J. Ellis and S. Stone, and the OMDC Warden, F. Figueroa, also testified/avowed that only VWP detainee workers are required to clean common living areas, no one else. (5-ER-956–959, ¶¶ 6–22; 6-ER-1375–1376; 8-ER-1672.) Ellis was CoreCivic's Rule 30(b)(6) witness who provided testimony concerning the "creation, development, review and approval, intent, implementation and meaning" of its policies "concerning work performed by detainees." (Dkt. 78, 78-1, 102.) Plaintiffs' four detainee declarations were not significant contrary proof of a policy or practice of requiring non-VWP detainees to clean the common living areas at OMDC, much less at all 24 facilities.[11] (3-ER-454.)

Moreover, the PBNDS § 3.1.A(III)(A)(306), and Supplemental Detainee Handbook (9-ER-2090) prohibit only a refusal to clean a detainee's "assigned living area," not the *common* living area; general directives to obey staff orders and not disrupt security are necessary to maintain order and security in a detention facility; and Plaintiffs did not provide a single record showing that any detainee

[11] Plaintiffs did not even submit policies for 10 of the 24 CoreCivic facilities. (3-ER-454; 6-ER-1351; 7-ER-1447, ¶ 11.)

was disciplined for refusing an order to clean a common living area.[12] (3-ER-434–435, 453–455.) All they submitted was four anecdotal declarations primarily based on what the declarants witnessed, observed, or were told by other detainees at SDCF/OMDC. (7-ER-1594, ¶ 19 [Gomez]; 7-ER-1615, ¶ 4 [Ortiz].) Thus, there was not significant proof that detainees were forced to clean common living areas under threat of discipline.

In addition to the absence of a classwide policy or practice, resolution of the TVPA and California TVPA claims require many individual determinations for each class member and those individual inquiries predominate and defeat class certification. (3-ER-457–459.) TVPA claims are inherently subjective and require an examination of each class member's state of mind to determine (1) whether they were, in fact, coerced into performing labor because of a threat of discipline. That also presumes (2) the detainee was even aware of CoreCivic's Sanitation and Hygiene Policy and the PBNDS's prohibited acts and (3) cleaned a common living area at the behest of a staff order. (*Id*.)

[12] All the hygiene-related records they did provide involved OMDC detainees' failures to clean their assigned living area or for unsanitary practices, such as throwing feces or urine out of their cells into the common living area. (3-ER-506, ¶¶ 28–32; 4-ER-628–638, ¶¶ 33–88.)

Superiority and Manageability. The fact that there are three other lawsuits around the Country raising identical or nearly identical claims[13] shows that class members have an interest in controlling their own separate actions and that "litigation concerning the controversy [has] already begun by class members." (3-ER-461–463, quoting Fed. R. Civ. P. 23(b)(3)(A).) Plaintiffs also failed to propose a plan to efficiently manage the Forced Labor claims and all the individual issues (involving liability and damages) in conjunction with the many different claims and counterclaims involving the CA Labor Law Class. (*Id*.)

Personal Jurisdiction. Regarding the National Forced Labor Class, the district court does not have personal jurisdiction over any claims that arose outside California, i.e, claims by non-California-facility detainees.[14] (Dkt. 117-1; Dkt. 140 at 12–20.) CoreCivic conducts substantial business in at least 20 States, and its business in California is a small part of its portfolio. (*Id*.) General jurisdiction lies only in Maryland (where CoreCivic is incorporated) or Tennessee (where CoreCivic is headquartered), not in California. (*Id*.) The district court lacks specific jurisdiction because: (1) in operating its non-California facilities, CoreCivic did not intentionally direct that conduct toward California or

[13] *See Barrientos v. CoreCivic*, No. 4:18-cv-00070-CDL (M.D. Ga.); *Martha Gonzalez v. CoreCivic*, No. 1:18-cv-00169-LY (W.D. Tex.); *Carlos Gonzalez v. CoreCivic*, No. 3:17-cv-02573-JLS-NLS (S.D. Cal.).

[14] CoreCivic raised this argument in a separate, but contemporaneous, motion for judgment on the pleadings. (Dkt. 117-1; 3-ER-441 n.13.)

purposefully avail itself of the privilege of conducting business in California through that conduct; (2) the non-California-facility class members' claims did not arise out of or relate to CoreCivic's activities in California; and (3) the exercise of jurisdiction in California is not reasonable. (*Id*.)

* * *

The district court certified both Forced Labor Classes. The court first ruled that Plaintiffs were typical and adequate members of both Classes. (1-ER-48.) Plaintiffs could represent the non-California-facility class members because there was evidence that CoreCivic uses "standardized policies concerning the cleaning of common areas under the threat of discipline" at all its facilities. (1-ER-54.)

Regarding commonality and predominance, the district court ruled that "Plaintiffs sufficiently have demonstrated for purposes of class certification that Defendant implemented common sanitation and discipline policies that together may have coerced detainees to clean areas of Defendant's facilities beyond the personal housekeeping tasks enumerated in the ICE PBNDS." (1-ER-60–61.) This ruling was based on language in the CLA Plan and the OA Plan. (*Id*.) The district court ruled that it was "not clear from the face of" those Plans that they do not require all detainees to clean common living areas. (*Id*.) It disregarded CoreCivic's substantial evidence that those Plans require only VWP detainee workers to clean common living areas, finding that the four declarations submitted

by Plaintiffs created "a dispute of fact" that it could not resolve at this stage. (*Id*.) As for the coercion component, it ruled that the general directives in the Supplemental Detainee Handbook to cooperate with staff and obey staff orders, as well as the pro forma listing of prohibited acts ("refusal to clean assigned living area" and "refusal to obey a staff member's" orders) and possible sanctions "suffice[d] to show that Defendant had a uniform disciplinary policy that could reasonably be understood to have subjected detainees to discipline for failure to comply with the uniform sanitation policy." (1-ER-62.) That conclusion was "bolstered" by the four detainee declarations attesting that the "failure to abide by an order to clean the common areas could result in disciplinary action." (*Id*.)

On the issue of common and predominating questions, the district court "ultimately agree[d] with Plaintiffs." (1-ER-72–73.) It was "not convinced" that the TVPA or California TVPA involved a subjective inquiry that required individualized inquiries into each detainee's state of mind. (*Id*.) Rather, it ruled the inquiry was an objective one—whether a "reasonable" detainee would feel compelled to work under the circumstances—which did not require a detainee-by-detainee inquiry. (1-ER-71, 73–74.) Alternatively, it ruled that a jury could *infer* that all class members felt compelled to work simply because they shared "common attributes"—all of them "are or were involuntarily detained in Defendant's facilities and subjected to common sanitation and disciplinary

policies." (1-ER-73–75.) The district court ruled that both the National and CA Forced Labor Classes satisfied commonality and predominance for the same reasons. (1-ER-75–76.)

With respect to superiority, the district court ruled that, although a class action "could prove unwieldly," class members would not pursue their own individual claims otherwise. (1-ER-78.) Finally, the district court ruled that CoreCivic waived its personal jurisdiction defense because it did not challenge the court's personal jurisdiction in its Rule 12(b) motion to dismiss and "the legal basis for the defense was known" to CoreCivic at that time. (1-ER-29–30.)

CoreCivic moved for reconsideration on several grounds, all of which the district court denied. (Dkt. 181 at 10–28; 1-ER-5–14.)

2. CA Labor Law Class.

Plaintiffs defined the CA Labor Law Class to include:

> 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 (the "VWP") during their period of detention in California.

(7-ER-1534.) Plaintiffs sought to certify their claims under California's Labor Code and UCL, WO 5-2001, and for unjust enrichment and negligence on behalf of this Class—which allegedly included "at least 8,346 putative class members." (1-ER-1556–1558.)

Plaintiffs argued that certification was proper because they had participated in the VWP and alleged that they were not paid minimum wage or overtime wages, not provided rest and meal breaks or wage statements, and worked under unlawful terms (for less than minimum wage).[15] (7-ER-1559, 1561–1562.) Owino was a kitchen worker, a chemical porter, and a cleaner / janitor. (7-ER-1580–1581, ¶¶ 5, 8–9.) Gomez worked only as a cleaner / janitor. (7-ER-1591, ¶ 5.) They further argued that their claims all hinge on the common legal question of whether they are "employees" under California law. (1-ER-1561.)

CoreCivic opposed certification of this Class as well. As a threshold matter, CoreCivic argued that Plaintiffs failed to mention, much less analyze, one of their Labor Code claims in their motion for class certification—Count Nine (Failure to Pay / Waiting Time). (3-ER-440; 7-ER-1533–1569.)

Moreover, the class period could not extend back to May 31, 2013, four years before Plaintiffs filed their Complaint on May 31, 2017 (13-ER-3061). (3-ER-444–445.) Labor Code claims seeking damages for minimum wage (§§ 1194, 1197), overtime wages (§§ 204, 510, 1194), meal and rest breaks (§§ 226.7, 512), wage statement damages (§ 226(e)), failure to pay/waiting time (§§ 201–203), and unlawful terms (§ 432.5) have a three-year statute of limitations, *see* Cal. Code

[15] Plaintiffs conceded that their UCL, unjust enrichment, and negligence claims are derivative of their Labor Code claims. (7-ER-1561.)

Civ. Proc. § 338; *Hassan v. Praxair, Inc.*, 2019 WL 3064435, at *5 (C.D. Cal. Mar. 4, 2019); a claim for unjust enrichment has a three-year statute of limitations, *see* Cal. Code Civ. Proc. § 338(d); a claim for negligence has a two-year statute of limitations, *see* Cal. Code Civ. Proc. § 335.1; and claims under WO 5-2001 and for minimum wage (§ 1197.1) and wage statement penalties (§ 226(e)) have a one-year statute of limitations, *see* Cal. Code Civ. Proc. § 340. (*Id.*) Only a claim under California's UCL has a four-year statute of limitations, *see* Cal. Bus. & Prof. Code § 17208, but Plaintiffs conceded that that claim is *derivative* of their Labor Code claims. (*Id.*)

CoreCivic also made the following arguments against class certification:

Typicality and Adequacy. Although Owino claimed that he was detained "at various times from approximately November 7, 2005, to March 9, 2015" (7-ER-1579, ¶ 2), he did not specify when he last worked in the VWP. (3-ER-448–449.) In fact, the last day he worked in the VWP was on May 22, 2013 (6-ER-1273), more than four years before the Complaint was filed. Since all his claims were time-barred, he could not represent the Class. (3-ER-448–449.) Gomez's last day in a CoreCivic facility was on September 18, 2013 (7-ER-1590, ¶ 2), and the last day he worked was on September 17, 2013 (3-ER-412), more than three years before the Complaint was filed. Thus, he could not represent the Class to the extent it pursued *any* claims under California's Labor Code, WO 5-2001, or for

unjust enrichment or negligence because they have one-, two-, or three-year statutes of limitations. (3-ER-451–452.)

Commonality, Predominance, and Superiority. Several Labor Code claims (overtime wages, meal period, and rest period) involve individual inquiries regarding how many hours a detainee worked in a day or week and whether (and when) they received a break. (3-ER-460–461.) And although the legal question of whether VWP detainees are employees under California law is common to the class, that question did not predominate. (*Id*.) Plaintiffs failed to propose any method by which they could calculate classwide damages with common proof and, even if they did, each detainee's calculated damage would then need to be offset by CoreCivic's defense and counterclaim for unjust enrichment, a case-by-case determination.[16] (3-ER-460–461; 12-ER-2931–2935.) That complicated and individualized evaluation for each class member is not efficient on a classwide basis. (3-ER-460–461.)

* * *

The district court certified the CA Labor Law Class in part. The court did not certify the Class to the extent it brought claims under California's Labor Code

[16] This offset includes the cost of providing each detainee housing, food, clothing, and other costs and expenses associated with their detention. (12-ER-2928, ¶ 35; 12-ER-2934, ¶ 24.) Those costs and expenses are unique to each detainee and the duration of their detention.

for overtime wages, rest breaks, meal breaks, or penalties for wage statements.[17] (1-ER-48–53, 58–59, 66–68.) But it did certify the class to the extent it brought the following claims:

- UCL
- Labor Code – Minimum Wage
- Labor Code – Wage Statement (damages)
- Labor Code – Failure to Pay / Waiting Time[18]
- Labor Code – Unlawful Terms

(1-ER-79.)

The district court first ruled that, even if Plaintiffs' Labor Code claims were time-barred (one- or three-year statute of limitations), they could still "recover for the majority of the alleged violations under the UCL [four-year statute of limitations]." (1-ER-51.) Thus, it ruled that the class period for the UCL, minimum wage, failure-to-pay, and unlawful-terms claims "begins May 31,

[17] The certification order does not formally certify the WO 5-2001, unjust enrichment, or negligence claims. (1-ER-79.) Because they are derivative of the Labor Code claims, they cannot be certified if the principal claims are not certified. Moreover, the district court did not address CoreCivic's related statute-of-limitations arguments but noted: "[T]o the extent these claims are causes of action not barred by the statute of limitations, the Court concludes that common questions predominate to the same extent discussed above." (1-ER-76 & n.19.) As discussed below, they are barred by the limitations period and should not be certified.

[18] The district court ruled that this claim could not be brought by members of the Class who are *currently* participating in the VWP because any claim would not be ripe. (1-ER-36 n.4, & 48 n.7.)

2013."[19] (*Id*.) For those claims that seek remedies that cannot be pursued under the UCL, the court ruled that the class period for the wage-statement (damages) and waiting-time (penalties) claims begin on May 31, 2014, and the class period for the wage-statement (penalties) claim begins on May 31, 2016.[20] (*Id*.)

The district court ruled that Owino could represent the Class on its UCL, minimum wage, wage-statement (damages), failure-to-pay (damages), waiting-time (penalties), and unlawful-terms claims, all of which had three- or four-year statutes of limitations since he was released on March 9, 2015. (1-ER-52.) The court refused to resolve when he last worked in the VWP, citing "factual disputes." (*Id*.) Had it resolved the purported dispute (and in CoreCivic's favor), all of Owino's claims would be time-barred and he could not represent the Class because his claims accrued more than four years before he filed the complaint. Gomez was

[19] Although the district court did not specifically mention the failure-to-pay or unlawful-terms claims, those claims have been held to be recoverable under the UCL. *See Arkley v. Aon Risk Servs. Companies, Inc.*, 2012 WL 12886445, at *4 (C.D. Cal. June 13, 2012); *Pineda v. Bank of Am., N.A.*, 241 P.3d 870, 872–73 (Cal. 2010).

[20] Under §§ 201–203, a claimant can sue to recover the wages that were earned but not paid upon their termination (failure to pay) *and* penalties until those earned wages are paid (waiting time). *See Pineda*, 241 P.3d at 874. Both claims are subject to the three-year statute of limitations, but a claim to recover waiting-time penalties is not recoverable under the UCL. *Id*. at 872–73. Plaintiffs' Count Nine brings claims for both the failure to pay wages upon termination and waiting-time penalties. (12-ER-2964, ¶¶ 94–96.)

permitted to represent the Class on its UCL, minimum wage, failure-to-pay (damages), and unlawful-terms claims. (1-ER-52.)

Regarding commonality and predominance, the district court recognized that Plaintiffs failed entirely to apply these elements to each of the Class's claims: "Strictly speaking, this does not suffice to meet Plaintiffs' burden." (1-ER-64.) Nonetheless, citing "public policy [to] … dispos[e] of cases on the merits," the court sua sponte analyzed each claim for Plaintiffs. (*Id.*) It addressed the minimum wage claim first. Although noting that it initially "expressed concern" regarding whether this claim was susceptible to common damages proof, it concluded that "methods of common proof could be devised" to formulate classwide damages. (1-ER-65.) It concluded that a jury might be able to calculate damages for the class based on records showing the days that detainees worked and testimony regarding the *average* or *typical* number of hours worked each day for each position. (*Id.*, citing 5-ER-970–971, ¶¶ 39–42 (avowing only that administrative porters "typically work[] no more than four hours [or] … six hours" a shift; outside workers "typically work no more than six hours a day"; laundry, commissary, and intake porters work "on average, two to four hours a day, but no more than six hours a day"; and kitchen workers "typically work four-to-six hour shifts"). The court also concluded that Plaintiffs' wage-statement, failure-to-

pay/waiting-time, and unlawful-terms claims were susceptible to common proof.[21] (1-ER-69–70.)

CoreCivic moved for reconsideration on several grounds, all of which the district court denied. (Dkt. 181 at 28–33; 1-ER-13–19.)

SUMMARY OF THE ARGUMENT

1. This sprawling immigration detainee class action covers three classes, one of them nationwide, and involves two dozen detention facilities and hundreds of thousands of putative class members over a period of 14 years. The district court erroneously certified the National and CA Forced Labor Classes on just four detainee declarations, all from one facility. The anecdotal allegations of four detainees are hardly proof of a policy or practice at one facility, much less proof of a systemwide practice at the 23 other facilities they never stepped foot in. Plaintiffs' failure to provide "significant proof" of the policy they allege exists should have precluded class certification.

2. The many individual inquiries necessary to resolve those class members' TVPA and California TVPA claims should have defeated class certification as well. To resolve just one class member's claim requires an examination of not only the circumstances surrounding his experience and circumstances, but a delve into his subjective mind to determine whether he was in

[21] The district court also found superiority for the same reasons it certified the Forced Labor Classes. (1-ER-76–78.)

fact coerced. The district court erroneously found commonality and predominance by relying on a classwide causation inference that is incompatible with Supreme Court and Ninth Circuit jurisprudence, and which eviscerates the causation elements of the statutes and Rule 23.

2. The district court's certification of the CA Labor Law Class was also error because it certified the Class despite a reliable and common method to prove classwide damages. Instead, it assumed that damages could be constructed based on varying averages that will overcompensate or undercompensate class members should they prevail on their claims. It also ignored the individual determinations underlying CoreCivic's counterclaim, which will offset any awarded damages depending on the circumstances of each class member's detention. At a minimum, the district court should not have certified any claims other than the California UCL claim because they are time-barred, and only Gomez can represent the Class to the extent that that claim is viable.

ARGUMENT

I. Standard of Review.

This Court reviews a district court's class certification decision for an abuse of discretion. *B.K. v. Snyder*, 922 F.3d 957, 965–66 (9th Cir. 2019). "An error of law is a per se abuse of discretion," and therefore a class certification decision is reviewed de novo for any legal errors. *Id*. A district court also abuses its

discretion if it "(1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *Id.* Factual findings are reviewed for clear error and should be reversed if they are "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record." *Id.*

II. Rule 23's Elements.

To certify a class, a plaintiff must satisfy the threshold elements in Rule 23(a)—numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a)(1)–(4). A plaintiff seeking damages must also satisfy Rule 23(b)(3)—predominance and superiority. Failure to meet "any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

Satisfying each element presents an extraordinarily high burden. "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). A district court presented with a motion to certify must conduct a "rigorous analysis" and conclude that each

Rule 23 element has been established. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011).

III. The Forced Labor Classes Should Not Be Certified.

A. Plaintiffs Did Not Provide "Significant Proof" of a Classwide Policy of Forced Labor, which Defeats Commonality.

To certify a claim based on a systemwide policy or practice, Plaintiffs were required to present "significant proof" that the policy or practice in fact exists, that it was implemented in the way they allege, and that all class members were exposed to it. *Wal-Mart*, 564 U.S. at 353; *Ellis*, 657 F.3d at 983. The district court concluded that there was sufficient evidence 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.) This conclusion was an abuse of discretion for the following reasons.

1. Sanitation and Hygiene Policy.

Plaintiffs' forced-labor theory is based solely on their allegation that all detainees are required to "clean" "common living areas" of the facility, which allegedly derives from CoreCivic's Sanitation and Hygiene Policy. Section A.1 of the CLA Plan states that "[**a**]**ll** detainees/inmates assigned to a unit are responsible for **maintaining** the common living area in a clean and sanitary manner." (9-ER-1999–2000, emphasis added.) Sections A.5 and A.6 state that "[d]etainee/inmate

workers will be assigned … **to perform the daily cleaning routine** of the common area" and lists those "[d]uties" that those VWP detainee workers are responsible for performing. (*Id*., emphasis added.) Thus, only VWP detainee workers are required to *clean* the common living areas. Non-VWP detainees are instructed to "return and remain inside [their] cell/room" while the VWP detainee workers clean. (9-ER-2083.)

The district court, however, believed the CLA Plan to be ambiguous: "There is no indication from the face of the policies that these tasks are to be performed only by those participating in the VWP …." (1-ER-61; *see also* 1-ER-60 [noting that it "is not clear from the face of the policies" that "policies do not require detainees to *clean* the common areas of the housing units"].). The ambiguity purportedly derived from other provisions in the Sanitation and Hygiene Policy, provisions on which Plaintiffs did not rely. The district court first pointed to the second sentence in Section A.1, which states: "All detainees/inmates assigned to a unit are responsible for maintaining the common living area in a clean and sanitary manner. **The officer assigned to that unit will see that all materials needed to carry out this cleaning assignment are provided**." (9-ER-1999, emphasis added; 1-ER-60.) But that sentence does not suggest that "[a]ll detainees/inmates" must perform the "daily cleaning routine" reserved for "detainee/inmate workers." While VWP detainee workers need "materials" to perform the "daily cleaning

routine" set forth in Sections A.5 and A.6, non-VWP detainees need "materials" to clean up after themselves, e.g., trash receptacles/liners to throw away their trash in conformance with Section A.2 ("Trash will not be thrown anywhere except in the trash containers provided in each unit"), or solvent to remove writing they affix on a wall in conformance with Section A.4 ("The walls in the common area will be kept free of writing"). (9-ER-1999–2000.)

The district court also pointed to the OA Plan. (1-ER-60–61.) But that Plan merely provides "guidelines" for cleaning areas "OTHER" than the personal and common living areas (9-ER-2000–2001), which are cleaned by VWP detainee workers (5-ER-970–971, ¶¶ 39–42). Unsurprisingly, Plaintiffs never relied on the OA Plan to support their contention that all detainees are required to clean common living areas. Neither they nor the other detainee declarants avowed that they were forced to clean any area other than the common living area. (7-ER-1579–1618.) Thus, the OA Plan is irrelevant.

Even if there was ambiguity in the Policy, it was *Plaintiffs'* burden to prove—with "significant proof"—that the policies required all detainees to clean the common living areas. *See Wal-Mart*, 564 U.S. at 353; *Ellis*, 657 F.3d at 983. Plaintiffs provided the declarations of only four detainees, all from one facility. Two of the four detainees merely avowed that they "had to do additional cleaning work in the communal areas when visitors came to the detention center." (7-ER-

1605, ¶ 6 [Nunez]; 7-ER-1616, ¶ 5 [Ortiz].) This anecdotal evidence is "worlds away" from the "significant proof" required to establish that every class member at all 24 facilities (in 11 different states) was exposed to a practice of forced labor. *See Wal-Mart*, 564 U.S. at 355. Indeed, it does not even establish a common practice at OMDC for purposes of the California TVPA Claim. Rule 23 requires much more. *See id*. at 358 (submission of "120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores," more than half of which were concentrated in only six States, did not establish significant proof of a uniform policy); *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 968 (9th Cir. 2020) ("Put another way, the mere existence of a facially defective written policy—without any evidence that it was implemented in an unlawful manner—does not constitute '[s]ignificant proof[]' that a class of employees were subject to an unlawful practice.") (internal citation omitted); *Willis v. City of Seattle*, 943 F.3d 882, 885 (9th Cir. 2019) ("Allegations of individual instances of mistreatment, without sufficient evidence, do not constitute a systemic deficiency or overarching policy of wrongdoing."); *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 965 (9th Cir. 2013) (district court correctly concluded that employee declarations did not establish that facially defective uniform policy regarding meal breaks was actually implemented as written so as to allow common question of liability to predominate).

Plaintiffs' four anecdotal declarations also pale in comparison to CoreCivic's evidence—eight declarations from CoreCivic officials who are knowledgeable of or responsible for the implementation of the Policy at seven different facilities, and deposition testimony/declarations from three additional CoreCivic officials, all of whom avowed that the Policy "only requires detainees to clean up after themselves" ("maintain") in the common living areas and "does not … require detainees to clean up after other detainees in common living areas,"; and that only VWP detainee workers are responsible for cleaning the common living areas." (3-ER-486–488, ¶¶ 6–20; 3-ER-502–504, ¶¶ 6–17; 3-ER-545–547, ¶¶ 5–19; 3-ER-568, ¶¶ 19–20; 3-ER-611–613, ¶¶ 9–24; 3-ER-617–620, ¶¶ 5–20; 5-ER-859–860, ¶¶ 6–15; 5-ER-956–959, ¶¶ 6–22; 5-ER-965, ¶¶ 8–9; 6-ER-1375–1376; 8-ER-1672.) Instead of crediting that evidence as conclusive proof that the Sanitation and Hygiene Policy does not require all detainees to clean the common living areas, the district court used it to create a "factual dispute[]" and declined to resolve it. That was error.

CoreCivic maintains that Plaintiffs' four declarations—even standing alone—are not significant proof. It was *Plaintiffs'* burden to *prove* that the Policy was implemented as they say it was, not CoreCivic's burden to *disprove* Plaintiffs' interpretation of the policies. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 793 n.14 (9th Cir. 2021) (a district court may not

improperly shift the burden of persuasion to the defendant "to affirmatively disprove" the plaintiff's claims). Nonetheless, if CoreCivic's evidence created a fact dispute as to this Rule 23 element, the district court was required to resolve it. *See Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1960–61 (2021) ("[A] court has an obligation before certifying a class to 'determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits.'") (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)); *Olean Wholesale*, 993 F.3d at 786 (holding that a "rigorous analysis" requires "judging the persuasiveness of the evidence presented for and against certification") (citation omitted).

The district court deferred, relying on *Howell v. Advantage RN, LLC*, 2018 WL 3437123, at *2 (S.D. Cal. July 17, 2018), which cited two cases for the proposition that "a weighing of competing evidence is inappropriate at this stage of the litigation": *Staton v. Boeing Company*, 327 F.3d 938 (9th Cir. 2003), and *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602 (C.D. Cal. 2005) ("*Wang I*"). *Staton* held: "The court may not go so far, of course, as to judge the validity of these claims. Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." 327 F.3d at 954 (internal quotations and citation omitted). *Wang I* cited *Staton* for essentially the same proposition, adding: "On a motion for class

certification, a court is bound to take the substantive allegations of the complaint as true." 231 F.R.D. at 605. Both cases, however, pre-date *Wal-Mart*, and *Wal-Mart* rejected these propositions:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied[.] Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.

564 U.S. at 350–51 (internal quotations and citations omitted). Indeed, this Court, relying on *Wal-Mart*, subsequently reversed *Wang I*, and held that "the district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 543–44 (9th Cir. 2013) ("*Wang II*") (quoting *Ellis*, 657 F.3d at 983).

In refusing to resolve what it perceived to be a factual dispute, the district court effectively relieved Plaintiffs of their burden to affirmatively establish a necessary element of commonality: "significant proof" that the Sanitation and Hygiene Policy says what they say it says. *See Olean Wholesale*, 993 F.3d at 793

("A district court that has doubts about whether the requirements of Rule 23 have been met should refuse certification until they have been met.") (internal quotations and citation omitted).

2. Disciplinary Policy.

The district court's conclusion that Plaintiffs provided "significant proof" that CoreCivic "may have procured this labor under threat of punishment" was also erroneous. (1-ER-61.) The district court reached this conclusion because CoreCivic's Supplemental Detainee Handbook informs detainees that they must obey staff orders and that the "[r]efusal to clean assigned living area" or "to obey a staff member/officer's order" may subject them to a range of discipline. (1-ER-61–62.) Initially, the directive that detainees must clean their "**assigned** living area" is not a basis for Plaintiffs' forced labor claims. Their contention is that detainees are required to clean *common* living areas under threat of discipline. The "common living area" is defined as "[a]ny area in the unit other than the assigned cell that is used by all detainees assigned to that unit." (9-ER-1999.) Nobody disputes that the PBNDS lawfully requires detainees to clean their assigned living area. PBNDS §§ 1.2(V)(A)(3), 5.8(V)(C); *see also Barrientos*, 951 F.3d at 1273 & n.3, 1278 n.5.

It is also beyond dispute that a detention facility may lawfully require detainees to obey staff orders. Such directives and disciplinary measures are

required by ICE and necessary to maintain the safety of the facility, its staff, and detainees. PBNDS §§ 3.1(V)(C), 3.1A. (6-ER-1123, 1124, 1168–1169.) As a federal contractor working on behalf of ICE, CoreCivic must abide by and impose that directive and discipline at all its facilities. (3-ER-497–498, ¶¶ 7, 9; 6-ER-1357–1358.) But this directive becomes relevant here only if there is some evidence that corrections officials are giving orders to clean common areas and disciplining detainees if they refuse. There is not. The only evidence to suggest that CoreCivic staff used that directive and their authority to coerce detainees to clean common living areas at every CoreCivic facility is the declarations of four detainees all based on anecdotes from one facility. Plaintiffs did not provide a single record showing that any detainee was disciplined for refusing an order to clean a common living area. Nor did Plaintiffs provide any proof that detainees at any facility outside of California were ordered to clean a common living area.

Finally, evidence that CoreCivic "may have coerced' detainees to clean common living areas (1-ER-61) is not "significant proof" that CoreCivic has a policy of threatening discipline or disciplining detainees who refuse an order to clean a common living area. Speculation is insufficient to establish a uniform classwide policy. *Koike v. Starbucks Corp.*, 378 F. App'x 659, 661 (9th Cir. 2010). Without significant proof that CoreCivic has a nationwide (or even California-wide) policy of requiring all detainees to clean common areas and have

threatened or imposed discipline for refusing to do so, they cannot establish commonality. *See Wal-Mart*, 564 U.S. at 350 (plaintiff must "affirmatively demonstrate" compliance with Rule 23).

B. Individual Questions Predominate, Which Further Defeats Commonality as well as Rule 23(b)(3).

Commonality requires a showing that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It is not enough to simply allege that class members "have all suffered a violation of the same provision of law" or that they seek the same relief. *See Wal-Mart*, 564 U.S. at 349–50 ("Reciting these questions is not sufficient to obtain class certification."). Such contentions "give[] no cause to believe that all their claims can productively be litigated at once." *Id*. A qualifying common question must be able to generate an answer that "resolve[s] an issue that is central to the validity of each" class member's claim "in one stroke." *Id*. Dissimilarities within a proposed class potentially impede the generation of common answers. *Id*.

Rule 23's predominance requirement is "far more demanding" than commonality. *See* Fed. R. Civ. P. 23(b)(3). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) ("[T]he presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)."). A plaintiff must establish predominance by a preponderance of the evidence. *Olean Wholesale*, 993 F.3d at 784. Where common questions do not

present a "significant aspect of the case" that "can be resolved for all members of the class in a single adjudication" certification is not appropriate. *Hanlon*, 150 F.3d at 1022. "Courts determine whether individual issues predominate over common issues by examining the elements of the plaintiffs' claims and the defenses raised by the defendant, as well as the evidence that relates to those elements." *Id.*

Section 1589(a) is a criminal statute that prohibits knowingly obtaining labor by several means:

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means--
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) 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,
>
> shall be punished as provided under subsection (d).[22]

[22] 18 U.S.C. § 1589(d) provides: "Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both." 18 U.S.C. § 1595(a) provides a civil remedy for victims of § 1589(a): "An individual who is a

The term "serious harm" is defined as:

> [A]ny 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).

The California TVPA provides:

> A victim of human trafficking, as defined in Section 236.1 of the Penal Code, may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. ...

Cal. Civ. Code § 52.5(a). Section 236.1 of California's Penal Code provides:

> (a) A person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking ….
>
> * * *
>
> (h) For purposes of this chapter, the following definitions apply:
>
> * * *
>
> (1) "Coercion" includes a scheme, plan, or pattern intended to cause a person to believe that failure to

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victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees."

> perform an act would result in serious harm to or physical restraint against any person; the abuse or threatened abuse of the legal process; debt bondage; or providing and facilitating the possession of a controlled substance to a person with the intent to impair the person's judgment.
>
> * * *
>
> (3) "Deprivation or violation of the personal liberty of another" includes substantial and sustained restriction of another's liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.
>
> * * *
>
> (8) "Serious harm" includes 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, services, or commercial sexual acts in order to avoid incurring that harm.
>
> (i) The total circumstances, including the age of the victim, the relationship between the victim and the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be factors to consider in determining the presence of "deprivation or violation of the personal liberty of another," "duress," and "coercion" as described in this section.

Cal. Penal Code § 236.1(a), (h), (i).

In their motion for class certification, Plaintiffs argued that commonality and predominance were satisfied with a single question: whether CoreCivic's purported policies and practices of coercing detainees to clean common areas (a) "constitute a violation of the Federal TVPA's prohibition on obtaining labor or services by means of force or serious harm," and (b) "constitute[] 'human trafficking' within the meaning of" the California TVPA. (7-ER-1562, 1564.) The district court agreed:

> [C]ommon questions of fact include whether Defendant utilized threats of serious harm to compel Plaintiffs to work and common questions of law include whether Defendants' conduct violated the TVPA, answers to which are capable of classwide resolution and will determine if the Plaintiffs were threatened with serious harm, an issue central to the TVPA claims. … For the same reasons the Court determines that … Plaintiffs have met their burden as to commonality and predominance for the California Forced Labor Class.

(1-ER-75, quotations and citation omitted.) But asking whether class members "have all suffered a violation of the same provision of law" "is not sufficient to obtain class certification." *Wal-Mart*, 564 U.S. at 349–50. It simply begs the question: does each class member actually have a viable TVPA or California TVPA claim?

Resolving that question requires the finder of fact to ask and answer a multitude of questions, including:

1. Was the detainee aware of the Sanitation and Hygiene Policy or the directives in the Detainee Handbooks relating to prohibited acts and discipline? These documents (the former is an internal CoreCivic document) are the basis for the district court's ruling that CoreCivic had a policy of forcing detainees to clean common living areas. Although detainees are provided both Handbooks at intake, they would only know of the directives if they actually read them. Owino and Gomez avowed that they were handed "documents" at intake "without any explanation as to what they were or what they meant," and that Spanish speaking detainees "would have difficulty understanding" them. (7-ER-1579, ¶ 3; 7-ER-1590, ¶ 3.) If the detainee did not read or understand either one, the purported "glue" common to all class members' claims begins to fall apart.

2. If the detainee did not read the Policy or the Handbooks, was it ever conveyed to the class member—by staff—that if he did not follow an order to clean a common living area he would be disciplined? If not, there is no basis to allege coercion—that CoreCivic threatened the detainee with discipline if he did not comply with the order.

3. If the detainee did believe (from Policy, the Handbooks, or from staff) that he would be disciplined if he refused an order to clean a common living area, what was the form of threatened discipline, e.g., disciplinary segregation, change housing, loss of privileges, or a reprimand? This information is critical to

determine whether the threatened discipline amounted to "force," "physical restraint," "serious harm," or an "abuse of law or legal process" under the TVPA, 18 U.S.C. § 1589(a), or a "substantial and sustained restriction" on the detainee's liberty under the California TVPA, Cal. Penal Code § 236.1(h)(3). If not, they do not have a claim.

4. Did a staff member actually order the detainee to clean a common living area? If not, there is no basis to allege that CoreCivic "obtain[ed] their labor, a necessary element of both claims. *See* 18 U.S.C. § 1589(a); Cal. Penal Code § 236.1(a).

5. If the detainee was ordered to clean a common living area, did the detainee oblige or refuse?

6. And if the detainee refused, was he subjected to any form of discipline? If the detainee refused and was not subjected to any discipline, then CoreCivic did not "obtain[]" his labor and he has no claim. *Id*.

7. If the detainee refused an order to clean a common living area and was subjected to discipline, was the discipline authorized by the PBNDS? *See Barrientos*, 951 F.3d at 1278 n.5 ("[I]n the interest of maintaining order in an immigration detention facility, the PBNDS authorize punishments for detainees who, among other things, refuse to complete basic personal housekeeping tasks or organize work stoppages. Our decision should likewise not be read to imply that

these basic disciplinary measures, on their own, give rise to TVPA liability."). Many of Plaintiffs' allegations may fall within the scope of the PBNDS depending on the particular facts and circumstances surrounding each one. For example, what cleaning task was the detainee ordered to perform? A basic housekeeping task or to simply clean up after himself? (*See* 13-ER-3019–3020 [district court recognized that liability under the TVPA turns on a "question of degree" of the labor involved; whereas "personal housekeeping tasks" do "not rise to criminal forced labor," "one could imagine forced labor to such an extent and degree as to go well beyond cleaning personal and communal areas"].) For those who claim they were disciplined for refusing to work, was their refusal part of an organized work stoppage? Whether any particular allegation rises to the level of a TVPA or California TVPA violation can only be determined on a case-by-case basis.

8. If the detainee worked, did he work *because of* the threat of discipline? The TVPA requires proof that the defendant knowingly obtained the labor of a person "by means of" "force," "physical restraint," "serious harm," or an "abuse of law or legal process." 18 U.S.C. § 1589(a). Similarly, the California TVPA requires proof that the labor was "accomplished through" a "substantial and sustained restriction" on the detainee's liberty. *See* Cal. Penal Code § 236.1(h)(3). Thus, a significant question for each class member is, why did you work? Was it voluntary or did you feel compelled to work because of threatened discipline?

That is an inherently subjective inquiry that requires delving into each class member's state of mind. *See, e.g.*, *Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258, 266–67 (D. Colo. 2017) ("[T]he forced labor statute does contain both an objective and a subjective component. The subjective component is whether the victims actually labored because of the perpetrator's conduct, while the objective component is whether a reasonable person would respond in a similar way as the victim. Representatives' proposal that the subjective component be eliminated by using only a reasonable person standard does not coincide with the statute."); *David v. Signal Int'l, LLC*, 2012 WL 10759668, at *21 (E.D. La. Jan. 4, 2012) ("The question in a forced labor case is … whether Defendants' coercive conduct was such that it could overcome the will of the victim so as to make him render his labor *involuntary*. The Court is persuaded that this question cannot be answered via generalized class-wide proof but rather must be answered individually based upon individualized proof.").

These questions cannot be answered "yes" or "no" in one stroke as to every one of the "several thousands" of class members. Rather, they must be asked of each class member to determine whether they have a viable TVPA and California TVPA claim. And because these individual questions predominate over any conceivable common question, the Forced Labor Classes cannot be certified. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) ("An individual

question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.") (citation omitted); *Olean Wholesale*, 993 F.3d at 791 ("If injury cannot be proved or disproved through common evidence, then 'individual trials are necessary to establish whether a particular [class member' suffered harm from the [alleged misconduct],' and class treatment under Rule 23 is accordingly inappropriate.") (alteration in original, citation omitted).

Instead of coming up with common questions, the district court attacked the eighth listed inquiry—whether the detainee worked because of a threat of discipline. (1-ER-72–73.) But even if you remove that inquiry from the equation, the other seven individualized questions still predominate. *See Olean Wholesale*, 993 F.3d at 792 ("'[P]redominate' means 'to hold advantage in numbers or quantity.'") (citation omitted). Nonetheless, the district court's ruling that the TVPA and California TVPA employ an objective standard to determine whether a defendant's coercive conduct caused the plaintiff to labor is erroneous and effectively eliminates the forced-labor statutes' subjective causation element.

The district court relied on this Court's decision in *United States v. Dann*, 652 F3d 1160 (9th Cir. 2011), to conclude that the inquiry is an objective one. (1-

ER-72–73.) But *Dann* analyzed the definition of "serious harm" in the TVPA, 18 U.S.C. § 1589(c)(2). That definition—which Congress added in 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044 (2008)—provides an objective standard for determining only whether the threatened harm was "sufficiently serious." *See* 18 U.S.C. § 1589(c)(2) ("The term 'serious harm' means any 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."). Even if "a reasonable person" would believe that the threatened harm was sufficiently serious under the circumstances (e.g., segregation), the fact finder must still inquire—of each class member—whether that threatened harm in fact caused "that person" (or "the person") to perform the labor. 18 U.S.C. § 1589(a)(2), (a)(4). If not, CoreCivic did not procure the labor from "that person" "by means of" serious harm or a scheme, plan, or pattern of threatening serious harm.[23]

[23] The California TVPA mirrors the TVPA's statutory text. *Compare* Cal. Penal Code § 236.1(h)(3) (human trafficking violation occurs where restriction of another's liberty is "accomplished through" coercion to "the victim" under circumstances where "the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out"); *with* Cal. Penal Code § 236.1(h)(8) (defining "serious harm" as including any 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 … in order to avoid incurring that harm."). In fact, the California TVPA requires the finder of fact to consider the "total circumstances, including the age of *the victim*, the relationship between *the*

Dann supports this statutory interpretation. Although the Court in *Dann* held that the seriousness of the threatened harm must be "considered from the vantage point of a reasonable person in the place of the victim," it further held that whether "the employer intended to cause *the victim* to believe that she would suffer serious harm … if *she* did not continue to work" must be considered "from the vantage point of *the victim*." 652 F.3d at 1170 (emphasis added). This Court's subsequent decision in *Headley v. Church of Scientology International*, 687 F.3d 1173 (9th Cir. 2012), confirms that the objective standard is confined to the statute's "serious harm" element. In *Headley*, the plaintiff had failed to establish the "by means of" element—the record established that she worked voluntarily because she "believed that it was the right thing to do, [and] because [she] enjoyed it." *Id*. at 1179–80. The same subjective inquiry must be made of every class member.

The district court alternatively ruled that it could infer that *every* class member felt threatened simply because they were all detained (similarly situated). (1-ER-73–75.) But an inference unsupported by evidence eliminates the statutes' causation elements ("by means of" and "accomplished through"). It also assumes

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victim and the trafficker or agents of the trafficker, and any handicap or disability of *the victim*, … in determining the presence of 'deprivation or violation of the personal liberty of another,' 'duress,' and 'coercion' as described in this section." Cal. Penal Code § 236.1(i) (emphasis added). This necessarily requires a subjective inquiry into each class member.

that every detainee at every CoreCivic facility was coerced to work even if they were not. In other words, it presumes they have standing to sue under the statutes. But the Supreme Court "has rejected the argument that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1620–21 (2020) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). Federal courts "do not adjudicate hypothetical or abstract disputes" or "issue advisory opinions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Only class members who have actually been injured—coerced—have standing to bring a claim. *See id*. at 2208 (quoting *Tyson Foods*, 577 U.S. at 466) ("Every class member must have Article III standing in order to recover individual damages. 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'").

The district court cited *Walker v. Life Insurance Company of the Southwest*, 953 F.3d 624, 630–31 (9th Cir. 2020), as an example of a case in which the Court permitted an inference of class-wide causation (1-ER-74), but that case involved a claim under California's UCL and, as the Court recognized, California law expressly allows courts to presume reliance by class members. This Court carefully distinguished UCL cases, noting that "in other contexts," without a presumption, there would be "so many individualized questions as to defeat

predominance." *Walker*, 953 F.3d at 631. Indeed, in a case involving a RICO claim, this Court rejected a class-wide causation inference. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664–65 (9th Cir. 2004) (noting that "[c]ausation lies at the heart of a civil RICO claim," rejecting a presumption of reliance, and holding that classwide circumstantial evidence "is just another effort to avoid the necessary proof of causation"). Like the RICO statute, causation is a necessary element of a TVPA and California TVPA claim that cannot be tossed aside or glossed over.[24]

The district court attempted to bolster its ruling by relying on the fact that all class members share "common attributes," namely that they are all detained and "subjected to common sanitation and disciplinary policies." (1-ER-74.) But *Wal-Mart* requires "common questions" that "generate common *answers* apt to drive the resolution of the litigation." 564 U.S. at 350 (citation omitted). And, as discussed above, whether any class member has a viable *claim* turns on many

[24] In *Menocal v. GEO Grp., Inc.*, the Tenth Circuit found that the plaintiffs' TVPA claims were susceptible to a classwide causation inference because it was undisputed that detention facility's policies expressly require every detainee to clean common areas under threat of discipline if they refused, and every detainee receives notice of these policies. 882 F.3d 905, 910, 918–21 (10th Cir. 2018). CoreCivic's policies do not require non-VWP detainee workers to clean common areas, nor does CoreCivic provide detainees with copies of the Sanitation and Hygiene Policy. The court also relied on unique Tenth Circuit jurisprudence permitting classwide causation evidence in a RICO case. *See id.* (applying *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014)). As noted above, this Court in *Poulus* refused to do so.

individual inquiries. Those individual inquiries predominate and defeat class certification.

C. CoreCivic Did Not Waive Its Personal Jurisdiction Challenge to the National Forced Labor Class Claims.

CoreCivic moved to dismiss Plaintiffs' Complaint, arguing it failed to state a claim. (Dkt. 18; Dkt. 18-1.) In that motion, CoreCivic did not challenge the district court's personal jurisdiction over Plaintiffs' (Owino's and Gomez's) claims.[25] (*Id*.) In conjunction with its opposition to Plaintiffs' motion to certify the National Forced Labor Class, CoreCivic argued that the district court should not certify that Class because it would not have either general or specific personal jurisdiction, *see* *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017), over any of the non-California-facility class members' claims. (Dkt. 117-1; 3-ER-441 n.13.)

The district court ruled that CoreCivic waived its personal-jurisdiction challenge. (1-ER-29–30.) Relying on *McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142 (S.D. Cal. 2019), the court reasoned that, because the Supreme Court issued *Bristol-Myers* before CoreCivic filed its motion to dismiss (its first responsive pleading), the challenge was "available" at that time for purposes of

[25] After the district court denied the motion to dismiss, CoreCivic challenged the legitimacy of the nationwide putative claims in its answer to Plaintiffs' Complaint (12-ER-2977–2980, ¶¶ 5, 10, 13–26), and in its Answer to Plaintiffs' First Amended Complaint (12-ER-2904, ¶ 5; 12-ER-2925, ¶ 8).

Rules 12(h) and (g), and consequently its failure to raise that challenge in its motion to dismiss constituted a waiver of the defense. (*Id*.) *McCurley* and its progeny are wrong. Under binding Supreme Court and Ninth Circuit precedent, as well as persuasive decisions from the D.C. and Fifth Circuit Courts of Appeals, a personal jurisdiction defense to class members' claims is not "available" until the class is certified because, until certification, a class-action complaint is brought only by the named plaintiffs. *See also, e.g.*, *Matic v. United States Nutrition, Inc.*, 2019 WL 3084335, at *10 (C.D. Cal. Mar. 27, 2019); *Gasser v. Kiss My Face, LLC*, 2018 WL 4538729, *2 (N.D. Cal. Sept. 21, 2018). There is no legal basis to raise a challenge before that time.

In *Gibson v. Chrysler Corp.*, 261 F.3d 927, 937 (9th Cir. 2001), this Court held: "A class action complaint is filed only by a named plaintiff or plaintiffs. Although such an action is often referred to as a class action when it is filed, it is, at the time of filing, only a would-be class action. It does not become a class action until certified by the district court."

Similarly, in *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011), the Supreme Court explained that "[i]n general, a party to litigation is one by or against whom a lawsuit is brought or one who becomes a party by intervention, substitution, or third-party practice." *Id*. at 313 (internal quotations and citations). It is a "surely erroneous argument that a nonnamed class member is a party to the class-action

litigation *before the class is certified*." *Id.* (internal quotations and citation omitted).

More recently, the D.C. Circuit recognized that "[p]utative class members become parties to an action—and thus subject to dismissal—only after class certification. It is class certification that brings unnamed class members into the action and triggers due process limitations on a court's exercise of personal jurisdiction over their claims." *Molock v. Whole Foods Mkt. Group, Inc.*, 952 F.3d 293, 297–98 (D.C. Cir. 2020). In reaching that conclusion, the court relied on *Gibson*, *Smith*, and other Supreme Court precedent. *Id.* It explained that under *Gibson*, a "class action when filed, includes only the claims of the named plaintiff or plaintiffs. The claims of unnamed class members are added to the action later, when the action is certified as a class under Rule 23." *Id.* (quoting *Gibson*). Thus, "any decision purporting to dismiss putative class members before that point would be purely advisory." *Id.* Moreover, personal jurisdiction "entails a court's power over the parties before it," and because putative class members are non-parties before class certification, any motion to dismiss them for lack of personal jurisdiction would be "premature—not to mention 'novel and clearly erroneous." *Id.* Applying these basic principles, *Molock* held that the defendant's Rule 12 "motion to dismiss the putative class members is premature. Only after the putative class members are added to the action—that is, 'when the action is certified as a

class under Rule 23,' *Gibson*, 261 F.3d at 940—should the district court entertain Whole Foods's motion to dismiss the nonnamed class members." *Id*. at 298.

The Fifth Circuit in *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020), went a step further. *Cruson* involved a nationwide putative class. *Id*. at 245–46. The defendant moved to dismiss the complaint for lack of standing and for failure to state a claim but did not challenge the court's personal jurisdiction over the putative class members' claims. *Id*. In opposing class certification, however, the defendant argued that the court lacked personal jurisdiction over the putative class members under *Bristol-Myers*. *Id*. at 247. The district court ruled that the defendant "had waived any personal jurisdiction defense by failing to raise it in its Rule 12 motions and, alternatively, by litigating on the merits of plaintiffs' claims." *Id*. at 248.

The Fifth Circuit reversed, holding the defendant "did not waive its personal jurisdiction defense." *Id*. at 249. Relying on (and citing) the propositions set forth in *Gibson*, *Smith*, and *Molock*, as well as cases from the Second and Eleventh Circuits, it held that the defense was not available until and unless the putative class became certified:

> The issue, then, is whether the personal jurisdiction defense was "available" under Rule 12(g)(2) when Jackson filed its Rule 12 motions. We conclude it was not. Jackson's objection to personal jurisdiction concerned only class members who were non-residents of Texas. Those members, however, were not yet before the

> court when Jackson filed its Rule 12 motions. What brings putative class members before the court is certification: "Certification of a class is the critical act which reifies the unnamed class members and, critically, renders them subject to the court's power." When Jackson filed its pre-certification Rule 12 motions, however, the only live claims belonged to the named plaintiffs, all Texas residents as to whom Jackson conceded personal jurisdiction. Thus, at that time, a personal jurisdiction objection respecting merely putative class members was not "available," as Rule 12(g)(2) requires for waiver.
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> [I]t is evident why a personal jurisdiction objection was not "available" with respect to the putative claims of unnamed Texas non-residents. Prior to certification, those nonresidents were "not yet before the [district] court," their possible "future" claims against Jackson were "hypothetical," and so there was no "justiciable controversy between [Jackson] and [them]." To rule that Jackson was required, on pain of waiver, to raise a personal jurisdiction objection against those putative class members would validate "the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified." That we decline to do.

Id. at 250–51 (citing and/or quoting *Gibson*, *Smith*, *Molock*, and others) (internal citations and footnotes omitted).

These decisions—all involving class-action lawsuits—compel reversal of the district court's waiver ruling. Notably, the *McCurley* line of cases rely on non-class action cases applying an inflexible waiver rule to belated defenses against *individual plaintiffs'* claims. *See* 331 F.R.D. at 164 (citing *Glater v. Eli Lilly &*

Co., 712 F.2d 735 (1st Cir. 1983); *Williams v. Life Sav. & Loan*, 802 F.2d 1200 (10th Cir. 1986); *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958 (D.C. Cir. 2016)). They simply do not apply.[26]

D. The Class Period for the CA Forced Labor Class Should Be Narrowed.

Plaintiffs' proposed definition of the CA Forced Labor Class, which the district court adopted, included all ICE detainees who were detained at a CoreCivic California facility "between January 1, 2006 and the present[.]" (7-ER-1534.) The California TVPA, however, "has a seven-year statute of limitations." *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 941 (N.D. Cal. 2018). Thus, no detainee/class member can bring a claim if they were released from detention before May 31, 2010, because a complaint was not filed "within seven years" of their release. *See* Cal. Civ. Code § 52.5(c) (a claim "shall be commenced within seven years of the date on which the trafficking victim was freed from the trafficking situation"). The district court refused to narrow the class period, ruling "it would be premature to make a determination on a tolling claim at the class certification stage." (1-ER-14, citations omitted.)

[26] Because it found waiver, the district court did not address the merits of CoreCivic's personal-jurisdiction challenge. If the Court holds that CoreCivic did not waive this defense and the National Forced Labor Class is not decertified for failure to satisfy Rule 23, this Court should remand and allow the district court the first opportunity to address CoreCivic's personal-jurisdiction challenge.

This was error. If a class member's claim accrued more than seven years before May 31, 2017, their claim is time-barred. Even if they have a plausible argument that their claim tolled, that is yet another individualized determination that defeats commonality. *See Stone v. Advance Am.*, 278 F.R.D. 562, 570 (S.D. Cal. 2011) ("Determining a membership in the class would essentially require a mini-hearing on the merits of each case.") (citation omitted); *see also Gonzales v. Comcast Corp.*, 2012 WL 10621, at *20 (E.D. Cal. Jan. 3, 2012) ("A class is not ascertainable … if the proposed definition would require the Court to determine whether a person is a member of the class by evaluating the merits of the individual claims.").

IV. The CA Labor Law Class Should Not Be Certified.

A. Plaintiffs Failed to Establish Common Proof of Damages.

A plaintiff bears the burden of establishing a reliable model that proves "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Comcast*, 569 U.S. at 36. This arises from the "unremarkable premise" that plaintiffs are entitled to only those damages resulting from the conduct for which the defendant is liable. *Id.* at 34. Although calculations "need not be exact," a "model purporting to serve as evidence of damages in [a] class action must measure only those damages," and courts must conduct a "rigorous analysis" to ensure they do. *Id.* at 35 (citations omitted). A plaintiff may use

representative evidence, however, provided that "each class member could have relied on that sample to establish liability" in an individual action, and "the evidence could have sustained a reasonable jury finding" on damages. *Tyson Foods*, 577 U.S. at 454–55. If the representative evidence is "statistically inadequate or based on implausible assumptions," it "could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked." *Id.* at 459. The Supreme Court has recognized one exception: where a defendant employer fails its statutory duty to maintain adequate employment records, in fairness, the burden may shift to the employer to prove "the precise amount of work performed." *Id.* at 456.

Here, Plaintiffs provided no model or method to establish that liability and damages could be calculated through representative evidence—let alone a reliable one. They never pursued or disclosed any such method during class discovery, seeking only actual damages and reimbursement of uncompensated hourly wages for work performed. (12-ER-94–95, 97.) This failure of proof alone defeats class certification of the California Labor Class claims.[27]

[27] *See, e.g.*, *In re Myford Touch Consumer Litig.*, 2016 WL 7734558, at *15–16 (N.D. Cal. Sept. 14, 2016) (finding plaintiffs failed to establish predominance where they "presented no methodology at all."); *Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 333 (C.D. Cal. 2015) (finding "plaintiffs have not met their burden under *Comcast* to proffer evidence of a damages measurement method that can be applied classwide"); *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 130–31 (N.D. Cal. 2014) (declining to certify class after

The district court erroneously held, however, that Plaintiffs did not have an "affirmative" obligation at the class certification stage to present a fully formed damages model. (1-ER-17–18.) But in *Comcast*, the Supreme Court rejected the logic that "at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be[,]" explaining "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id*. at 35–36.

The district court's ruling also belies the Supreme Court's holding that "[a] party seeking to maintain a class action 'must *affirmatively* demonstrate compliance' with [Rule] 23." *Daniel F.*, 305 F.R.D. at 120 (quoting *Comcast* and *Walmart*) (emphasis added). Plaintiffs' burden includes proving, at the class certification stage, that every class member's damages can determined through a reliable method. *Tyson Foods*, 577 U.S. at 459. As this Court emphasized, "reliability is the touchstone for establishing predominance through representative sampling." *Olean Wholesale*, 993 F.3d at 791. "It is thus necessary for courts to

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Plaintiffs failed to provide reliable damages model); *Caldera v. J.M. Smucker Co.*, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) (same); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *11–13 (N.D. Cal. Jan. 7, 2014) (same). The district court rejected these cases as nonbinding but failed to meaningfully distinguish them as imposing an "evidentiary burden" rather than a "fully formed damages model." (1-ER-17–18.) Plaintiffs failed to provide any evidence, let alone a *reliable* model capable of accurately estimating class damages without the need for individualized proof.

consider 'the degree to which the evidence is *reliable* in proving or disproving' whether a common question of law or fact predominates over the class members." *Id.* "To do so, courts must 'resolve any factual disputes necessary to determine whether' predominance has in fact been met" and may not outsource this threshold determination to a jury. *Id.* By allowing Plaintiffs to come up with a reliable method later, the district court applied the wrong standard and effectively outsourced the threshold finding of predominance to the jury.

The district court then compounded this error by shifting Plaintiffs' burden to CoreCivic, presumably under the exception that applies to employers who fail to keep adequate employee records. (1-ER-18–19.) That exception does not apply because CoreCivic is not Plaintiffs' employer and had no statutory duty to keep any records of the number of hours that each VWP participant worked.[28] And under the PBNDS, CoreCivic had no contractual duty to keep such records because VWP compensation was calculated based on a "per day" allowance. *See* 2011 PBNDS, § 5.8(V)(K).

Nevertheless, the method the district court proposed is invalid. To be valid, a method of calculating damages must plausibly represent a fair and accurate

[28] Indeed, the district court has yet to decide whether VWP participants are CoreCivic employees. Its finding that CoreCivic failed to maintain adequate records thus puts the proverbial cart before the horse by presuming it was an employer with the legal duty to maintain VWP participant hours despite the contrary evidence.

estimate of uncompensated hours that each class member actually worked. *See Tyson Foods*, 577 U.S. at 459. The method must also show that "their damages stemmed from the defendant's actions that created the legal liability." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) (quotation omitted). Absent such proof, the class cannot be certified because questions of individual damages calculations 'will inevitably overwhelm questions common to the class.'" *Daniel F.*, 305 F.R.D. at 130 (*quoting Comcast*, 133 S. Ct. at 1433).

Here, the district court found that the evidence "may allow" a jury to calculate each class member's damages based on records of the days detainees worked and testimony regarding the *average* or typical number of *maximum* hours that a detainee worked for certain positions. But the purported testimony will not allow an accurate estimation as to how many hours each detainee actually worked. Testimony that certain workers "typically work **no more than** six hours a day" or "**on average**, two to four hours a day, **but no more than** six hours a day" (5-ER-970–971, ¶¶ 39–42, emphasis added), do not show uniformity among the class, particularly since there was no set schedule and detainees typically worked until an assignment "was done." (2-ER-154, 157, 191–192, 223–224, 226.) Absent individual testimony from each class member, there is no way to know whether they worked 15 minutes, 1 hour, or more.

Further, the district court's use of averages is unreliable for proving class members' damages. Consistent with Plaintiffs' disclosed damages, California's minimum wage laws require workers to be "compensated for each hour worked." *Aldapa v. Fowler Packing Co., Inc.*, 323 F.R.D. 316, 353 (E.D. Cal. 2018). Averaging work hours will *not* fairly compensate class members for hours they actually worked. For instance, detainees who worked more than the average will not be fully compensated while those who work less will receive a windfall.[29] Such a result would be hardly fair to class members who are undercompensated. And damages cannot be said to have "stemmed from" CoreCivic's actions" for those who receive a windfall in wages for hours they did not work. Stated differently, awarding compensation to class members for an injury they did not suffer would be inconsistent with Plaintiffs' theory of liability that detainees were undercompensated. *See Olean Wholesale*, 993 F.3d at 791 ("When considering if predominance has been met, a key factual determination courts must make is

[29] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) ("[I]f for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would … undercompensate him by half."); *Dueker v. CSRT Expedited Inc.*, 2020 WL 7222095, at *7 (C.D. Cal. Dec. 7, 2020) (finding individual inquiries required to determine how many hours each class member driver was entitled to minimum wages for time spent resting in sleeper berth).

whether the plaintiffs' statistical evidence sweeps in uninjured class members."). *Comcast* forbids the unreliable method that the district court has proposed.

Because Plaintiffs could not rely on averaging work hours in an individual case to sustain a jury damages award, they may not rely on it to prove damages classwide. *Tyson Foods*, 577 U.S. at 454–55. In addition, CoreCivic's counterclaim seeking an offset require more individual inquiries, which further defeats predominance and superiority.

B. At Most, Only the UCL Claim Can Be Certified and Only Gomez Can Represent the Class on that Claim.

Other than the California UCL claim, all other state law claims have a one-, two-, or three-year statute of limitations. It is undisputed that Gomez's last day working in the VWP was on September 17, 2013. (3-ER-412). Thus, he is time-barred from pursuing the non-UCL claims, and he cannot, therefore, represent the Class to the extent it is pursuing those claims. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 560 (9th Cir. 2010) ("When a named plaintiff has no cognizable claim for relief, 'she cannot represent others who may have such a claim, and her bid to serve as a class representative must fail.'") (citation omitted).

With respect to Owino, CoreCivic provided records showing that the last day he worked in the VWP was on May 22, 2013. (6-ER-1273.) That is more than four years before he filed the May 31, 2017 Complaint, and, if true, it would bar all his claims and prevent him from representing the Class at all. (1-ER-52 n.10.) But

the district court abstained from making that ruling because Owino vaguely avowed that he worked "[d]uring each period of detention at OMDC" (7-ER-1580, ¶ 5) and his last stint in detention was from February 9, 2015 to March 9, 2015. (1-ER-52 n.10.) That evidence created a factual dispute. (*Id*.) But as discussed above, the district court was required to resolve that factual dispute to determine whether Owino satisfied typicality. *Wang II*, 737 F.3d at 543–44. If the Class is not decertified, the Court should remand to the district court to resolve that dispute. But it should also hold now that Owino is time-barred from raising any claims with one- or two-year limitations periods (negligence, WO 5-2001, and minimum wage/wage statement penalties), and since neither he nor Gomez can raise those claims themselves, they cannot be certified.[30]

C. The Failure-to-Pay/Waiting-Time Claim Should Not Be Certified.

Although Plaintiffs' motion for class certification stated that the CA Labor Law Class was bringing their "claims for violations of the California Labor Code" (7-ER-1534), in analyzing the elements of Rule 23, plaintiffs did not reference

[30] If the district court finds that Owino is time-barred from raising claims with a three-year limitations period, which means both Plaintiffs are time-barred, those claims cannot be certified. Although "an action to recover wages that might be barred if brought pursuant to [the] Labor Code … still may be pursued as a UCL action seeking restitution pursuant to § 17203 if the failure to pay constitutes a business practice," *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 716 (Cal. 2000), it does not follow that the time-barred Labor Code claims may still be pursued. Rather, only the UCL claim can be pursued. *Mendoza v. Bank of Am. Corp.*, 2019 WL 4142140, at *9 (N.D. Cal. Aug. 30, 2019); *Van v. Language Line Servs., Inc.*, 2016 WL 3143951, at *30 (N.D. Cal. June 6, 2016).

their failure-to-pay/waiting-time claim (§§ 201–203). In fact, they *excluded* that claim from the list of claims that were common to the Class. (7-ER-1560.) The district court should not have sua sponte certified it without any affirmative demonstration of compliance by Plaintiffs. *See Wal-Mart*, 564 U.S. at 350–51.

CONCLUSION

For these reasons, this Court should reverse the class certification orders.

RESPECTFULLY SUBMITTED this 28th day of July, 2021.

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STATEMENT OF RELATED CASES

There are no known related cases pending in the Ninth Circuit Court of Appeals.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief contains 17,356 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

RESPECTFULLY SUBMITTED this 28th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Description of Documents: OPENING BRIEF

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ADDENDUM

PERTINENT STATUTORY AUTHORITIES

18 U.S.C. § 1589

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means--

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) 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,

shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “serious harm” means 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.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or

an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 1595

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under subsection (a) shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under subsection (a) unless it is commenced not later than the later of--

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

Cal. Civ. Code § 52.5

(a) A victim of human trafficking, as defined in Section 236.1 of the Penal Code, may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney's fees and costs.

(b) In addition to the remedies specified in this section, in an action under subdivision (a), the plaintiff may be awarded up to three times his or her actual damages or ten thousand dollars ($10,000), whichever is greater. In addition,

punitive damages may be awarded upon proof of the defendant's malice, oppression, fraud, or duress in committing the act of human trafficking.

(c) An action brought pursuant to this section shall be commenced within seven years of the date on which the trafficking victim was freed from the trafficking situation or, if the victim was a minor when the act of human trafficking against the victim occurred, within 10 years after the date the plaintiff attains the age of majority.

(d) If a person entitled to sue is under a disability at the time the cause of action accrues so that it is impossible or impracticable for him or her to bring an action, the time of the disability is not part of the time limited for the commencement of the action. Disability will toll the running of the statute of limitations for this action.

(1) Disability includes being a minor, lacking legal capacity to make decisions, imprisonment, or other incapacity or incompetence.

(2) The statute of limitations shall not run against a plaintiff who is a minor or who lacks the legal competence to make decisions simply because a guardian ad litem has been appointed. A guardian ad litem's failure to bring a plaintiff's action within the applicable limitation period will not prejudice the plaintiff's right to bring an action after his or her disability ceases.

(3) A defendant is estopped from asserting a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action, or due to threats made by the defendant causing the plaintiff duress.

(4) The suspension of the statute of limitations due to disability, lack of knowledge, or estoppel applies to all other related claims arising out of the trafficking situation.

(5) The running of the statute of limitations is postponed during the pendency of criminal proceedings against the victim.

(e) The running of the statute of limitations may be suspended if a person entitled to sue could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and the inability to access services.

(f) A prevailing plaintiff may also be awarded reasonable attorney's fees and litigation costs including, but not limited to, expert witness fees and expenses as part of the costs.

(g) Restitution paid by the defendant to the victim shall be credited against a judgment, award, or settlement obtained pursuant to an action under this section. A judgment, award, or settlement obtained pursuant to an action under this section is subject to Section 13963 of the Government Code.

(h) A civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim. As used in this section, a "criminal action" includes investigation and prosecution, and is pending until a final adjudication in the trial court or dismissal.

Cal. Penal Code § 236.1

(a) A person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than five hundred thousand dollars ($500,000).

(b) A person who deprives or violates the personal liberty of another with the intent to effect or maintain a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than five hundred thousand dollars ($500,000).

(c) A person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking. A violation of this subdivision is punishable by imprisonment in the state prison as follows:

(1) Five, 8, or 12 years and a fine of not more than five hundred thousand dollars ($500,000).

(2) Fifteen years to life and a fine of not more than five hundred thousand dollars ($500,000) when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person.

(d) In determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the totality of the circumstances, including the age of the victim, his or her relationship to the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be considered.

(e) Consent by a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense to a criminal prosecution under this section.

(f) Mistake of fact as to the age of a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense to a criminal prosecution under this section.

(g) The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(9) of Title 22 of the United States Code.

(h) For purposes of this chapter, the following definitions apply:

(1) “Coercion” includes a scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; the abuse or threatened abuse of the legal process; debt bondage; or providing and facilitating the possession of a controlled substance to a person with the intent to impair the person's judgment.

(2) “Commercial sex act” means sexual conduct on account of which anything of value is given or received by a person.

(3) “Deprivation or violation of the personal liberty of another” includes substantial and sustained restriction of another's liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.

(4) “Duress” includes a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to acquiesce in or perform an act which he or she would otherwise not have submitted to or performed; a direct or implied threat to destroy, conceal, remove, confiscate, or possess an actual or purported passport or immigration document of the victim; or knowingly destroying, concealing, removing, confiscating, or possessing an actual or purported passport or immigration document of the victim.

(5) “Forced labor or services” means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person.

(6) “Great bodily injury” means a significant or substantial physical injury.

(7) “Minor” means a person less than 18 years of age.

(8) "Serious harm" includes 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, services, or commercial sexual acts in order to avoid incurring that harm.

(i) The total circumstances, including the age of the victim, the relationship between the victim and the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be factors to consider in determining the presence of "deprivation or violation of the personal liberty of another," "duress," and "coercion" as described in this section.