UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. _____

Wilhen Hill Barrientos, Keysler Ramón Urbina Rojas, and Gonzalo Bermudez Gutiérrez, individually and on behalf of all others similarly situated,

Plaintiffs-Petitioners,

v.

CoreCivic, Inc.,

Defendant-Respondent.

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE RULE 23(f)

From the Order Denying Plaintiffs' Motion for Class Certification, Entered on March 28, 2023, by the United States District Court for the Middle District of Georgia, Columbus Division, No. 4:18-cv-00070-CDL (Land, J.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the Plaintiffs-Petitioners submit their Certificate of Interested Persons and Corporate Disclosure Statement and furnish the following list of individuals and entities having an interest in the outcome of this particular case:

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The undersigned attorney further certifies, pursuant to Federal Rule of Appellate Procedure 26.1, that Plaintiffs-Petitioners have no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest in any of the Plaintiffs-Petitioners.

Respectfully submitted,

/s/ Meredith B. Stewart

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TABLE OF CONTENTS

INTRODUCTION AND RELIEF SOUGHT 1

RELEVANT FACTS AND PROCEDURAL HISTORY 2

QUESTIONS PRESENTED 4

REASONS FOR GRANTING THE PETITION 4

I. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD TO PLAINTIFFS' TVPA CLAIMS. 5

A. The Plain Language of §1589 Establishes an Objective Standard. 5

B. The Court Erred When It Applied a Subjective Test to Plaintiffs' TVPA Claims. 10

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE WORK PROGRAM PARTICIPATION RATE CONCLUSIVELY ESTABLISHES CORECIVIC'S POLICIES ARE NOT UNIFORMLY COERCIVE. 15

III. THE DISTRICT COURT'S USE OF THE INCORRECT CAUSATION STANDARD ALSO LED TO A CASCADE OF LEGAL ERRORS IN DENYING CLASS CERTIFICATION OF THE ATTEMPT, RULE 23(B)(2), AND UNJUST ENRICMENT CLAIMS. 18

A. The District Court's Application of the Subjective Causation Standard to the Plaintiff's TVPA Attempt Claim is Contrary to the Statute's Plain Language 18

B. The District Court's Use of the Incorrect Causation Standard Also Pervaded its Evaluation of the 23(b)(2) Injunctive Relief Class 20

C. The District Court's Use of an Incorrect Legal Standard Also Infected Its Determination of Plaintiffs' Unjust Enrichment Claim. 21

CONCLUSION 22

TABLE OF CITATIONS

Page(s)

Cases

Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.,
57 F.4th 791 (11th Cir. 2022) 11

Arlington Video Prods., Inc. v. Fifth Third Bancorp,
569 F. App'x 379 (6th Cir. 2014) 17

Barrientos v. CoreCivic, Inc.,
332 F. Supp. 3d 1305 (M.D. Ga. 2018), *aff'd*, 951 F.3d 1269 (11th Cir. 2020) 21

Barrientos v. CoreCivic, Inc.,
951 F.3d 1269 (11th Cir. 2020) 2, 6

Klay v. Humana, Inc.,
382 F.3d 1241 15

Cordoba v. DIRECTTV,
942 F.3d 1259 (11th Cir. 2019) 13

Dresdner Bank AG v. M/V Olympia Voyager,
446 F.3d 1377 (11th Cir. 2006) 16

Fortis Ins. Co. v. Kahn,
299 Ga. App. 319 (2009) 21

Fouche v. United States,
No. 3:21-CV-00050-BSM, 2021 WL 5567302 (E.D. Ark. Nov. 29, 2021) 19

Headley v. Church of Scientology Int'l,
687 F.3d 1173 (9th Cir. 2012) 10

Magtoles v. United Staffing Registry, Inc.,
No. 21-cv-1850-KAM-PK, 2023 WL 2710178 (E.D.N.Y. Mar. 30, 2023) 7

Menocal v. GEO Grp., Inc.,
882 F.3d 905 (10th Cir. 2018) 14

Menocal v. GEO Grp., Inc.,
No. 14-CV-02887-JLK-MEH, 2022 WL 17038977 (D. Colo. Oct. 18, 2022) 12

Myers v. TooJay's Mgmt. Corp.,
640 F.3d 1278 (11th Cir. 2011) 9

N.Y. State Nurses Ass'n v. Albany Med. Ctr.,
No. 19-cv-1265, 2020 WL 4001056 (N.D.N.Y. July 15, 2020).....7

Neder v. United States,
527 U.S. 1 (1999).....8

Novoa v. GEO Grp., Inc.,
No. EDCV 17-2514-JGB-SHKx, 2019 WL 7195331 (C.D. Cal. Nov. 26, 2019) 15, 19

Novoa v. GEO Grp., Inc.,
No. EDCV17-2514-JGB-SHKx, 2021 WL 4913286 (C.D. Cal. Sept. 30, 2021) 7, 20

Nuñag-Tanedo v. E. Baton Rouge Parish Sch. Bd.,
No. LACV10-01172-JAK-MLGx, 2011 WL 7095434 (C.D. Cal. 2011) 8, 13, 19

Nuñag-Tanedo v. E. Baton Rouge Parish Sch. Bd.,
790 F. Supp. 2d 1134 (C.D. Cal. 2011) 19

Owino v. CoreCivic, Inc.,
60 F.4th 437 (9th Cir. 2022) 7, 14, 15

Owino v. CoreCivic,
No. 17-cv-1112-JLS-NLS, 2020 WL 1550218 (S.D. Cal. Apr. 1, 2020) 12, 13

Paguirigan v. Prompt Nursing Emp. Agency LLC,
No. 17-cv-1302-NG-JO, 2018 WL 4347799 (E.D.N.Y. Sept. 12, 2018) 8, 19

Prado-Steiman ex rel. Prado v. Bush,
221 F.3d 1266 (11th Cir. 2000) 2, 4, 5

Ratha v. Phatthana Seafood Co.,
35 F.4th 1159 (9th Cir. 2022) 19

Rosas v. Sarbanand Farms, LLC,
329 F.R.D. 671 (W.D. Wash. 2018) 8

Saraswat v. Selva Jayaraman, Bus. Integra, Inc.,
No. 15-cv-4680-PKC-LB, 2016 WL 5408115 (E.D.N.Y. Sept. 28, 2016) 19

United States v. Brown,
934 F.3d 1278 (11th Cir. 2019) 11

United States v. Dann,
652 F.3d 1160 (9th Cir. 2011) 8

United States v. Rivera,
799 F.3d 180 (2d Cir. 2015) 7

United States v. Yost,
479 F.3d 815 (11th Cir. 2007) 19

Vill. Auto Ins. Co. v. Rush,
286 Ga. App. 688 (2007) 21

Villarreal v. R.J. Reynolds Tobacco Co.,
839 F.3d 958 (11th Cir. 2016) (en banc) 10

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).....21

Statutes

18 U.S.C. chapter 77 18

18 U.S.C. §1589 .....*passim*

18 U.S.C. §1594(a) .....*passim*

18 U.S.C. §1595(a) .....*passim*

Trafficking Victims Protection Act (TVPA) .....*passim*

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(b)(3), 122 Stat. 5044 (2008) 10

Other Authorities

Am. Heritage Coll. Dictionary (4th ed. 2010) 11, 18

Black's Law Dictionary (8th ed. 2004) 18

Fed. R. Civ. P. 23 .....*passim*

Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment, 39 F.R.D. 69 (1966) 20

Merriam Webster's Advanced Learner's Dictionary (2008).....10

INTRODUCTION AND RELIEF SOUGHT

This Court should permit immediate appeal of the district court's denial of class certification. The decision is premised on an incorrect legal standard that is at odds with the plain language of the Trafficking Victims Protection Act ("TVPA"), which resulted in a domino effect of legal errors, and an overarching and clearly erroneous factual finding.

Plaintiffs allege, on behalf of themselves and two putative classes, that Defendant/Respondent CoreCivic, Inc. ("CoreCivic") forced and attempted to force them to work for as little as $1 per day while they were in civil detention at Stewart Detention Center ("SDC") by depriving them of basic necessities and threatening to punish and punishing them with physical restraint and serious harm if they refused. Plaintiffs also claim CoreCivic was unjustly enriched by this conduct. Plaintiffs seek Rule 23(b)(2) and Rule 23(b)(3) certification for two classes—the Forced Labor Class under the TVPA and the Unjust Enrichment Class under Georgia law.

By erroneously adding a subjective causation standard to Plaintiffs' claims under the TVPA's forced labor provision, 18 U.S.C. §1589, the district court improperly foreclosed a forced labor class that could have been certified through any of the four unlawful means listed in §§1589(a)(1),(2), and (4), 1589(b) or a separate attempt claim under §1594(a). The district's denial of certification also

hinged upon a clearly erroneous factual finding: 80% of the detained population *chose* not to work when, in fact, work program participation is capped at approximately 20% of the detained population due to the limited number of jobs. That CoreCivic consistently filled its work program jobs with detained workers is evidence its deprivation and punishment policies are coercive. These two fundamental errors then formed the predicate for further legal errors.

Immediate appeal is necessary to prevent the district court's error-ridden class certification decision—which is premised on an incorrect legal standard with broad potential ramifications for forced labor claims—from ending this case. *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-75 (11th Cir. 2000). Petitioners respectfully request that this court grant this petition and reverse the denial of certification for both putative classes.

RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiff/Petitioner Wilhen Hill Barrientos filed a complaint on behalf of himself and others similarly situated against CoreCivic to redress CoreCivic's forced labor and related violations of the TVPA, 18 U.S.C. §§1589(a), 1594(a), 1595(a), through its "Voluntary Work Program" ("Work Program") at SDC. Doc. 1. Mr. Hill Barrientos also brought an unjust enrichment claim under Georgia law. *Id.* ¶¶128-33. The district court denied CoreCivic's motion to dismiss, and this Court affirmed. *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269 (11th Cir. 2020).

Plaintiffs/Petitioners Gonzalo Bermudez Gutiérrez and Keysler Ramón Urbina Rojas joined the Amended Complaint. Doc. 87.

After extensive discovery, Plaintiffs moved to certify (1) a Forced Labor Class; and (2) an Unjust Enrichment Class. Docs. 213, 213-1 at 8, 33-35. Plaintiffs sought certification based on four different CoreCivic policies applied to detained individuals at SDC: (1) threatened and actual deprivation of basic necessities, (2) threatened and actual transfer to unsafe housing; (3) threatened and actual solitary confinement and lockdown; and (4) abuse of legal process through threatened referral for criminal prosecution, threatened increased classification level, and threatened impact on immigration proceedings. Doc. 213-1 at 18-28, 39, 46-47. With these uniform policies, CoreCivic obtained or attempted to obtain labor from class members through serious harm or threats of serious harm, physical restraint or threats of physical restraint, abuse of legal process or threats of abuse of legal process, and/or a scheme, pattern, or plan of threats of or actual serious harm, and/or engaged in a venture relying on the coercive scheme, in violation of §§1589(a)-(b), 1594(a). *Id.* at 39.

Plaintiffs sought to certify the classes under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. *Id.* at 36-46. On March 28, 2023, the district court denied Plaintiffs' motion for class certification. Ex. 1, Order. Based on that

decision, the district court denied Plaintiffs' related motion for spoliation sanctions and denied as moot Plaintiffs' motion to exclude CoreCivic's expert witness. *Id*.

QUESTIONS PRESENTED

1. Did the district court abuse its discretion when it applied a subjective causation standard to Plaintiffs' claims under the TVPA, contrary to the statute's plain language?
2. Did the district court commit clear error when it found that 80% of the detained population at SDC chose not to participate in CoreCivic's Work Program when program participation is capped at 20%?
3. Did these two legal and factual errors cause the district court to commit a cascade of other legal errors in its certification order?

REASONS FOR GRANTING THE PETITION

Review should be granted because the district court committed fundamental errors when it (1) applied the incorrect legal standard to the TVPA claims, Rule 23(b)(2) class, and unjust enrichment claim and (2) relied on the erroneous factual finding that 80% of detained individuals chose not to participate in the Work Program. These "*substantial* weakness[es] . . . constitute[ ] an abuse of discretion." *Prado-Steiman*, 221 F.3d at 1274.

This case is in an appropriate "posture for interlocutory appellate review" because manifest legal and factual errors in the certification decision will taint—

and perhaps be dispositive of—future merits determinations. *Id.* at 1276. With completed discovery involving numerous depositions and an exchange of over 70,000 documents, this Court has a well-developed record for appellate review. *Id.* Finally, Petitioners will be "irreparabl[y] harm[ed] from delaying appellate review." *Id.* at 1274. Without the economies of scale provided by the class mechanism, litigating individual by individual will be cost prohibitive given the comparatively low value of individual damages and the high costs of trial for persons without significant resources. Consequently, the class certification decision is likely a "death knell" for individual cases. *Id.*

Finally, given the gravity of forced labor and the strong public interest in its prevention, this Court's review would correct the district court's glaring errors of statutory interpretation that would effectively leave broad categories of forced labor victims out in the cold. The question of the statute's scope is a question of first impression in this Circuit that "relates specifically to . . . the mechanics of certifying a class." *Id.* at 1275.

I. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD TO PLAINTIFFS' TVPA CLAIMS.

A. The Plain Language of §1589 Establishes an Objective Standard.

The district court erred in applying a subjective standard, contrary to the plain language of §§1589(a)(1),(2), and (4) and 1589(b), to conclude that Plaintiffs

could not establish classwide causation.[1] This erroneous causation analysis was the district court's basis for finding Plaintiffs could not establish numerosity, commonality, typicality, ascertainability, predominance *and* superiority under Rules 23(a) and (b)(3) for both proposed classes. Ex. 1 at 8-11. Absent this overarching error, the putative classes satisfy these and all other Rule 23 requirements. Accordingly, the district court's decision should be reversed.[2]

"The interpretation of a statute begins with its language." *Barrientos*, 951 F.3d at 1276 (citations omitted). The Court first must "determine whether the language at issue has a plain and unambiguous meaning," and, "[i]f so, [the Court] need go no further." *Id*. (citations omitted).

The TVPA's forced labor provision, 18 U.S.C. §1589(a), provides a cause of action against:

> [w]hoever knowingly provides or obtains the labor or services of a person . . . (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

[1] Plaintiffs do not seek immediate appeal of the district court's denial of class certification of their claim under §1589(a)(3) (abuse or threatened abuse of the legal process); however, they maintain the denial of certification of their claim that CoreCivic attempted to coerce labor through abuse or threatened abuse of the legal process under §1594(a) was an abuse of discretion. *See infra* Section III.A.

[2] The district court did not address Plaintiffs' request to certify their "venture" claim under §1589(b).

> that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

Only under §1589(a)(3) (abuse of legal process) does the plain text of §1589 require a factfinder to peer into the mindset of a victim to prove a violation, since Congress expressly included a subjective causation requirement only for that prong:

> 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.

§1589(c)(1) (emphasis added).

On the other hand, liability may attach under §1589(a)(2) (serious harm) based on an objective "reasonable person" standard.[3] The statute defines "serious harm" in §1589 as

[3] Courts have routinely recognized that the plain language of §1589 establishes a reasonable person standard for causation. *See, e.g.*, *Owino v. CoreCivic, Inc.*, 60 F.4th 437, 446 (9th Cir. 2022) ("CoreCivic's argument that the TVPA necessitates a subjective, individualized inquiry fails due to contrary language in the statute.") *United States v. Rivera*, 799 F.3d 180, 186-87 (2d Cir. 2015) (finding error, albeit harmless, where the court failed to instruct the jury that TVPA causation hinged on a "reasonable person" rather than the victim's subjective experience); *Magtoles v. United Staffing Registry, Inc.*, No. 21-cv-1850-KAM-PK, 2023 WL 2710178, at *23-25 (E.D.N.Y. Mar. 30, 2023); *Novoa v. GEO Grp., Inc.*, No. EDCV17-2514-JGB-SHKx, 2021 WL 4913286, at *5 (C.D. Cal. Sept. 30, 2021); *N.Y. State Nurses*

> 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.

§1589(c)(2) (emphasis added). The plain language establishes a causation element ("*to compel* . . . *to perform* . . .") that is governed by an objective standard ("*reasonable person*"). *See Neder v. United States*, 527 U.S. 1, 21 (1999) ("Where Congress uses terms that have accumulated settled meaning under … the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (citation omitted).[4]

As for §1589(a)(1) (force or physical restraint), Congress did not require evaluation of a victim's subjective mindset *or* an objective "reasonable person" standard—any use of force, physical restraint, or threats thereof to obtain labor

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Ass'n v. Albany Med. Ctr., No. 19-cv-1265, 2020 WL 4001056 (N.D.N.Y. July 15, 2020); *Rosas v. Sarbanand Farms, LLC*, 329 F.R.D. 671, 689 (W.D. Wash. 2018); *Paguirigan v. Prompt Nursing Emp. Agency LLC*, No. 17-cv-1302-NG-JO, 2018 WL 4347799, at *8 (E.D.N.Y. Sept. 12, 2018); *Nuñag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, No. LACV10-01172-JAK-MLGx, 2011 WL 7095434, at *7-8 (C.D. Cal. 2011).

[4] The statute's objective causation requirement in §§1589(a)(2) and (a)(4) is not unbounded because those sections require the defendant have the necessary intent and the threats be "sufficiently serious." *See United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011).

(accompanied by the necessary mens rea), amounts to a violation of this prong of the statute.

Section §1589(a)(4) bars a "scheme, pattern, or plan" based on serious harm or physical restraint, and thus like §§1589(a)(1) and (a)(2), does not depend on the victim's individual mindset. The plain language of §1589(a)(4) further illustrates an objective test applies because the text prohibits a scheme "*intended to cause*" the person to believe they would suffer serious harm or physical restraint. Had Congress intended a subjective test apply, it would have written simply "to cause" as it did in §1589(a)(3),(c)(1). *See Myers v. TooJay's Mgmt. Corp.,* 640 F.3d 1278, 1284 (11th Cir. 2011) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

Lastly, §1589(b) provides that whoever knowingly benefits from a venture which has engaged in the obtaining of labor through means described in §1589(a)(1)-(4) incurs TVPA liability, with the standard applied based on the respective paragraph of §1589(a) at issue.

The plain language of the statute thus establishes an objective causation test applying to §§1589(a)(1),(2),(4) and 1589(b). Because the statute's language is

unambiguous, the "judicial inquiry is complete." *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016) (en banc) (citation omitted).[5]

B. The Court Erred When It Applied a Subjective Test to Plaintiffs' TVPA Claims.

The district court abused its discretion when it applied a subjective test to Plaintiffs' TVPA claims to deny certification of Plaintiffs' Forced Labor Class for failure to satisfy Rule 23(a) and (b)(3). Because the district court held that all prongs of §1589 necessitate individual inquiry into why each class member participated in the Work Program, contrary to the statute's text, *see supra* Section I.A,[6] it disregarded Plaintiffs' substantial classwide evidence of causation. This

[5] In *Roman v. Tyco Simplex Grinnell*, this Court affirmed the dismissal of a pro se plaintiff's TVPA claim against his employer because he failed (after four attempts) to sufficiently plead how his employer's threats of termination "qualified as a serious harm" and "led to his forced labor." 732 F. App'x 813, 817 (11th Cir. 2018) (per curiam) (citing *Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1179 (9th Cir. 2012) for the proposition that the TVPA requires the labor be "obtained 'by means of' a threat of serious harm."). In *Headley*, the Ninth Circuit affirmed summary judgment for defendant because it held the plaintiffs failed to show the threatened harm (excommunication from the church) was sufficiently serious to compel them to work. 687 F.3d at 1180. These cases fell on the "serious harm" prong and do not hold that the TVPA has a subjective causation element.

[6] The district court held that the source of §1589's causation requirement is the statute's "by means of" language. Ex. 1 at 9. The TVPA does not define "by means of," and the phrase's ordinary meaning at the time it was added to the statute denotes the use of a method—not a separate causation requirement. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(b)(3), 122 Stat. 5044 (2008) (current version at 18 U.S.C. § 1589). "By means of" is defined as "through the use of (something)," Merriam Webster's Advanced Learner's Dictionary 1012 (2008), and "with the use of;

overarching error resulted in the sweeping holding that Plaintiffs did not satisfy any Rule 23(a) and (b)(3) factors. Ex. 1 at 10 (denying certification because some class members "may not have perceived the conditions as coercive," and thus finding no predominance); *id.* at 8-9, 11 (same reasoning for ascertainability, typicality, numerosity, commonality, and superiority).

Plaintiffs provided significant evidence establishing that CoreCivic has deprivation and punishment policies and practices at SDC that apply uniformly to the class and that the question of whether those policies and practices coerce class members to work under §1589(a)(1),(2), and (4) can be determined on a classwide basis. Disregarding this evidence was an abuse of discretion. To the extent this could be considered a factual error, it resulted from the "appli[cation of] an incorrect legal standard" and is therefore "not insulated by the clear-error standard." *United States v. Brown*, 934 F.3d 1278, 1307 (11th Cir. 2019).

The district court acknowledged the existence of two common policies and practices at SDC: a practice of providing food to detained people that is inadequate in amount and nutritional value and a policy of threatening to discipline

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owing to," Am. Heritage Coll. Dictionary 1528 (4th ed. 2010). *See also Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) ("One of the methods of determining the ordinary meaning of a word is by looking at dictionaries in existence around the time of enactment.") (citation omitted).

people with segregation or lockdown—which the district court found are "forms of physical restraint"—if they refuse to work. *See* Ex. 1 at 4-6.

CoreCivic's discipline policy establishes a plausible class-wide violation of §1589(a)(1) because threats of or actual physical restraint are unlawful means under the statute and every class member had notice of the policy. *See Menocal v. GEO Grp., Inc.*, No. 14-CV-02887-JLK-MEH, 2022 WL 17038977, at *28 (D. Colo. Oct. 18, 2022) (denying defendant's summary judgment motion on plaintiffs' §1589(a)(1) claim because "the [TVPA] makes clear that a showing of serious harm is not required to prove a violation; physical restraint and threats of physical restraint are sufficient"). The district court wrongly suggested Plaintiffs could not show the punishment policy was uniformly coercive because the class members did not have notice of it. Ex. 1 at 12-13. This finding is a clear error because, as the district court noted, the sanctions appear in the handbook, *see id.* at 5, and the handbook is provided to every detained person at SDC. Doc. 213-1 at 16-17 (citing SDC warden's testimony). Thus, *Menocal* and *Owino*—cases where courts certified forced labor classes because threats of segregation constitute physical restraint and all detained people had notice of those threats—are directly analogous to the case at bar, and the district court's attempt to distinguish them is incorrect. *See* Ex. 1 at 12-13; *Menocal*, 2022 WL 17038977, at *33; *Owino v. CoreCivic*, No. 17-cv-1112-JLS-NLS, 2020 WL 1550218, at *21 (S.D. Cal. Apr. 1,

2020) (finding "threat of discipline was conveyed to all detainees at intake through the admission handbook").

Plaintiffs' evidence similarly establishes that their "serious harm" claims under §1589(a)(2) and (4) are amenable to class certification because Plaintiffs can show with classwide proof that CoreCivic's uniform policies would compel a reasonable class member to work. *See generally* Doc. 213-1 at 33 (listing common evidence). Plaintiffs also put forth evidence to show that class members share common attributes (non-citizens subject to immigration removal proceedings and uniform conditions at the same detention facility) permitting the factfinder to apply the reasonable person standard. *Id*. at 34; *Nuñag-Tanedo*, 2011 WL 7095434, at *8 (certifying class where common attributes allowed the factfinder to apply the TVPA's reasonable person standard). Under these circumstances, TVPA causation may be established with classwide proof. *See Owino*, 2020 WL 1550218, at *28 (certifying class where plaintiffs established common policies would cause a reasonable detained person to labor).[7]

[7] The district court, relying on *Cordoba v. DIRECTTV*, 942 F.3d 1259 (11th Cir. 2019), held that failure to show that causation can be established with classwide proof raises standing issues. Ex. 1 at 8. Here, because Plaintiffs can establish causation with classwide proof, certifying the class does not contravene this Court's holding in *Cordoba*. *See Cordoba*, 942 F.3d at 1273 (holding that Rule 23 does not require a showing that each class member has standing so long as Article III traceability may be established with classwide proof).

The district court also ignored Plaintiffs' direct and circumstantial evidence showing that the policies did, in fact, coerce Plaintiffs and class members to work. This evidence shows classwide resolution of causation is possible, but the district court overlooked it because of its erroneous application of a subjective, necessarily individualized standard. Plaintiffs' evidence included, *inter alia*, testimony from Plaintiffs that they worked to stave off hunger and avoid segregation, Ex. 1 at 7 (citing Plaintiffs' declarations);[8] CoreCivic documents showing SDC implemented an incentive program offering food in exchange for work, Doc. 213-1 at 9-10; undisputed evidence that putative class members had notice of potential discipline, including segregation, for failing to work, *id*. at 16-17 (citing SDC warden's testimony); and evidence that the positions available in CoreCivic's Work Program were consistently filled, *id*. at 5-6, 25, 33. This evidence is sufficient to establish that TVPA causation can be shown with classwide proof here. *See Owino*, 60 F.4th at 446 (affirming certification of TVPA class in part because the statute's causal element "may be inferred by class-wide evidence"); *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 918 (10th Cir. 2018) (affirming certification of TVPA class in part because causation may be proven with classwide proof regardless of the standard);

[8] The district court usurped the role of the factfinder in concluding the food deprivation policy did not coerce two Plaintiffs to work, despite their testimony to the contrary, because they had some outside funds in their detention trust accounts. Ex. 1. at 10. This finding is an improper credibility determination only appropriate for a jury during the case's merits phase.

Novoa v. GEO Grp., Inc., No. EDCV 17-2514-JGB-SHKx, 2019 WL 7195331, at *16 n.11 (C.D. Cal. Nov. 26, 2019) (certifying TVPA class and explaining "the reasonable person analysis [of the TVPA] . . . is susceptible to class-wide resolution"); *c.f.*, *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (holding in RICO case that "circumstantial evidence that can be used to show reliance is common to the whole class").

Accordingly, but for the district court's misapplication of the legal standard, Plaintiffs satisfy the Rule 23(a) and (b)(3) factors because the existence of common polices and classwide proof of causation permits the question of whether CoreCivic's policies violated the rights of class members to be resolved for the class as whole. *See Owino*, 60 F.4th at 445 (citing *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014)). The district court's decision is an abuse of discretion and should be reversed.

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE WORK PROGRAM PARTICIPATION RATE CONCLUSIVELY ESTABLISHES CORECIVIC'S POLICIES ARE NOT UNIFORMLY COERCIVE.

The district court erred when it baselessly found that "the record in fact indicates that 80% of the detainees *chose* not to participate in the work program . . . ." Ex. 1 at 10, 13 n.5 (emphasis added). The district court seized on this statistical fallacy to conclude that Plaintiffs could not show that "no reasonable detainee could resist the coercion" for purposes of the Rule 23(a) and (b)(3)

inquiry. *Id.* at 13 n.5. Such clearly erroneous fact finding warrants this Court's review. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377, 1380 (11th Cir. 2006).

At most, only 20% of the detained population can participate in the Work Program at SDC at any given time. *See* Ex. 1 at 3 ("In 2021, there were approximately 326 job openings for detainee workers at Stewart, which has a design capacity of about 1,700 detainees.") (citing SDC Work Program Plan Guidelines); Doc. 213-1 at 5 (compiling evidence showing that only between 326 and 336 work program jobs were available during the class period); Doc. 213-11 at 61:9-12 (former SDC warden testifying that SDC has confined as many as 2,000 people during the class period). There is no evidence in the record that jobs existed for the approximately 80% of the population who did not participate in the program nor is there evidence that they *chose* not to participate. Moreover, the SDC warden testified that more than 21.72% of the population between December 2008 and December 2020 were confined for less than 14 days—meaning those individuals were likely not at SDC long enough to secure a work program job. Doc. 250-4 ¶36. Additionally, ICE's prohibition of detained individuals classified as "high custody" from working jobs outside of their housing unit limits the number of jobs available to those individuals and further narrows the pool of

potential work program participants. Doc. 213-1 at 5.[9] Approximately 20% of the total detained population participated in the Work Program from December 2008 to December 2020. Ex. 1 at 3 (citing SDC warden's declaration). This fact establishes the jobs that CoreCivic needed to fill were consistently filled by detained individuals throughout the class period and is circumstantial evidence that CoreCivic's policies were uniformly coercive.[10]

Because the decision rests on clear factual error, it should be reversed. *See Arlington Video Prods., Inc. v. Fifth Third Bancorp*, 569 F. App'x 379, 392 (6th Cir. 2014) (reversing denial of class certification when district court's decision relied on the misapprehension of facts).

[9] In 2018, ICE granted a waiver to CoreCivic to allow some high custody individuals to work in the SDC kitchen. Doc. 213-1 at 9.

[10] The district court faulted Plaintiffs for failing to "rebut" the factually incorrect 80% figure. Ex. 1 at 12-13 n.5. But it was Plaintiffs who offered the high participation rate—wherein all job slots were generally filled—as *affirmative* evidence of causation. Doc. 213-1 at 33. CoreCivic made no argument that this figure was dispositive of the causation issue and instead mentioned it in its fact section only. Doc. 250 at 8.

III. THE DISTRICT COURT'S USE OF THE INCORRECT CAUSATION STANDARD ALSO LED TO A CASCADE OF LEGAL ERRORS IN DENYING CLASS CERTIFICATION OF THE ATTEMPT, RULE 23(B)(2), AND UNJUST ENRICMENT CLAIMS.

A. The District Court's Application of the Subjective Causation Standard to the Plaintiff's TVPA Attempt Claim is Contrary to the Statute's Plain Language.

Plaintiffs also asserted a claim that CoreCivic attempted to subject them and the putative class to forced labor. 18 U.S.C. §1594(a) ("Whoever attempts to violate [18 U.S.C. §1589] shall be punishable in the same manner as a completed violation of that section."); Doc. 87 ¶115. Section 1595(a) plainly provides for a civil cause of action for an "individual who is a victim of a violation of this chapter [18 U.S.C. chapter 77]," which includes §1594(a) (the attempt provision).

The district court improperly denied class certification of the attempt claim by applying a subjective causation standard to conclude that no "person who is impervious to attempted coercion is nonetheless a 'victim' within the meaning of §1595(a)." Ex. 1 at 11 n.4. But the district court disregards the ordinary meaning of "victim," which is a person who has been harmed. *See, e.g.*, Victim, Black's Law Dictionary (8th ed. 2004) ("A person harmed by a crime, tort, or other wrong."); Am. Heritage College Dictionary 1528 (4th ed. 2010) (defining "victim" as "[o]ne

who is harmed or killed by another," and "[o]ne harmed by or made to suffer from an act, circumstance, agency, or condition").[11]

Courts have repeatedly found that attempt claims under the TVPA create civil causes of actions. *See, e.g.*, *Ratha v. Phatthana Seafood Co.*, 35 F.4th 1159, 1176 n.16 (9th Cir. 2022) (reading the term "perpetrator" in §1595(a) to include people who have committed an "attempt" under §1594(a)); *Fouche v. United States*, No. 3:21-CV-00050-BSM, 2021 WL 5567302, at *2 (E.D. Ark. Nov. 29, 2021); *Saraswat v. Selva Jayaraman, Bus. Integra, Inc.*, No. 15-cv-4680-PKC-LB, 2016 WL 5408115, at *2 (E.D.N.Y. Sept. 28, 2016) ("The TVPA extends liability to whoever attempts to violate Section 1589" (internal quotations omitted)); *Nuñag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1147 (C.D. Cal. 2011) (holding plaintiffs alleged sufficient facts showing an attempt to engage in a forced labor scheme). And several courts have granted class certification for attempted forced labor claims under §§1589, 1594(a). *See, e.g.*, *Novoa*, 2019 WL 7195331, at *10, *20; *Paguirigan*, 2018 WL 4347799, at *4, *10; *Nuñag-Tanedo*, 2011 WL 7095434, at *11.

[11] Because a defendant need only possess specific intent and undertake a substantial step toward commission of an underlying crime in order to commit an attempt, *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007), an attempt need not result in the ultimate harm that might accompany a completed violation. Thus, in any attempted forced labor case, the defendant did not yet obtain the victim's labor in violation of the statute, as the district court postulated could be the case for some putative class members here.

The district court's conclusion that not all class members experienced subjective feelings of coercion and therefore are not "victims" contravenes the plain language of §1595(a). Accordingly, the denial of class certification of Plaintiffs' attempt claim should be reversed.

B. The District Court's Use of the Incorrect Causation Standard Also Pervaded its Evaluation of the 23(b)(2) Injunctive Relief Class.

The district court abused its discretion when it denied Rule 23(b)(2) certification of the Forced Labor and Unjust Enrichment Classes. Although the district court acknowledged that "policies and practices may have existed that applied to every putative class member who chose to participate in the program," Ex. 1 at 8, the district court's emphasis on those policies and practices' subjective effect on individual class members—resulting in a lack of predominance—has no bearing on the Rule 23(b)(2) inquiry, *id.* at 10. *See* Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment, 39 F.R.D. 69, 102 (1966) ("Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.").

Plaintiffs have satisfied the Rule 23(b)(2) requirements because injunctive and declaratory relief would stop CoreCivic from continuing these policies or practices applied uniformly at SDC. *See Novoa*, 2021 WL 4913286, at *7. Because of the court's improper causation analysis (which was determinative for all Rule 23

factors discussed in the opinion, *see supra* at Sections I-III.A) and its effective application of a predominance requirement to the Rule 23(b)(2) class, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011), the denial of Rule 23(b)(2) class certification should also be reversed.

C. The District Court's Use of an Incorrect Legal Standard Also Infected Its Determination of Plaintiffs' Unjust Enrichment Claim.

To establish a claim of unjust enrichment under Georgia law, Plaintiffs must show that "CoreCivic coerced them to provide labor to CoreCivic, that CoreCivic benefitted from that labor, and that CoreCivic should compensate Plaintiffs . . . because allowing CoreCivic to keep that benefit would be unjust." *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305, 1313 (M.D. Ga. 2018), *aff'd*, 951 F.3d 1269 (11th Cir. 2020). Because classwide causation can be established for the TVPA claims, *see supra* Sections I-III.B, that element is satisfied for the Unjust Enrichment claim too. *See Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 320 (2009) (affirming class certification for claims including unjust enrichment); *Vill. Auto Ins. Co. v. Rush*, 286 Ga. App. 688, 691 (2007) (same). Accordingly, the district court erred in denying the certification of the Unjust Enrichment Class based on the same erroneous individualized causation standard that it applied to the TVPA claims. Ex. 1 at 9-10.

CONCLUSION

For the foregoing reasons, this Court should grant review of the order denying certification of the two classes and reverse.

Dated: April 11, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitations of Rule 5(c)(1) of the Federal Rules of Appellate Procedure because it contains 5,141 words and that this brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Microsoft 365 in 14-point Times New Roman font.

/s/ Meredith B. Stewart
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Dated: April 11, 2023

CERTIFICATE OF SERVICE

I certify that on April 11, 2023, I served a true and correct copy of the foregoing Petition upon all counsel of record by and through the Court's CM/ECF system.

/s/ Meredith B. Stewart
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

WILHEN HILL BARRIENTOS, *et al.*,	*	
Plaintiffs,	*	
vs.	*	CASE NO. 4:18-CV-70 (CDL)
CORECIVIC, INC.,	*	
Defendant.	*	

O R D E R

The Court has spent too much time considering the pending motion for class certification, partly because it has been vacillating on whether the claims in this case are appropriate for class resolution. Vacillation typically means that the party with the burden of carrying the issue has failed to do so. And that is the case here. The Court finds that Plaintiffs have failed to carry their burden of establishing that this case should be certified for class action purposes. Their motion (ECF Nos. 213 & 238) is therefore denied.

DISCUSSION

A class action may only be certified if the party seeking class certification satisfies, "through evidentiary proof," all the requirements specified in Federal Rule of Civil Procedure 23(a) plus at least one of the requirements set forth in Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *accord* Fed. R.

Civ. P. 23. Plaintiffs must also "demonstrate that the class is 'adequately defined and clearly ascertainable.'" *Sellers v. Rushmore Loan Mgmt. Servs., LLC*, 941 F.3d 1031, 1039 (11th Cir. 2019) (quoting *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)). Plaintiffs have the burden to prove that the class certification requirements are met. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016). With these standards in mind, the Court analyzes Plaintiffs' motion for class certification, starting with some factual background.

I. Factual Background[1]

United States Immigration and Customs Enforcement ("ICE") detains certain aliens while their removal proceedings are pending "or for other reasons related to enforcement of the nation's immigration laws." *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1272 (11th Cir. 2020). Stewart County, Georgia detains aliens on ICE's behalf at Stewart Detention Center ("Stewart"), which is operated by CoreCivic, Inc.

Plaintiffs claim that CoreCivic enlists detainees in a "voluntary work program" to provide cheap labor for operating Stewart, which enables CoreCivic to increase its profits. Plaintiffs further assert that CoreCivic uses coercive tactics to

[1] The Court spent considerable time studying the parties' briefing, which contains extensive factual details. The Court also carefully considered the voluminous exhibits that the parties submitted. In this Order, the Court has attempted to distill the facts to include only those that are truly material.

force the detainees to keep working, including (1) a "deprivation scheme" which threatens work program participants with serious harm if they refuse to work and (2) a practice of physically restraining work program participants who refuse to work. The Court will describe the voluntary work program, the "deprivation scheme," and the work program discipline policies.

CoreCivic must provide Stewart detainees an opportunity to participate in a voluntary work program. Pls.' Mot. Class Certification Ex. 13, 2016 ICE Detention Standards § 5.8(V)(A), ECF No. 213-17 ("2016 ICE Standards"). Stewart work program participants serve as kitchen workers, laundry workers, barbers, commissary workers, and in various other jobs. Pls.' Mot. Class Certification Ex. 35, Stewart Detention Center Work/Program Plan Guidelines at CCBVA0000118621, ECF No. 213-39. The three named Plaintiffs—Wilhen Hill Barrientos, Keysler Ramon Urbina Rojas, and Gonzalo Bermudez Gutierrez—served as kitchen workers. Most detainees at Stewart do *not* participate in the work program. In 2021, there were approximately 326 job openings for detainee workers at Stewart, which has a design capacity of about 1,700 detainees. *Id.* Between December 2008 and December 2020, approximately 32,000 detainees—nearly twenty percent of the total population during that period—participated in the program. Washburn Decl. ¶ 37, ECF No. 250-4.

In keeping with ICE's rules, Stewart work program participants are paid at least $1 per day. Their earnings are deposited into their trust accounts. Detainees may save the money, spend it in the commissary, or send it to friends or family. The Stewart commissary offers phone cards, soft drinks, snacks, condiments, limited groceries like tuna and ramen, personal care items like shampoo and toothpaste, limited clothing like t-shirts and underwear, and other items. *See, e.g.*, Pls.' Mot. Class Certification Ex. 89, 2015 Inventory Sales Report, ECF No. 213-93. To purchase items, a detainee must have money in his detainee trust fund. Detainees may receive funds from outside sources or may earn money in the work program.[2]

Plaintiffs contend that the food, clothing, and hygiene items Stewart provides to its detainees are so inadequate that detainees would suffer serious harm if they could not earn funds through the work program and purchase necessities from the commissary. Plaintiffs also allege that detainee workers are assigned to safer housing than non-workers. Under these circumstances, Plaintiffs argue that some detainees are coerced to join the work program and then become trapped in it. Plaintiffs pointed to evidence of

[2] Two of the named Plaintiffs received significant funds from outside sources in addition to their work program earnings. Washburn Decl. ¶ 121 (stating that Hill Barrientos received $675 from outside sources and $1,313 in work program earnings); *id.* ¶ 129 (stating that Urbina Rojas received $1,580 from outside sources and $1,072 in work program earnings).

common practices at Stewart which would permit a factfinder to conclude that the food at Stewart was inadequate in both nutritional value and amount. They also submitted evidence of Stewart's practices regarding the provision of clothing and hygiene items, laundering of clothes, and housing assignments, though this evidence does not strongly support an inference that detainees were exposed to serious harm based on these practices.

Plaintiffs assert that after detainees join the work program, they are coerced to remain in the program because they are subject to physical restraint if they refuse to work. Work program participants are "expected to be ready to report for work at the required time and may not leave an assignment without permission." 2016 ICE Standards § 5.8(V)(M). They "may not evade attendance and performance standards [or] encourage others to do so." *Id.* Detainees may be removed from the work program because of unexcused absences. Pls.' Mot. Class Certification Ex. 36, Stewart Detainee Voluntary Work Program Policy § 19-100.4(H)(3), ECF No. 213-40; Trinity Servs. Grp. 30(b)(6) Dep. 419:3-5, ECF No. 233-1. Detainees who are removed from the work program can no longer earn money to purchase items at Stewart's commissary.

Refusal to work may result in discipline in addition to removal from the work program, including "lockdown" or "segregation," for refusing to work. *See* Pls.' Mot. Class Certification Ex. 38, SDC Detainee Handbook 35, ECF No. 213-42

(permitting lockdown for even the lowest category of offenses, like "malingering"); *id.* at 33-34 (allowing disciplinary segregation for offenses like "encouraging others to participate in a work stoppage or to refuse to work" and "refusing to obey the order of a staff member or officer"); *see also* Pollock Dep. 148:23-149:8, ECF No. 229 (assistant warden stating that when a single detainee stopped working, that was a "work stoppage" that could warrant discipline); Peterson Dep. 235:24-236:25, ECF No. 232 (explaining that a detainee saying "no work tomorrow" would not be a "work stoppage" if the detainee just said it "to himself" but might be a "work stoppage depending on the detainee and "who's around"). Both lockdown and segregation are forms of physical restraint. *See* Hill Barrientos Decl. ¶ 33, ECF No. 213-64 (explaining that detainees in lockdown are restricted to their beds and must receive permission to use the bathroom); Pls.' Mot. Class Certification Ex. 119, Special Mgmt. Resident Policy § 10-100.4(F), ECF No. 213-123 (describing segregation as restrictive housing where detainees have very limited time outside their cells).[3]

[3] Stewart policies also permit CoreCivic to initiate criminal proceedings against work program participants for offenses like encouraging a work stoppage. Plaintiffs did not, however, clearly point to any evidence that CoreCivic had a practice of initiating or threatening to initiate legal proceedings for work stoppages. Plaintiffs also argue that detainees who refuse to work might be reclassified as a higher security risk—with a corresponding change in uniform color that would give an immigration judge a visual cue about CoreCivic's evaluation of the detainee's security risk. But Plaintiffs did not point to any evidence

The named Plaintiffs joined the work program to get extra food, and they remained in the program to keep getting extra food and to avoid discipline. Urbina Rojas Decl. ¶¶ 17-19, 44, ECF No. 213-79; Bermudez Gutierrez Decl. ¶¶ 20, 37, ECF No. 213-57; Hill Barrientos Decl. ¶¶ 12, 31.

II. Analysis

Plaintiffs seek to certify two classes pursuant to Rule 23(b)(2) and Rule 23(b)(3): a Forced Labor Class and an Unjust Enrichment Class. Both classes include all civil immigration detainees who participated in Stewart's "volunteer work program." The Forced Labor Class's claims are under the Trafficking Victims Protection Act ("TVPA",) 18 U.S.C. § 1589 *et seq.*, and the Unjust Enrichment Class's claims are under Georgia unjust enrichment law. All the claims are based on Plaintiffs' assertion that the work program is not voluntary—that CoreCivic coerces detainees to perform labor at Stewart by using or threatening serious harm and physical restraint if work program participants refuse to work. CoreCivic, on the other hand, contends that Plaintiffs cannot establish causation on a class-wide basis, which would defeat ascertainability, numerosity, commonality, and typicality.

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that any Stewart detainee was ever reclassified to a higher security risk category (or threatened with reclassification) based on refusal to work. For these reasons, Plaintiffs did not establish that detainees were subjected to a common practice under which they were threatened with criminal legal action or harm to their immigration proceedings if they refused to work in the work program.

Notwithstanding the complexity of the briefing, the issue is relatively simple. Are the claims of the putative class members sufficiently common and typical such that litigating them together as a certified class is appropriate under Federal Rule of Civil Procedure 23? When all the rhetoric and hyperbole is peeled away, the essence of Plaintiffs' claims is that CoreCivic created an environment which had the effect of coercing putative class members to participate in the work program, and then, upon signing up for the program, the putative class members were trapped in the program and unable to escape it. While policies and practices may have existed that applied to every putative class member who chose to participate in the program, Plaintiffs fail to recognize that not every putative class member is similarly situated with other class members.

Before certifying a class, the Court must consider "how the class will prove causation" and whether the elements of the plaintiffs' claims "will be subject to class-wide proof." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019) (quoting *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358) (11th Cir. 2009)). If Plaintiffs cannot prove causation using class-wide evidence, then that creates problems with ascertainability, typicality, numerosity, and superiority (because it is not possible to tell which putative class members suffered an injury and thus have standing absent an individualized inquiry) and

predominance (because individualized questions of causation predominate over common issues).

Plaintiffs have not established that the critical issue of causation is susceptible to class-wide proof under the circumstances presented here. There is no dispute that the TVPA's forced labor provision requires a plaintiff to prove causation—that the defendant knowingly procured labor "by means of" physical restraint, serious harm, threats of physical restraint or serious harm, or a scheme intended to threaten serious harm or physical restraint. 18 U.S.C. § 1589(a). Plaintiffs' unjust enrichment claims are based on their contention that all work program participants were *coerced* to participate. So, at its core, this action is about whether the worker detainees decided to participate and remain in the work program *because* CoreCivic would subject them to some type of harm if they did not work. Plaintiffs contend that class-wide evidence should be sufficient to prove that CoreCivic knowingly established a scheme intended to coerce detainees to participate in the work program, so class-wide evidence can also prove that CoreCivic obtained the labor of all detainee work program participants "by means of" that scheme. The Court is not convinced.

Plaintiffs simply did not point to sufficient evidence from which the Court could reasonably conclude that every putative class member agreed to participate in the Stewart work program because

he was coerced to do so—or that this issue is capable of class-wide resolution. While each putative member may have been subjected do the same conditions of confinement, the Court cannot find based on the current record that all putative class members perceived the conditions of confinement the same way or that those conditions were the motivating factor for the putative class member's decision to join the work program. The record in fact indicates that 80% of the detainees chose not to participate in the work program even though they were presumably subjected to the same conditions as those who chose to participate in the program. And two out of the three named Plaintiffs had sufficient personal funds in their detainee trust accounts to purchase food at the commissary, which belies counsel's contention that they were coerced to join the work program because it was their only means for purchasing food or other essential items from the commissary. Accordingly, the Court cannot conclude that every reasonable detainee would have felt coerced to participate in the program. Some may have felt that way and some may not have perceived the conditions as coercive. Those who found the conditions coercive may have an individual claim, and those who did not may not have such a claim. That determination requires an individualized assessment of each detainee's situation, with individual issues predominating over common ones.

The claim that detainees were trapped in the work program once they signed up for it suffers from the same commonality, typicality, and predominance problems. There are several reasons why some putative class members may have wished to remain in the program voluntarily—including earning funds to buy non-essential items from the commissary and earning funds to save for use upon release from the detention facility. The Court cannot find based on the current record that no reasonable detainee would have remained in the program voluntarily or even that most reasonable detainees continued to participate in the program because they felt they had no choice given the conditions of confinement and the potential discipline for refusal to work. Evaluating these issues requires an individualized assessment of each detainee's situation. The Plaintiffs failed to carry their burden on these issues.[4]

This case is different than a conditions of confinement case in which the challenged conditions of confinement apply in the same manner to each detainee and where causation can be inferred from common class-wide evidence, with no individualized evidence

[4] Plaintiffs point out that it is a violation of the TVPA to *attempt* to procure labor by means of serious harm, physical restraint, or threats of serious harm and physical restraint, so even if a detainee was not subjectively coerced to provide labor, CoreCivic still *attempted* to obtain his labor by coercive means. 18 U.S.C. § 1594(a). But 18 U.S.C. § 1595(a) only provides a civil remedy for an "individual who is a victim of a violation" of the TVPA. 18 U.S.C. § 1595(a). Plaintiffs did not point to any authority that a person who is impervious to attempted coercion is nonetheless a "victim" within the meaning of § 1595(a).

that could otherwise explain the class members' conduct. In *Menocal v. GEO Group, Inc.*, for example, the Tenth Circuit found that the detainees were subjected to a uniform policy under which detainees were threatened with physical restraint or serious harm if they refused to perform mandatory unpaid cleaning assignments. 882 F.3d 905, 916-17 (10th Cir. 2018). The Tenth Circuit further concluded that because the class members received notice of the sanitation policy's terms (including possible sanctions for refusing to clean) and performed work when they were assigned to do so, a clear inference was that the sanitation policy *caused* the detainees to work. *Id.* at 919-920. Significantly, the defendant in *Menocal* did not point to any evidence to rebut the common inference of causation. *Id.* at 921; *see also Owino v. CoreCivic, Inc.*, 60 F.4th 437, 446 (9th Cir. 2022) (considering sanitation policy similar to the one in *Menocal* and finding no abuse of discretion where the district court concluded "that a factfinder could reasonably draw a class-wide causation inference" from the uniform policy). In contrast, here, Plaintiffs did not demonstrate that the work program policies are uniformly coercive, such that no reasonable detainee would join or remain in the Stewart work program voluntarily, absent the potential for serious harm or physical restraint.[5] Thus, this is not a case like *Menocal* or

[5] To rescue their motion for class certification, Plaintiffs may argue that they are willing to assume the burden of proving at trial that the

Owino where there is no other reasonable explanation for the labor other than coercion. For these reasons, the claims asserted in this action are best suited for individual and not class treatment. The Court denies the motion for class certification.

THE OTHER PENDING MOTIONS

I. Plaintiffs' Motion for Spoliation Sanctions

In addition to their class certification motion, Plaintiffs filed a motion for spoliation sanctions because a CoreCivic employee destroyed the detention files of Urbina Rojas and an unknown number of other putative class members, even though CoreCivic understood that it had an obligation to preserve such documents. As a sanction, Plaintiffs seek an adverse inference jury instruction requiring the jury to presume that Urbina Rojas's testimony about his experience at Stewart is uncontroverted, plus attorneys' fees associated with the sanctions motion.

Spoliation is "the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation." *Bath v. Int'l Paper Co.*, 807 S.E.2d 64, 68 (Ga. Ct. App. 2017) (quoting *Baxley v. Hakiel Indus., Inc.*, 647 S.E.2d 29, 30 (Ga. 2007)). In this circuit, "federal law governs the imposition of

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conditions of confinement and the conditions of continued participation are so coercive that no reasonable detainee could resist the coercion. But Plaintiffs did not rebut the evidence that through the years approximately 80% of the detainees have chosen not to participate in the program. This evidence contradicts the assertion that no reasonable detainee could resist the coercion caused by conditions of confinement at Stewart.

spoliation sanctions," although Georgia law provides guidance that the Court may consider. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). Spoliation sanctions "are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Id.* The Court has "broad discretion" to impose sanctions for spoliation of evidence. *Id.* The most severe sanctions, like adverse inference instructions to the jury, "are reserved for exceptional cases, generally only those in which the party lost or destroyed material evidence intentionally in bad faith and thereby prejudiced the opposing party in an uncurable way." *Cooper Tire & Rubber Co. v. Koch*, 812 S.E.2d 256, 261 (Ga. 2018) (internal quotation marks omitted) (quoting *Phillips v. Harmon*, 774 S.E.2d 596, 606 (Ga. 2015)).

In determining whether a sanction is warranted for spoliation, the Court may consider whether Plaintiffs were prejudiced because of the destruction of the detention files, whether the prejudice can be cured, the practical importance of the evidence, whether CoreCivic acted in bad faith, and the potential for abuse if sanctions are not granted. *Flury*, 427 F.3d at 945. Here, CoreCivic admits that its employee deleted Urbina Rojas's detention file (and others) despite a litigation hold. The record suggests that CoreCivic did not take adequate measures to ensure that all relevant document custodians were aware of the litigation hold and its requirements. Plaintiffs contend that

Urbina Rojas's detention file is central to his claim that he was coerced to work in the Stewart work program because it should contain evidence to corroborate his testimony that he was placed in segregation when he refused to do work outside of his regular duties. CoreCivic's discipline log does not include this segregation placement. If the discipline record were the only evidence of Urbina Rojas's segregation placement, Plaintiffs might have a good argument for some type of spoliation sanction. But Urbina Rojas presented testimony that he was placed in segregation for refusing to complete certain tasks. It is difficult to see how CoreCivic's failure to preserve the detention file will result in uncurable prejudice to Urbina Rojas, which suggests that the practical importance of the evidence is low. So, even if CoreCivic did wrongfully fail to preserve the detention file, the Court is not convinced that the sanctions Urbina Rojas seeks are warranted at this time. The Court thus declines to impose spoliation sanctions based on the destruction of Urbina Rojas's detention file. The Court notes that if CoreCivic tries to suggest that Urbina Rojas was not placed in segregation by pointing to the discipline log, then the Court would likely permit the factfinder to consider the fact that CoreCivic destroyed the detention file, which would have contained documentation regarding any segregation placement.

Plaintiffs also did not establish how they were prejudiced by CoreCivic's failure to preserve the other detention files. There is no contention that Plaintiffs would be able to establish the class certification requirements if they had access to the files. Plaintiffs' chief concern is that CoreCivic's motion to exclude one of their experts rested in part on his failure to consider enough detainee grievances and disciplinary reports. But, as discussed below, the motions to exclude the experts are moot, and the Court declines to impose spoliation sanctions based on the failure to preserve the other detention files.

II. The Parties' Motions to Exclude Experts

The parties also filed motions to strike the proposed testimony of three experts under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 590 U.S. 579 (1993).

First, CoreCivic seeks to strike Plaintiffs' psychiatrist expert, Dr. Pablo Stewart. The Court reviewed the portions of Dr. Stewart's report that Plaintiffs rely on in their motion for class certification. In those portions of his report, Dr. Stewart opines that Stewart's food practices might coerce some detained individuals to work, that segregation can cause psychological harm, and that the transfer from worker housing to non-worker housing could potentially result in harm. The Court finds that even if it were to admit Dr. Stewart's opinions over CoreCivic's objections, his opinions do not demonstrate that causation can be

established on a class-wide basis using common evidence or that common issues predominate over individual ones. The Court terminates the motion to exclude Dr. Stewart (ECF Nos. 247 & 253)

Second, CoreCivic moves to strike Plaintiffs' economist expert, Steven Schwartz. Plaintiffs rely on Dr. Schwartz to establish a class-wide damages model. Because the Court concludes that the issue of causation cannot be determined on a class-wide basis, the Court finds that it need not consider whether Dr. Schwartz class-wide damages model reliably measures the damages suffered by the putative class members. The Court terminates the motion to exclude Dr. Schwartz (ECF Nos. 248 & 254).

Finally, Plaintiffs move to strike CoreCivic's psychiatric expert, Dr. Joseph Penn. The Court did not consider Dr. Penn's opinion in ruling on the motion for class certification, so the Court terminates the motion to exclude Dr. Penn (ECF Nos. 215 & 239) as moot.

CONCLUSION

For the reasons set forth above, the Court finds that Plaintiffs did not meet their burden to prove that the class certification requirements are met for the two classes they seek to certify. Accordingly, the Court denies Plaintiffs' motion for class certification (ECF Nos. 213 & 238). The Court also denies Plaintiffs' motion for spoliation sanctions (ECF Nos. 263 & 265). The motions to exclude experts (ECF Nos. 215, 239, 247, 248, 253,

254) are terminated as moot. Given the Court's ruling on class certification, the only claims remaining in this action are the individual claims of the named Plaintiffs.

IT IS SO ORDERED, this 28th day of March, 2023.

s/Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA