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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**STEPHEN RAHER,**
**Plaintiff,**

**v.**

**FEDERAL BUREAU OF PRISONS,**
**Defendant,**

**and**

**THE GEO GROUP, INC,**
**Defendant-Intervenor.**

**Case No. CV 09-526-ST**

**PLAINTIFF'S RESPONSE TO DEFENDANT-INTERVENOR GEO GROUP'S MOTION TO DISMISS OR TRANSFER PLAINTIFF'S AMENDED COMPLAINT**

**Oral Argument Requested In Person**[1]

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[1] Plaintiff requests in-person oral argument. Plaintiff does not object to opposing counsel appearing telephonically.

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After its unsuccessful attempt to covertly thwart plaintiff's FOIA request at the administrative level and on summary judgment, GEO has intervened in this suit only to cry foul when faced with the prospect of being held accountable for its manipulations of the administrative process. In short, GEO wants the benefits of being a party to this suit, but not the burdens.

GEO's Rule 12(b)(6) motion should be denied because plaintiff has pled a prima facie case under 42 U.S.C. § 1983. There are minimal factual issues asserted in plaintiff's § 1983 claims. Assuming these allegations to be true, as the court must on a motion to dismiss, GEO's motion fails. GEO's protestations of improper venue also ring hollow. Venue rules exist to protect parties and witnesses from the unfair surprise of being haled into distant courts. None of these considerations are present in the current case. Venue is clearly proper in Oregon for multiple reasons and GEO has failed to make a single plausible argument for transferring this case. Accordingly, GEO's Rule 12(b)(3) motion and its alternative motion to transfer should both be denied.

## I. GEO's 12(b)(6) Motion Should be Denied Because Plaintiff Has Pled a Prima Facie Case under 42 U.S.C. § 1983

A motion to dismiss for failure to state a claim should be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (internal quotation marks omitted). When deciding a Rule 12(b)(6) motion, "the facts alleged in the complaint are assumed to be true and are construed in the light most favorable to the plaintiff." *Id.*

### A. GEO is a Person Acting under Color of State Law

As a threshold matter, GEO is clearly a "person" for purposes of § 1983 because GEO is an entity duly incorporated under Florida law. Third Raher Decl., Exh. D, at 3;[2] *Wackenhut Corp. v. Union de Tronquistas de Puerto Rico*, 336 F.Supp. 1058, 1061 (D.P.R. 1971) (holding that GEO's former parent corporation was a "person" for purposes of the Civil Rights Act of 1871, and thus was a proper § 1983 plaintiff).

In its brief, the defendant-intervenor correctly points out that a § 1983 defendant's conduct must be fairly attributable to the state, but GEO then goes on to advocate an impermissible bright-line test under the theory that "actions that are commercial are of a different hue." GEO Mem., at 4. The relevant standard for state attribution is much more nuanced than GEO would lead the court to believe. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity."). Moreover, despite GEO's insinuations to the contrary, a profit motive does not act as an all-purpose bar to § 1983 liability. As relevant to the current motion, GEO's nominally private activity is properly characterized as state action under each of two tests. First, the Ninth Circuit's rationale for holding that GEO's employees in a federal contract facility are acting under color of federal law is equally applicable here. *Pollard v. The GEO Group Inc.*, 607 F.3d 583 (2010) (allowing *Bivens* claim against GEO employees).

[2] The documents cited in this memorandum include the following items from the record in this case: Plaintiff's First Amended Complaint (Doc. #72) ("First Amend. Complaint"); Declaration of Stephen Raher in Support of Plaintiff's Motion for Partial Summary Judgment (Doc. #35) ("Second Raher Decl."); Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment (Doc. #34) ("Pltf. SJ Mem."); Memorandum Opinion (Doc. #48) ("SJ Opinion"); Declaration of Stephen Raher in Support of Plaintiff's Opposition to GEO Group's Motion to Dismiss or Transfer Plaintiff's Amended Complaint ("Third Raher Decl."); Declaration of Kyle Schiller (Doc. #61) ("Schiller Decl."); Declaration of LeeAnn Tufte (Doc. #18) ("Tufte Decl."); Intervenor-Defendant GEO Group's Memorandum of Law in Support of Its Motion to Dismiss or Transfer the Amended Complaint (Doc. #78) ("GEO Mem.").

Second, GEO's relationship with Reeves County is such that GEO's actions have "become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966). Each of these two tests is examined in greater detail in the following sections.

### 1. *Pollard* and the Public Function Test

In June of 2010, the Ninth Circuit Court of Appeals held that GEO employees working at the Taft Correctional Institution pursuant to a contract with the BOP were acting under color of federal law for purposes of liability under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Pollard*, 607 F.3d at 588. It is true that *Pollard* did not hold GEO itself liable on the *Bivens* action, but this was attributable entirely to the holding of *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001). *Pollard*, 607 F.3d at 586, n.5 (citing *Malesko* for the proposition that "*Bivens* should not be extended to allow recovery against a private corporation operating a halfway house under contract with the BOP"). The reasoning of *Malesko* is not applicable here, because that case was concerned primarily with the prudential limitations on implied causes of actions. *Malesko*, 534 U.S. at 67, n.3 ("Since our decision in [*J.I. Case Co. v.*] *Borak*, we have retreated from our previous willingness to imply a cause of action where Congress has not provided one."). Thus, the guiding principle behind *Malesko*'s refusal to impose liability on a private prison contractor is not present in the context of § 1983, where Congress has expressly provided a cause of action.

Whereas *Malesko* dealt with contractor liability, *Pollard* dealt with determining whether a defendant's acts constitute state action. Although *Pollard* involved a *Bivens* claim, it is

relevant to determining state action in the present case because "the standards for determining whether an action is governmental are the same whether the purported nexus is to the state or to the federal government." *Pollard*, 607 F.3d at 589 (quoting *Mathis v. Pac. Gas & Elec. Co.*, 891 F.2d 1429, 1432, n.3 (9th Cir. 1989) (internal quotation marks omitted)). *Pollard* held that GEO employees were acting under color of federal law because incarceration is a fundamentally public function. *Id.* at 592 ("[W]e hold that there is but one function at issue here: the government's power to incarcerate those who have been convicted of criminal offenses. We decline to artificially parse that power into its constituent parts . . . as that would ignore that those functions all derive from a single public function that is the sole province of the government: enforcement of state-imposed deprivation of liberty." (internal quotation marks and citation omitted)). In *Pollard*, GEO was operating a federal institution under contract with the United States. In the present case, it is operating a county correctional facility under contract with Reeves County. Third Raher Decl., Exh. A and B. Accordingly, GEO is acting under color of state law for purposes of § 1983.

The only potentially material difference between the state-action analysis in *Pollard* and here is that Pollard was an inmate who was allegedly injured by GEO employees while they were carrying out their official duties. Here, plaintiff is a non-inmate who was injured while seeking information about GEO's relationship with the BOP. This difference should not change the state-action analysis, because the information plaintiff is seeking pertains to how GEO carries out the fundamental public function with which it is charged. Plaintiff only seeks information related to GEO's contractual obligations to perform the governmental function of incarceration. Plaintiff does not seek information related to GEO's non-governmental functions, such as the firm's overall financial condition, merger and acquisition activities, or investor relations.

GEO seems to argue that its profit motive is determinative and that it is simply acting "like any other private citizen might." GEO Mem., at 4-5. Nothing could be further from the truth. GEO's contract with Reeves County gives GEO the authority to "manage all aspects" of the county jail, including promulgating and enforcing jail policies, enforcing county personnel policies, and entering into contracts on behalf of the county. Third Raher Decl., Exh. A § 3.02. These powers far exceed those exercised by private citizens and GEO's power-sharing arrangement with Reeves County is far more than a simple distribution of "public funds to perform limited duties." GEO Mem., at 4. Even more importantly, Reeves County has given GEO the power to "act on its behalf in the management of the County-BOP CAR 6 Contract." Third Raher Decl., Exh. A § 3.06. This provision appears to cover the administrative aspects of the BOP procurement process, in which case GEO is acting as the county's proxy when it responds to BOP's contract-related inquiries, including BOP's inquiries concerning plaintiff's FOIA request.

### 2. *Brentwood Academy* and the Pervasive Entwinement Test

Even if this court concludes that GEO's misconduct was not undertaken in furtherance of its public function, it should nonetheless find that GEO acted under color of state law pursuant to the "pervasive entwinement" test as articulated in *Brentwood Academy*. When finding state action in *Pollard*, the Court of Appeals also noted that the same result may have been reached under *Brentwood Academy*. *Pollard*, 607 F.3d, at 593, n.11. The pervasive entwinement analysis is a "necessarily fact-bound inquiry." *Brentwood Acad.*, 531 U.S. at 298. When applying the inquiry to the Reeves County Detention Center ("RCDC"), the inevitable

conclusion is that GEO and Reeves County ("Reeves") are pervasively entwined in the operation of RCDC.

GEO is acting under color of Texas law because Reeves County has delegated to GEO the power to "manage *all aspects* of RCDC." Third Raher Decl., Exh. A § 3.02 (emphasis added). In particular, the test articulated in *Brentwood Academy* looks to whether the "nominally private character of the [§ 1983 defendant] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood Acad.*, 531 U.S. at 298.

In the context of RCDC, GEO and Reeves have designed a working relationship so opaque and labyrinthine that even defendant BOP has difficulty identifying precisely who is in charge. For example, in advance of the CAR 6 contract, BOP stated that proposals must show that the "prime contractor" (in this case, Reeves County) meets the "decisional rule criterion." Second Raher Decl., Exh. O, at 13. Given these instructions, the RCDC proposal would presumably addresses *Reeves County's* experience operating corrections or detention facilities. *See* Second Raher Decl., Exh. E, at 4 (BOP's definition of "decisional rule criterion"). Yet GEO now claims, without explanation, that the proposal contains *GEO's* proprietary commercial information. Schiller Decl. ¶¶ 50-55. Indicative of the truly intertwined nature of the Reeves/GEO relationship is the cover page of the CAR 6 proposal itself, which designates Reeves County officials and GEO officers as apparently co-equal "authorized negotiators." Second Raher Decl., Exh. Q, at 1.

Consistent with the overlapping relationship between Reeves and GEO, the CAR 6 contract names "Reeves County, Texas" as the "offeror." Second Raher Decl., Exh. Q, at 2. Yet

GEO and Reeves themselves characterize the CAR 6 proposal as a joint offer from both parties. Third Raher Decl., Exh. A, at 1 ("[Reeves] County and GEO have . . . submitted a revised final proposal to the Federal Bureau of Prisons . . . to house BOP inmates in response to a competitive solicitation by the BOP"). Indeed, even BOP is inconsistent with its terminology. The transmittal letter which BOP included with the executed contract congratulates "Reeves County and The GEO Group" on the contract award and expresses the contracting officer's anticipation of "working with Reeves County and The GEO Group throughout the life of this contract." Third Raher Decl., Exh. C.

Perhaps the most instructive evidence as to the Reeves/GEO relationship is the management contract that the two parties entered into in November 2006. *See* Third Raher Decl., Exh. A and B. Not only does the contract authorize GEO to manage "all aspects" of the jail, but GEO is "responsible for the performance of all duties required to be performed by the County under the terms of the County-BOP CAR 6 Contract" (absent exceptions not relevant here). *Id.*, Exh. A § 3.02. Yet this is not a case of simple outsourcing, because Reeves still remains heavily involved in facility management. For example, GEO is responsible for forming a small "management team" which oversees and controls the rest of the RCDC workforce of *county* employees. *Id.*, Exh. A §§ 3.04-3.05. The contract also provides for a "County Monitor" who is an agent of the county and who has "access at all times . . . to inspect all documents and records relating to inmates housed pursuant to this Agreement and GEO's performance hereunder." *Id.*, Exh. A § 3.11. The contract also provides that the monitor "shall receive any correspondence between the County or GEO and [the BOP]." *Id.*[3] Reeves also maintains

[3] The quoted provision refers to "correspondence between the County or GEO and any sending authority." Third Raher Decl., Exh. A § 3.11. "Sending authority" is defined in § 7.14 and appears to refer only to BOP.

control over various functions and subcontracts, such as inmate telephone service and bond financing. *Id.* §§ 3.02, at 4.

Given the patchwork of overlapping duties and responsibilities, it is essentially impossible to tell whether any action taken by GEO is for its own benefit or on behalf of Reeves County. In regards to *Brentwood Academy*'s concern with the fairness of applying constitutional standards to private parties, there is absolutely no unfairness here, seeing as how GEO's entire business consists of exercising sovereign power on behalf of federal, state, and local governments. If ever there was a private firm which should not be surprised by the applicability of constitutional standards, it is a company which exists solely to carry out governmental functions.

### B. GEO Interfered with Plaintiff's Federally Protected Rights

GEO criticizes plaintiff for his reliance on "some as-of-yet undefined right." GEO Mem., at 3. Of course, such a complaint is squarely at odds with the principles of notice pleading. As explained below, plaintiff's First Amended Complaint alleges the violation of rights which are supported by well-established legal principles.

#### 1. Procedural Due Process

GEO cites *Parratt v. Taylor*, 451 U.S. 527 (1981) for the proposition that plaintiff's amended complaint fails to state a claim for denial of procedural due process. GEO Mem., at 6. GEO further contends, incorrectly, that plaintiff did not have a legally protected interest. *Id.* In fact, plaintiff's right to receive public records consistent with the terms of FOIA is a protected liberty interest.

Plaintiff's FOIA request was submitted as part of his professional research activities. To successfully conduct his research, plaintiff sought to exercise the rights guaranteed to him by the Freedom of Information Act. FOIA mandates release of government records unless an enumerated exemption applies. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . *shall* make the records promptly available to any person.") (emphasis added); *see also* SJ Opinion at 2. The mandatory language of FOIA is sufficient to create a liberty interest protected by the Due Process Clause. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) ("[A] State creates a protected liberty interest by placing substantive limitations on official discretion."); *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 462 (1989) ("[T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making . . . and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.") (citation omitted)). This is precisely what FOIA does—unless an exemption applies, a requestor has a right to obtain the documents she requests. *See* Presidential Memorandum, 74 Fed. Reg. 4683 (Jan. 21, 2009) ("All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.").

Furthermore, GEO's reliance on *Parratt* is misplaced. *Parratt* denied a § 1983 claim for damages based on the negligent loss (by prison mailroom staff) of a $23 mail-order item. The Ninth Circuit Court of Appeals has held that *Parratt* applies only to deprivation-of-property claims. *Wakinekona v. Olim*, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 238 (1983). Here, plaintiff alleges violation of a liberty interest, therefore *Parratt* is inapposite.

Procedural due process does not entail a one-size-fits-all guarantee of certain procedures, but "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks and citation omitted). One ubiquitous component of procedural due process in the administrative context is that an agency must make decisions based on evidence. *See Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992) ("Due process requires notice that gives an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense."). This requirement is corollary to an affected individual's right to examine and rebut evidence. *Carnation Co. v. Sec'y of Labor*, 641 F.2d 801, 803 (9th Cir. 1981) ("Procedural due process requires that a party against whom an agency has proceeded be allowed to rebut evidence offered by the agency if that evidence is relevant."). It is axiomatic that an individual cannot rebut evidence if the evidence is secret. Here, GEO's alleged actions prevented the creation of a record of the company's objections. BOP based its decision to withhold information on GEO's objections. Accordingly, GEO's acts of concealment deprived plaintiff of the ability to challenge adverse evidence, and thus deprived him of the process to which he was entitled.

Plaintiff's due process claim is analogous to the § 1983 claim in *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999), where an applicant for renewal of an occupational license was denied renewal in violation of his rights under the federal Privacy Act. Dittman brought a due process claim against the state official who had rejected his renewal application. *Id.* at 1026. The Court of Appeals held that the due process claim was a cognizable § 1983 claim, although it ultimately dismissed the claim under a finding that the defendant was entitled to qualified immunity because she acted "in reliance on a duly enacted statute or ordinance." *Id.* at 1027.

Here, GEO did not act consistently with any statute—to the contrary, GEO acted in *violation* of applicable Department of Justice regulations which required it to "submit a detailed written statement" explaining its objections to disclosure. 28 C.F.R. § 16.8(f). GEO was made aware of this requirement twice by the BOP, but appears to have flaunted its obligations as part of its efforts to deny plaintiff the opportunity to challenge the substantive basis for withholding information. *See* Tufte Decl., Attch. D, at 9-10,[4] Attch. E, at 1-2 (notifying GEO of its obligation to object to disclosure via a written explanation of why information is subject to Exemption 4).

**2. Freedom of Information Act**

Section 1983 can be used to vindicate the violation of rights created by federal statute. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Although the holding of *Thiboutot* has been narrowed in recent years, FOIA meets even the comparatively restrictive test of *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Under *Gonzaga*, § 1983 cannot be used to read an implied cause of action into a statute. *Id.* at 283. Instead, § 1983 is limited to enforcing statutes which "create not just a private *right* but also a private *remedy*." *Id.* at 284 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis by *Gonzaga*)). FOIA meets this test, as it contains an unambiguous private cause of action. 5 U.S.C. § 552(a)(4)(B).

GEO submits that plaintiff's § 1983 claims must fail because there are "alternative remedial schemes like FOIA." GEO Mem., at 6. This argument mischaracterizes the relevant standard. In determining whether a federal right may be enforced via § 1983, the court must

[4] The June 22, 2009 letter included in Attachment D to the Tufte Declaration is only addressed to Reeves County, but Reeves apparently forwarded a copy to GEO, as evidenced by the fact that the next letter from BOP was addressed to both Reeves County and GEO's general counsel (see Tufte Decl., Attch. E, at 1).

focus on congressional intent. *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) ("[D]ismissal is proper if Congress specifically foreclosed a remedy under § 1983. Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a *comprehensive* enforcement scheme that is incompatible with individual enforcement under § 1983." (emphasis added, internal quotation marks and citations omitted)).

Although FOIA provides a remedy (in the form of a private cause of action), GEO does not explain how this remedy is comprehensive enough so as to clearly preclude a § 1983 claim. The very fact that GEO has interfered with plaintiff's rights but is beyond the FOIA cause of action indicates the appropriateness of a § 1983 remedy. It is true that *Dittman* concluded that the Privacy Act's cause of action (which is applicable only to federal agencies) prevented a § 1983 claim, but this holding is distinguishable. The *Dittman* court relied on the fact that the original legislation contained a remedy for improper action by state officials, but those provisions were deleted during the legislative process. *Dittman*, 191 F.3d at 1028-1029. Here there is no similar indication that Congress intended FOIA to preclude a claim such as plaintiff's. Indeed, a comparison of the statutory language illustrates this very difference. The Privacy Act's cause of action allows an aggrieved individual to "bring a civil action *against the agency*." 5 U.S.C. § 552a(g)(1) (emphasis added). FOIA's cause of action, in contrast, does not contain such limiting language, but rather provides for a complaint to be filed in U.S. District Court. 5 U.S.C. § 552(a)(4)(B). While FOIA's cause of action arguably limits the application of *injunctive* relief to federal agencies, nothing in the text of the statute can be read to preclude a § 1983 claim against a non-federal defendant who interferes with a FOIA requester's rights under the statute.

GEO's reliance on *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771 (D.C. Cir. 2002) is similarly misplaced. *Johnson* denied a *Bivens* claim based upon the alleged mishandling of the plaintiff's FOIA request. *Id.* at 777. As discussed previously, liability under *Bivens* is subject to a different and more exacting analysis than is liability under § 1983. *See supra* at 6.

Finally, GEO should not be able to escape liability under the theory that FOIA provides a comprehensive remedy. The very actions that plaintiff complains of were intended to interfere with plaintiff's invocation of FOIA's remedial provisions. Accordingly, in the event that plaintiff's third claim for relief fails due to the availability of FOIA's remedial provisions, then plaintiff's second claim assumes paramount importance. Otherwise, GEO will receive a license to covertly defeat any FOIA request concerning the company's lucrative federal contracts, unless the requester has the resources and time to undertake lengthy court proceedings.

### C. Plaintiff Was Injured as a Result of GEO's Actions

Plaintiff was damaged by his having to defend against BOP's motion for summary judgment without knowing the basis of GEO's objections—objections upon which BOP claims to have relied when it determined that GEO's information was protected by Exemption 4. GEO does not appear to dispute these damages, but instead argues that "the only dispositive acts at issue in the instant case are those of the federal government." GEO Mem., at 5. This argument ignores the fact that BOP's improper acts were done at GEO's urging.

Moreover, GEO knew or should have known that BOP would acquiesce to any objection raised by GEO, regardless of its substantive merit. Unlike many government procurement agencies, BOP does not view private prison operators as mere contractors which it can select and

terminate based on the quality of their work. Rather, BOP is dependent on private contractors and has committed to ensuring the viability of the industry. While most agencies would presumably evaluate the efficiency and quality of contractor operations and decide whether to outsource functions based on the contractors' abilities, BOP is under a statutory mandate to privatize certain operations regardless of whether the private sector is capable of competently performing such operations. BOP cannot meet its statutory obligation to privatize unless it helps to ensure that there is a private industry that can submit bids. Thus, rather than defining its needs and expecting contractors to meet those needs, BOP has a history of "soliciting feedback from the private corrections community regarding the contracting approach to be used [by the BOP]." *See* Third Raher Decl., Exh. F, at 1. In fact, BOP has pursued facility privatization even during times when prudence would dictate avoiding the trouble-plagued industry. *Id.* Exh. F, at 2 (describing BOP's privatization efforts during a time when "there have been several serious incidents involving private correctional facilities."). Although BOP's commitment to promoting the private prison industry may be attributable to congressional directives, this does not detract from the fact that GEO knew or should have known that BOP would be willing to deny disclosure of information based on even the flimsiest of pretexts.[5]

### D. GEO's Actions Are Not Protected by the *Noerr-Pennington* Doctrine

GEO's theory of *Noerr-Pennington* immunity mischaracterizes the doctrine and misinterprets plaintiff's complaint. Furthermore, even if *Noerr* immunity somehow applied to the present dispute, GEO's conduct would fall within the sham litigation exception.

[5] To the extent that GEO's § 1983 liability must properly be based on a conspiracy with BOP, plaintiff reserves the right to move for leave to amend his complaint for the purposes of pleading a conspiracy between GEO and BOP to deprive plaintiff of his federally protected rights.

*Noerr-Pennington* immunity is an anti-trust doctrine that is not applicable in the present context. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) ("Because the *Noerr-Pennington* doctrine grows out of the Petition Clause, its reach extends only so far as necessary to steer *the Sherman Act* clear of violating the First Amendment.") (second emphasis added); *accord Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889-890 (10th Cir. 2000).

Even if *Noerr-Pennington* somehow applied to the present situation, GEO's actions fall within the "sham activities" exception to the doctrine. The sham activities exception vitiates *Noerr-Pennington* immunity when the complained-of activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993) (quoting *Eastern Railroad Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961)) (internal quotation marks omitted). Plaintiff is not GEO's competitor, but if for some reason GEO can invoke *Noerr-Pennington* immunity, then the sham doctrine should apply given its underlying policy of preventing parties from using the immunity to bar others "'from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process' by 'institut[ing] . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.'" *Id.* (quoting *Calif. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972) (omissions and alteration by *Columbia Pictures*)). Here, GEO's intervention in the administrative review process sought to deprive plaintiff of records to which he was entitled and to prevent plaintiff from even knowing the basis for the withholding, thus depriving him of his right to adversarial testing of the rationale for withholding. *See Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (FOIA requester who is

denied information must be given opportunity for "effective advocacy").

Legal proceedings fall within the sham exception if, pursuant to an objective standard, the proceeding lacks probable cause. *Professional Real Estate*, 508 U.S. at 58 ("[T]he institution of legal proceedings 'without probable cause' will give rise to a sham if such activity effectively 'bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] th[e] decisionmaking process.'" (quoting *Calif. Motor Transport*, 404 U.S. at 512) (omissions and alterations by *Columbia Pictures*)). Several of GEO's claims lack probable cause. This, coupled with GEO's attempt to prevent plaintiff from examining the basis for BOP's withholding of information, bring GEO's actions within the sham exception.

GEO's claims regarding the merits of this case lack probable cause in two important regards. First, GEO's attempts to withhold release of the Reeves County contract are objectively unreasonable. Reeves County has conceded in a Texas administrative proceeding that the contract is fully discloseable under Texas state law. Tex. Atty. Gen. Opp. OR2010-03117 (Mar. 2, 2010) (*see* Third Raher Decl., Exh. E). Accordingly, the contract cannot be considered "confidential" as is required for protection under FOIA Exemption 4 and any contrary argument by GEO is frivolous. *See* Pltf. SJ Mem., at 28-29. Second, GEO and Reeves, as pervasively entwined joint venturers, have engaged in a pattern of litigation to prevent the disclosure of important public information. For example, Reeves County sought a letter ruling from the Texas Attorney General, hoping to find a legal basis for withholding information related to deaths in custody at the detention center. *See* Third Raher Decl., Exh. E. When the Attorney General ruled that Reeves must disclose certain unfavorable information, the county filed suit in Texas state court seeking to hinder public scrutiny of the Reeves-GEO facility. *Reeves County v. Abbott*, Case No. D-1-GN-10-000800 (Dist. Ct., 261st Judicial Dist., Travis County, Tex., filed

Mar. 10, 2010) (*see* Third Raher Decl., Exh. G). Additionally, GEO's conduct in this case is enough to show a pattern of baseless and repetitive claims because GEO has persistently stated that the information BOP has withheld from plaintiff contains "trade secrets," yet despite numerous opportunities, GEO has never satisfied its burden of defining the alleged trade secrets. *See* Restatement (Third) of Unfair Competition § 39, cmt. d (1993) ("A person claiming rights in a trade secret bears the burden of defining the information for which protection is sought with sufficient definiteness to permit a court to apply the criteria for protection.").

If GEO were to abandon its reliance on *Noerr-Pennington* (as it must), and recast its arguments in general First Amendment terms, the result would be no different. First Amendment privilege is not absolute. *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech and association as protected by the First and Fourteenth Amendments are 'absolutes.'" (citation omitted)). Just as frivolous representations to a court are sanctionable under Fed. R. Civ. P. 11 notwithstanding the Petition Clause, so too are GEO's baseless arguments in the administrative review process unprotected by the First Amendment.

## II. GEO's Venue Arguments are Meritless

Venue in civil litigation is "primarily a matter of choosing a convenient forum." 14D Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper *Federal Practice and Procedure* § 3801, at 3 (3d ed. 2007) [hereinafter "Wright & Miller"] (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006)). Furthermore, "if venue is proper, a plaintiff's choice of forum is given substantial weight, and a transfer will be granted under [28 U.S.C. § 1404(a)] only if the defendant can show that the convenience of the parties and the witnesses, and the interest of justice, strongly favor transfer." *Id.* § 3801, at 6-8 (citations omitted). GEO has not shown that

venue is improper in Oregon, nor has it produced any relevant evidence showing a material inconvenience to the parties or witnesses arising from the current venue.

### A. Venue is Proper in the District of Oregon

Venue in Oregon is proper both because GEO has waived any objections it might have and because Oregon is a proper forum under the relevant statutes. Furthermore, even if there were not an independent basis for venue as to the § 1983 claims, this court could still adjudicate the claims under the doctrine of pendant venue.

#### 1. GEO Has Waived any Objection to Venue

GEO has waived any objections to venue for two reasons. First, GEO maintains an authorized agent for service of process in Oregon. Third Raher Decl., Exh. D, at 5-7. By maintaining a registered agent in Oregon, GEO is subject to this court's personal jurisdiction and thus venue here is proper. *See* 14D Wright & Miller § 3829, at 757 ("A venue objection also may be waived even before suit has begun . . . by the appointment of an agent to receive process in that jurisdiction.").

Second, because venue is proper in any district where GEO is subject to personal jurisdiction, GEO has waived any objection to venue by not objecting to personal jurisdiction. 14D Wright & Miller § 3829, 757 ("Some courts hold that a corporate defendant who objects to venue but not to personal jurisdiction necessarily waives the venue objection because, under Section 1391(c) of the Judicial Code, if a corporate defendant is subject to personal jurisdiction in a district, it is deemed to reside there for purposes of venue."); *accord Markel Am. Ins. Co. v. Pac. Asian Enter. Inc.*, 2008 WL 2951277 (N.D. Cal. 2008), at *2.

### 2. Venue in Oregon is Proper under 28 U.S.C. § 1391(b)(1)

Venue is proper in a district where a defendant resides. 28 U.S.C. § 1391(b)(1). A corporation is deemed to reside in any state where it is subject to personal jurisdiction. 28 U.S.C. § 1391(c). GEO is subject to personal jurisdiction in this district for two reasons. First, as noted in the previous section, GEO has appointed a registered agent in Oregon.

Second, GEO consented to jurisdiction by appearing in this case without reservation. *See* 14D Wright & Miller § 3811.1, at 338, n.15. GEO's counsel argued at the November 24 status conference that GEO had consented to jurisdiction only for purposes of the FOIA complaint. This theory is unpersuasive because plaintiff's § 1983 claims arise from the same transactions and occurrences as his FOIA claim. Based on its brief, GEO has apparently abandoned this line of argument, seeing as how it fails to explain how consent to jurisdiction for one claim could possibly exclude jurisdiction over a closely related claim.

### 3. Venue in Oregon is Also Proper under 28 U.S.C. § 1391(b)(2)

Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions leading to the claim occurred in the District of Oregon. At all times relevant to plaintiff's § 1983 claims, GEO was on notice that BOP's processing of the FOIA request was related to pending litigation in the District of Oregon. *See* Tufte Decl., Attch. D, at 9-10, Attch. E, at 1-2. Thus, the harm that resulted from GEO's improper actions was felt by plaintiff and this court.

The forum in which the effects of wrongdoing are felt is the location of "a substantial part of the events . . . giving rise to the claim." 28 U.S.C. § 1391(b)(2). For example, the Ninth Circuit has recognized that venue for a claim under Title VII of the Civil Rights Act is proper in

the forum where an allegedly improper decision is made, implemented, or where "its effects are felt." *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 506 (9th Cir. 2000). Indeed, generally applicable principles of transactional venue counsel consideration of both the location of the allegedly tortious activities and the location where the harm was felt. 14D Wright & Miller § 3806.1, at 212-215.

Here, the harm was clearly felt in Oregon because GEO's actions were directed at plaintiff's litigation in this district. On the other hand, GEO has provided no persuasive evidence identifying the forum from which the alleged activities were initiated. Even if GEO could show that, for example, the alleged oral objection was made by a GEO employee in Florida placing a phone call to BOP's Kansas City office, Oregon would clearly be the location of a *more substantial* part of the events leading to plaintiff's claim because GEO's actions negatively impacted both plaintiff and this court, both of which are located in Oregon.

#### 4. In the Alternative, This Court May Hear the § 1983 Claims under Pendant Venue

Although Oregon is clearly the proper forum in which to adjudicate plaintiff's § 1983 claims under principles of residence and transactional venue, even if this were not the case this court could still hear the § 1983 claims pursuant to the doctrine of "pendent venue." Plaintiff originally filed this suit under one cause of action—FOIA. GEO's misconduct was focused on defeating plaintiff's FOIA claim, thus the FOIA claim is the principle cause of action and this court may "adjudicate closely related claims even if they lack[] an independent source of venue." *Shari's Berries Int'l. v. Mansonhing*, 2006 WL 2382263 (E.D. Cal. 2006), at *3.

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### B. GEO's Motion to Transfer Should be Denied

GEO only partially cites the relevant rules regarding burden of proof. GEO Mem., at 11. It is true that a plaintiff bears the burden of proving proper venue. But if venue in this district is proper (as plaintiff has shown that it is) then the defendant seeking transfer of the case "must make a *strong showing* of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commw. Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (emphasis added). GEO's attempts to show inconvenience do not satisfy this standard. This is especially true given that GEO's wrongdoing was purposefully directed at plaintiff's litigation in this jurisdiction. *Cf. Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986) (When considering personal jurisdiction over a foreign defendant, "there is a *presumption of reasonableness* upon a showing that the defendant purposefully directed his activities at forum residents which the defendant bears the burden of overcoming by presenting a *compelling case* that jurisdiction would be unreasonable." (first emphasis in original, second emphasis added)); *see also Passantino*, 212 F.3d at 505, n.8 (acknowledging the difference between personal jurisdiction and venue, but using *Haisten* as support for determining venue). Finally, transfer under § 1404(a) "should not be freely granted," nor should a motion to transfer "be granted if the effect is simply to shift the inconvenience to the party resisting the transfer." *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004) (internal quotation marks and citations omitted).

GEO argues that venue would be proper either where the records are allegedly located, or (perplexingly) where "GEO *could have* undertaken this alleged scheme." GEO Mem., at 13 (emphasis added). These arguments must be rejected for three reasons. First, GEO has provided no evidence indicating the jurisdiction in which its actions took place. Second, merely because

the District of Columbia *could* be a proper forum, does not mean that the case should be transferred there. *Gherebi*, 352 F.3d at 1303, n.13 ("[T]here is a strong presumption in favor of plaintiff's choice of forum." (internal quotation marks omitted)). Indeed, if venue is proper in more than one forum, a case need not even be heard in the "best venue." *Id*. Second, GEO's argument that the District of Columbia is the proper forum because it is "the location of the documents subject to Plaintiff's FOIA request . . . and BOP's letters to Reeves County and GEO" (GEO Mem. at 13) is irrelevant and possibly factually inaccurate. At the beginning of this case, the records at issue were converted to electronic format, thus their "location" is immaterial for venue purposes, since the evidence can easily be brought to any district in the country. *See* Tufte Decl. ¶¶ 10-11. Moreover, the evidence in this case indicates that the FOIA case file is located in Kansas City, Kansas, and that all activities BOP undertook in reviewing, analyzing, and processing the records were carried out in BOP's Kansas City office. Tufte Decl. ¶ 1.

Furthermore, even if a more substantial part of the events occurred in another district, this still would not satisfy the burden that GEO must shoulder to justify transferring venue. *See Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256, 1261 (D.Colo. 1998) ("Even if a more substantial portion of the activities giving rise to the claim occurred in other districts, venue is proper if the district the plaintiff chose had a substantial connection to the claim.").

The factors that a court must weigh when considering a § 1404(a) motion to transfer are divided into two categories: private factors and public factors. *Decker Coal*, 805 F.2d, at 843. The private factors include:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Id.* (internal quotation marks and citation omitted). These factors are all either inapplicable or

weigh against GEO's motion. There is no possibility of a view of premises; nor (assuming, contrary to the apparent expectation of the original parties and the court, that there would be a trial in this case) are there any unwilling witnesses who are not parties (and thus subject to compulsory process). GEO argues that Oregon is an inconvenient location for BOP's and plaintiff's witnesses to travel to. GEO Mem., at 15. The court should disregard this argument in its entirety because a party cannot raise venue defects on behalf of another party. 14D Wright & Miller § 3829, at 750. Moreover, GEO's arguments concerning plaintiff's witnesses miss the mark entirely, since plaintiff does not anticipate any further involvement in this case by Judy Greene or Tom Barry.[6] In fact, plaintiff has recently engaged a consultant and expert witness based in Oregon, thus this factor now clearly weighs against transfer because of the prohibitive costs which would be incurred if both plaintiff and his expert witness had to travel to the District of Columbia. Third Raher Decl. ¶ 1. GEO has pointed to no other "practical problems" with Oregon venue.

> The public factors a court must consider include:
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> the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

*Decker Coal*, 805 F.2d at 843. None of the factors weigh in favor of GEO's motion, nor does GEO even pretend that they do. Accordingly, ever single factor that this court must consider is either inapplicable or weighs against GEO's motion to transfer. Thus, the motion must be denied.

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[6] In addition, GEO inaccurately states that Mr. Barry "works in Washington, D.C." GEO Mem., at 15. In fact, the Barry Declaration only stated that Mr. Barry is *employed* by a Washington, D.C.-based entity. Barry Decl. (Doc. #36) ¶ 1. To the best of plaintiff's knowledge, Mr. Barry lives in New Mexico.

## III. Conclusion

Plaintiff has pled a cognizable claim under § 1983. GEO launches a barrage of attacks (some plausible, some baseless) against the § 1983 claims. The amount of monetary damages sought by plaintiff is trivial in the context of GEO's operations, yet GEO is understandably disturbed by the amended complaint because plaintiff's success would make it more difficult for GEO to continue achieving its corporate objective of secrecy through the exertion of silent, undetectable pressure on agency officials. Plaintiff respectfully asks this court to look through GEO's self-serving arguments and affirm plaintiff's right to hold GEO accountable.

GEO's attempts to show that the litigation is better heard in another district are thoroughly unpersuasive. GEO makes vague references to venue in Texas or Florida but only asks for transfer to the District of Columbia. The only people who would benefit from such a transfer are the Washington-based employees of the law firm retained by GEO. On the other hand, such a transfer would be a tremendous burden to plaintiff and plaintiff's primary witness. The relevant factors clearly weigh in favor of denying GEO's motion. Because GEO chose to appear in this district for purposes of intervening in plaintiff's case, it should not be able to defeat a closely related claim simply based on ill-founded venue arguments.

For the reasons stated above, GEO's motion should be denied.

Dated this 27th day of December, 2010.

Respectfully submitted,

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