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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TODD ASHKER, et al.,

Plaintiffs,

v.

GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Defendants.

Case No.: 4:09-cv-05796-CW (RMI)

CLASS ACTION

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR DE NOVO DETERMINATION OF DISPOSITIVE RULING BY MAGISTRATE JUDGE REGARDING PLAINTIFFS' SECOND MOTION FOR EXTENSION OF SETTLEMENT AGREEMENT BASED ON SYSTEMIC DUE PROCESS VIOLATIONS

Date: October 28, 2021
Time: 2:00 p.m.
Place: Oakland – Videoconference Only
Judge: Honorable Claudia Wilken

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INTRODUCTION

If Defendants wish this case to end, there is a simple solution: CDCR must remedy the longstanding and systemic due process violations it has been imposing upon the *Ashker* class since 2015. Plaintiffs' evidence irrefutably demonstrates that this has not yet occurred.

I. DEFENDANTS RELY ON PLAINLY INCORRECT LEGAL STANDARDS.

A. Standard of Review.

Defendants' contention that the "Magistrate Judge's findings and recommendations here are entitled to deference" is flat wrong. De Novo Opp. at 4. "Because the standard of review is de novo, the Court considers the arguments and evidence presented to the magistrate judge … as if no decision had been rendered by the magistrate judge." ECF No. 1440 ("XM1 Order") at 11-12 (*citing Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009)).

B. Law of the Case.

Defendants misconstrue Plaintiffs' reliance on the law of the case doctrine as an effort to apply the factual record from the first extension motion to the present, thereby "guarantee[ing] endless settlement extensions." De Novo Opp. at 6. In fact, Plaintiffs only rely on the doctrine for *legal* rulings that must be reaffirmed for consistency between the prior and present extension motions. De Novo Mot. at 1-3, 11-13 & n.8, 15-16. This is exactly how the caselaw cited by Defendants defines the doctrine. *See Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018) ("The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (citations omitted). Defendants do not suggest a change in the law or any other basis upon which this Court should exercise its discretion to change its legal rulings.

II. THE MAGISTRATE JUDGE ERRED IN DENYING PLAINTIFFS' CLAIM OF DUE PROCESS VIOLATIONS IN CDCR'S USE OF CONFIDENTIAL INFORMATION.

A. The Court Has Already Ruled That Due Process Requires an Accurate Summary of Confidential Information Relied Upon in a Rule Violation Determination.

The Court has already determined the law applicable to Plaintiffs' claim of systemic fabrication of confidential information. Due process requires "adequate notice of the charges and evidence. . .

[I]naccurate or incomplete disclosures . . . deprive[] class members of the ability to challenge or otherwise raise questions as to the reliability of confidential information that could have been or was used against them during their disciplinary hearings." XM1 Order at 42.[1]

Defendants ignore this ruling, insisting that *Wolff v. McDonnell,* 418 U.S. 539 (1974), only requires written notice of the *charges*, not the *evidence* relied upon for prison discipline. De Novo Opp. at 10. This is wrong. Due process requires notice adequate to "marshal the facts and prepare a defense," and this requires notice of and access to the evidence itself or an accurate non-confidential summary. *See Wolff,* 418 U.S. at 563-65 (due process requires "advance written notice of the claimed violation *and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken*") (emphasis added). "[A]s to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." *Id.; see also Grillo v. Coughlin*, 31 F.3d 53, 56 (2d Cir. 1994) ("[i]t is but a slight turn on Kafka for the accused to be required to mount his defense referring to prison documents that, unbeknownst to him, differ from those before the hearing officer"); *Young v. Kann*, 926 F.2d 1396 (3d Cir. 1991) (collecting cases in which prison system's failure to allow prisoner access to evidence against him during disciplinary hearing found to violate due process).

B. The Evidence Shows That CDCR Systemically Fabricates and Fails to Accurately Disclose Confidential Information.

Defendants' attempt to refute Plaintiffs' examples of fabrication is equally flawed:

- [redacted] was told that [redacted] *See* De Novo Mot. at 4. CDCR insists the confidential disclosure is accurate because [redacted] De Novo Opp. at 12-13. But [redacted]

[1] Defendants suggest that the Court need not review the substance of the Magistrate Judge's decision because neither Plaintiffs' confidential information claim nor the interference with parole claim present proper grounds for an extension under paragraph 41 of the settlement agreement. De Novo Opp. at 5-6. The Court has already rejected this argument and need not revisit it here. XM1 Order at 33-34 (confidential information claim arises out of reforms required by the settlement agreement); *id*. at 50 (parole claim was alleged in Second Amended Complaint).

[redacted] thus a statement that [redacted] suggests [redacted]. *See* Decl. of Rachel Meeropol ISO XM2, ECF No. 1348 ("Meeropol Decl."), Ex. E at 001247 (Q27), 001286 (emphasis added). Moreover, CDCR ignores that [redacted] *Id.* at 001248 (Q32).[2]

- CDCR ignores that confidential information about [redacted] was described in the disclosures as if [redacted]. *Compare* De Novo Mot. at 4 and XM2 Mot. at 5 *with* De Novo Opp. at 13. And while Defendants are correct that the confidential disclosures do not explicitly state that [redacted] Defendants provide no explanation for CDCR's failure to accurately disclose [redacted]. *Compare* Meeropol Decl., Ex. F at 024678 ([redacted]) *with id.* at 024681 ([redacted]); *compare id.* at 024671 ([redacted] *with id.* at 024674 ([redacted]); *compare* De Novo Opp. at 13 (CDCR informs the court, without citation to the evidence, that [redacted]) *with* Meeropol Decl., Ex. F at 024694 ([redacted]).

- CDCR responds to only one of the four distinct issues with [redacted] RVR (De Novo Mot. at 4; XM2 Mot. at 6): that the *confidential disclosure* does not misrepresent [redacted]. De Novo Opp. at 13. This is technically correct: it is the RVR, rather than the confidential disclosure form, which includes the fabrication. *Compare* Meeropol Decl., Ex. G at 024313 [redacted] *with id.* at 24404, 24408 (no mention of [redacted]).[3] Rather than responding to the other points, including critical contradictions in the alleged confidential testimony, CDCR directs the Court's attention to Magistrate Judge Illman's ruling on a prior discovery motion which did not include the relevant issues. De Novo Opp. at 13; ECF No. 1368 at 1-2; ECF No. 1334-3 at 3.

- Regarding [redacted], CDCR insists it is accurate to inform a prisoner that "[redacted]" when in fact the communication states "[redacted]

[2] Defendants claim that Plaintiffs concede that all class members' disciplinary findings are supported by some evidence. De Novo Opp. at 10. Plaintiffs make no such concession.

[3] Plaintiffs acknowledge their mistake in attributing the fabrication to the confidential disclosure rather than the RVR, but CDCR was previously directed to the relevant pages of the record, and still had no explanation or response to the fact of the fabrication. *See* XM2 Mot. at 6; XM2 Reply at 10.

[redacted]." Meeropol Decl., Ex. H at 023783, 023793-94 (emphasis added). According to CDCR, the added (italicized) phrase "[redacted]." De Novo Opp. at 13. But, in contrast to CDCR's argument regarding [redacted], above, [redacted] CDCR cannot really be suggesting that [redacted]. *Id*.

- CDCR concedes that [redacted] was erroneously told that [redacted] when in fact "[redacted]" De Novo Opp. at 13-14; Meeropol Decl., Ex. T at 021905. Defendants seek to excuse this fabrication by claiming [redacted], but the description in the confidential memorandum of [redacted] *Id.* at 022044, 021905. CDCR also defends as accurate the statement that [redacted]" De Novo Opp. at 13-14, but CDCR provides no citation to the evidence, and the confidential memorandum [redacted] includes nothing of the sort. Meeropol Decl., Ex. T at 022045.

Importantly, the above five examples are just that—examples. Plaintiffs submitted evidence of 29 other inaccurate disclosures, XM2 Mot. at 4-13, and could have provided more, but CDCR conceded that 23 examples would be enough to evidence a systemic violation when opposing Plaintiffs' motion for additional pages. *Id.* at 13, n.5. Defendants' responses to the five examples above are representative of their responses to the balance of these examples. XM2 Reply at 4-14.[4]

Moreover, Plaintiffs explained in the opening motion that the Magistrate Judge failed to acknowledge Plaintiffs' evidence of lengthy periods in administrative segregation based on fabricated confidential information, confidential memoranda that misstate the confidential information, and coercion of debriefers in a manner designed to produce unreliable confidential information. XM2 Mot.

[4] Contrary to Defendants' conclusory assertion, De Novo Opp. at 14, n.6, their counsel's declarations contained argument, resulting in an end-run around the local rules. Counsel herself describes one chart as a "detailed analysis and response to Plaintiffs' allegations," and indeed it contains arguments like "[t]he sentence in question is a reasonable deduction from the text of the long kite…" *See* XM2 Reply at 1. The Court should admonish that Defendants' counsel's declarations are improper.

at 13-24, 36-37; De Novo Mot. at 6-8. On all these far-reaching and systemic problems, CDCR offers no defense.

C. This Court Has Already Ruled That Due Process Requires a Determination as to the Reliability of Confidential Information.

The law relevant to CDCR's systemic failure to ensure the reliability of confidential information is also already clear. *See* XM1 Order at 45-46 (requirements for determining reliability of confidential information set forth in *Zimmerlee v. Keeney*, 831 F.2d 183 (9th Cir. 1987), are paramount to protect due process). CDCR argues that the *Zimmerlee* requirements are an aspect of the some-evidence requirement, De Novo Opp. at 14, but this misses the point. A systemic failure to adhere to the *Zimmerlee* requirements fails to guarantee due process to the class, regardless of whether non-confidential evidence might be adequate to support guilt in an individual case.

D. The Evidence Shows That CDCR Systemically Fails to Ensure the Reliability of Confidential Information.

Defendants barely attempt to address Plaintiffs' many examples of failure to follow the *Zimmerlee* requirements. Defendants acknowledge, for example, that Plaintiffs' first argument involves hearing officers finding informant statements corroborated when they are not, De Novo Opp. at 15, but they never again mention corroboration or refute any of Plaintiffs' 19 examples. *Id.* at 15-16; XM2 Mot. at 27-33. Similarly, Plaintiffs provided 29 examples of the Senior Hearing Officer relying on confidential disclosures instead of reviewing the confidential memoranda to ensure the information is accurately disclosed and reliable. XM2 Mot. at 34. Instead of engaging with these examples, Defendants broadly insist "[redacted]" but their evidence is a self-serving declaration from a CDCR employee who fails to explain how he could possibly know what every Senior Hearing Officer actually does in practice, as well as the fact that the officers check boxes on the RVR form. De Novo Opp. at 15 (*citing* [redacted] Decl., ¶ 15; Lyons Decl., Ex. D).[5] Checking a box is *not* evidence that the hearing officer actually made their own

[5] The Magistrate Judge did not address Plaintiffs' request that the declaration be stricken for lack of foundation under Civil L.R. 7-5(b). XM2 Reply at 22. Plaintiffs request that this Court do so.

reliability determination. *See Madrid v. Gomez*, 889 F. Supp. 1146, 1277 (N.D. Cal. 1995) (prison officials "must do more than simply invoke 'in a rote fashion' one of the five criteria" listed for reliability in CDCR's regulations). This is particularly true given Plaintiffs' evidence of the Hearing Officer checking boxes not supported by the record. *See* XM2 Reply at 20.

Defendants also try to dispute Plaintiffs' evidence that CDCR interferes with class members' ability to ask questions about source reliability during their disciplinary hearings. XM2 Mot. at 33-34; De Novo Opp. at 16. According to Defendants, that [redacted] is dispositive of the issue. De Novo Opp. at 16. But this ignores how class members, including [redacted] and [redacted], were regularly denied any *substantive response* to important questions regarding source reliability. XM2 Mot. at 33-34. Getting to ask the question is not enough; due process requires that staff witnesses *answer* the questions.

E. The Court Should Impose an Adverse Inference for Spoliation of Evidence.

Defendants contend they had no notice CDCR needed to preserve informant interview recordings until Plaintiffs asked them to do so in September 2019. De Novo Opp. at 17. They insist that the "allegation of 'CDCR's systemic falsification of confidential disclosures' [in Plaintiffs' first extension motion] is far too attenuated a connection to constitute notice that *all* confidential interview recordings were potentially relevant to the litigation." *Id.* (emphasis in original). But it is precisely the *systemic* nature of Plaintiffs' allegations that put Defendants on notice to preserve *all* records of confidential informant interviews. Defendants then selectively quote from Plaintiffs' request for interview recordings in February 2019 to suggest it was somehow tentative or nebulous, *id.*, when in fact Plaintiffs made clear they were seeking, *at least*, "all relevant confidential information and disclosures, including not only confidential memoranda but also recordings and/or transcripts of informant interviews" each quarter during extended monitoring. *See* Decl. of Le-Mai Lyons ISO XM2 Opp., Ex. O. And the very fact that the parties discussed what records CDCR would *produce* to evidence its confidential information practices—under an agreement that contemplates litigating enforcement and extension motions based on that evidence—demonstrates there was a duty by at least that date to *preserve all* records reflecting how CDCR uses confidential information against class

members. Finally, Defendants try to distinguish *Institute for Motivational Living* (regarding post-settlement spoliation) by arguing "[h]ere, Plaintiffs seek an adverse inference for the destruction of confidential recordings that were indisputably beyond the scope of this case…" De Novo Opp. at 18. In fact, the recordings were indisputably *within* the scope of this case since Plaintiffs specifically sought them and Magistrate Judge Illman *ordered their production,* but Defendants had destroyed them. ECF No. 1396 at 1. And Defendants do not even attempt to distinguish *In re Napster*, which clearly negates the Magistrate Judge's suggestion there can be no duty to preserve evidence after settlement. *See* De Novo Mot. at 8-9. Plaintiffs have established Defendants were under a duty to preserve interview recordings well before they finally took steps to do so in October 2019.

Regarding state of mind, Defendants assert that the Ninth Circuit and this district have rejected the contention that spoliation sanctions can be based on negligence. De Novo Opp. at 19. They cite no authority from this district, and in fact courts in this district *have* recognized that a culpable state of mind for purposes of spoliation can include negligence. *See*, *e.g.*, *Hamilton v. Signature Flight Support Corp.*, No. 05-490, 2005 U.S. Dist. LEXIS 40088, at *15 (N.D. Cal. Dec. 20, 2005) (culpable state of mind factor "is satisfied by a showing that the evidence was destroyed 'knowingly, even if without intent to [breach a duty to preserve it], or negligently.'") (citations omitted). Other district courts in this Circuit agree. *See Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 628 (C.D. Cal. 2013) (collecting Ninth Circuit district court cases finding negligence sufficient to support spoliation sanctions); *see also* De Novo Mot. at 9.[6] The court in *Reinsdorf* explained why negligence is sufficient to adopt an adverse inference:

> It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.

[6] Plaintiffs noted an error in their briefing when responding to this argument. Plaintiffs' parenthetical for *Soulé v. P.F. Chang's China Bistro, Inc.* should likewise say "collecting Ninth Circuit district court cases." De Novo Mot. at 9:17-18.

Reinsdorf, 296 F.R.D. at 628. Further negating Defendants' proposition, the Ninth Circuit has not rejected negligence as a basis for spoliation sanctions either, and in fact it has held that "simple notice of 'potential relevance to the litigation'" can suffice to impose adverse inference sanctions. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993).

Defendants' Ninth Circuit case is not inconsistent with these decisions. *Med. Labs. Mgmt.*, in which the defendant misplaced slides of biological tissue during a trip abroad and then hired a private investigator to try to recover them, stands for nothing more than the proposition that a court is not *required* to adopt an adverse inference when evidence is lost *accidentally*. *Med. Labs. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002) (holding that district court did not abuse its discretion in finding adverse inference instruction unwarranted under the totality of the circumstances and noting that "[w]hen relevant evidence is lost accidentally or for an innocent reason, an adverse evidentiary inference from the loss *may* be rejected") (emphasis added). *See also Till v. Big Lots Stores, Inc.*, No. 12-6133, 2014 U.S. Dist. LEXIS 194661, at *6-7 (C.D. Cal. July 10, 2014) (citing both *Reinsdorf* and *Med. Labs. Mgmt*. and holding that spoliation can include a negligent state of mind). Moreover, the circumstances here are quite different than in *Med. Labs. Mgmt.*, in that CDCR did not accidentally misplace interview recordings, but rather intentionally decided *not* to preserve them prior to October 2019. *See* XM2 Mot. at 25; XM2 Reply at 29-30.

And even if a mindset more culpable than negligence were required, Plaintiffs showed that Defendants affirmatively misled them about the existence of the interview recordings CDCR destroyed, insisting that interviews with non-debriefing confidential informants are not recorded until Plaintiffs found mention of such a recording in CDCR's own documents. XM2 Mot. at 25-26. This is compelling evidence of bad faith, not "conclusory allegations and hyperbole" as Defendants maintain. De Novo Opp. at 19. Plaintiffs amply demonstrated a sufficiently culpable state of mind.

Finally, concerning relevance, Defendants embrace Magistrate Judge Illman's finding that Plaintiffs "conceded" the destroyed recordings were "not necessary or relevant to any claim in this case." De Novo Opp. at 16. In fact, Plaintiffs said they believed more evidence is unnecessary to prove systemic due process violations (because Plaintiffs met their burden on the record that exists) but

argued for an adverse inference in the alternative should the Court disagree. XM2 Mot. at 24. And Plaintiffs *never* said the destroyed recordings were irrelevant. To the contrary, Plaintiffs moved for their production and the Magistrate Judge ordered them produced, *see* ECF No. 1396 at 1; clearly relevance has been established. Defendants then twist Plaintiffs' rebuttal to their point that debriefers initial each page of debriefing reports, claiming that Plaintiffs argue they "alone could have determined the accuracy of debriefing reports." De Novo Opp. at 19. This is nonsense; Plaintiffs argue *the destroyed recordings alone* could have determined accuracy, as was the case with recordings that were retained. De Novo Mot. at 10 & n.6. Plaintiffs amply demonstrated relevance and this Court should reject the Magistrate Judge's findings to the contrary.

III. THE MAGISTRATE JUDGE ERRED IN DENYING PLAINTIFFS' CLAIM THAT DEFENDANTS DEPRIVE CLASS MEMBERS OF A MEANINGFUL OPPORTUNITY TO SEEK PAROLE.

Defendants continue to misconstrue Plaintiffs' motion as an attack on the Board of Parole Hearings ("BPH"), willfully ignoring this Court's order on the first extension motion. XM1 Order at 54-55. In actuality, Plaintiffs' demand is for fair access to the parole process—by directing CDCR to stop retaining and unqualifiedly making available to BPH flawed gang validations and by having CDCR provide contemporaneous and meaningful notice to prisoners whenever confidential information is placed in their file.

A. Plaintiffs' Claims Are Not Barred by Judicial Estoppel.

Defendants falsely accuse Plaintiffs of changing positions between the time of settlement approval and the motion to extend the SA, thereby purportedly subjecting this claim to judicial estoppel. De Novo Opp. at 7. This Court implicitly rejected the same argument with respect to the previous extension motion. ECF Nos. 1345 at 2-3, 1367 at 2; XM1 Order at 55.

Defendants acknowledge estoppel only applies when a party has taken a position "inconsistent" with its earlier position. De Novo Opp. at 7. Defendants attempt to manufacture inconsistency based on Plaintiffs' statement during settlement approval that they did not seek to change parole policies. Plaintiffs have taken no different position in the extension motions. ECF Nos. 905, 1002, and 1122 at 13, 22. Rather, Plaintiffs' entire challenge is to *CDCR*'s actions, and Plaintiffs' proposed remedies

affect only what *CDCR* should do—*i.e.*, provide guidance about the unreliability of old gang validations and provide notice and an opportunity to challenge confidential information at the time it goes into a prisoner's file.

B. Plaintiffs Have a Due Process Right to a Meaningful Opportunity for Parole.

Defendants acknowledge that this Court already has ruled on the legal standard applicable to Plaintiffs' parole due process claim. De Novo Opp. at 8 & n.3. Defendants also acknowledge the legal ground for the Court's ruling by stating that a prisoner's due process right to "the opportunity to be heard at a meaningful time and in a meaningful manner" is a "noncontroversial principle." *Id.* at 8; *see also* XM1 Order at 54-55; De Novo Mot. at 8; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Haygood v. Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985); *Khan v. Holder*, 134 F. Supp. 3d 244, 253 (D.D.C. 2015) (applying *Mathews* meaningfulness standard in parole revocation context); *Smith v. Pennsylvania Dep't of Corr.*, No. 18-01134, 2020 WL 1244493, at *8 (M.D. Pa. Mar. 16, 2020) (claim by prisoner barred from applying for parole judged by *Mathews* meaningfulness standard). Yet Defendants flout the Court's ruling, as did the Magistrate Judge, by insisting CDCR has the right to engage in policies and practices that deny prisoners a meaningful opportunity for parole so long as BPH provides a hearing and a reason for denial. *Id.* at 8-9; XM2 R&R at 10.[7]

With respect to the old constitutionally flawed validations, Defendants argue that Plaintiffs must prove that gang validation was the *sole* reason for a prisoner's parole denial. De Novo Opp. at 6, 10. However, Plaintiffs challenge the *systemic* bias and denial of a meaningful opportunity to be heard created by CDCR's practice of making these validations available to BPH without qualification. It is of no avail to Defendants whether other factors influence BPH decisions, or whether any particular parole decision is right or wrong, as this Court has determined. XM1 Order at 54-55 ("Plaintiffs are not challenging the outcome of any parole determinations;" CDCR's "continued retention and use of old gang validations without any acknowledgement of the fact that they are flawed and unreliable gives rise to violations of class members' right to a meaningful hearing. . ."). Notably, Defendants do *not*

[7] Defendants do not even attempt to support the Magistrate Judge's legal authorities in the Report & Recommendation, which are inapposite. De Novo Mot. at 12, n.7; De Novo Opp. at 9.

contest that the old validations play a significant factor in parole decisions, nor do they contest that they continue retaining and unqualifiedly making available these unconstitutional validations. XM1 Order at 55; De Novo Mot. at 12.

With respect to CDCR's systemic practice of maintaining undisclosed and untested confidential information, Defendants rely on a string of cases for the proposition that "the use of, or failure to disclose, confidential information relied upon in parole suitability hearings does not violate due process." De Novo Opp. at 9 & n.4. But in every case Defendants cite, the prisoners challenged BPH's reliance on or refusal to disclose the *confidential information itself* at the hearing or in the Board's decision. *See, e.g., Urenda v. Hatton*, No. 16-02650, 2017 WL 2335375, at *1 (N.D. Cal. May 30, 2017); *Von Staich v. Ferguson*, No. 15-1182, 2018 WL 3322901, at *7 (E.D. Cal. July 5, 2018); *Harrison v. Shaffer*, No. 18-04454, 2019 WL 11706232, at *1 (N.D. Cal. Aug. 20, 2019). Thus, Defendants' authorities are inapposite to the two systemic practices *by CDCR* which deny Plaintiffs a meaningful opportunity to be heard, *i.e.*, that when confidential information is placed in a prisoner's file, CDCR must provide adequate notice (such as through provision of a non-confidential summary) and opportunity to enable the prisoner to investigate and rectify any errors, and that CDCR's Notice provided just before the hearing is so scant that it prevents prisoners from even belatedly attempting to challenge the confidential information or explain their side of the story. *See also* XM2 Mot. at 44-46 (*citing Swarthout v. Cooke*, 562 U.S. 216, 220 (2011)) (parole applicants have right "to contest the evidence against them, [and to be] afforded access to their records in advance"); De Novo Opp. at 9.

Defendants claim to have "meticulously dissected" the parole records submitted by Plaintiffs. De Novo Opp. at 6. Yet the only factual challenge they make (which is not even relevant to the confidential information claim) is that [redacted]. *Id.* at 10. But past gang affiliation does not mean that the involvement continues, and is not dispositive of parole eligibility, thus making Defendants' point inconsequential. *See, e.g.*, Decl. of Samuel Miller ISO XM2 Mot., ¶ 5 & Ex. 3 ([redacted]). Moreover, their read of the evidence is inaccurate. In one instance ([redacted]), counsel asserts that [redacted]." Decl. of

Cassandra Shryock ISO XM2 Opp., Ex. D. In another ([redacted]), Defendants' counsel asserts that [redacted]." *Id.*

IV. THE MAGISTRATE JUDGE ERRED IN DENYING PLAINTIFFS' CLAIM OF A SYSTEMIC DUE PROCESS VIOLATION WITH REGARD TO RCGP.

A. Class Members Have a Liberty Interest in Avoiding RCGP.

Defendants claim that Plaintiffs did not address the question of whether class members have a liberty interest in avoiding RCGP in their *de novo* motion and therefore "failed to make that record in their second extension motion." De Novo Opp. at 20. In fact, Plaintiffs did not object to the Magistrate Judge's findings regarding the liberty interest in avoiding RCGP because he assumed there *is* one. XM2 R&R at 10. And Plaintiffs did establish a continued liberty interest in their second extension motion, demonstrating that the factors that supported this Court's liberty-interest finding on Plaintiffs' first extension motion—lack of weekend visits, the indeterminate nature of RCGP placement, and the possibility of being placed on walk-alone status—each persisted during the second monitoring period. *See* XM2 Reply at 41-43; *see also* XM2 Mot. at 48-50.

Defendants next argue that if class members had a liberty interest in avoiding RCGP placement, then surely Plaintiffs would have filed enforcement motions concerning the RCGP during the second monitoring period. De Novo Opp. at 20. This has no logical bearing on the liberty interest question, and more importantly, the Court already has rejected the notion that enforcement motions are relevant to extension under the Settlement Agreement. *See* XM1 Order at 12-13, n.1.

Defendants then address whether RCGP imposes atypical and significant hardships relative to the ordinary incidents of prison life under *Sandin v. Connor*, though without once acknowledging this Court's analysis of the issue in reference to *Aref v. Lynch*. *Id.* at 19-23. Regarding conditions in the RCGP, Defendants argue that the unit's remote location cannot give rise to a liberty interest because the parties negotiated for it and that RCGP prisoners receive bi-weekly contact and non-contact visits and use the telephone, so their experience is comparable to general population. De Novo Opp. at 21-22. But this Court's findings on Plaintiffs' first extension motion dispensed with these arguments:

> This undisputed limitation on contact visits [on weekends in RCGP], which is atypical relative to inmates in the general population, has resulted in very limited contact visits for RCGP inmates in light of the fact that Pelican Bay is located in a remote part of California. The Court is persuaded, as a matter of common sense, that the ban on weekend contact visits for RCGP inmates makes it less feasible for family and friends who live in other parts of California to make the trip to Pelican Bay.

XM1 Order at 21. These findings indisputably still apply on the current record. *See* XM2 Reply at 42.

Defendants claim there were only [redacted] prisoners on walk-alone status when the parties briefed Plaintiffs' second extension motion. De Novo Opp. at 22. But it is undisputed that [redacted] the prisoners in RCGP as of the end of the second monitoring period were on walk-alone status, and even the "modified" version that Defendants introduced into this case only after monitoring ended[8] gives rise to a liberty interest because it still entails diminished programming and socializing opportunities. *See* XM2 Reply at 42, n.23. Finally, Defendants emphasize that considerations of prisoner safety require restrictive conditions, but "[w]hether [ ] restrictions are necessary to keep RCGP inmates safe is irrelevant to the liberty interest analysis." XM1 Order at 24.

Defendants next make the curious assertion that "Plaintiffs do not, and cannot, point to any case where threats to the inmate's safety ceased to exist and yet CDCR held that inmate in RCGP indeterminately." De Novo Opp. at 23. While this implicates the deficiency of CDCR's RCGP review procedures rather than the liberty interest analysis, Plaintiffs provided three detailed case studies of RCGP prisoners whose safety concerns appear to have been resolved but who were nevertheless kept in RCGP, as well as [redacted] instances in which the ICC kept prisoners in RCGP [redacted] *See* XM2 Mot. at 53-56; XM2 Reply at 44.

Defendants finally argue that RCGP placement is not atypical or significant because no California statute or CDCR regulation *requires* RCGP prisoners to be denied parole. De Novo Opp. at 23. But "diminished opportunities for programming, in turn, can negatively impact inmates' eligibility

[8] Defendants did not include anything about prisoners on "modified" walk-alone status in their disclosures under the SA during the second monitoring period. *See* XM Reply at 42, n.23. The Court should disregard Defendants' evidence concerning this previously undisclosed status.

for parole, which in turn can lengthen the duration of inmates' sentences." XM1 Order at 22 (citation omitted). Plaintiffs made the same showing in their second extension motion. *See* XM2 Mot. at 48-49.

B. RCGP Placement and Review Procedures Are Constitutionally Deficient.

Defendants claim that "Plaintiffs do not point to any departure from the negotiated and Court-approved procedures." De Novo Opp. at 23. This Court confirmed the opposite in its findings on Plaintiffs' first extension motion. XM1 Order at 27-28 ("Plaintiffs' evidence showed that, instead of evaluating whether a safety concern continues to exist, the ICC operates under what appears to be a presumption that historical threats to prisoners' safety continue to exist in the absence of affirmative evidence that the threats have abated."); *id.* at 30 ("Plaintiffs' alleged due process violations arise out of Defendants' failure to meaningfully implement Paragraph 27"). As noted above, Plaintiffs presented even more compelling evidence of CDCR's departures from the negotiated standards of Paragraph 27 in their second extension motion. Defendants characterize this evidence as "counsel's testimony" (which it is not) because counsel described in her declaration how she found [redacted] instances of the ICC's rote repetition of a particular standard, but they do not dispute its accuracy or that it comes from their own documents. Defendants likewise charge that Plaintiffs rely on counsel's "personal evaluation" of threats to inmates' safety and what "amounts to disagreement with the evidence on which CDCR relies to evaluate [ ] safety concerns," De Novo Opp. at 24, but as this Court found previously, "Plaintiffs are not challenging the ultimate determinations of the DRB or ICC … instead, Plaintiffs challenge the lack of procedural protections afforded to class members in connection with RCGP placement or retention…" XM1 Order at 31 (emphasis in original).

V. DEFENDANTS' SYSTEMIC CONSTITUTIONAL VIOLATIONS MUST BE REMEDIED.

Defendants have made clear that they have no intention of remediating any constitutional violations without Court intervention. De Novo Mot. at 18. In this context, limiting relief to mere monitoring frustrates the purpose of the Agreement.

Defendants fail to address Plaintiffs' authorities holding that a federal court has jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian*

Life. Ins. Co. of Am., 511 U.S. 375, 380 (1994); *see also TNT Mktg., Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986); De Novo Mot. at 18. Instead, Defendants argue that the ruling in *William Keeton Enters., Inc. v. A All Am. Strip-O-Rama, Inc.*, 74 F.3d 178, 182 (9th Cir. 1996), limits relief to extended monitoring only. De Novo Opp. at 25. In *Strip-O-Rama,* the Ninth Circuit held that a district court cannot enforce a settlement agreement after the court has dismissed the action with prejudice unless the order of dismissal reserves jurisdiction for enforcement. Here, the case has not been dismissed, and this Court explicitly retained jurisdiction in the order granting final approval of the settlement, thus making *Strip-O-Rama* inapposite. ECF No. 488 at 2.

With respect to Plaintiffs' alternative request for a modification to the Agreement, Defendants make perfunctory arguments that Plaintiffs have not met their evidentiary burden nor filed a proper motion. De Novo Opp. at 25 n. 9. Plaintiffs have met their burden by explaining that circumstances have changed significantly since the Agreement was approved, in that Plaintiffs have proved three distinct constitutional violations which continue unabated and in full defiance by Defendants, and have alleged a fourth violation in this motion, all of which are causing great detriment to Plaintiffs and the public interest. The extensive briefing and evidence provided with the motion all support this position. Fed. R. Civ. Proc. 60(b). As for procedure, Rule 60(b) requires that the request be "on motion and just terms." Plaintiffs requested modification as an alternative before the Magistrate Judge and now this Court, asking "that the Court construe this Motion as including a request to modify its final approval order and the Agreement." De Novo Mot. at 19; XM2 Reply at 49-50. In addition: "If the Court finds modification appropriate, Plaintiffs propose that the parties meet and confer and provide the Court with joint or separate proposed alterations to the Agreement, with further briefing if so ordered." XM2 Reply at 50. Thus, both the evidentiary grounds and process are sufficient for modification.

CONCLUSION

Plaintiffs respectfully request that the Court grant the motion for extension, including a remedy to cure the continuing and systemic constitutional violations.

DATED: September 9, 2021

Respectfully submitted,

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