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15
 16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

19 TODD ASHKER, *et al.*,
 20 Plaintiffs,
 21 vs.
 22 GOVERNOR OF THE STATE OF
 CALIFORNIA, *et al.*,
 23 Defendants.
 24

Case No. 4:09-cv-05796-CW

CLASS ACTION

**PLAINTIFFS' ENFORCEMENT MOTION
 REGARDING VIOLATION OF
 SETTLEMENT AGREEMENT PROVISION
 REQUIRING RELEASE OF CLASS
 MEMBERS TO GENERAL POPULATION**

Date: November 28, 2017
 Time: 2:30 p.m.
 Location: TBD
 Judge: Honorable Claudia Wilken

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 28, 2017 at 2:30 p.m. in a courtroom to be determined, 1301 Clay Street, Oakland, California, Plaintiffs will move the Court pursuant to Paragraphs 52 and 53 of the Settlement Agreement for an order directing CDCR to remedy the violation of the Settlement Agreement provision requiring that prisoners released from SHU be placed in General Population housing. This motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Declarations Eldon Vail, Daryn Reichert, and Samuel Miller and exhibits thereto, a proposed order, and all documents and arguments submitted in support thereof. Plaintiffs have noticed this motion for Your Honor’s calendar, despite its status as an enforcement motion appropriate for presentation to Magistrate Judge Vadas, given Judge Vadas’ impending retirement on November 1, 2017.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 A core feature of the settlement of this case was the agreement that class members held in
4 SHU based on gang validation would be reviewed and, absent a SHU-eligible rule violation with a
5 proven STG nexus in the previous 24 months, transferred to General Population prisons. Hundreds of
6 class members were transferred to, and remain at, Level IV prisons where their experiences are
7 disturbingly akin to their years and decades in SHU. Many class members are spending the same or
8 *more* time isolated in their cells than when they were in SHU. This is not, and cannot be, what
9 “General Population” means. Therefore, Plaintiffs bring this enforcement motion to require CDCR to
10 abide by the Settlement Agreement and provide sufficient yard, day room, programming, jobs, and
11 other means of social interaction and environmental stimulation to meet the obligation of housing
12 these class members in actual general population conditions.

13 **II. BACKGROUND**

14 The Settlement Agreement provides that class members who are eligible for release from the
15 SHU shall be “transferred to a General Population level IV 180-design facility, or other general
16 population institution consistent with [their] case factors.” (ECF No. 424-2, para. 25 [Settlement
17 Agreement]). The latest compliance report from CDCR states that 1,557 class members were
18 reviewed under paragraph 25 of the Settlement. The great majority of these prisoners were released
19 from SHU, and now are housed at various institutions around the State, with many remaining in Level
20 IV facilities and others being transferred to lower security facilities. (Miller Decl. ¶¶ 2-3).

21 Following transfer to the Level IV prisons, many class members reported that conditions were
22 similar to what they experienced in SHU, especially in terms of having very little out-of-cell time or
23 programming. Therefore, Plaintiffs’ counsel, in their monitoring and enforcement role under the
24 Settlement, conducted a survey of a representative sample of class members to generate data and
25 assess the extent of the problem. (Miller Decl. ¶ 4). The results of the survey show that many class
26 members are being held in conditions of restrictive housing, or what some prisoners call “Modified
27 SHU,” regardless of the moniker of “General Population” attached to the placement by CDCR. (*Id.*
28 ¶ 4-6 & Exhs. 1-2).

1 Plaintiffs retained a corrections expert to analyze the out-of-cell data and evaluate CDCR's
2 general population housing in the Level IV prisons where class members were placed since release
3 from SHU. Eldon Vail is the former Secretary for the Washington State Department of Corrections
4 (WDOC) with nearly thirty-five years of experience working in and administering adult and juvenile
5 institutions. (Declaration of Eldon Vail ¶¶ 1-4). Mr. Vail has served as an expert witness and
6 correctional consultant for cases and disputes over 40 times in jails and prisons in nineteen different
7 states. (*Id.* ¶¶ 5-11 & Exh. 1). He has extensive knowledge of the California prison system, having
8 toured and inspected many of the institutions, and having been retained as an expert witness in five
9 previous cases regarding CDCR. (*Id.*).

10 The data show that many class members are spending days on end in their cells with virtually
11 no time for yard, day room, or other activities out-of-cell. As one data point, 15 of 55 respondents
12 reported averaging *less than one hour per day* out-of-cell for the entire month. (Vail Decl. ¶ 49;
13 Miller Decl., Exh. 2 [survey spreadsheet]). Another 11 respondents reported averaging less than two
14 hours per day out-of-cell for the entire month. (*Id.*).

15 The experiences of individual prisoners give further insight into the deprivations they have
16 experienced, and continue to experience, on a daily basis. The following narratives are drawn entirely
17 from the data:

18 KVSP

19 **L4-25** (Survey Respondents are identified by code numbers. (Miller Decl. para. 7).)

20 During March 2017, had yard on 5 days (ranging from 30 minutes to 2 hrs), dayroom on 1 day,
21 and took 6 showers (approximately 15 minutes each). All meals were in cell. His total out of cell
22 time for the month of March 2017 was 10 hours, an average of 0.32 hours/day. On at least 20 days
23 during the month, he did not leave his cell at all. On 5 days, he left his cell only to shower. Reasons
24 given by staff for limited or cancelled program: down day, radios not working, lost phone list, code,
25 holiday, lockdown, and no reason given.

26 **L4-49**

27 During March 2017, had yard on 6 days, three of which were under 45 minutes, and dayroom
28 on 3 days. He didn't use the shower. All meals were in cell. His total out of cell time for the month

1 was 10.48 hours, an average of 0.34 hours/day. On 23 days during the month, he did not leave his cell
2 at all. Reasons given by staff for limited or cancelled program: down day, incident on yard, not on
3 schedule, no reason given, and lockdown.

4 **L4-46**

5 During March 2017, left his cell only on 7 days (and two were only for 15 minutes or less.)
6 He had yard 5 times, dayroom twice, and made one 15-minute phone call. He was offered showers on
7 7 occasions but only did so once (for 7 minutes). All meals were in cell. His total out of cell time for
8 the month was approximately 11 hours, an average of 0.35 hours/day. On 24 days, he did not leave
9 his cell. Reasons given by staff for limited or cancelled program: maintenance, missing tray, no
10 reason, and lockdown.

11 **L4-10**

12 During March 2017, left his cell on 15 days, 10 of which were for 30 minutes or less. He had
13 yard on 5 days, dayroom twice, one phone call, one visit to the law library, and 11 showers. All meals
14 were in cell. On 16 days of the month, he did not leave his cell. On 26 days of the month, he left his
15 cell for less than 30 minutes. His total out of cell time for the month was 17.3 hours (an average of
16 0.56 hours/day), 3.7 hours of which were spent showering. Reasons given by staff for limited or
17 cancelled program: staff training, no reason given, staff shortened, incident on another yard, and
18 lockdown.

19 **L4-48**

20 During March 2017, had yard on 6 days, dayroom on 4 days, 2 phone calls, one visit to the law
21 library, and one medical appointment. He took 10-minute showers on 18 days. All meals were in
22 cell. On 10 days during the month, he did not leave his cell at all. On 22 days, left his cell for 15
23 minutes or less. His total out of cell time for the month was approximately 20 hours, an average of
24 0.65 hours per day. Reasons given by staff for cancelled or limited our of cell time: down day, officer
25 training, maintenance, missing tray, count delayed, no reason given, incident on another yard, pizza
26 sale, and lockdown.

1 **L4-88**

2 During March 2017, had yard on 4 days (6.78 hours), 3 visits (13.25 hours), and one 50-
3 minute program about the parole process. All meals were in-cell, day room was not available, and he
4 did not use the showers. His total out of cell time was 20.8 hours, an average of 0.67 hours/days. On
5 24 days during the month, he did not leave his cell. Reasons given by staff for cancelled or limited
6 out of cell time: down day, incident, no reason given, food sale, and lockdown.

7 **L4-30**

8 During March 2017, had yard on 6 days, dayroom once, 7 phone calls (15 minutes each), and
9 showers on 23 days (15 minutes each). On 17 days, the only time he left his cell was to shower/and or
10 use the phone, for a total of 15-30 minutes. All meals were in cell. His total out of cell time for the
11 month was 22.25 (5.75 hours of which was spent showering), an average of 0.72 hours/day. Reasons
12 given by staff for cancelled or limited out of cell time: down day, altercation, worker yard only, staff
13 training, short of staff, pizza sale, and lockdown.

14 HDSP

15 **L4-87**

16 During March 2017, had yard on 7 days and dayroom on 11 days (which included shower
17 time). His total out of cell time for the month was 33.16 hours, an average of 1.07 hours/day. All
18 meals were eaten in cell. On 16 days during the month, he did not leave his cell at all. Reasons
19 provided by staff for cancelled or limited out of cell time: lockdown, holiday, or short of staff.

20 **L4-66**

21 During March 2017, had yard on 5 days, and dayroom on 13 days (which included shower
22 time), one medical appointment, one visit to the law library and 2 NA meetings. He received insulin
23 2x/day. All meals were eaten in cell. His total out of cell time for the month, not including waiting
24 for or receiving insulin, was 41.33 hours, an average of 1.33 hours/day. On 2 days, he only left his cell
25 to receive insulin. On 13 days, he did not leave his cell at all.

26 **L4-38**

27 During March 2017, had yard on 12 days, day room on 8 days, and one phone call. All meals
28 were eaten in cell. His total out of cell time for the month was 36.67 hours, an average 1.18

1 hours/day. On 18 days during the month, he did not leave his cell. Reasons given by staff for
2 cancelled or limited out of cell time: down day, lockdown (search for missing metal), short of staff,
3 priority for another tier, installation of a computer monitor.

4 **L4-16**

5 During March 2107, he had yard on 11 days, dayroom on 10 days, 3 showers, and a medical
6 appointment. All meals were eaten in cell. His total out of cell time for the month was 43.4 hours
7 (including showers and medical), an average of 1.4 hours/day. He did not leave his cell at all on 15
8 days of the month, and on 2 days, he left his cell for only 5-10 minutes. Reasons given by staff for
9 cancelled or limited out-of-cell time: staff training, no reason given, lockdown, maintenance, and
10 holiday.

11 **L4-14**

12 During March 2017, he had yard and day room on 6 days (which included phone and shower
13 time). His total out of cell time for the month was 17.67 hours, an average of 0.57 hours/day. On the
14 other 25 days of the month, he did not leave his cell at all. Reasons given by staff for cancelled or
15 limited out-of-cell time: staff training, lockdown for missing metal, maintenance, and staff shortage.

16 CSP-SAC

17 **L4-19**

18 During March 2017, had yard on 24 days and a 5-minute shower on 27 days. His total out of
19 cell time for the month was 38.5 hours, an average of 1.24 hours/day, which includes 2.25 hours of
20 shower time. On 6 days, the only time he left his cell was to shower. He did not leave his cell on 1
21 day. He reported no program cancellations or limitations.

22 COR

23 **L4-34**

24 During March 2017, had yard on 8 days, day room on 2 days, out-of-cell meals on 8 days (the
25 rest were in-cell) and a GED program on 5 days. His total out of cell time for the month was just
26 under 23 hours, an average of 0.74 hours/day. He did not leave his cell on 17 days of the month. On
27 4 days, he only left his cell for meal(s), for approximately 20-35 minutes. Reasons given by staff for
28 cancelled or limited out-of-cell time include: staff shortage, modified program, lockdown, power

1 outage, interviews, no reason given, staff training, priority for workers, and holiday. He reports that
2 yard and dayroom are supposed to occur twice daily with tiers alternating (and an evening day room
3 for workers), but the program is rarely fully operational. There are no vocations available in his
4 facility (3A).

5 **L4-61**

6 During March 2017, had yard on 16 days (with occasional day room overlap), day room or
7 programming on 3 days, attended at least 2 religious services, had out-of-cell meals on 9 days, and
8 showers on 7 days. His total out of cell time for the month was approximately 25.58 hours, an
9 average of 0.83 hours/day. He did not leave his cell at all on 7 days. On 6 days, he only left his cell
10 for a shower or meal for 15 minutes or less. Reasons given by staff for cancelled or limited out-of-cell
11 time include staff shortage, lockdown, staff meeting, fight, no reason given, and staff training.

12 Additionally, a number of class members have provided declarations with this Motion, with
13 examples summarized below:

14 Mr. Cannon, who was transferred post-SHU to Level IV housing at Corcoran, reports that he
15 was confined 24-hours per day in his cell for ten days of March 2017; on eight days he was allowed
16 out of his cell for less than 30 minutes per day; he had yard only ten days, and day room only six days
17 (with some overlap). These figures are typical of other months he has spent at Corcoran following his
18 release from SHU. (Miller Decl., Exh. 4 [Cannon Declaration]).

19 Mr. Esquivel, who was transferred following release from SHU to Level IV housing at
20 Calipatria State Prison, reports that on 13 out of 23 days he tracked, he was confined to his cell the
21 entire day except for meals. He had yard only 5 days, and showered only once. (Miller Decl., Exh. 3
22 [Esquivel Declaration]).

23 Mr. Mendiola, who was transferred following release from SHU to Level IV housing at Kern
24 Valley State Prison, reports that for 23 days of March 2017 he was permitted to leave his cell for only
25 30 minutes or less each day, and that on eight days he did not leave his cell at all. His average yard
26 time for the month was .31 hours per day, and his day room time averaged .06 hours per day. He was
27 required to eat all meals in his cell. (Miller Decl., Exh. 6 [Mendiola Declaration]).

1 Mr. Herrera, who was transferred following release from SHU to Level IV housing at HDSP in
 2 December 2015, reports that during the entire month of March 2017, he remained all day in his cell
 3 for all but 7 days. He was allowed to go to yard only 5 days that month, and to the day room only 4
 4 days. This is typical of his 22 months housed at HDSP. (Miller Decl., Exh. 5 [Herrera Declaration]).
 5 *See also id.*, Exhs. 7 to 10 [Clement, Lopez, Martinez, and Thomas Declarations, respectively].

6 **III. ARGUMENT**

7 **A. Defendants Have Violated the Settlement By Placing Many SHU Prisoners In** 8 **Housing That Fails to Meet the Ordinary Meaning of General Population**

9 The Settlement Agreement is to be interpreted according to the ordinary sense of its terms. As
 10 this Court has held:

11 The parties' agreement here is governed by California law (Settlement Agreement
 12 ¶ 60), which requires that contractual terms "be understood in their ordinary and
 13 popular sense, rather than according to their strict legal meaning; unless used by the
 14 parties in a technical sense, or unless a special meaning is given to them by usage."
 15 Cal. Civ. Code § 1644. Moreover, the parties agreed that "the language in all parts of
 this Agreement shall in all cases be construed as a whole, according to its fair
 meaning." (Settlement Agreement ¶ 61.)

16 (ECF No. 785 at p. 2 [Order Denying Plaintiffs' Motion to Compel]). *See also Los Angeles Lakers,*
 17 *Inc. v. Federal Insurance Company*, 869 F.3d 795, 801 (9th Cir. 2017) (analyzing "ordinary and
 18 popular" meaning of contractual term that is not explicit as to its breadth). The Settlement Agreement
 19 provides:

20 If an inmate has not been found guilty of a SHU-eligible rule violation with a proven
 21 STG nexus within the last 24 months, he shall be released from the SHU and
 22 transferred to a General Population level IV 180-design facility, or other general
 population institution consistent with his case factors.

23 (Settlement Agreement, ¶ 25).

24 The "ordinary and popular sense" of general population, as presented by Plaintiffs' expert,
 25 Eldon Vail (whose experience is summarized in the Background section), and as reflected in the
 26 practices of other state prison systems across the country, is that even in the highest security general
 27 population units, the low end of the range of out-of-cell time is approximately six hours per day.
 28 (Vail Decl. ¶ 35). CDCR does not come close to meeting that norm. As Mr. Vail plainly states:

1 “This is the lowest amount of out-of-cell time for general population prisoners that I have ever
2 seen in my career as a corrections administrator and as a consultant/expert witness.” (*Id.*)
3 (emphasis in original). From his broad experience, his understanding of CDCR operations, and the
4 evidence presented in this Motion, Mr. Vail concludes:

5 In my expert opinion, and based on my years of experience working in and evaluating
6 numerous prison systems, these prisoners are not actually in what reasonably may be
7 considered general population; rather, they are in a form of restrictive housing as these
8 terms are commonly understood within the corrections profession.

8 (*Id.* ¶ 26; *see also id.* ¶ 60).

9 **B. CDCR’s Highly Restrictive Level IV Housing is Inconsistent with the Settlement**
10 **Agreement as a Whole**

11 In addition to the ordinary sense of General Population, as discussed above, the term gains
12 meaning from the Settlement Agreement as a whole. As this Court has recognized, “[t]he whole of a
13 contract is to be taken together, so as to give effect to every part if reasonably practicable, each clause
14 helping to interpret the other.” (ECF No. 785 at p. 2 [Order Denying Plaintiffs’ Motion to Compel],
15 quoting *Foothill Properties v Lyon/Copley Corona Assoc.*, 46 Cal. App. 4th 1542, 1550 (1996)). The
16 Settlement Agreement contains a number of provisions governing various forms of restricted housing
17 that provide guideposts for what is meant by General Population.

18 The Settlement Agreement provides for out-of-cell time for prisoners in Administrative SHU
19 that far exceeds what most Level IV prisoners are allowed. Paragraph 29 of the Agreement provides:
20 “CDCR shall provide inmates on Administrative SHU status with enhanced out of cell recreation and
21 programming of a combined total of 20 hours per week.” Thus, Defendants allow Ad/SHU prisoners
22 nearly 3 hours per day out of cell, yet deny many “GP” prisoners even an hour per day. Defendants’
23 Level IV policy and practice fails to live up to the contractual agreement in the Settlement and cannot
24 be condoned.

25 Additionally, the Restrictive Custody General Population Unit (RCGP) is a Level IV facility at
26 Pelican Bay State Prison, which the parties designed to be more restrictive than GP housing, as
27 reflected in the terms of the Settlement Agreement and the very name of the unit. Yet, the parties
28 specified that even prisoners assigned to the RCGP would receive “increased opportunities for

1 positive social interaction with other prisoners and staff” beyond what is available in SHU. (ECF No.
 2 424-2 [Settlement Agreement ¶ 28]). The data presented in this Motion shows that, by severely
 3 limiting out-of-cell time for former SHU prisoners in their “GP” cells, CDCR fails to provide such
 4 increased social interaction. As Mr. Vail states, CDCR’s routine practice of “limiting access to
 5 informal social contacts for inmates in their prisons” is contrary to “one of the reasons to get inmates
 6 out of SHU and into general population settings in the first place.” (Vail Decl. ¶ 43). The Settlement
 7 Agreement also provides for a range of programming in RCGP, including Alternative Education
 8 Program and/or small group education opportunities; access to religious services; support services job
 9 assignments for eligible inmates as they become available; and leisure time activity groups. (ECF No.
 10 424-2 [Settlement Agreement ¶ 28]). The data collected by Plaintiffs show that programming in
 11 Level IV GP falls well short of even the RCGP agreed-upon standard. (Vail Decl. ¶¶ 45-49).

12 **C. CDCR Violates the Settlement Agreement by Treating Level IV Prisoners Similar**
 13 **to, or Even Worse Than, Those in Segregation**

14 Even if the term General Population were to be given special meaning rather than its ordinary
 15 usage (which, as discussed in section A, it should not), the evidence shows that CDCR still violates
 16 many class members’ rights by severely restricting their out-of-cell time. Indeed, many class
 17 members in Level IV facilities experience *less* out-of-cell time than they did while housed in SHU.
 18 (Vail Decl. ¶¶ 16, 26-28). CDCR’s own policy on restrictive housing dictates as follows:

19 Prisoners assigned to ASU or SPHU shall be permitted a minimum of one hour a day,
 20 five days a week, of exercise outside their rooms or cells unless security and safety
 21 considerations preclude such activity. When ASU or SPHU are equipped with their
 22 own recreation yard, the yard periods may substitute for other out of cell exercise
 periods, providing the opportunity for use of the yard is available at least three days per
 week for a total of not less than 10 hours a week.

23 (Title 15, sec. 3343(h)). Thus, as Mr. Vail states: “By policy, this language suggests that prisoners
 24 who are not in a CDCR SHU or ASU but are instead in general population should be receiving greater
 25 than 5 – 10 hours a week of out of cell time for exercise.” (Vail Decl. ¶ 22).

26 This is generally consistent with the United States Department of Justice (DOJ) and the
 27 American Correctional Association (ACA). The DOJ defines “isolation” or “solitary confinement” as
 28 “being confined to one’s cell for approximately 22 hours per day or more.” (Miller Decl., Exh. 11 at

1 p. 5]). The ACA’s 2016 standard for prisoners in segregation defines restricted housing as “a
2 placement that requires an inmate to be confined to a cell at least 22 hours per day for the safe and
3 secure operation of the facility.” (Vail Decl. ¶ 23).

4 Additionally, California regulations require that prisoners in privilege groups A and B be
5 afforded “[a]ccess to yard, recreation and entertainment activities during the inmate’s non-
6 working/training hours and limited only by security needs.” Many of the class members in Level IV
7 prisons are not being afforded these activities, or their access is minimal. As Mr. Vail concludes:
8 “CDCR is failing to live up to their own policy language regarding general population inmate
9 ‘privileges’ for these ex SHU prisoners.” (Vail Decl. ¶ 52).

10 The dramatically restrictive conditions shown by Plaintiffs’ data, as described in the
11 Background section above, fall at or below the standards for restrictive housing, and fail to meet
12 standards for non-restrictive housing, and therefore cannot be considered as General Population.
13 Class members in Level IV facilities experiencing *less* out-of-cell time than in SHU – where prisoners
14 had approximately one-and-a-half hours per day out-of-cell – cannot be considered as living in the
15 “General Population.” (Vail Decl. ¶ 16). *Cf.* Order Granting Motion for Leave to File Supplemental
16 Complaint, at 8 (ECF No. 387) (granting leave based on finding that SHU conditions state-wide that
17 are “slightly different” or “not meaningfully different” than Pelican Bay may produce “physical and
18 mental health effects”).

19 **D. The Court Has the Inherent Authority to Ensure Compliance with the Terms and**
20 **Spirit of the Settlement Agreement**

21 A federal court has jurisdiction to “manage its proceedings, vindicate its authority, and
22 effectuate its decrees.” *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016), *quoting Kokkonen v.*
23 *Guardian Life. Ins. Co.*, 511 U.S. 375, 380 (1994). Here, CDCR’s treatment of class members who
24 have been released from SHU into overly restrictive Level IV institutions undermines the Court’s
25 Order approving the Agreement and its monitoring and enforcement provisions. (Dkt. No. 488 [Order
26 Granting Final Approval of Class Action Settlement Agreement]). *See K.C. ex rel. Erica C. v.*
27 *Torlakson*, 762 F.3d 963, 967 (9th Cir. 2014). To effectuate that Order, the Court must require
28 Defendants to provide general population housing with out-of-cell time that is not the functional

1 equivalent of, or worse than, SHU.

2 **E. The Continuation of Restrictive Housing Following Long-Term SHU Causes**
 3 **Great Harm and Must Be Remedied**

4 The harm caused by prolonged highly restrictive housing is widely recognized and well
 5 documented. With this motion, Plaintiffs submit an expert declaration of Daryn Reicherter, MD, and
 6 a report entitled *Mental Health Consequences Following Release from Long-Term Solitary*
 7 *Confinement in California*, establishing the harm suffered by *Ashker* class members, including a focus
 8 on those being housed in highly restrictive Level IV units. (D. Reicherter Decl. & Exh. 1-2 thereto).

9 To highlight some of the portions of the Report particularly relevant to this Motion:

10 General Population units “in which prisoners spend almost all of their day in their cell
 11 with little productive activity, have contributed to many class members’ continuing
 12 psychological symptoms.”

13 “Class members who are denied opportunities for employment or education can be
 14 expected to demonstrate greater levels of psychiatric distress, poorer general health,
 15 and poorer outcomes with regard to functioning and performance.”

16 “Class members who were involved in jobs and other programming at the time of
 17 interview appeared to adjust to GP significantly better than those who lacked similar
 18 opportunities.”

19 “However, the lack of programming, significant restrictions, limited mobility, and
 20 repeated distress and disruptions experienced by ex-SHU prisoners in GP led some
 21 class members to describe their experience in GP as a ‘modified SHU.’”

22 (Reicherter Decl., Exh. 2).¹

23 There are a number of ways in which CDCR can increase out-of-cell time and otherwise
 24 remediate the harm caused by overly restrictive Level IV housing without jeopardizing institutional
 25 security. As Mr. Vail states:

26 The CDCR took an important step when they agreed to release certain inmates from
 27 long term SHU confinement. To achieve success with this decision, they need to
 28 normalize the conditions of confinement for those inmates released from the SHU to
 general population.

¹ See *Miller v. Carson*, 563 F.2d 741, 751 n. 12 (5th Cir. 1977) (deprivation of exercise “may constitute an impairment of health forbidden under the eighth amendment”); *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (“A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”).

1 (Vail Decl. ¶ 60).

2 Plaintiffs propose that the Court order the parties to meet and confer with the goal of
3 presenting a joint plan for Court approval. Absent agreement, the parties would present their own
4 respective plans for a remedial ruling.² Plaintiffs note that an effective plan must ensure sufficient
5 out-of-cell time, in accordance with the following recommended guidelines:

- 6 • Establish a benchmark minimum for out of cell time for this group of prisoners.
- 7 • Ensure daily access to recreation yards.
- 8 • Establish and post hours of access to dayrooms for the living units where these prisoners
9 reside.
- 10 • Ensure daily access to showers if not otherwise achieved through posted dayroom hours.
- 11 • Serve meals outside of the cell in a congregate setting whenever and wherever possible.
- 12 • Develop more jobs, education, vocational opportunities and other programming options.
- 13 • Assign caseworkers to assist prisoners to gain access to program opportunities.
- 14 • Make sure prisoners have access to congregate religious programs.
- 15 • Monitor and limit the reasons for and length of lockdowns.
- 16 • Require consistent documentation and regular reports on each of these items to make
17 sure they are being achieved in all institutions housing prisoners released from long term
18 SHU.

19 (*See* Vail Decl. ¶ 61 (making recommendations “[t]o the end of normalizing conditions for former
20 SHU prisoners in a manner that would comport with a professionally acceptable understanding of
21 general population”). Additionally, an effective plan should consider discretionary overrides for class
22 members whose classification scores are incommensurate with their actual security needs and who can
23 be housed safely in Level III or II prisons.

24 **IV. CONCLUSION**

25 For the foregoing reasons, Plaintiffs respectfully request that the Court find that Defendants

26 _____
27 ² If the Court finds that more evidence is needed to assess the nature and/or extent of the problem,
28 Plaintiffs ask that the Court require Defendants to produce documentation kept in the ordinary course
of business with information as to class members’ out-of-cell time in Level IV institutions, and hold
open the possibility of an evidentiary hearing.

1 are not in substantial or material compliance with their obligation under the Settlement Agreement to
2 house class members released from SHU in General Population conditions, and to order a remedial
3 process, consistent with the Proposed Order filed herewith.
4

5 DATED: October 13, 2017

Respectfully submitted,

6
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