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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TODD ASHKER, et al., Plaintiffs, **v.** **GOVERNOR OF THE STATE OF CALIFORNIA, et al.,** Defendants.	4:09-cv-05796 CW (RMI) **DEFENDANTS' REPLY IN SUPPORT OF OBJECTIONS TO FINDINGS & RECOMMENDATION OF MAGISTRATE JUDGE (ECF No. 1122)** Judge: The Honorable Claudia Wilken Action Filed: December 9, 2009

INTRODUCTION

This case settled in 2015. And, notwithstanding two full years of agreed-to monitoring by the Court and Plaintiffs' counsel, the Ninth Circuit recently held that Defendants did not breach the Settlement Agreement. But Plaintiffs still seek to extend monitoring, and this Court's jurisdiction, based on alleged constitutional violations that fall outside the enumerated grounds that the parties agreed could warrant extension. Plaintiffs also take positions inconsistent with those they took when seeking the Court's approval of the Agreement. The Court should reject Plaintiffs' attempt to impermissibly expand this settled case, decline to adopt the magistrate judge's recommendation, and terminate this action.

DISCUSSION

I. JUDICIAL ESTOPPEL BARS PLAINTIFFS' PAROLE ISSUE.

Plaintiffs' previous position that they did "not seek to change parole policies" and that CDCR need not exonerate past gang validations is clearly inconsistent with their current position. (*See* ECF No. 486 at 17–18; ECF No. 1363 at 4:3–4.) In their motion, Plaintiffs sought to "expunge all past validations . . . which may be used in the consideration of class members applying for parole." (ECF No. 898-3 at 64.) Even their now walked-back request seeks a directive that "past validations are not reliable and should not be given consideration for parole purposes." (ECF No. 1363 at 4:3–8.) Such relief would effectively exonerate past validations and change parole policies, altering what the parole board considers when making parole decisions. These are the changes Plaintiffs previously disclaimed when they settled this case. This appears to be yet another example of Plaintiffs pursuing their goals by improper gamesmanship. *See Ashker v. Newsom*, 968 F.3d 975, 983 (9th Cir. 2020).

II. BOTH THE PAROLE AND CONFIDENTIAL-INFORMATION ISSUES FALL OUTSIDE THE SCOPE OF PARAGRAPH 41 AND CANNOT BE A BASIS TO EXTEND THE AGREEMENT.

If estoppel does not apply, the parole and confidential-information issues still fall outside the scope of paragraph 41. Thus, even if Plaintiffs proved some violation, that violation would need to be raised in a separate action and cannot be a basis to extend the Agreement.

First, regarding the parole issue, Plaintiffs did not allege that considering gang validations when making parole decisions violated due process. Plaintiffs' assertion that they included parole allegations in the complaint to establish a Fourteenth Amendment claim is misleading. (*See* ECF No. 1363 at 5:16–19.) Of the five paragraphs of the supplemental complaint that Plaintiffs rely on, four support an Eighth Amendment claim challenging SHU conditions (*see* ECF No. 388 at ¶¶ 230, 237, 256, 261), and Plaintiffs previously admitted those references were only to show how SHU housing extends confinement (ECF No. 486 at 12–13), not to show a due-process violation. The words "Fourteenth Amendment" are in the headings over the claims, but the claims are labeled "cruel and unusual punishment." The Fourteenth Amendment is only mentioned because it is through that Amendment that the Eighth Amendment's protections extend to the

states. *See Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963). The only paragraph truly relating to a due-process claim was to support Plaintiffs' assertion that there is a liberty interest in avoiding indefinite SHU confinement—a legal prerequisite to a due-process claim. The claim itself only challenged the purported lack of "meaningful periodic review" of SHU placement. (ECF No. 388 at ¶ 249.) The parole issue is simply not "alleged in" the complaints.

But even if such a violation were "alleged in" the complaints, Plaintiffs have not proved they were denied the protections the constitution requires. The Supreme Court has been clear: all that is required is notice and, if parole is denied, a statement of reasons why. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979). "The Constitution requires nothing more." *Id.*; *see also Roberts v., Hartley*, 640 F.3d 1042, 1046 (9th Cir. 2011). And this Court has applied that principle, holding, for example, that due process is satisfied even where inmates are denied access to confidential information used at parole hearings. *See, e.g.*, *Jackmon v. Fritz*, No. 16-07178 BLF (PR), 2018 WL 4219234, at *4–5 (N.D. Cal. Sept. 4, 2018); *Urenda v. Hatton*, No. 16-cv-02650-WHO (PR), 2017 WL 2335375, at *2 (N.D. Cal. May 30, 2017).

Lastly, Plaintiffs' evidence does not prove what they contend; it does not show blind reliance on old gang validations, but rather that the parole board considers an inmate's entire record when making decisions, as it must, which at times leads the board to determine the inmate is involved in gang-related activity. (SEALED Decl. S. Miller ISO Mot. Ext. Settlement, Exh. 51 at 94–97 (noting confidential memoranda in the inmate's file); Exh. 52 at 185–87 (noting commitment offense was gang-related and other "overwhelming" evidence in file); Exh. 42 at 82 (noting review of underlying re-validation evidence); Exh. 43 at 117 (explaining reasons for doubting inmate's denial of gang affiliation); Exh. 48 at 17 (assessment notes that inmate's "crimes and series of 115s seem to support that he has been involved in gang activity").) This evidence does not suggest any due-process issue.

Second, Plaintiffs' confidential-information issue was not "alleged in" the complaints or a result of the Agreement's reforms to the "Step Down Program or SHU polices." The magistrate judge's recommendation to extend the Agreement based on purported mishandling of confidential information erroneously interprets paragraph 41 to permit extension based on any constitutional

violation relating to any term in the Agreement. (*See* ECF No. 1122 at 24:1–3.) That is not what the parties agreed to. While paragraph 53 may have permitted Plaintiffs to seek *enforcement* of any term of the Agreement, paragraph 41 is narrower. Paragraph 41 only permits extension of the Agreement based on violations "as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by [the] Agreement." (*Compare* ECF No. 424-2 ¶ 41 *with id.* ¶ 53.) And paragraph 34, which discusses confidential information, is not a reform, much less a reform to CDCR's Step Down Program or SHU policies. Thus while Plaintiffs could seek enforcement of paragraph 34 during the Agreement's term, the parties agreed that Plaintiffs could not extend the Agreement based on a constitutional violation relating to paragraph 34.[1]

Finally, Plaintiffs' evidence does not support a finding that there are *systemic* violations of due process, but rather only points to individual instances of inaccuracies. And there is no evidentiary basis to suggest that these inaccuracies were intentional, as Plaintiffs speculate.

III. PLAINTIFFS HAVE NO LIBERTY INTEREST IN AVOIDING RCGP PLACEMENT AND PERIODIC REVIEWS DO NOT AMOUNT TO A SYSTEMIC DUE-PROCESS VIOLATION.

The magistrate judge correctly found that Plaintiffs did not prove any systemic due-process violation related to 180-day RCGP reviews, but he incorrectly found that Plaintiffs have a liberty interest in avoiding RCGP placement. (*See* ECF No. 1122 at 25:7–12.) Inmates have a liberty interest in avoiding particular housing that imposes an "atypical and significant hardship" relative to "the ordinary incidents of prison life," such that the conditions are "a dramatic departure from the basic conditions" of an inmate's sentence. *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

The factors the magistrate judge considered—limits on parole eligibility, the RCGP's singular and remote location, and being housed there may be prolonged and stigmatizing—do not evidence atypical or significant hardship. (*See* ECF No. 1122 at 25:7–12.) First, a potential impact on parole eligibility is not relevant to the liberty-interest analysis. *See Sandin v. Connor*, 515 U.S. 472, 485–87 (1995). And Plaintiffs' claim of such an effect is speculative. Second, the

[1] As for Plaintiffs' footnoted "as alleged in" argument, the complaints noted that CDCR used confidential information in some ways, but do not allege any form of misuse. And the only references to "reliable" evidence did not relate to confidential information; they relate to the true subject of Plaintiffs' lawsuit: that, prior to CDCR's reforms, inmates could be placed in SHU without evidence (reliable or otherwise) of gang-related misconduct. (ECF No. 388 ¶¶ 121, 252.)

fact that the RCGP is singular and remotely located is also irrelevant. The RCGP is established at Pelican Bay State Prison, which is one of California's prisons and thus within the "normal limits or range of custody which the conviction has authorized the State to impose." *See Meachum v. Fano*, 427 U.S. 215, 225 (1976). Third, while the duration of confinement may properly be considered, RCGP conditions and available programming opportunities demonstrate that the RCGP is less restrictive than Administrative Segregation—a placement inmates have no inherent liberty interest in avoiding. *Sandin*, 515 U.S. at 485–87. Finally, the inmate-created "stigma" Plaintiffs allege is not the type of stigma courts have recognized as contributing to a liberty interest. *See, e.g.*, *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997).

Lastly, Plaintiffs' contention that retaining inmates in RCGP until the threat to their safety no longer exists shows a systemic due-process violation is baseless. The Settlement Agreement provides that inmates will be housed in RCGP until this standard is satisfied. (ECF No. 484-2 at ¶ 27.) Plaintiffs cannot now claim the very standard they agreed to violates the Constitution. And their own evidence shows that there were, in fact, on-going threats to inmate safety when officials retained inmates in the RCGP to protect them. Therefore, the magistrate judge correctly found that Plaintiffs have not demonstrated a systemic due-process violation regarding RCGP reviews.

CONCLUSION

This Court should decline to adopt the magistrate judge's findings and recommendation with respect to the parole and confidential information issues, and there being a liberty interest in avoiding RCGP placement. But this Court should adopt the magistrate's conclusion that Plaintiffs have not demonstrated any due-process violation concerning RCGP reviews.

Dated: October 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***Ashker, et al. v. Newsom, et al.*** Case No. **4:09-cv-05796 CW (RMI)**

I hereby certify that on October 7, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' REPLY IN SUPPORT OF OBJECTIONS TO FINDINGS & RECOMMENDATION OF MAGISTRATE JUDGE (ECF No. 1122)

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 7, 2020, at San Francisco, California.

B. Chung	*/s/ B. Chung*
Declarant	Signature

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