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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' 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: September 22, 2021
Time: 2:30 p.m.
Place: TBD
Judge: Honorable Claudia Wilken

**REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 22, 2021 at 2:30 p.m. in a courtroom to be determined, 1301 Clay Street, Oakland, California, Plaintiffs will move the Court for *de novo* review of Magistrate Judge Illman's Report and Recommendation Re: Motion to Extend Settlement Agreement (ECF No. 1497). This motion is brought pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1)(B), Local Rule 72-3, and Paragraph 41 of the Settlement Agreement (ECF No. 424-2), and is based on this Notice, the accompanying Memorandum of Points and Authorities, and all documents and arguments submitted in support thereof.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

Magistrate Judge Illman's Report and Recommendation on Plaintiffs' second motion to extend the Settlement Agreement is astonishing. In recommending that this Court terminate the *Ashker* case, the Magistrate Judge completely defies this Court's April 9, 2021 Order extending the Settlement based on the same due process arguments and a comparable factual record. The current Recommendation references this Court's first extension order *only once*, and *never* on the Court's due process legal analysis. As well, the Magistrate Judge contradicts and reverses his own prior legal conclusions without comment.

The Magistrate Judge apparently believes that extending the Settlement requires Plaintiffs to not only meet their burden under Paragraph 41 of the Agreement to establish current and ongoing systemic constitutional violations, but also to bring (and win) enforcement motions relating to those violations during the monitoring period. ECF No. 1497, Report & Recommendation Re: Motion to Extend Settlement Agreement ("XM2 R&R") at 3-4. But this Court rejected essentially the same position in response to Plaintiffs' first extension motion, admonishing that enforcement motions are *not* relevant to whether extension is warranted. ECF No. 1440, Order Extending the Settlement Agreement ("XM1 Order") at 12-13, n.1 (ruling that "the orders [denying enforcement motions] that Defendants cite are irrelevant to the analysis here"). Both the structure and the plain language of the Agreement make it perfectly clear that enforcement motions and extension motions are two separate avenues for relief, and neither requires the other. ECF No. 424-2, Settlement Agreement ("SA") ¶¶ 41, 52, 53.

Plaintiffs present a record in support of their second extension motion conclusively demonstrating that Defendants continue to systemically violate *Ashker* class members' due process rights through fabrication and inadequate disclosure of confidential information, failure to ensure confidential information is reliable, denial of a fair opportunity for parole, and failure to provide prisoners in the Restricted Custody General Population unit ("RCGP") with a meaningful opportunity for release to the general population. Based on this record and the Court's own prior legal holdings,

which are now law of the case, this Court should reject the Magistrate Judge's recommendations and grant a second extension of the Settlement Agreement.[1]

## LEGAL STANDARD

This Court reviews the findings of the Magistrate Judge by a de novo standard of review, pursuant to 28 U.S.C. § 636 (b)(1)(C), whereby the District Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *See also* XM1 Order at 10-11 (*citing Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) ("De novo review means that the reviewing court do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below.")) (citation and internal quotation marks omitted).

## ARGUMENT

### I. THE MAGISTRATE JUDGE ERRED IN FINDING DEFENDANTS' SYSTEMIC MISUSE OF CONFIDENTIAL EVIDENCE TO RETURN CLASS MEMBERS TO THE SHU CONSTITUTIONAL.

#### A. CDCR Continues To Violate Due Process Through the Fabrication and Inadequate Disclosure of Confidential Information.

According to Magistrate Judge Illman, CDCR's systemic fabrication and inaccurate reporting of confidential information does not violate due process because Plaintiffs have not "shown… that these asserted errors amount to … violation of the 'some evidence' standard." XM2 R&R at 7. This contradicts the Court's ruling on the first extension motion, XM1 Order at 43, as well as the Supreme Court decision in *Edwards v. Balisok*, holding that "when the basis for attacking the judgment is not insufficiency of the evidence, it is irrelevant" whether some evidence in the record supports the prison hearing determination. 520 U.S. 641, 648 (1997) (*cited* in XM1 Order at 43). The current recommendation also contravenes Magistrate Judge Illman's own finding on the first extension motion

[1] Plaintiffs present in this de novo motion their objections to the errors in the Magistrate Judge's recommendations. Given the disutility of replicating the voluminous evidence presented to the Magistrate Judge, *see* ECF Nos. 1411, Plaintiffs' Second Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations (Corrected) ("XM2 Motion") and 1448, Plaintiffs' Reply in Support of Second Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations ("XM2 Reply"), Plaintiffs provide the Court a roadmap to the underlying briefing and exhibits for this Court's independent review and ruling.

that "time and again, the shield of confidentiality for informants and their confidential accounts [was] used to effectively deny class members any meaningful opportunity to participate in their disciplinary hearings..." ECF No. 1122, Order granting Plaintiffs' motion to extend the Settlement Agreement ("XM1 R&R") at 24.

This Court rejected the position now taken by the Magistrate Judge when Defendants asserted it in response to Plaintiffs' first extension motion, as it "misses the point." XM1 Order at 43. "Plaintiffs' due process allegations here are not predicated on the theory that the ultimate determination of the disciplinary officers was unsupported, they are predicated instead on the theory that the procedures employed were Constitutionally insufficient." *Id*. In *Wolff v. McDonnell*, the Supreme Court required that people in prison be provided with written notice sufficient to enable them to "marshal the facts and prepare a defense." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). Defendants' systemic provision of inaccurate, incomplete, or fabricated disclosures deprives class members of an opportunity to challenge the confidential information used against them, in violation of *Wolff's* command. XM1 Order at 42.

Inexplicably, Magistrate Judge Illman failed to follow (or even acknowledge) this Court's mandate. Instead, the Magistrate Judge dismissed Plaintiffs' argument as propounding a "non-existent 'error free' standard." XM2 R&R at 7. Plaintiffs assert no such thing, but rather challenge Defendants' systemic practice of denying them adequate notice and an opportunity to marshal a defense. As the Second Circuit noted, "[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." *Grillo v. Coughlin*, 31 F.3d 53, 56 (2d Cir. 1994).

Resting on this fundamental misunderstanding of Plaintiffs' claim and misapplication of the pertinent law, the Magistrate Judge failed to address Plaintiffs' numerous examples of fabricated and inaccurately disclosed confidential information, finding that "this category of allegation does not rise to the level of making out a due process claim in the prison disciplinary context..." XM2 R&R at 7. This contradicts this Court's prior ruling and the Magistrate Judge's own prior recommendation. XM1 Order at 38-45; XM1 R&R at 4-8, 15-18, 20-21, 23-24. Plaintiffs' copious examples illustrate that Defendants continue to fabricate and inaccurately disclose confidential information. *See* XM2 Motion

at 3-24; XM2 Reply at 3-17 (almost half of the 151 RVRs reviewed during extended monitoring period contained examples of inaccurate or fabricated confidential disclosures used to return class members to solitary confinement).[2] This should come as no surprise, as Defendants failed to identify any meaningful changes to their practices or enhanced training in the three years following Judge Illman's first extension decision. XM2 Motion at 3-4.[3] The full factual record is set forth in Plaintiffs' extension motion; the following few examples are merely illustrative of that comprehensive record:

- [redacted] XM2 Motion at 4-5; XM2 Reply at 6-7.
- [redacted] XM2 Motion at 5. *See also* XM2 Reply at 11-12 (discussing numerous examples of disclosures suggesting that an informant identified the accused by name whereas another method such as a moniker was used); XM1 Order at 40-41 (criticizing this practice).
- [redacted] XM2 Motion at 6. *See also* XM2 Reply at 10. [redacted] *Id.*

[2] Plaintiffs lodged twelve of the exhibits cited in their extension briefing *in camera* with Magistrate Judge Illman to address Defendants' concern that the documents present a heightened security risk to CDCR. The parties have since agreed to file these documents under seal so they are in the record for *de novo* review. Accordingly, this Court can find Exhibits BG, BH, BL, BQ, BS, and CS to the Declaration of Rachel Meeropol in Support of Plaintiffs' Second Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations (ECF No. 1358) and Exhibits B, C, F, H, I, and L to the AEO Declaration of Carmen Bremer in Support of Plaintiffs' Reply in Support of that motion (ECF No. 1448-1) in the record at ECF Nos. 1498-3 and 1498-4/1500, respectively.

[3] In an ironic recapitulation of the way that confidential memoranda often do not support the allegations in the confidential disclosures, Defendants asserted recent improvements in confidential information procedures which are purportedly documented in a July 2019 memorandum to the field, but the actual document says absolutely *nothing* about confidential information. XM2 Motion at 4.

- [redacted]. XM2 Motion at 7.
- [redacted]. XM2 Motion at 10.

Of Plaintiffs' 34 examples of fabricated and inaccurately disclosed confidential information, Defendants' brief addressed only three. ECF No. 1418, Defendants' Opposition to Plaintiffs' Second Motion to Extend Monitoring Under the Settlement Agreement ("XM2 Opp.") at 24. Defendants inappropriately attempted to refute the remainder in tables attached as an appendix,[4] but none of their attempts to refute the facts succeed. XM2 Reply at 4-17.

**B. CDCR Continues To Violate Due Process by Failing To Ensure That the Confidential Information It Uses Is Reliable.**

Plaintiffs also present extensive evidence that CDCR continues to rely on confidential information without ensuring reliability. XM2 Motion at 27-35. Magistrate Judge Illman ignores this evidence and Plaintiffs' legal analysis, instead issuing a blanket statement that CDCR is in "compliance with" the some-evidence standard. XM2 R&R at 7. This recommendation ignores the Ninth Circuit's requirement that prison systems ensure confidential information is reliable, a procedural due process requirement that exists independent of whether any individual disciplinary proceeding meets the some-evidence standard. *See Zimmerlee v. Keeney*, 831 F.2d 183,186 (9th Cir. 1987). The recommendation also ignores this Court's ruling that "[c]ompliance with [the *Zimmerlee*]

[4] Magistrate Judge Illman did not acknowledge Plaintiffs' request that he issue an appropriate sanction for Defendants' submission of more than 80 pages of argument in charts attached to their counsel's declarations in circumvention of his order limiting the parties' opening briefs to 65 pages and in violation of Local Rule 7-5(b). XM2 Reply at 1-2, 4-9 (quoting examples of argument in counsel's declarations). Plaintiffs responded to the improperly submitted arguments in their reply brief out of an abundance of caution, but doing so was a strain on their resources and expended pages afforded for their reply brief. Plaintiffs ask this Court to impose an appropriate sanction to deter this conduct in the future.

procedural requirements is paramount in light of the significant risk that prisoners could fabricate information to settle grievances with other prisoners." XM1 Order at 46 (*citing Jones v. Gomez*, No. C-91-3875 MHP, 1993 WL 341282, at *3 (N.D. Cal. Aug. 23, 1993)). The voluminous evidence submitted in Plaintiffs' second extension motion establishes that Defendants continue the same practices this Court criticized in the first extension order, with hearing officers: (a) finding that informant statements were corroborated when they were not (XM2 Motion at 27-34), (b) refusing to allow the accused to ask questions of officers challenging the reliability of the confidential informant (*id.* at 33-34), and (c) assuming that informant statements are reliable without actually determining reliability for themselves (*id*. at 34-35). *See also* XM2 Reply at 18-24.

Again, Defendants failed to successfully refute these facts before the Magistrate Judge, as Plaintiffs' reply brief amply demonstrates. *See* XM2 Reply at 18-24. For example, Defendants argue that [redacted]. *See* XM2 Reply at 20, 21. Similarly, instead of contesting the fact that Hearing Officers continue to refuse to require officers to answer questions presented by accused prisoners that are relevant to the reliability of the informant, Defendants erroneously argue that [redacted]. XM2 Opp. at 21. But the whole point of allowing questions is to allow the accused prisoner to test reliability. XM2 Reply at 22-23. CDCR has no response to Plaintiffs' examples of numerous disclosures stating that incriminating information was corroborated when in fact it was not, except to say that if *any* information is corroborated that suffices for corroboration. *Id.* at 23-24.

Finally, in the second extension motion, Plaintiffs presented compelling evidence of several new categories of serious misuse and fabrication of confidential information uncovered during the extended monitoring period. Plaintiffs sought and reviewed transcripts of the actual interviews of confidential informants, which had been summarized in confidential memoranda relied on in

disciplinary hearings. In *every one of the transcripts produced to Plaintiffs,* the confidential memorandum contained significant information damaging to the accused prisoner that does *not* appear in the transcript or recording. XM2 Motion at 18-24; XM2 Reply 16-17.[5] Plaintiffs also accessed debriefer interview transcripts and debriefer autobiographies used by Defendants in conjunction with their decision to [redacted], and these materials demonstrate that debriefer informant statements contained in confidential memoranda also were fabricated by Defendants. XM2 Motion at 22-23; XM2 Reply at 17 n. 11, 19. These interviews also demonstrate that debriefers were promised benefits for their information, calling into question the reliability of the information. XM2 Motion at 36-37; XM2 Reply at 24-26; *United States v. Monzon-Valenzuela*, 186 F.3d 1181, 1183 (9th Cir. 1999); *Maxwell v. Roe,* 628 F.3d 486, 505, 510 (9th Cir. 2010).

Magistrate Judge Illman did not address any of the evidence discussed above. Yet the fabrication or misreporting of informant statements in confidential memoranda is in some respects even worse than inaccuracies in the disclosures provided to accused prisoners – not only is the prisoner deprived of notice of what the informant actually said, but so too is the hearing officer. As the Ninth Circuit explained in a different administrative context, an interviewer "who deliberately mischaracterizes witness statements in her investigative report… commits a constitutional violation." *Costanich v. Dept. of Soc. & Health Serv.,* 627 F.3d. 1101, 1111 (9th Cir. 2010). Such mischaracterization or fabrication is more constitutionally egregious when the witness is a confidential informant, whose identity is never known to the charged party and who never testifies at the administrative hearing. *See* XM1 Order at 44-45.

Finally, Plaintiffs presented evidence that prisoners were confined in Administrative Segregation for extended periods of time based on fabricated confidential information. XM2 Motion at 14-18. CDCR's response was that such placement did not involve a protected liberty interest, but Plaintiffs presented this evidence not to show any individual's deprivation of liberty but rather to

[5] Only a handful of transcripts were produced to Plaintiffs because Defendants' agents destroyed the recordings of many of the interviews, even after Plaintiffs had requested them. *See* section II.C., *infra*.

illustrate the breadth of CDCR's systemic misreporting of confidential information spanning different contexts. The Magistrate Judge failed to address this aspect of Plaintiffs' claim.

In sum, CDCR took no meaningful steps to remedy the misuse of confidential information Magistrate Judge Illman and this Court found existed when the initial two-year monitoring period concluded in 2017. As a consequence, those constitutional violations continued during the extended monitoring period. CDCR misstates, falsifies, and fails to disclose significant informant statements in disclosures to accused prisoners, which hinders them in preparing their defense and questioning the accuracy and reliability of informant statements. CDCR does not ensure that informant statements are reliable when using those statements against prisoners. And CDCR's agents fabricate and inaccurately report informant statements in confidential memoranda and debrief reports. The inherent difficulties with the use of confidential information require that procedural safeguards are followed to ensure that informant statements are reliable, accurately disclosed, and accurately recorded. CDCR fails on all these counts.

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

The Magistrate Judge also erred in his findings concerning Plaintiffs' request for an adverse inference based on CDCR's destruction of confidential informant interview recordings. As a threshold matter, the Magistrate Judge applied an unduly narrow understanding of the scope of the duty to preserve evidence, suggesting the duty is not applicable to post-settlement proceedings. XM2 R&R at 12. But there can be no question that a duty to preserve evidence endures during post-settlement proceedings where the settlement agreement expressly provides for continued litigation over motions to enforce and extend the agreement with specified evidentiary standards of proof. *See*, *e.g.*, *Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, 110 F. App'x 283, 287-88 (3d Cir. 2004) (awarding spoliation sanctions during post-settlement proceedings and noting that "[n]ormally, the termination of litigation after settlement moots civil contempt proceedings [such as for spoliation of evidence]. In this case, however, the settlement did not terminate the litigation, because it was incorporated into a consent order under which the District Court retained jurisdiction to enforce the settlement terms") (citation omitted); *cf. In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060,

1070 (N.D. Cal. 2006) (defendant had a continuing duty to preserve even after lawsuit against it was dismissed because of various indicators it would be sued again).

Magistrate Judge Illman provided four erroneous grounds for his recommendation that "an adverse inference presumption, or any sanction, is unnecessary." XM2 R&R at 12-13. The first ground is that "Plaintiffs have conceded that more evidence of the supposedly systemic violations by CDCR was not even necessary, thereby undermining their request for sanctions..." *Id.* at 12. But Plaintiffs requested an adverse inference in the event the Magistrate Judge found their evidence of systemic due process violations insufficient, XM2 Motion at 24, which he did; Plaintiffs' assertion that they believed they carried their burden based on the evidence already of record should not be held against them in evaluating the appropriateness of a spoliation sanction.

The Magistrate Judge's next ground for the recommendation is that Plaintiffs did not show the failure to retain recordings was done "with any culpable state of mind such as being specifically done to deny Plaintiffs the ability to use the information in this litigation." XM2 R&R at 12. However, the spoliation law in this Circuit does not require a specific intent of a party to deny the other party the ability to use the information contained in destroyed documents. An adverse inference may be imposed based on a party's "conscious disregard" of its obligations to preserve documents, and a "'culpable state of mind includes negligence.'" *See, e.g., Soulé v. P.F. Chang's China Bistro, Inc.*, No. 2:18-cv-02239, 2020 WL 959245, *4 (D. Nev. Feb. 26, 2020) (collecting Ninth Circuit cases); XM2 Reply at 30-31. Here, Defendants clearly were negligent in destroying these recordings after they knew the recordings were relevant to the litigation and indeed were being sought by Plaintiffs. Moreover, here there was more than negligence: Defendants lied and sought to keep Plaintiffs' counsel from learning about the recordings and their destruction. XM2 Motion at 25.

The third ground for the Magistrate Judge's recommendation was that it was "far from certain that Plaintiffs put CDCR on actual notice to preserve the recordings in question when they claim they did." XM2 R&R at 12. Yet the Magistrate Judge did not address any of the four separate events Plaintiffs identified putting CDCR on notice that recordings of confidential informant interviews used in disciplinary proceedings are relevant to this litigation, one of which was articulated in this Court's

recent findings extending the Settlement. *See* XM2 Motion at 25 & n.11 (CDCR placed on notice by Plaintiffs' first extension motion based on fabrication of confidential information in 2017, Plaintiffs' request for confidential-informant interview recordings in February 2019, and Plaintiffs' motion successfully seeking such recordings in April 2019); XM2 Reply at 28 & n.16 (*citing* XM1 Order at 33-34) (Settlement "[b]y its plain terms" requires Defendants to ensure that "confidential information used against inmates is accurate," including "in connection with the disciplinary proceedings described [therein]").

Finally, the Magistrate Judge erred in finding that Plaintiffs "have not established how a broad category of interview recordings would be relevant, rather than merely hoping their contents might be relevant." XM2 R&R at 12-13. Plaintiffs showed in their moving papers that even the handful of recordings CDCR preserved reveal material discrepancies between what was said during the interview and what CDCR agents reported was said, which is relevant to Plaintiffs' claim based on fabrication of confidential information. XM2 Motion at 19-23; XM2 Reply at 30. The Magistrate Judge did not address or acknowledge these points, instead finding that relevance of the recordings is "the subject of serious doubt" because debriefing inmates initial each page of their debriefing reports. XM2 R&R at 13. But this practice provides no assurance that the destroyed recordings are either irrelevant or unnecessary, as it wholly fails to account for the numerous discrepancies Plaintiffs identified between the several interview recordings that were produced and the debriefing reports that purported to document them.[6] XM2 Motion at 19-23; XM2 Reply at 30. And debriefers are not the only confidential informants whose information CDCR uses against prisoners. *See*, *e.g.*, XM2 Motion at 19 (describing

[6] As Plaintiffs demonstrated in their moving papers, the debriefing process encourages debriefers to tell interviewers what they want to hear because debriefers are sometimes promised material benefits, like [redacted] in exchange for providing information. *See* XM2 Motion at 36-37; XM2 Reply at 24-26. In this context, it would not be surprising to find a cooperating debriefer's initials on a document containing information he did not actually provide. Another possibility is that some debriefers may initial the pages without reading them in detail or at all. Or they may see inaccurate information and not care enough to correct it or be too concerned about jeopardizing their situation to object. No matter the explanation, the Court need only compare the debriefing reports of record to the underlying interview transcripts to confirm that material discrepancies exist—an exercise that can only be undertaken if a recording is retained.

discrepancies between interview of non-debriefing informant and statements attributed to him in RVR). Plaintiffs amply demonstrated prejudice and all other elements necessary for this Court to impose an adverse inference, based on spoliation of evidence, that the destroyed recordings reveal the same kinds of fabrications and misleading information as those found by comparing the recordings that do exist to the corresponding confidential memoranda. The Court should reject the Magistrate Judge's recommended findings to the contrary.

## II. THE MAGISTRATE JUDGE ERRED IN FINDING THAT DEFENDANTS DID NOT VIOLATE DUE PROCESS BY DENYING CLASS MEMBERS A FAIR OPPORTUNITY TO SEEK PAROLE.

Magistrate Judge Illman's recommendation to deny Plaintiffs' parole-related claims ignores and indeed contradicts both his recommendation on the first extension motion and this Court's affirmance. In his prior recommendation, the Magistrate Judge stated that "of key importance … it should be noted that a fundamental requirement of due process is not only 'the opportunity to be heard' … but the opportunity to be heard at a meaningful time and in a meaningful manner." XM1 R&R at 22 (citations omitted); *id*. at 23 ("[I]t is no answer for Defendants to simply state that class members were given an opportunity to be heard, instead, due process required 'the opportunity to be heard at a meaningful time and in a meaningful manner.'") (*citing Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). This Court properly agreed, holding that *CDCR* systemically violates due process by depriving class members of a meaningful opportunity to seek parole through its "continued retention and use of old gang validations without any acknowledgement of the fact that they are flawed and unreliable," regardless of process afforded *from the Board*, or the ultimate outcome, once the prisoners get to the parole hearing. XM1 Order at 54-55. Yet now the Magistrate Judge states that the meaningfulness requirement "can only be described as a non-existent standard of due process in the parole context." XM2 R&R at 10. The Magistrate Judge relies on *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011), and two irrelevant unpublished opinions, to support his abandonment of the meaningfulness standard. Plaintiffs recognize the limitations on federal review of parole decisions, as reflected in *Swarthout*, but the Constitution nevertheless demands that prison officials not deprive prisoners of a meaningful opportunity to seek parole, as the Magistrate Judge originally found and as

this Court has held. XM1 R&R at 22; XM1 Order at 54-55; *Mathews*, 424 U.S. at 335.[7] Thus, the Magistrate Judge's unfounded reversal and direct contravention of this Court's ruling on the standard applicable to a challenge to the meaningful opportunity to seek parole cannot stand. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990) (under law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case").

**A. The Magistrate Judge Failed To Address Plaintiffs' Claim That CDCR Continues To Use Unreliable Gang Validations To Deny Class Members a Fair Opportunity To Seek Parole.**

This Court has ruled that "Defendants' 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 in the context of parole," and that these "ongoing and systemic due process violations [] constitute a valid basis for extending the settlement agreement." XM1 Order at 55; *see also* XM1 R&R at 21-23. The Magistrate Judge ignored this ruling without any explanation or analysis, without a single factual finding, and without even a reference to this Court's Order. This is confounding, as none of the factors relevant to this issue have changed since the initial Recommendation and Order, and Defendants have not altered their practice of retaining and unqualifiedly transmitting these unconstitutionally garnered validations. XM2 Motion at 39-40.

The Magistrate Judge's only mention of this issue in the current Recommendation is the following sentence: "In essence, Plaintiffs contend that some parole seekers, who had not been 'active' in a prison gang for some time were entitled to have CDCR inform the parole board that … perhaps that validation has become stale due to the prisoner's inactivity in that gang." XM2 R&R at 8 (*citing* XM2 Motion at 45). But that is not Plaintiffs' argument at all (the Magistrate Judge's citation to page 45 of Plaintiffs' brief is about the use of stale confidential information, *not* the distinct issue of old gang validations). The problem identified by Plaintiffs is not that old validations become "stale," it is

[7] The first of the unpublished decisions relied upon by the Magistrate Judge, *Andrews v. Martinez*, 829 F. App'x 814 (9th Cir. 2020), is inapposite as the claim was limited to the process due by the parole board. In the second, *Harley v. Shartle*, 754 F. App'x 667, 668 (9th Cir. 2019), the plaintiff had no due process rights at all because there is no liberty interest in parole before the U.S. Parole Commission.

that the validations were unconstitutionally flawed at the outset, as this Court found. XM1 Order at 53 ("the Court concludes that Plaintiffs have shown that the procedures used to generate the old gang validations, as well as the resulting old gang validations themselves, are Constitutionally deficient and unreliable.").[8] That constitutional violation is compounded when CDCR fails to inform BPH of the unreliability of the validations it makes available, resulting in the denial of a meaningful opportunity to be heard and the creation of systemic bias in the parole system. XM2 Motion at 39-40; XM1 Order at 48-55; *Mathews*, 424 U.S. at 344. This is the exact same violation this Court found unconstitutional on Plaintiffs' first extension motion, and there is no reason to deviate from that ruling now.

**B. The Magistrate Judge Erred in Rejecting Plaintiffs' Claim That CDCR Denies Class Members a Meaningful Opportunity To Challenge Confidential Information.**

In the second extension motion, Plaintiffs presented a newly revealed due process violation based on how CDCR keeps stale and untested confidential information in secret from prisoners for years, giving them only a cursory Notice of Confidential Information in Advance of Parole Hearing ("Notice") just before their parole hearings. *See* XM2 Motion at 40-46; XM2 Reply at 31-39. CDCR deprives class members of any realistic way to challenge the alleged facts, yet makes the information fully available to the Parole Board, thereby violating due process. XM2 Motion at 44-46; XM2 Reply 33-37. The Magistrate Judge erred in recommending the denial of this claim.

Unless confidential information is used in a disciplinary proceeding or housing determination, CDCR does not disclose it to prisoners; this prevents class members from any realistic opportunity to challenge confidential information when it is gathered. XM2 Motion at 40-41. Keeping confidential material unbeknownst to prisoners for years, CDCR builds and maintains a collection of what becomes stealth evidence when the time comes for parole review. XM2 Motion at 42-43. CDCR thus prevents prisoners from meaningful access to confidential information long before they get to the parole

[8] The Magistrate Judge did not address the unconstitutionality of the old gang validations in the Report, but he did refer to them as "purportedly" unreliable. XM2 R&R at 8. This is inconsistent with his original finding and, as cited above, this Court's Order. XM1 R&R at 22 ("Plaintiffs have provided the court with ample evidentiary examples that demonstrate that the CDCR's old process for gang validation was constitutionally infirm"); XM1 Order at 53.

hearing. By the time of the hearing, witnesses have become unavailable, evidence has gone stale, and investigation is impossible. *Id.* at 42-44. Moreover, the 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. The Notice often does not even inform the prisoner of the alleged misconduct or the time period during which it took place. Yet all confidential items in the Notice are made fully available to the Parole Board, even where the source information has been deemed unreliable and there is no corroboration. *Id.* Class members thus are deprived of the due process right to "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); XM1 Order at 55.

The Magistrate Judge mistakenly focused on the process due at the parole hearing. But even within that context, he incorrectly stated, without citation, that Plaintiffs "concede" that the "basic standards of process were adhered to." XM2 R&R at 8. However, Plaintiffs actually have challenged the basic standard of being afforded access to records in advance. XM2 Motion at 44-45 (*citing Swarthout*, 562 U.S. at 220) (parole applicants have right "to contest the evidence against them, [and be] afforded access to their records in advance"). As Plaintiffs argued in the Motion, CDCR's belated Notice, which is "cursory and often useless," "makes it impossible for prisoners to give the commissioners an alternative assessment of the facts, challenge informant credibility, critique any corroboration (or point out its absence), or otherwise contest the confidential evidence," thus "violat[ing] th[e] fundamental guarantee of due process." XM2 Motion at 45. The Court should reject the Magistrate Judge's recommendation and rule that the misuse of confidential information in the parole context constitutes a ground for extension of the Agreement.

## III. PLAINTIFFS HAVE PROVEN THAT CDCR'S RCGP PLACEMENT AND RETENTION PROCEDURES ARE CONSTITUTIONALLY DEFICIENT.

This Court should reject Magistrate Judge Illman's recommended finding that "Plaintiffs' identification of flaws in the RCGP placement and retention procedures do not amount to systemic and

ongoing due process violations that would justify extending the Agreement," XM2 R&R at 10, because it contravenes this Court's Order on the first extension motion and is based on several errors.[9]

First, the Magistrate Judge misapprehended Plaintiffs' argument regarding the notice due process requires in connection with RCGP placement and retention reviews. He asserted that "Plaintiffs contend that RCGP prisoners . . . are 'denied adequate notice' because CDCR will not necessarily always give them all the information that would inform that prisoner of every detail as to why CDCR believes that their gang (or another gang) means to harm them." XM2 R&R at 11. But Plaintiffs made no such claim. Rather, as this Court recently confirmed from the first monitoring period, Plaintiffs demonstrated that CDCR denies RCGP prisoners adequate notice of how they can demonstrate eligibility for release. XM2 Motion at 58-59 (CDCR tells prisoners they can secure release by programming positively in RCGP for six months but then retains them when they've done so, tells them they must demonstrate their safety concerns have been resolved but then discounts or ignores their evidence and arguments in that regard, and then tells them they must debrief or transfer to a non-designated programming facility to secure release); XM1 Order at 27 ("Plaintiffs' evidence also showed that Defendants failed to provide inmates with accurate notice of how to gain release from RCGP under paragraph 27."). *See also* XM2 Motion at 53-55 (documenting instances where CDCR tells prisoner he must provide evidence his safety concerns are resolved but then simply assumes continuing safety concerns despite prisoner presenting evidence to the contrary). Furthermore, Magistrate Judge Illman's rejection of Plaintiffs' RCGP due process claims is based on the same erroneous reasoning that characterized his views on the fabrication of confidential information: that the procedures for RCGP placement and retention "do not need to rise to the level of being completely error-free." XM2 R&R at 11. Plaintiffs do not quibble with errors in individual placement and retention determinations; Plaintiffs maintain, as this Court recently affirmed, that by applying a

[9] The Magistrate Judge assumed, without deciding, that *Ashker* class members have a liberty interest in avoiding RCGP placement. XM2 R&R at 10. This assumption is correct for all the reasons the Magistrate Judge and this Court already have held. *See* XM1 R&R at 25; XM1 Order at 18-24.

presumption in RCGP housing reviews that historical safety concerns continue absent affirmative evidence to the contrary, CDCR denies prisoners due process. XM1 Order at 27-28, 31.

Second, the Magistrate Judge's findings were based on a mistaken understanding that Plaintiffs "urge" the court "to take it upon itself to micro-manage CDCR's operations," and that extending or enforcing the agreement consistent with Plaintiffs' arguments would require doing so. XM2 R&R at 11. However, this Court rejected this same position from Defendants in its first extension order. *See* XM1 Order at 31 ("Defendants next contend that Plaintiffs cannot show due process violations by merely 'disagree[ing] with CDCR's findings regarding inmates' safety concerns.' This argument misapprehends the basis of the alleged due process violations here. Plaintiffs are not challenging the ultimate determinations of the DRB or ICC with respect to whether security concerns exist to place or keep class members in the RCGP under paragraph 27; instead, Plaintiffs challenge the lack of procedural protections afforded to class members in connection with RCGP placement or retention, and the resultant risk of erroneous RCGP placement or retention.") (emphasis in original).

Finally, the Magistrate Judge erred in finding that "Plaintiffs' attacks on the RCGP placement and retention procedures do not even establish isolated and occasional due process violations, let alone the sort of ongoing and systemic constitutional deprivations described in Paragraph 41 of the Agreement." XM2 R&R at 11. Plaintiffs presented evidence of at least [redacted] instances in which the ICC repeated verbatim during the second monitoring period that it would retain a prisoner in RCGP, [redacted] XM2 Motion at 56. But Magistrate Judge Illman did not mention this evidence or the law Plaintiffs cited making clear it is a due process violation. XM2 Motion at 57 (citing cases holding that rote repetition of same justification for retention at every review does not satisfy due process). Nor did he acknowledge this Court's recent findings on this point. *See* 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."). And while the Magistrate Judge did mention Plaintiffs' case studies of four illustrative class members in RCGP, he offered no analysis of

them but rather expressed his mistaken understanding (discussed above) that Plaintiffs claim their case studies are illustrative of prisoners being denied adequate notice of "every detail" of why prison officials believe they have safety concerns. XM2 R&R at 10-11.

Instead, the Magistrate Judge's recommended finding was apparently based on his belief, adopting Defendants' words, that "Plaintiffs continue to press this Court to not only impose a level of due process different than the one they negotiated, but which has no foundation in the law." XM2 R&R at 12. Again, however, the Magistrate Judge's recommendation ignores this Court's recent findings from the first monitoring period that CDCR's *implementation* of the terms Plaintiffs negotiated violates due process. *See* XM1 Order. at 30-31 ("Defendants argue, conclusorily, that no due process violations exist because 'CDCR is abiding' by the settlement agreement and Plaintiffs agreed to the terms of the settlement agreement. However, it is undisputed that Defendants have failed to provide meaningful notice to inmates of the basis for RCGP placement or retention that is consistent with the terms of Paragraph 27 . . . and such failures can give rise to due process violations that would permit an extension of the settlement agreement…Plaintiffs have shown that the current procedures, as implemented, are Constitutionally deficient under Mathews and that such deficiencies gives rise to ongoing and systemic due process violations."). Of course, this Court's prior findings were based on the record that Plaintiffs developed during the first monitoring period, but Plaintiffs made an even stronger showing of the insufficiency of CDCR's placement and retention procedures for RCGP prisoners in their moving papers from the second monitoring period. XM2 Motion at 51-61; XM2 Reply at 43-45.

This Court should reject the Magistrate Judge's recommendation and hold that Plaintiffs again carried their burden to establish systemic due process violations in CDCR's RCGP placement and retention procedures.

## IV. THIS COURT HAS THE AUTHORITY TO ORDER A REMEDY TO CORRECT ONGOING CONSTITUTIONAL VIOLATIONS.

Magistrate Judge Illman erred in recommending the rejection of Plaintiffs' request for a remedy to correct Defendants' constitutional violations which persist beyond the first extended one-year

monitoring period, reasoning that the only mechanism for remedying constitutional violations is an enforcement motion. XM2 R&R at 13. In the only citation throughout the Report to this Court's first extension order, the Magistrate Judge quoted a portion of footnote 10 as follows: "The only issue now before the Court is whether Plaintiffs have shown that the settlement agreement should be extended by twelve months under paragraph 41. Plaintiffs have not shown that the Court can take any action under paragraph 41 other than to extend the settlement agreement." *Id.* (quoting XM1 Order at 56, n.10). The Magistrate Judge provided no further analysis and did not address any of Plaintiffs' arguments or citations establishing the District Court's remedial authority. XM2 R&R at 13; XM2 Motion at 62-64; XM2 Reply at 45-49.

Plaintiffs did not raise the issue of a comprehensive remedy in their objections to the Magistrate Judge's recommendations on the first extension motion, and thus footnote 10 of this Court's Order is entirely correct: the question of a remedy was not yet before this Court. *See* ECF No. 1363 (Plaintiffs' Response and Cross-Objection Re First Extension of Settlement Agreement). Now it is. Plaintiffs focus on remedy in the second extension motion because Defendants now have made clear they do not intend to remedy the ongoing constitutional violations absent judicial intervention, irrespective of continuing monitoring. XM2 Opp. at 64. Indeed, Defendants argue that Plaintiffs will *never* be entitled to a substantive remedy for any constitutional violations demonstrated by extension motions, no matter the extent of Defendant's recalcitrance nor how egregious the harm. *Id.* Continuing monitoring alone thus is unavailing to remedy these violations.

In this context, it is axiomatic that a Federal Court has both the constitutional and inherent judicial authority to impose a remedy. *See Brown v. Plata*, 563 U.S. 493, 511 (2011). The obligation to remedy proven constitutional violations stems not just from the Constitution itself, but also from the intrinsic authority of the federal courts. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th. Cir. 2016) (*quoting Kokkonen v. Guardian Life. Ins. Co.*, 511 U.S. 375, 380 (1994) (federal court has jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its decrees")); XM2 Reply at 45-46.

The fact that paragraph 41 provides for an automatic extension of the Agreement's terms and jurisdiction when Plaintiffs show ongoing systemic constitutional violations does not mean the Court is

powerless to provide a remedy when it finds Defendants have failed or refused to remedy those violations during the monitoring periods. *See Gilmore v. People of the State of California*, 220 F.3d 987, 1007 (9th Cir. 2000) ("'If the reservation [of power to modify the decree] had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery'") (quoting *United States v. Swift & Co*., 286 U.S. 106, 114-115 (1932)).

Both the text and the purpose of the Settlement Agreement are inconsistent with the Magistrate Judge's belief that an enforcement motion is the exclusive mechanism for remedying constitutional violations. Defendants themselves recognize that "[t]he parties [ ] addressed the possibility that CDCR's reforms to its Step Down Program and SHU policies might cause new, unexpected constitutional violations. If so, the court could extend the Agreement and litigation *so the parties could address those unintended consequences.*" *Ashker v. Newsom*, 19-15224, Appellants' Opening Brief, July 17, 2019, Dkt. No. 24 at 30-31 (emphasis added). This assertion acknowledges that the extension provision in Paragraph 41 of the Agreement, unlike the enforcement provisions in Paragraphs 52 and 53, does not require Plaintiffs to prove "that CDCR is in material breach of its obligations under this Agreement." *Compare* ECF No. 424-1, ¶ 52 *with id.*, ¶ 41. The extension provision of Paragraph 41 is thus more expansive than the enforcement provisions, encompassing a range of potential constitutional violations subject to remediation via the Court's constitutional and inherent power irrespective of whether they are also violations of Defendants' obligations under the Agreement.

In the alternative, if the Court declines to use its equitable power to craft a remedy, Plaintiffs request that the Court construe this Motion as including a request to modify its final approval order and the Agreement under Federal Rule of Civil procedure 60(b). *See* XM2 Reply at 49-50; *Horne v. Flores*, 557 U.S. 433, 447 (2009) (court may modify order "if 'a significant change…in factual conditions…' renders continued enforcement 'detrimental to the public interest.'"), *quoting Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (modification appropriate where original remedy has become "unworkable").

The time has come for this Court to design and implement remedies, or a remedial process, for the ongoing and flagrant constitutional violations that this Court already has found to exist and which

continue unabated. Defendants undoubtedly will appeal if this Court rules against them; thus judicial economy (not to mention the urgency felt by the victims of CDCR's unremedied systemic constitutional violations) requires that any remedy or remedial process designed by this Court be addressed now.

**CONCLUSION**

This Court must reject the Magistrate Judge's recommendation, and rule that Plaintiffs have met their burden to extend the Settlement Agreement and the Court's jurisdiction over this matter by a further year pursuant to Paragraph 41 of the Settlement Agreement, and design and implement a remedy as discussed above and as provided in the Proposed Order submitted herewith.

DATED: July 28, 2021

Respectfully submitted,

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