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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' OPPOSITION TO PLAINTIFFS' MOTION FOR *DE NOVO* DETERMINATION OF DISPOSITIVE RULING BY MAGISTRATE JUDGE REGARDING PLAINTIFFS' SECOND MOTION FOR EXTENSION OF SETTLEMENT AGREEMENT (CORRECTED)** Date: October 28, 2021 Time: 2:00 p.m. Place: By Videoconference Judge: The Honorable Claudia Wilken

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INTRODUCTION

The Court can end a class action that settled nearly six years ago, at which time this Court praised the parties' settlement agreement as "remarkable," "extremely fair, extremely humane, and extremely innovative." (ECF No. 493.) No one disputes that Defendants met their threshold settlement obligation to reform their Security Housing Unit policies. Therefore, it would not be "astonishing," as Plaintiffs boldly contend (Pls.' Mot. for *De Novo* Determination of Dispositive Ruling by Magistrate Judge, ECF No. 1507 ("Pls.' *De Novo* Mot.") at 6), to terminate this case. Inmates are no longer assigned to any form of segregated housing based solely on "gang affiliation;" it now requires specific conduct, subject to CDCR's disciplinary process (which was not challenged in the underlying litigation), to be transferred to a Security Housing Unit. The Security Housing Unit population has dramatically decreased and CDCR has shuttered or repurposed many of its SHU units. (ECF No. 985-3.) The settlement worked—any inmate in secured housing is there because his behavior violated prison rules.

On July 12, 2021, Magistrate Judge Illman, to whom this Court assigned daily management of this case following Magistrate Judge Vadas' retirement (ECF No. 856), found and recommended that this case terminate. (Report & Recommendation Re: Mot. to Extend Settlement Agreement, ECF No. 1497 ("R&R").) The Magistrate Judge, tasked by this Court to steer the case to resolution, knows its historical context and present posture, and is well positioned to evaluate whether Defendants have met their settlement obligations. The Magistrate Judge reviewed the parties' extensive briefing on Plaintiffs' second effort to extend the settlement, and informed by his day-to-day case management over another monitoring year, found that Plaintiffs failed to meet their evidentiary burden to show current and ongoing systemic due-process violations in CDCR's settlement implementation. (*See generally* R&R.) Plaintiffs object, largely—but incorrectly—relying on this Court's first extension order as "law of the case" that cannot be reconsidered.[1] The Court should reject their efforts to keep this settled case alive,

[1] The law of the case doctrine does not apply where, as here, there is new evidence, a different factual record, or changed circumstances. *U.S. v. Lummi Indian Tribe*, 235 F.3d 443, 452-53 (9th Cir. 2000). As in *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1043 (9th Cir. 2018), which discussed law of the case in the context of amended pleadings, this Court "is

both on the grounds on which the Magistrate Judge based his recommendation and on the grounds that he did not reach, but found to be "both compelling and persuasive." (R&R at 10.)

First, this Court need not reach the merits of Plaintiffs' parole and confidential information claims as they fall outside of the scope of the agreement and the narrow issues the parties agreed could extend this Court's jurisdiction.

Second, should the Court reach the merits of Plaintiffs' claims, the Board of Parole Hearings' (Board) potential consideration of gang validations in parole determinations does not violate Plaintiffs' due process rights. Plaintiffs are judicially estopped from arguing otherwise, having confirmed they do "not seek to change parole policies" under the agreement. Regardless, as required by well-established law unchanged by the parties' settlement, Defendants give class members the opportunity to be heard at their parole hearing and a statement of reasons when parole is denied, which is what due process requires. Plaintiffs rely on a handful of inmates' parole proceedings to argue otherwise, but none were denied parole based solely on their gang validation. Instead, the record shows that the Board performed a comprehensive evaluation for each inmate's case factors, [redacted] As the Magistrate Judge found, these "parole procedures do not, by any means, manifest anything approaching systemic and ongoing due process violations[.]" (R&R at 10.)

Third, Defendants do not misuse confidential information in disciplinary proceedings. If anything here is "astonishing," as Plaintiffs claim, it is Plaintiffs' repeated slander (counsel is subject to Federal Rule of Civil Procedure 11) that Defendants "lie" and fabricate evidence during disciplinary proceedings. Class members, like all inmates, are given advance written notice of the charges against them so they can marshal the facts and prepare a defense. Plaintiffs go on at

free to follow the same reasoning and hold that the" violations as presented in Plaintiffs' second extension motion persist today, but it cannot reach that conclusion based on "any law of the case." (*See* R&R at 10 (assuming without deciding that RCGP placement gives rise to a liberty interest).) So however this Court decides the second extension motion, it "requires a new determination" and "leaves the district court free to correct any errors or misunderstandings without having to find that its prior decision was 'clearly erroneous.'" *See id*. At bottom, the doctrine simply "allows the court to impose a heightened burden on [a party]—to show clear error, changed law, new evidence, changed circumstances, or manifest injustice." *Id*. Plaintiffs' second extension motion is based on a new record or changed circumstances and, thus, requires a new determination; otherwise, manifest injustice would result if jurisdiction over the settlement agreement is extended based on an old record or erroneous legal rulings.

length about the results of individual inmates' disciplinary proceedings while ignoring the complete record. But the record is clear—Defendants do not "fabricate" information or fail to adequately disclose confidential information. Instead, each proceeding Plaintiffs rely on to support an extension of the settlement illustrates overwhelming evidence of guilt, timely disclosure of confidential information via Confidential Information Disclosure Forms, and an opportunity for inmates to challenge that evidence. The record also shows Defendants' efforts to determine the reliability of confidential information, as required by the settlement, regulations, and case law. Therefore, even by the measure of the Court's ruling on the first extension motion, Plaintiffs failed on their second motion to submit sufficient admissible evidence showing current and ongoing systemic misuse of confidential information in disciplinary proceedings.

Fourth, the placement and retention procedures governing the Restricted Custody General Population housing unit (RCGP), which the parties negotiated and this Court approved, do not violate class members' due process rights. Plaintiffs fail to show that Defendants, under well-established case law governing housing decisions in correctional settings captured by the parties' settlement, failed to provide adequate notice of the reasons for RCGP placement and retention, or that the inmates did not receive sufficient periodic review regarding their housing. Plaintiffs settled this case after negotiating the amount of due process owed to inmates assigned to the RCGP. Plaintiffs' second extension motion confirms that Defendants apply the procedures agreed to by the parties, and approved by this Court, in connection with RCGP assignment, review, and retention.

Finally, Plaintiffs cannot use the settlement's extension provisions to raise requests for discovery sanctions and enforcement-type remedies. As the Magistrate Judge noted, "Plaintiffs have developed this habit of including blanket requests for enforcement type relief in various unrelated motions or papers." (R&R at 11-12.) This Court has also rejected Plaintiffs' overreach, when it denied Plaintiffs' request for extensive remedial relief on their first extension motion by holding that "[t]he only issue now before the Court is whether Plaintiffs have shown that the settlement agreement should be extended by twelve months under paragraph 41." (ECF No. 1440

at 56, n.10.) The same is true now—the settlement's terms control, and the Court should reject Plaintiffs' request for spoliation sanctions and other remedies.

In sum, an order rejecting the Magistrate Judge's findings and recommendations would undermine the letter and spirit of the parties' settlement, which this Court approved. The Court should adopt the Magistrate Judge's findings and recommendations in full, and finally terminate this settled case.

STANDARD OF REVIEW

This Court is obligated to "determine *de novo* any part of the [Report and Recommendation] that has been properly objected to." FED. R. CIV. P. 72(b)(3). Notwithstanding the Court's *de novo* review, the Magistrate Judge's findings and recommendations here are entitled to deference and should, at a minimum, inform the Court's analysis, particularly given the authority the Court granted the Magistrate Judge to manage the case's day-to-day activity. Indeed, the magistrate's role "substantially assists the district judge in performance of [the court's] judicial function," "helps focus the court's attention on the relevant portions of what may be a voluminous record," and "helps the court move directly to those legal arguments made by the parties that find some support in the record." *Mathews v. Weber*, 423 U.S. 261, 271 (1976). The "magistrate's report puts before the district judge a preliminary evaluation of the cumulative effect of the evidence in the record, to which the parties may address argument, and in this way narrows the dispute." *Id.*

Here, the dispute is whether, under the settlement's paragraph 41, Plaintiffs have met their burden of proof to extend the Court's jurisdiction. The agreement shall automatically terminate unless Plaintiffs present by a "preponderance of the evidence that current and ongoing systemic violations of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment" exist "as alleged in" Plaintiffs' complaints or "as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by this Agreement." (Settlement Agreement, ECF No. 424-2 ("Agreement") at ¶ 41.) As the Magistrate Judge found, Plaintiffs failed to meet their burden. Plaintiffs' objections to the Magistrate Judge's findings lack merit. The Court should fully adopt the Magistrate Judge's recommendation and terminate this case.

1 ARGUMENT

2 I. TWO OF PLAINTIFFS' CLAIMS FALL OUTSIDE THE SCOPE OF THE PARTIES'
SETTLEMENT AGREEMENT AND CANNOT EXTEND THE COURT'S JURISDICTION.
3

4 While the Magistrate Judge reached the merits of Plaintiffs' parole and confidential
5 information claims, and correctly found the claims meritless, this Court need not reach those
6 questions. As a threshold issue, neither Plaintiffs' parole claim nor their confidential information
7 claim establishes a "violation[] of the Eighth Amendment or the Due Process Clause of the
8 Fourteenth Amendment of the United States Constitution as alleged in" the operative complaint,
9 nor is either claim premised on alleged due-process violations that are "a result of CDCR's
10 reforms to its Step Down Program or [] SHU policies." (Agreement ¶ 41 (limiting grounds under
11 which Settlement Agreement can be extended).) This action challenged CDCR's former policy of
12 housing inmates in Security Housing Units indefinitely based solely on their gang affiliation, not
13 parole or the use of confidential information. (ECF No. 388, Pls.' Supp. Compl. at 57-58.)

14 Plaintiffs' effort to extend the settlement on these two bases is contrary to the Agreement's
15 plain terms and to California law governing contracts. Plaintiffs contort the grounds on which the
16 settlement can be extended, misconstruing the phrases "violations . . . alleged in," and "as a result
17 of." (*See* Defs.' Opp'n to Pls.' 2d Mot. Extend, ECF No. 1419-4 ("Defs.' Opp'n") at 3-5.) The
18 former phrase is expressly limited to violations alleged in the operative complaints, which raised
19 two Eighth Amendment violations and one Fourteenth Amendment due process violation related
20 to housing inmates in Security Housing Units based solely on gang affiliation. (Pls.' Supp.
21 Compl. at 47-56.) The complaint did not allege a due process violation related to the use of
22 confidential information or parole decisions (*see id.*), so those claims are not "violations . . .
23 alleged in" the operative complaint.

24 Similarly, "as a result of" has a plain meaning, which must be used here. CAL. CIV. CODE
25 § 1644 (requiring contractual terms to be given their plain meaning); *see also Baddie v. Berkeley*
26 *Farms, Inc.*, 64 F.3d 487 490 (9th Cir. 1995) (interpreting "as a result of" to mean direct or
27 proximate causation). Plaintiffs can only extend the settlement based on claims arising as "a result
28 of CDCR's reforms to its Step Down Program or [] SHU policies." (Agreement ¶ 41.) CDCR's

reforms to these policies did not result in any change to the use of confidential information. The settlement makes that distinction clear, as reforms to the Step Down Program and Security Housing Unit policies are completely separate from, and do not refer to, reforms to CDCR's use of confidential information. (*Compare* Agreement ¶¶ 13, 22 *with* ¶ 34.) Similarly, Plaintiffs have not demonstrated that the Board of Parole Hearings, which is not a party to this litigation or to the settlement, made any changes to its practices because of the settlement, so they have not demonstrated that any independent parole decisions by the Board were "as a result of" the settlement. This Court should reject Plaintiffs' parole and confidential information claims without reaching the claims' merit (which also fail).

II. THE MAGISTRATE JUDGE IDENTIFIED THE CORRECT LEGAL STANDARD FOR DUE PROCESS IN THE PAROLE CONTEXT, AND PROPERLY CONCLUDED THAT PLAINTIFFS HAVE NOT DEMONSTRATED A CURRENT, ONGOING, AND SYSTEMIC VIOLATION OF THAT STANDARD.

Plaintiffs continue to ignore well-established case law governing due process in parole proceedings. In contrast to their position in opposing Defendants' recent stay motion, Plaintiffs now take the position that their two extension motions are "based on the same due process arguments and a comparable factual record," thus the rulings on each motion must be identical. (*Compare* ECF No. 1475 *with* Pls.' *De Novo* Mot. at 6.) But, in opposing Plaintiffs' second extension motion, Defendants meticulously dissected the specific alleged "examples" of due process violations that Plaintiffs identified, which the Magistrate Judge noted in ruling for Defendants. (R&R at 3, 7.) Defendants addressed each piece of evidence to show that the Board did not once rely solely on a class member's gang validation to deny the inmate parole. Plaintiffs argue that the law of the case doctrine prohibits this Court from considering whether Plaintiffs have carried their burden of proving an ongoing and systemic due process violation, because the Court found that Plaintiffs met that burden on a different record three years ago. (Pls.' *De Novo* Mot. at 16-17.) Under Plaintiffs' theory, Plaintiffs would be guaranteed endless settlement extensions based on the Court's first extension order. But that is not the law, particularly on this new record. *See Askins*, 899 F.3d at 1042 ("The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case.").

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A. Plaintiffs Are Judicially Estopped from Asserting Their Parole Claim.

Judicial estoppel prevents a litigant from gaining an unfair advantage by taking inconsistent positions at various stages of a lawsuit, i.e., "playing fast and loose with the courts." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012). That is precisely what Plaintiffs are doing here. Despite previously representing to the Court that the settlement would not exonerate past gang validations and confirming that they "did not seek to change parole policies," (ECF No. 486 at 17-18), Plaintiffs now seek to invalidate past gang validations for parole purposes and change parole policies. (Pls.' Second Mot. Extend, ECF No. 1346-4 ("Pls.' 2d Mot. Extend") at 16.) Plaintiffs seek an order requiring that CDCR give the Board a directive about what the Board may consider when making parole-suitability determinations, specifically that gang validations "should not be presumed to reliably indicate that the inmate was active with a prison gang," and that the Board "only consider overt acts of recent gang activity." (*Id.* at 69.) According to Plaintiffs, CDCR's retention of prior gang validations in class members' files violate their right to due process in seeking parole. (Pls.' *De Novo* Mot. at 12-13.) This cannot be a ground to extend the settlement.

Plaintiffs seek to extend the settlement because the Board considers prior gang validations, effectively arguing they should have been exonerated. But Plaintiffs took a different position when seeking the settlement's approval. (ECF No. 486 (asserting that even though the settlement did not exonerate past gang validations or change parole policies, that did not detract from the overall fairness and adequacy of the settlement).) Likewise, by demanding that CDCR tell the Board how to weigh evidence when making parole-suitability determinations, Plaintiffs seek to change parole policies.[2] This Court should reject Plaintiffs' gamesmanship and find that Plaintiffs are judicially estopped from extending the settlement based on their challenge to the manner in which the Board determines an inmate's parole suitability.

[2] Plaintiffs also appear to collaterally attack California's regulations governing parole-suitability determinations. *See, e.g.*, Cal. Code Regs., tit. 15 §§ 2235-2449.34.

B. Plaintiffs Do Not Cite the Correct Legal Standard, Nor Does Their Evidence Demonstrate a Systemic and Ongoing Violation of Due Process.

Plaintiffs continue to misstate and misapply the law governing due process in parole proceedings. The Magistrate Judge got it right, and this Court should adopt his findings and recommendations. "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). It is only where a parole scheme creates an expectation of release that procedural due process protections attach. *See id.* at 13. And the only procedural protections required in the parole context are an opportunity to be heard, and when parole is denied, a statement of reason for the denial. *Id.* at 16. The standard is minimally stringent, in part because a parole-suitability determination is "essentially an experienced prediction based on a host of variables," and "there is no prescribed or defined combination of facts which, if shown, would mandate release on parole." *Id.* If an inmate received these protections, that "should [be] the beginning and the end" of the due-process inquiry. *Swarthout v. Cooke*, 562 U.S. 216, 217-19 (2011); *see also Roberts v. Hartley*, 640 F.3d 1042, 1046 (9th Cir. 2011) ("[i]f the state affords the procedural protections required by *Greenholtz* and *Swarthout*, that is the end of the matter"). Plaintiffs' evidence establishes that inmates are afforded these procedural protections and more when seeking parole. (*See* Decl. of Shryock Supp. Defs.' Opp'n to Pls.' 2d Mot. Extend, ECF No. 1419-13 ("Shryock Decl.") at Ex. 3.) As the Magistrate Judge found, Plaintiffs have not proved a systemic and ongoing constitutional violation to support extending the settlement. (R&R at 10.)

Plaintiffs, relying on *Mathews v. Eldridge*, 424 U.S. 319 (1976), note that due process also requires "the opportunity to be heard at a meaningful time and in a meaningful manner," and contort that noncontroversial principle to demand procedural protections beyond those required by the Constitution.[3] (Pls.' Reply Supp. 2d Mot. Extend, ECF No. 1446-4 at 40.) The argument is inconsistent with the Supreme Court's holding in *Greenholtz.* There, the Court cited *Mathews*, but

[3] Defendants challenge the Court's ruling on this issue on appeal of the Court's first extension order.

concluded that no additional procedures, beyond an opportunity to be heard and a statement of reasons why parole was denied, is required in the parole context. *Greenholtz*, 442 U.S. at 14-16. Plaintiffs argue that the authority the Magistrate Judge relied on is distinguishable, but they do not present any authority requiring the right to additional procedural protections. And that is because none exists.

Plaintiffs also attack the Board's parole policies by arguing class members do not have a meaningful opportunity to challenge confidential information. (Pls.' *De Novo* Mot. at 13-14.) The Ninth Circuit, and all district courts that have considered the issue, have uniformly held that if an inmate is given an opportunity to be heard and a statement of reasons parole is denied, the use of, or failure to disclose, confidential information relied upon in parole suitability hearings does not violate due process.[4] The crux of Plaintiffs' complaint that confidential information is used in parole proceedings is that, "[b]y the time of the hearing, witnesses have become unavailable, evidence has gone stale, and investigation is impossible." (Pls.' *De Novo* Mot. at 18-19.) But the right to call witnesses and present evidence are rights afforded to the accused in the guilt-determination phase of criminal, adversarial proceedings; inmates are not constitutionally entitled to these processes in the parole context, as the Supreme Court and Ninth Circuit have reiterated. *See, e.g.*, *Greenholtz*, 442 U.S. at 15-16; *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). The Magistrate Judge correctly rejected Plaintiffs' attempt to equate the discretionary parole-release determination with a guilt determination, and to convert the parole process into an adversarial proceeding. (R&R at 9); *see also Greenholtz*, 442 U.S. at 15-16.

Finally, Plaintiffs attack the Board's parole policies by claiming it continues to use "unreliable gang validations" to deny class members a fair opportunity to seek parole. (Pls.' *De*

[4] *See Harrison v. Shaffer*, No. 19-17409, 2021 WL 374575, at *1 (9th Cir. Feb. 3, 2021); *Young v. Lozano*, No. 2:20-cv-0350 TLN KJN (PR), 2020 WL 6270270, at *4 (E.D. Cal. Oct. 26, 2020); *Jackmon v. Fritz*, No. 16-07178 BLF (PR), 2018 WL 4219234, at *4–5 (N.D. Cal. Sept. 4, 2018); *Von Staich v. Ferguson*, No. 2:15-cv-1182 JAM DB P, 2018 WL 3322901, at *7 (E.D. Cal. July 5, 2018) (adopted Sept. 27, 2018); *Michael v. Borders*, No. CV 17-7234 DOC (RAO), 2017 WL 6942434, at *2 (C.D. Cal. Dec. 11, 2017) (adopted by 2018 WL 400746 (C.D. Jan. 11, 2018); *Urenda v. Hatton*, No. 16-cv-02650-WHO (PR), 2017 WL 2335375, at *2 (N.D. Cal. May 30, 2017); *Ward v. Price*, 2017 WL 1354569, at *4; *Dunn v. Gonzales*, No. CV 13–2628 GHK (FFM), 2014 WL 1333720, at *2 (C.D. Cal. Apr. 3, 2014); *Nieto-Benitez v. Parole Bd.*, No. SACV 13-1212 JGB (AJW), 2014 WL 585437, at *4 (C.D. Cal. Feb. 10, 2014; *Reed v. Grounds*, No. C 10-5803 CRB PR, 2011 WL 4853368, at *2 (N.D. Cal. Oct. 13, 2011).

Novo Mot. at 17-18.) But Plaintiffs' evidence demonstrates that none of the inmates they relied on were denied parole based just on their validation status. (*See* Shryock Decl. at Exs. B, D.) A comprehensive evaluation was completed for each inmate. (*Id.*; *see also id.* at Ex. C.) [redacted] Regardless, the Ninth Circuit has regularly upheld CDCR's validation process against due process challenges. *See, e.g., Bruce v. Ylst*, 351 F.3d 1283, 1287-88 (9th Cir. 2003); *Castro v. Terhune*, 712 F.3d 1304, 1313 (9th Cir. 2013).

Based on the Magistrate Judge's day-to-day management of this case and review of the record, he correctly found that "Defendants parole procedures do not, by any means, manifest anything approaching systemic and ongoing due process violations[.]" (R&R at 10.) This Court should adopt that finding.

III. THE MAGISTRATE JUDGE CORRECTLY FOUND THAT PLAINTIFFS FAILED TO ESTABLISH A CURRENT, ONGOING SYSTEMIC DUE PROCESS VIOLATION RELATING TO CDCR'S USE OF CONFIDENTIAL INFORMATION.

Plaintiffs concede that all the *Wolff* procedural requirements, save for the advance written notice requirement, are provided to class members during the disciplinary process. (Pls.' *De Novo* Mot. at 3 (plaintiffs "challenge Defendants' systemic practice of denying them adequate notice and an opportunity to marshal a defense").) Plaintiffs also concede that each of the class members' disciplinary findings are supported by some evidence. (*Id.* ("Plaintiffs' due process allegations here are not predicated on the theory that the ultimate determination of the disciplinary officers was unsupported[.]").) Thus, the only element in dispute is whether class members are provided with written notice of the charges against them in advance of the hearing.

The *Wolff* Court held that "written notice of the *charges* must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense." 418 U.S. at 539, 564 (1974) (emphasis added). However, Plaintiffs do not dispute that class members are given advance written notice of the charges against them. (*See generally* Pls.' *De Novo* Mot.) Rather, they transform the phrase, "to marshal the facts and prepare a defense," into a separate, stand-alone requirement that CDCR provide each inmate with advance written notice of all *evidence* against them without error. Error-free evidence, though a

laudable goal towards which CDCR strives, is not what the law requires, nor does the law require that inmates be given unfettered access to all information, including confidential information, if it may be considered by the Board. The Magistrate Judge properly rejected this claim.

Plaintiffs fail to prove by a preponderance of the evidence any current due process violations, much less current and ongoing systemic violations that merit extension of the Agreement. As recognized by the Magistrate Judge:

> [A]ll that Plaintiffs have shown is that some or most (or even all) of the several dozen examples of prisoner discipline were not completely error-free – however, what has not been shown is that these asserted errors amount to ongoing and systemic disciplining of prisoners in violation of the 'some evidence' standard described above. Defendants, on the other hand, identify the correct standards and convincingly argue that Plaintiffs' arguments fail to show any widespread or systemic violation of those standards.

(R&R at 7.) Nevertheless, Plaintiffs argue CDCR violates due process in two ways: (1) through the "fabrication" or inadequate disclosure of confidential information used against class members in their disciplinary proceedings, and (2) failing to ensure that the confidential information it uses is reliable. (Pls.' *De Novo* Mot. at 2-8.) Neither argument supports an extension of the settlement.

A. CDCR Does Not "Fabricate" or Inadequately Disclose Confidential Information.

The Supreme Court has made clear, in identifying the safeguards that due process requires in the context of prison disciplinary proceedings, that "courts should remember 'the legitimate institutional needs of assuring the safety of inmates and prisoners' and avoid 'burdensome administrative requirements that might be susceptible to manipulation.'" *Zimmerlee v. Keeney*, 831 F.2d 183, 188 (9th Cir. 1987) (quoting *Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985)). "Whether notice satisfies due process is a question of law[.]" *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 918 (9th Cir. 1995). These well-established principles are lost on Plaintiffs.

Plaintiffs fail to prove, by a preponderance of the evidence, any current and ongoing systemic failure to disclose confidential information before disciplinary hearings. Plaintiffs repeatedly attempt to conflate the evidence in their first extension motion with the evidence before the Court now. Plaintiffs argue that the record since the Plaintiffs' first extension motion, during which time Plaintiffs filed a single enforcement motion, does not reflect sufficiently

"meaningful" changes to practices or enhanced training. (*See* Pls.' *De Novo* Mot. at 4.) Yet the Magistrate Judge, in comparing the results of more recent disciplinary proceedings against disciplinary proceedings presented in the first motion, correctly found "a wholly different picture—one that leads the undersigned to arrive at the opposite conclusion." (R&R at 3.)

Plaintiffs' objections feature five purported examples of "fabricated" or otherwise inadequate disclosures. But Plaintiffs' argument rests on a slender reed: namely, trying to show some discrepancy between the Confidential Information Disclosure Form and the underlying confidential information. The record supports no such claim—the alleged discrepancies are subjective, minor, and isolated, if not non-existent. (*See* R&R at 7.) Plaintiffs suggest this Court focus on alleged discrepancies between the Confidential Information Disclosure Forms and the underlying confidential information, but ignore the extensive evidence of guilt in each case.

Plaintiffs cite *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) for the proposition that, "when the basis for attacking the judgment is not insufficiency of evidence, it is irrelevant" whether there is sufficient evidence in the record to support the prison hearing determination. (Pls.' *De Novo* Mot. at 2-3). In so doing, Plaintiffs wish to simultaneously critique the adequacy with which evidence was disclosed, while denying a full picture of the evidence itself. *Edwards* demands no such tunnel vision. This Court must review the evidence in its totality, rather than just the cropped and misleading image presented by Plaintiffs in their briefing.[5] And viewing the evidence in its complete form, not one of Plaintiffs' examples shows current or systemic failures to fabricate evidence or disclose confidential information in connection with inmate disciplinary proceedings. Defendants address those examples here:

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[5] Plaintiffs submitted over 130 pages of additional evidence with their reply. (ECF Nos. 1446, 1448). Defendants objected and moved to strike the material, or alternatively requested leave to submit further briefing. (ECF No. 1455.) The Magistrate Judge denied the requests because he found the materials to be "unpersuasive" and further briefing was unnecessary. (R&R at 14 n.2.) Defendants reserve their right to dispute that evidence should this Court require additional briefing.

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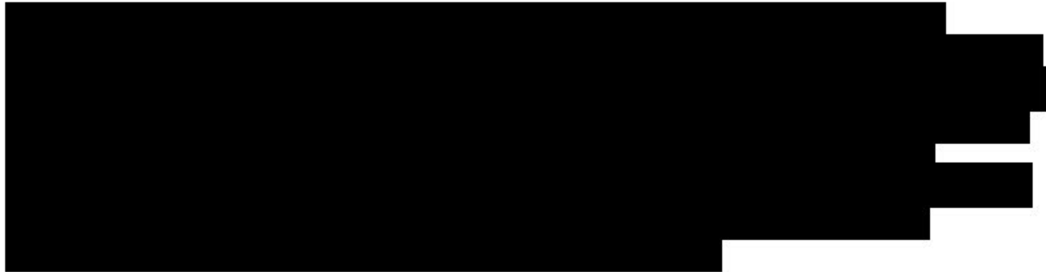

In none of these examples—arguably the most "egregious" ones Plaintiffs selected for this Court's focus and attention—were the inmates found guilty based on "fabricated" or undisclosed confidential information. A cursory review of the record reveals overwhelming evidence of guilt. Where confidential information was considered at the disciplinary hearing, it was timely provided to the inmate via a Confidential Information Disclosure Form and each inmate had the opportunity to dispute the allegations, and in most cases did so. This undermines any notion that inmates are somehow systemically provided inadequate notice of the charges against them. Defendants thoroughly demonstrated that each inmate in Plaintiffs' examples received all the due process required by law.[6] Accordingly, Plaintiffs have failed to prove by a preponderance of the evidence any current and systemic ongoing violation of their due process rights.

B. CDCR Ensures that Confidential Information Is Reliable.

Plaintiffs claim they do not challenge the sufficiency of the evidence; however, they do just that by claiming CDCR relies on unreliable confidential information. *See Castaneda v. Marshall*, No. 93-cv-03118 CW, 1997 WL 123253, at *5 (N.D. Cal. Mar. 10, 1997), *aff'd*, 142 F.3d 442 (9th Cir. 1998) (noting *Zimmerlee*'s reliability criteria are part of the "some evidence" analysis). Contrary to Plaintiffs' arguments, the Magistrate Judge did not "ignore" the evidence or Plaintiffs' "legal analysis." Rather, he considered it and found that Plaintiffs failed to show by a preponderance of the evidence any current and systemic ongoing violations based on Defendants' alleged failure to follow the reliability requirements of *Zimmerlee*, 831 F.2d at 186.

[6] The charts attached to defense counsel's declaration did not contain "80 pages of argument." (*But see* Pls.' *De Novo* Mot. at 10 n.4.) Rather, Defendants summarized and addressed Plaintiffs' alleged evidence in a series of tables for the Court's convenience. Plaintiffs responded to Defendants' charts in their 50 pages of reply briefing, which was double what the Magistrate Judge provided—there is no prejudice to Plaintiffs. (ECF No. 1427.)

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In sum, Plaintiffs fail to establish, by a preponderance of the evidence, any current and ongoing systemic violation based on Defendants' alleged failure to follow the reliability requirements of *Zimmerlee*. Rather, the record shows that Defendants adhere to the reliability procedures set forth in California's regulations (Title 15, section 3321), which were not changed by the parties' settlement.

C. The Magistrate Judge Properly Rejected Plaintiffs' Unsupported Request for an Adverse Inference Because No Spoliation Occurred.

The Magistrate Judge properly rejected Plaintiffs' request for a finding of spoliation and imposition of an adverse inference for four reasons: (1) Plaintiffs conceded that the evidence they claim was destroyed was not necessary or relevant to any claim in this case; (2) Plaintiffs made no showing that Defendants acted or failed to act with any culpable state of mind; (3) "it is far from certain" that Plaintiffs put CDCR on notice to preserve any potential recordings at issue; and

(4) Plaintiffs failed to establish the relevance of an overbroad category of recordings of meetings between staff and confidential informants. (*See* R&R at 12-13.) The Court should adopt the Magistrate Judge's recommendation and reject Plaintiffs' request because Plaintiffs fail to meet a single threshold necessary for an adverse inference based on alleged spoliation.

1. Plaintiffs Have Not Established An Obligation to Preserve Recordings Before September 2019.

Plaintiffs have not established that CDCR had an obligation to preserve confidential informant recordings before Plaintiffs' September 2019 e-mail.[7] (*See* Lyons Decl. Ex. K.) Following the e-mail, Defendants promptly instituted a litigation hold of the requested material. (J. Harden Decl. in Support of Defs.' Opp'n, ECF No. 1419-7 ("Harden Decl.") ¶ 25; *see also* Meeropol Decl. Ex. BT at 55-58.) The Magistrate Judge correctly found that there was no earlier obligation to preserve recordings.

The three alleged "triggering events" Plaintiffs identified before September 2019 did not put Defendants on notice to preserve recordings. *See Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012). Defendants have been preserving and producing thousands of documents in connection with the settlement. Plaintiffs' allegation of "CDCR's systemic falsification of confidential disclosures" (Pls.' 2d Mot. Extend at 25 & n.5), is far too attenuated a connection to constitute notice that *all* confidential interview recordings were potentially relevant to the litigation. Similarly, Plaintiffs' then "current thinking" in a meet and confer that they were "open to negotiating," as they proposed modifications to CDCR's established production obligations under the settlement agreement, did not trigger a preservation obligation. (*See* Lyons Decl. Ex. O.) At the time of the meet and confer, CDCR was under no obligation to produce recordings or transcripts, and its production obligations had been previously negotiated by the parties and extensively enumerated in the Agreement. (*Id.*; *see generally* Agreement.) Lastly,

[7] The existence of a duty to preserve only certain narrow categories of confidential interview recordings (in homicide and PREA investigations) highlights the lack of a duty to preserve any other confidential interview recordings. (Harden Decl. ¶ 25.)

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3 it could not have reasonably served as sufficient notice
4 that all confidential interview recordings were now relevant to warrant preservation.
5 Plaintiffs rely on a Third Circuit case in which the court ordered the parties to maintain all
6 relevant evidence, and a party then intentionally destroyed indisputably relevant evidence before
7 a settlement agreement and consent decree were entered. *Institute for Motivational Living, Inc. v.*
8 *Doulos Institute for Strategic Consulting, Inc.*, 110 F. App'x 283, 285 (3d Cir. 2004) (sanctioning
9 that pre-settlement-agreement conduct after settlement agreement entered). (*See* Pls.' *De Novo*
10 Mot. at 13.) This case is distinguishable and does not support Plaintiffs' argument. Here,
11 Plaintiffs seek an adverse inference for the destruction of confidential recordings that were
12 indisputably beyond the scope of this case, that were *not* subject to a preservation order, and that
13 were allegedly destroyed after this Court approved the parties' settlement. *But see Duolos*
14 *Institute*, 110 F. App'x at 287-88. The Magistrate Judge correctly found that "it does not appear
15 that any of Plaintiff's cited authorities would be even arguably applicable in the present context."
16 (R&R at 12.) Neither Plaintiffs' factual nor legal arguments establish that CDCR was under a
17 duty to maintain confidential interview recordings before Plaintiffs' September 2019 e-mail.
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19 **2. Plaintiffs Have Not Established That Any Recordings Were Destroyed with a Culpable State of Mind.**
20 Plaintiffs cannot establish CDCR deleted recordings "with a culpable state of mind." *See*
21 *Apple Inc.*, 888 F. Supp. 2d at 991. While a finding of bad faith is not required, a court does not
22 abuse its discretion in rejecting an adverse inference "[w]hen relevant evidence is lost
23 accidentally or for an innocent reason." *Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*,
24 306 F.3d 806, 824 (9th Cir. 2002). Any decision not to retain confidential informant interview
25 recordings prior to the issuance of the October 2019 litigation hold was done without a culpable
26 state of mind given the fact there was no policy in place to create the recordings, let alone retain
27 them. (Harden Decl. ¶ 25; *see also* Meeropol Decl. Ex. BT at 55-58.)
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Plaintiffs argue that even negligent destruction of these recordings can form the basis for sanctions. (Pls.' *De Novo* Mot. at 14.) The Ninth Circuit and this district have rejected this contention—negligence does not support an adverse inference. *See Med. Lab. Mgmt. Consultants*, 306 F.3d at 824 (affirming rejection of adverse inference in "the absence of bad faith or intentional conduct"). But even if that were the law, Plaintiffs have not established that any confidential interview recordings were negligently destroyed. Plaintiffs rely entirely on conclusory allegations and hyperbole, arguing that Defendants "clearly were negligent," "knew the recordings were relevant to the litigation," and "lied," (Pls.' *De Novo* Mot. at 14),[8] apparently in an effort to avoid the actual standard for negligence, which requires breach of a duty. As discussed *supra*, there was no duty to preserve these recordings; without such a duty, there cannot have been any negligent destruction of recordings. Because Plaintiffs cannot establish that any recording was destroyed with any culpable state of mind, their spoliation argument fails.

3. Plaintiffs Have Not Established that Any Destroyed Recordings Were Relevant to Any Claim or Defense In This Action.

The Magistrate Judge correctly found that Plaintiffs have not established how a broad category of interview recordings would be relevant, rather than merely hoping their contents might be relevant. (R&R at 12-13.); *See Apple Inc.*, 888 F. Supp. 2d at 989. Plaintiffs have, in fact, conceded that the recordings were not necessary for their case. (R&R at 12; Pls.' 2d Mot. Extend at 31.) Despite that concession, Plaintiffs now dismiss the Magistrate Judge's analysis and consideration of Plaintiffs' arguments as failing to "address or acknowledge" them, when he correctly considered and found Plaintiffs' arguments unpersuasive. (R&R at 12-13.) Plaintiffs also dismiss class members' own review and initialing of debriefing reports that verified their accuracy, arguing that despite that verification by the interview subjects themselves, Plaintiffs alone could have determined the accuracy of debriefing reports. (Pls.' *De Novo* Mot. at 15-16.)

[8] Plaintiffs raise several dubious, factually unsupported, legally far-reaching and misplaced arguments seeking to keep this case alive that informs whether Plaintiffs' work on this motion is reasonably performed, which is required for Plaintiffs to recover their attorneys' fees and costs. Just because Plaintiffs have avenues to raise issues before the Court does not render their work reasonable. Where Plaintiffs go so far to argue that "Defendants lied" in public filings, without any factual or legal basis, Defendants will object to fees for any unreasonable work performed on this motion or subsequent proceedings seeking to further extend the settlement.

The Magistrate Judge correctly rejected Plaintiffs' arguments as, at best, a "hop[e] that [the recordings] might be relevant." (R&R at 13.) Because Plaintiffs have not demonstrated that any relevant evidence was destroyed, their spoliation claim should be denied.

IV. INMATES' PLACEMENT AND RETENTION IN THE RCGP DOES NOT IMPLICATE A DUE PROCESS INTEREST, AND IF IT DOES, THE MAGISTRATE JUDGE CORRECTLY FOUND THAT CDCR'S PROCEDURES SATISFY CONSTITUTIONAL REQUIREMENTS.

A. There Is No Liberty Interest in Avoiding RCGP Placement or Retention.

Plaintiffs do not address Defendants' argument that RCGP placement does not implicate a liberty interest, which the Magistrate Judge found to be "both compelling and persuasive." (R&R at 10; *see* Pls.' *De Novo* Mot. at 20 n.9.) Plaintiffs have the burden of showing, by a preponderance of the evidence, that there are current and ongoing systemic violations of due process. (Agreement ¶ 41.) That necessarily requires a showing of a liberty interest in avoiding RCGP placement or retention based on the current record in this action. Plaintiffs failed to make that record in their second extension motion.

Since the Court last extended the settlement, Plaintiffs did not file a single enforcement motion alleging that Defendants failed to comply with the terms governing the RCGP. The Agreement is clear, that "[i]f Plaintiffs' counsel contends that CDCR has abused its discretion in making housing decisions . . . that concern may be raised . . . in accordance with the dispute resolution and enforcement procedures" in the Agreement, rather than extension proceedings. (Agreement ¶ 27.) Enforcement motions may not be prerequisites to an extension motion, but if Plaintiffs had any evidence to suggest that their rights were being violated in the RCGP, surely they would have raised the issue during the case's extended monitoring period. Plaintiffs know how to file enforcement motions, including motions concerning the RCGP (which they brought during the settlement's original two-year monitoring period). (*See e.g.*, ECF Nos. 513, 524, 553, 702, 706, 712, 728, 735, 737.)

The conditions in the RCGP do not give rise to a due process interest because they are not atypical or burdensome. The RCGP only implicates a due process right if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 483-87 (1995); *see also Meachum*, 427 U.S. at 225 (inmates have no due

process right to hearing before being transferred to a less-favorable institution). Three guideposts frame the inquiry into whether housing is atypical and significant: (1) whether the challenged condition "mirrored those conditions imposed upon inmates in administrative segregation and protective custody," and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the state's action will inevitably affect the duration of the inmate's sentence. *Sandin*, 515 U.S. at 486-87; *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). None of the above considerations point towards atypical and burdensome conditions implicating a due process interest.

1. Conditions in the RCGP Mirror Conditions in High Security Housing Units Throughout CDCR.

None of Plaintiffs' complaints regarding conditions in the RCGP implicate a due process interest. The location of the RCGP cannot give rise to a due process interest, both because the Constitution does not "guarantee that the convicted prisoner will be placed in any particular prison," *Meachum*, 427 U.S. at 224, and because the parties negotiated (and the Court approved) the RCGP's location. (*See* Order Final Approval 2, Jan. 26, 2016, ECF No. 488.) *See also McKune v. Lile*, 536 U.S. 24, 39 (2002) ("It is well settled that the decision where to house inmates is at the core of prison administrators' expertise."). Inmates in the RCGP are permitted to receive bi-weekly contact and non-contact visits and to use the telephone to contact family and friends, the same amount permitted for general population inmates. (L. Kirby Decl. Supp. Defs.' Opp'n, ECF No. 1419-8 ("Kirby Decl.") ¶¶ 11, 13-14, 21, 24-26.) Plaintiffs' assumption that general population inmates receive more visitation than RCGP inmates is false, and regardless, is insufficient to establish a due process interest.

The social interaction available to inmates in the RCGP is also comparable to, or even exceeds, interaction available to general population high-security inmates in similar circumstances. The eighty inmates housed in the RCGP at the time the extension motion was briefed have serious safety concerns, and are provided social interaction to the extent that CDCR can continue to provide for their safety. (*See* Kirby Decl. ¶¶ 6-10.) Pelican Bay correctional staff constantly evaluate the RCGP population to determine how to safely assign inmates to groups,

which resulted in thirty-two inmates being assigned to six compatible groups at the time this issue was briefed. (*Id*. at ¶¶ 4-5, 10, 20, 32-34.) There are more inmates in groups now than when CDCR responded to Plaintiffs' first extension motion in March 2018, and inmates may socialize both within their groups outside of their cells and along the tier of their housing units while in their cells. Even inmates on walk-alone status, which at the time of briefing was only ten inmates, have opportunities for social interaction, regular access to telephone calls, contact and non-contact visits, educational programs, and self-help programs, commensurate with inmates in other high-security general population inmates. (*Id*. at ¶¶ 8, 21, 22, 30.) The Ninth Circuit found that CDCR's use of walk-alone status substantially complies with the settlement. *Ashker v. Newsom*, 968 F.3d 939, 944-46 (2020).

Inmates in the RCGP also have access to jobs to a comparable or greater extent to inmates in general population—not all inmates get jobs, even in the general population. (*Id*. at ¶¶ 22, 27.) Forty-five percent of inmates in the RCGP have jobs, which is more than the thirty-six percent of inmates with jobs in Pelican Bay's general population. (*Id.*) Not only are conditions in the RCGP neither atypical nor present a significant hardship; they provide programming that is comparable to, or in the case of job opportunities, exceeds, that available to inmates in comparable high-security general population housing.

2. Placement and Retention in the RCGP Is of Limited Duration.

Plaintiffs argue that RCGP placement implicates a due process interest because it is "indefinite" (Pls.' 2d Mot. Extend at 56), but this is both unsupported and contradicted by the record. Inmates move into and out of the RCGP according to the agreed-upon criteria outlined in the Agreement. (Agreement ¶ 27.) Reviews of an inmate's placement are completed every 180 days. (*Id.*) Almost seventy inmates have been transferred from the RCGP to other housing units since the RCGP opened in January 2016. (Kirby Decl. ¶¶ 18, 35-37.) If Pelican Bay's Institutional Classification Committee determines that the "demonstrated threat to the inmate's personal safety" that required him to be housed in the RCGP "no longer exists," he is referred to the Departmental Review Board for potential transfer to the general population or other appropriate housing. (*Id.*) As with any other housing determination, an inmate who disagrees with

1 his housing assignment can challenge the assignment, including through CDCR's administrative
2 grievance process, habeas corpus proceedings, or a separate civil-rights lawsuit. And Plaintiffs'
3 counsel can also challenge any particular RCGP housing decision pursuant to the Agreement;
4 however, they did not do so even a single time during the year of extended monitoring, implying
5 there were no decisions that merited any challenge. (Agreement ¶ 28.) These are the procedures
6 that Plaintiffs negotiated, agreed to, and the Court approved. Ultimately, Plaintiffs disagree with
7 the housing committees' determinations, and claim that because of these disagreements,
8 placement is "indefinite." But, if CDCR released the inmate to the general population while
9 aware that a threat to his safety still existed, it would be breaching its constitutional duty to
10 protect inmates in its care. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (noting prison
11 officials' duty "to protect prisoners from violence at the hands of other prisoners"). And CDCR
12 could be liable if the inmate, or nearby inmates or staff, were injured in an accident it foresaw.
13 Plaintiffs do not, and cannot, point to any case where threats to the inmate's safety ceased to exist
14 and yet CDCR held that inmate in RCGP indeterminately.

15 **3. RCGP Placement Does Not Impact Inmates' Sentences.**

16 The RCGP does not affect the duration of the inmate's sentence or his eligibility for parole.
17 *See Sandin*, 515 U.S. at 486-87. Comparable to the circumstances that the Supreme Court
18 considered in *Sandin*, no statute or regulation requires inmates in the RCGP to be denied parole, a
19 decision that is dependent on "a myriad of considerations" and has its own procedural protections.
20 *See id.* at 487. Even if Plaintiffs met their burden to show that RCGP placement *could* impact
21 parole considerations, a due process interest only arises if the effect is inevitable. *See id.* Plaintiffs
22 have not made any such showing here.

23 **B. Inmates Are Assigned and Retained in the RCGP Under Negotiated and**
24 **Court-Approved Procedures Consistent with Due Process.**

25 If the Court finds that RCGP placement implicates due process, the Court-approved
26 procedures for assignment and retention in the RCGP are constitutionally adequate. Plaintiffs do
27 not point to any departure from the negotiated and Court-approved procedures, and contrary to
28 their claims, they "quibble with [alleged] errors in individual placement and retention

determinations." (Pls.' *De Novo* Mot. at 20.) This falls short of their burden to show a current and ongoing systemic due process violation to extend the settlement.

If there is a due process interest in avoiding RCGP placement, which there is not, then inmates are entitled to procedural protections of adequate notice, an opportunity to be heard, and periodic review. *Bruce v. Ylst*, 351 F.3d 1283, 1287 (9th Cir. 2003) (citing *Toussaint v. McCarthy*, 801 F.2d 1080, 1100-01 (9th Cir. 1986)). The settlement's terms are consistent with these standards, the Court approved them, and CDCR has implemented them. The Magistrate Judge correctly found 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," (R&R at 10), and the Court should adopt that recommendation.

Plaintiffs essentially contest the sufficiency of the evidence on which CDCR relies in determining that inmates still face safety concerns in the general population, rather than the process by which inmates are provided notice. (*See* Pls.' *De Novo* Mot. at 20-21.) An extension motion is not the vehicle to contest individual inmates' housing. And, rather than address the evidence showing that inmates in the RCGP receive sufficient notice, an opportunity to be heard, and periodic review of their RCGP placement and retention (*see* Defs.' Opp'n at 47-62), Plaintiffs ask the Court to look solely to its prior conclusion to reject the Magistrate Judge's findings and recommendation, arguing that "Plaintiffs made an even stronger showing." (Pls.' *De Novo* Mot. at 22.) The Magistrate Judge correctly found that Plaintiffs fall short of carrying their burden to extend the settlement.

Plaintiffs' alleged "showing" amounts to a disagreement with the evidence on which CDCR relies to evaluate the safety concerns RCGP inmates face in the general population. (*See id.* at 15-16.) Plaintiffs rely on their counsel's testimony and personal evaluation of threats to inmates' safety (as if they were experts in corrections, which they are not), and ask the Court to substitute that inadmissible evidence for CDCR's evaluation of how best to manage its prison population. (*See* Pls.' 2d Mot. Extend at 52-57 (relying on counsel's testimony in arguing that CDCR's evaluation of safety threats faced by RCGP inmates was inadequate).) But CDCR is uniquely positioned to know whether an inmate is subject to harm, and courts must defer to CDCR's

judgment on such issues. *See Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010) ("It is well established that judges and juries must defer to prison officials' expert judgments."). Even Plaintiffs agreed that CDCR retains that discretion. (Agreement ¶ 27.) Plaintiffs' disagreement with CDCR's interpretation of evidence fails to establish a current and ongoing, systemic due-process violation, and fails to provide deference to CDCR officials.

V. PLAINTIFFS SHOW THEIR OVERREACH BY SEEKING REMEDIES NOWHERE CONTEMPLATED BY THE SETTLEMENT.

Plaintiffs continue to seek remedies—other than more monitoring under paragraph 41—to which they are not entitled, despite two court orders rejecting the availability of such relief. Even in this Court's first extension order, which Plaintiffs tout as "law of the case," the Court rejected Plaintiffs' argument that they were entitled to other remedies beyond one more year of settlement monitoring. (ECF No. 1440 at 56 n.10 (holding that "Plaintiffs have not shown that the Court can take any action under paragraph 41 other than to extend the settlement agreement").)

This Court should not be sidetracked by Plaintiffs' misdirection. A court's authority to grant relief under a settlement is defined by the agreement's terms. *See William Keeton Enters., Inc. v. A All Am. Strip-O-Rama, Inc.*, 74 F.3d 178, 182 (9th Cir. 1996) (reversing injunction because it fell outside the scope of the parties' agreement). Here, Plaintiffs seek to extend the Court's jurisdiction under paragraph 41, which provides for one remedy: up to twelve months of more monitoring. That is all. Plaintiffs cannot use this motion to modify the Agreement.[9]

CONCLUSION

It is time to terminate this case.

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[9] With one sentence, Plaintiffs ask this Court to modify the Agreement under Federal Rule of Civil Procedure 60(a). Plaintiffs have not met their evidentiary burden under Rule 60(a), nor filed a properly noticed and supported motion. The Court should reject Plaintiffs' latest effort to rewrite the Agreement.

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3 Dated: September 8, 2021

Respectfully submitted,

4 ROB BONTA
Attorney General of California

5 /s/ Adriano Hrvatin

6 ADRIANO HRVATIN
7 Supervising Deputy Attorney General
Attorneys for Defendants

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