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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EUREKA 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' SECOND MOTION FOR EXTENSION OF SETTLEMENT AGREEMENT BASED ON SYSTEMIC DUE PROCESS VIOLATIONS** Date: February 2, 2021 Time: 11:00 a.m. Place: Eureka-McKinleyville Courthouse Judge: Honorable Robert M. Illman

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 February 2, 2020 at 11:00 a.m., before the Honorable Robert M. Illman, in the Eureka-McKinleyville Courthouse, located at 3140 Boeing Avenue, McKinleyville, California, or on another date or at another location convenient to the Court and the parties, Plaintiffs will move the Court pursuant to Paragraph 41 of the Settlement Agreement for an order extending that Agreement and the Court's Jurisdiction over this matter for one year, based on Plaintiffs' demonstration by a preponderance of the evidence of continuing, systemic violations of the Due Process Clause of the United States Constitution, related to the *Ashker v. Governor* Second Amended Complaint and Settlement Agreement. This motion 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

In January of 2019, this Court found that the California Department of Corrections and Rehabilitation (CDCR) was systemically violating the due process rights of the *Ashker* class and ordered a one-year extension of monitoring. Order, ECF No. 1122 ("Ext. Order") at 27. The *Ashker v. Governor* Settlement Agreement promised release from solitary confinement of thousands of men held for alleged affiliation with a prison gang. But after an initial two-year monitoring period, the Court found that CDCR was systemically failing to accurately disclose confidential information used against the class, "[t]ime 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, and resulting in their return to secured housing units – effectively frustrating the purpose of the Settlement Agreement." *Id.* at 24.

CDCR had over a year to address this far-reaching constitutional violation, but it took no meaningful steps to do so. As a result, the constitutional deprivations continue. In the second monitoring period Plaintiffs gathered and analyzed new information to establish the breadth and depth of California's failed confidential informant system. As shown below, in more than one half of the STG-related Rule Violation Reports (RVR)s used to return class members to Security Housing Units ("SHU") in 2019 and 2020, confidential information was fabricated or inaccurately disclosed, frequently to appear more damning than justified. And the steps necessary to ensure reliability—independent review by the hearing officer, meaningful corroboration, and the opportunity to ask relevant questions during hearings—were ignored.

New violations have emerged as well. Below, Plaintiffs provide evidence of class members subjected to serial and prolonged stays in administrative segregation ("ASU"—another form of solitary) based on confidential information that never actually leads to an RVR or a guilty finding. Many men in this category are retained in ASU for alleged safety concerns after investigation, extending their time in solitary even further.

And for the first time, Plaintiffs were able to pierce the secrecy of CDCR's confidential informant interview process. We present below evidence that just as gang investigators fabricate and exaggerate confidential information when drafting confidential disclosure forms, these same

1 investigators fabricate and exaggerate the confidential source's words when drafting the confidential
2 memorandum meant to summarize the interview. CDCR's use of confidential information is a high-
3 stakes game of telephone, with gang investigators spinning the evidence at every step while prisoners
4 and hearing officers wait in silence for the game to end.

5 CDCR not only fails to properly analyze whether the resulting confidential information is
6 reliable; its system is set up to produce information that is useful to CDCR without regard for truth or
7 reliability. Rather, men are pressured to debrief and provide information in exchange for favors and
8 better treatment, obviously false information is treated as reliable, and no steps are taken to ensure
9 lying informants will not be empowered to peddle more lies in the future.

10 In January of 2019, this Court also found a second systemic due process violation. The *Ashker*
11 Complaint described a *de facto* bar on parole for validated prisoners. The Settlement's guaranty of
12 release to a general population unit should have alleviated that bar. Instead CDCR retained its
13 unreliable validations—themselves accomplished in violation of due process—and by transmitting
14 these validations to the Board of Parole Hearings *as if they were reliable indicators of gang* activity,
15 CDCR biased the parole system against the class, denying them a meaningful opportunity to be heard
16 by the parole board.

17 Again, CDCR took no steps to rectify this problem, and again, Plaintiffs' monitoring found
18 overwhelming evidence that it continues. During the second monitoring period, Plaintiffs also
19 discovered that numerous class members have been confronted at their parole hearings with a slew of
20 outdated confidential information. These flawed confidential materials, some of which are more than a
21 decade old, are not revealed to the prisoners until just before their parole hearings and are then used by
22 commissioners to deny parole. By keeping all this stale and untested confidential information
23 effectively a secret for years and only giving cursory and clearly inadequate notice to the prisoners just
24 before the hearings, CDCR provides class members no realistic way to challenge the information,
25 thereby violating due process.

26 Finally, in the first monitoring period, Plaintiffs also challenged CDCR's procedures for
27 reviewing men for retention in the Restricted Custody General Population Unit ("RCGP"). In its
28 January 2019 Order, the Court agreed that the unusual and onerous conditions of the RCGP give rise to

a liberty interest. Below, Plaintiffs provide the Court with updated information confirming the continued existence of a liberty interest in avoiding RCGP placement, along with detailed case studies (found lacking from Plaintiffs' first extension motion) showing how CDCR's refusal to recognize new evidence refuting safety concerns turns RCGP periodic review into a sham hearing and denies Plaintiffs meaningful notice of what they need to do to get out.

Between 2017, when Plaintiffs first provided evidence of these systemic violations, and today, the situation has only gotten worse—men are languishing in solitary for RVRs secured with fabricated evidence, they are trapped in RCGP with no hope of release, and at a time when California should be emptying its prisons of elders, class members are being denied parole over and over based on constitutionally infirm validations and undisclosed confidential information. Rectifying these far-reaching violations requires another year of the Court's jurisdiction and Plaintiffs' monitoring, as well as a remedy for CDCR's unconstitutional actions.

I. CDCR'S FABRICATION AND INADEQUATE DISCLOSURE OF CONFIDENTIAL INFORMATION VIOLATES DUE PROCESS.

During the second monitoring period, Plaintiffs reviewed all SHU-eligible RVRs with an STG nexus which rely on confidential information. Defendants produced 151 such RVRs and underlying confidential material, each of which led to a prisoner being returned to solitary confinement. Declaration of Rachel Meeropol in Support of Pltfs' Second Mot. to Ext. the SA ("Meeropol Decl.") at ¶ 2. These documents show that CDCR has not resolved the systemic due process violations uncovered in Plaintiffs' first extension motion. Of the 151 RVR packets produced to Plaintiffs, 82 of them—*more than half* of the sample—contain significant due process problems. *Id.*

It is not surprising that the constitutional violations the Court recognized during the first monitoring period have continued, as CDCR does not appear to have made any meaningful changes in its approach to confidential information in the nearly three years since Plaintiffs provided CDCR with overwhelming evidence of this problem. Indeed, in response to Plaintiffs' request for information about any changes CDCR made to improve its confidential information practices, CDCR identified five steps (*see* Meeropol Decl., Ex. A (4.30.20 Email)), four of which are wholly irrelevant. The first step—trainings—was mandated by the Settlement Agreement ("SA") to occur in the first monitoring

period, *before* the initial extension motion. *See* SA ¶ 35. Thus, it clearly did not prevent due process violations. The second step identified by CDCR—a July 2019 memorandum to the field addressing serious rules violations reports with a nexus to a Security Threat Group that relied on confidential information—says *absolutely nothing about confidential information;* it's solely about ensuring any STG nexus is supported, as is step three—a newly created review process. *See* Meeropol Decl., Ex. A (4.30.20 Email); Ex. B (July 2019 Memo).

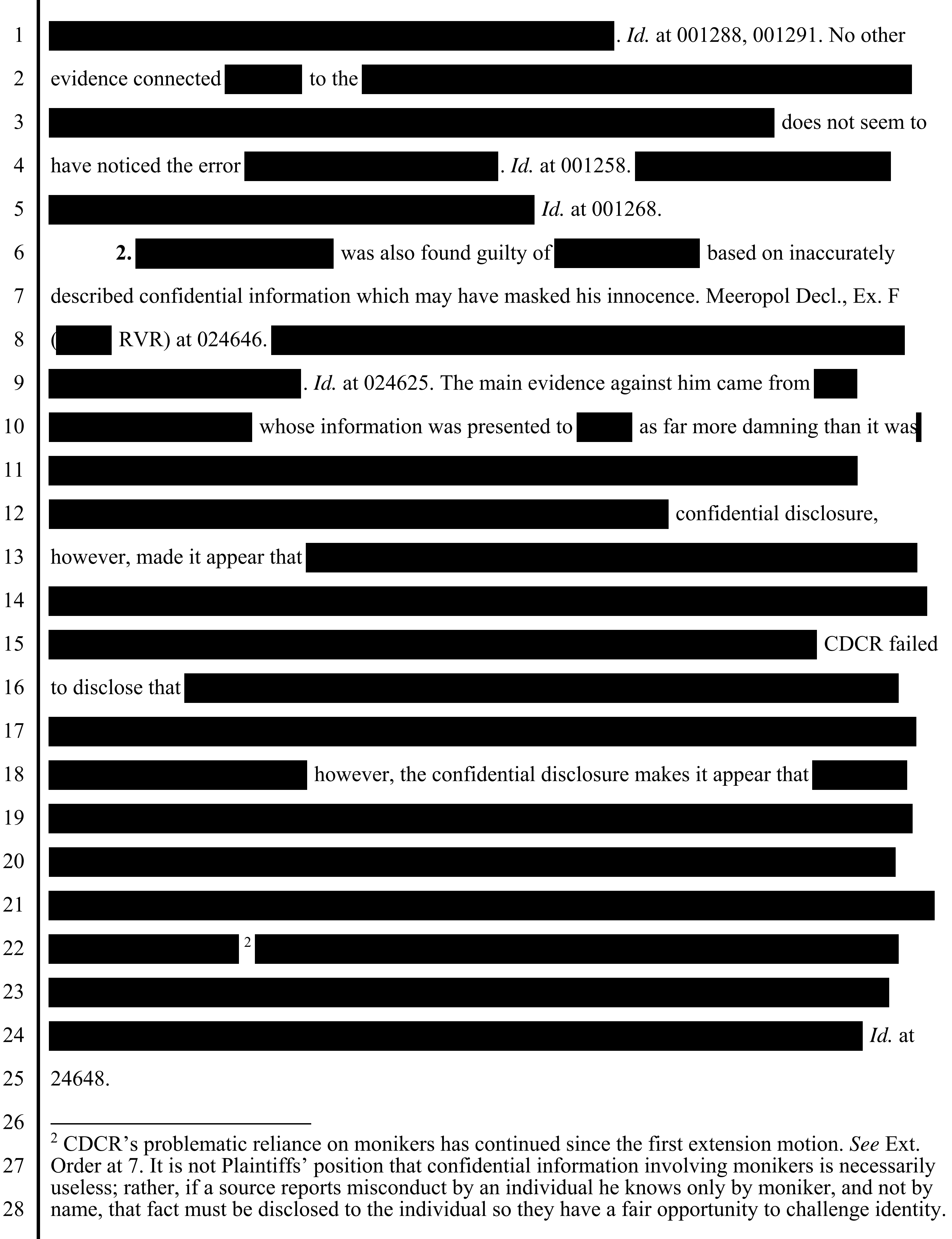
CDCR also claims to have implemented new confidential information trainings for gang investigators, but these do not appear to have occurred.[1] Thus, it seems like the *single* step CDCR may have taken in response to overwhelming evidence and a judicial finding of systemic constitutional violations is adding "an additional layer of review at headquarters to ensure the proper disclosure of confidential information in connection with rules violations." *See* Meeropol Decl., Ex. A (4.30.20 Email). Without more information on this new review, its utility is unclear; regardless, the following examples prove that it is nowhere near enough to remedy CDCR's continuing systemic violation of the constitution.

A. CDCR Systemically Fabricates and Inaccurately Discloses Confidential Information to Place Class Member in Solitary Confinement for Rule Violations.

The evidence shows that CDCR systemically uses fabricated and inadequately disclosed confidential information to find class members guilty of rule violations and return them to solitary.

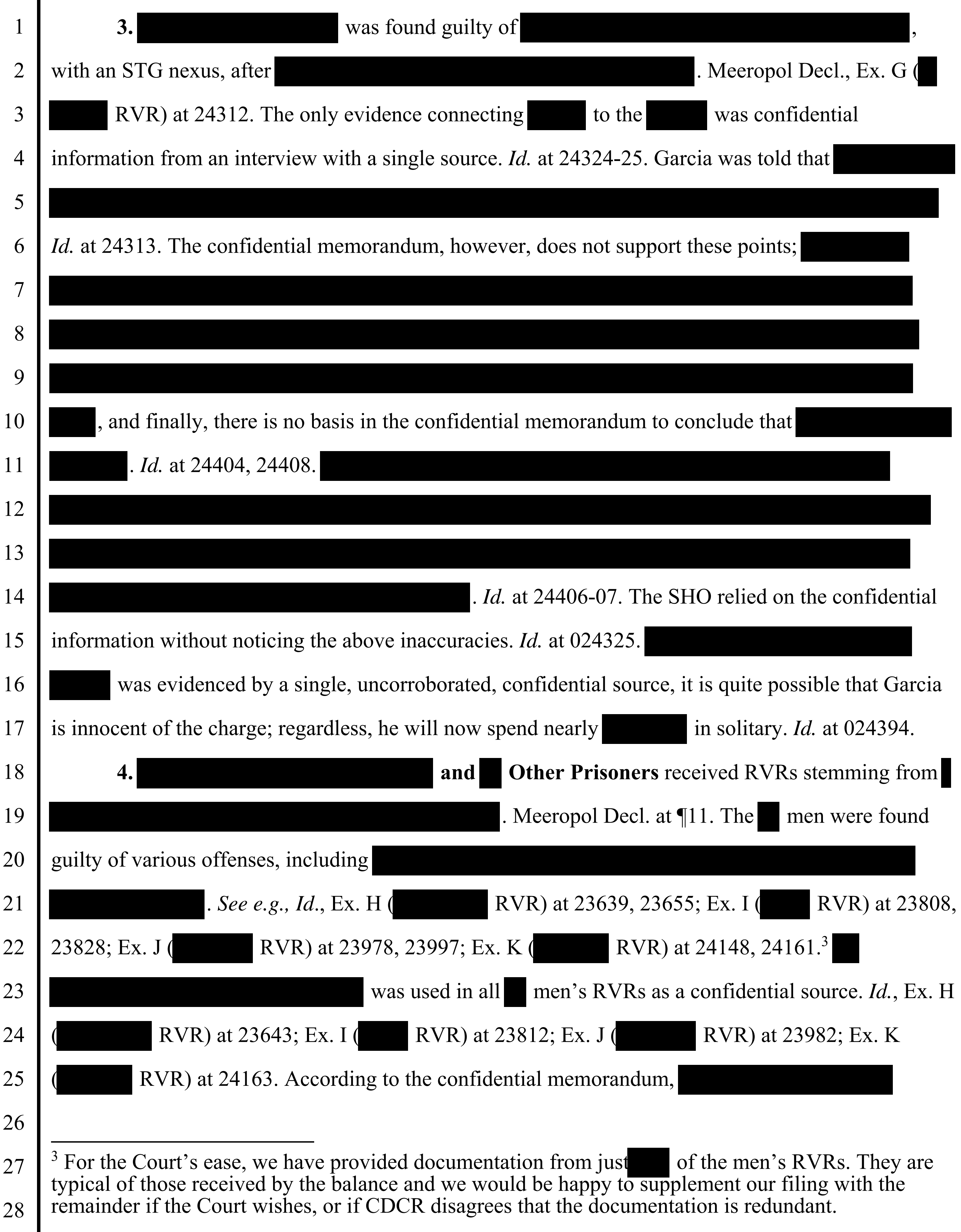
1. [redacted] for example, was found guilty of [redacted] [redacted] with an STG nexus. Meeropol Decl., Ex. E ([redacted] RVR) at 001258. [redacted] was informed that [redacted] [redacted] *Id.* at 001286. [redacted] if the reporting employee added that information; the reporting employee responded that [redacted] [redacted]. *Id.* at 001248. This is a fabrication: the confidential memorandum shows that [redacted]

[1] Plaintiffs deposed two gang investigators in July 2020, who both testified that [redacted] [redacted]. Meeropol Decl., Ex. C ([redacted] Dep.) at 13; Ex. D ([redacted] Dep.) at 12- 13.



1 . *Id.* at 001288, 001291. No other
2 evidence connected to the
3 does not seem to
4 have noticed the error . *Id.* at 001258.
5 *Id.* at 001268.
6 **2.** was also found guilty of based on inaccurately
7 described confidential information which may have masked his innocence. Meeropol Decl., Ex. F
8 (RVR) at 024646.
9 . *Id.* at 024625. The main evidence against him came from
10 whose information was presented to as far more damning than it was
11
12 confidential disclosure,
13 however, made it appear that
14
15 CDCR failed
16 to disclose that
17
18 however, the confidential disclosure makes it appear that
19
20
21
22 [2]
23
24 *Id.* at
25 24648.
26
27
28

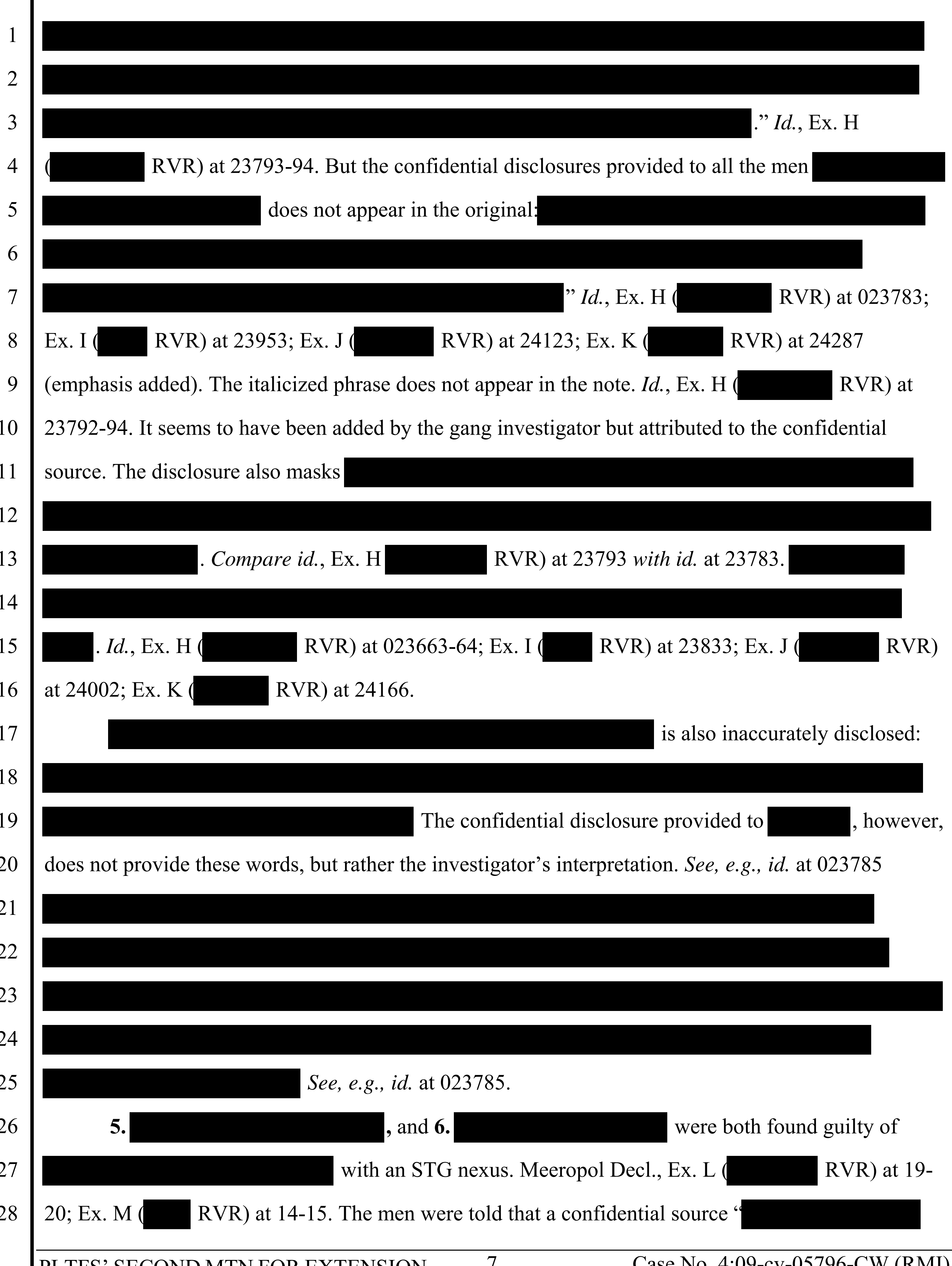
[2] CDCR's problematic reliance on monikers has continued since the first extension motion. *See* Ext. Order at 7. It is not Plaintiffs' position that confidential information involving monikers is necessarily useless; rather, if a source reports misconduct by an individual he knows only by moniker, and not by name, that fact must be disclosed to the individual so they have a fair opportunity to challenge identity.



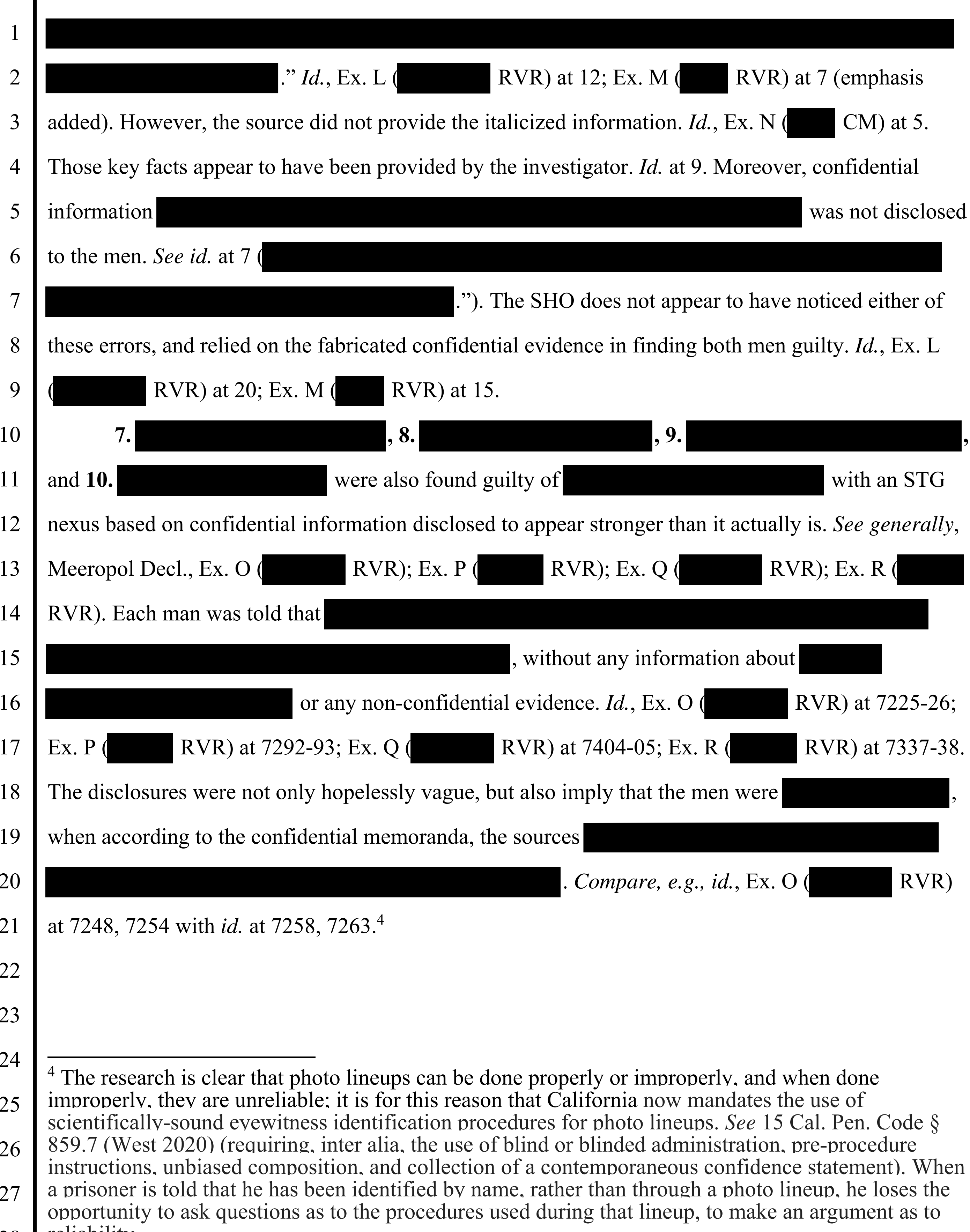
3. was found guilty of , with an STG nexus, after . Meeropol Decl., Ex. G (RVR) at 24312. The only evidence connecting to the was confidential information from an interview with a single source. *Id.* at 24324-25. Garcia was told that *Id.* at 24313. The confidential memorandum, however, does not support these points; , and finally, there is no basis in the confidential memorandum to conclude that . *Id.* at 24404, 24408. . *Id.* at 24406-07. The SHO relied on the confidential information without noticing the above inaccuracies. *Id.* at 024325. was evidenced by a single, uncorroborated, confidential source, it is quite possible that Garcia is innocent of the charge; regardless, he will now spend nearly in solitary. *Id.* at 024394.

4. **and** **Other Prisoners** received RVRs stemming from . Meeropol Decl. at ¶11. The men were found guilty of various offenses, including . *See e.g.*, *Id.*, Ex. H (RVR) at 23639, 23655; Ex. I (RVR) at 23808, 23828; Ex. J (RVR) at 23978, 23997; Ex. K (RVR) at 24148, 24161.[3] was used in all men's RVRs as a confidential source. *Id.*, Ex. H (RVR) at 23643; Ex. I (RVR) at 23812; Ex. J (RVR) at 23982; Ex. K (RVR) at 24163. According to the confidential memorandum,

[3] For the Court's ease, we have provided documentation from just of the men's RVRs. They are typical of those received by the balance and we would be happy to supplement our filing with the remainder if the Court wishes, or if CDCR disagrees that the documentation is redundant.



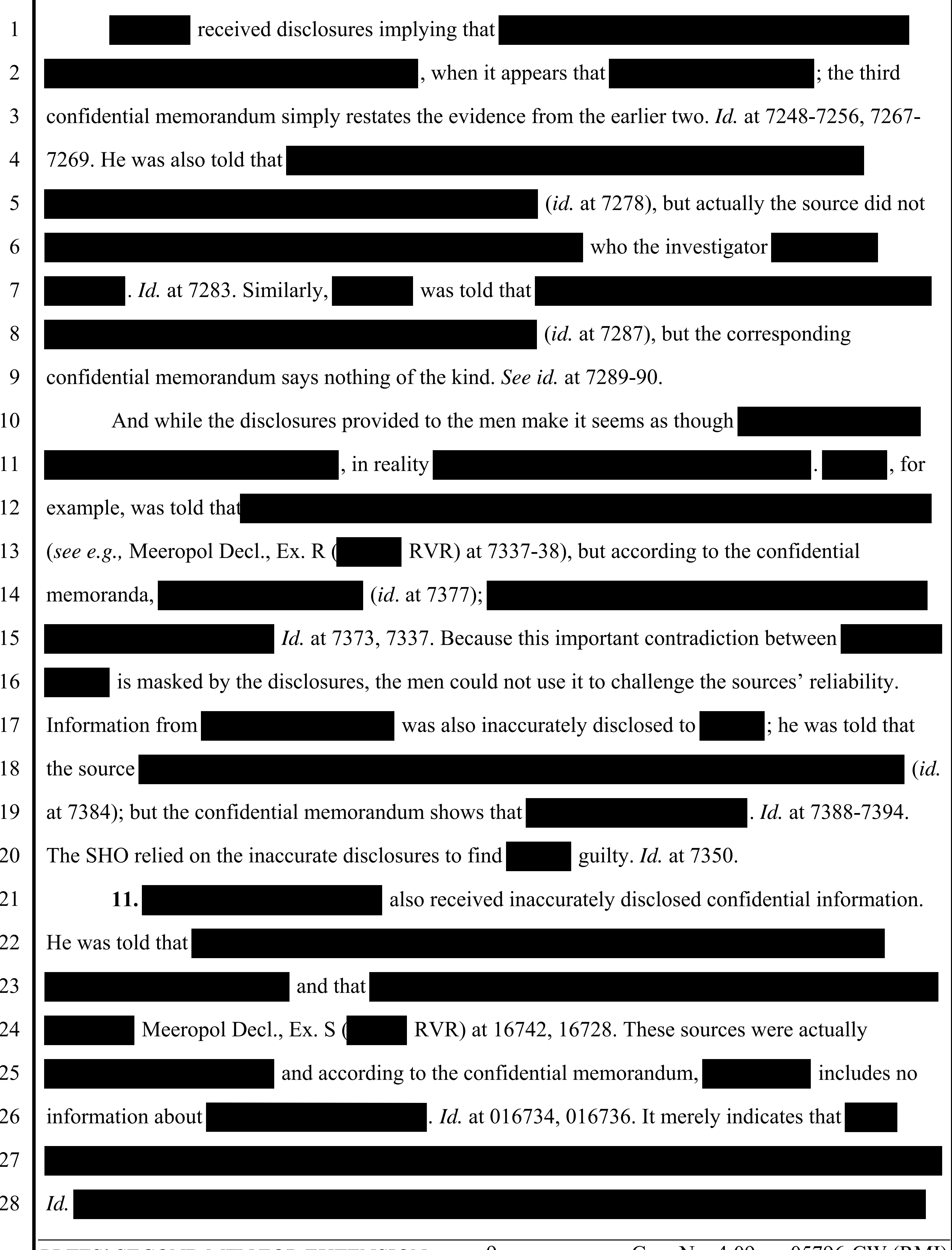
1
2
3 ." *Id.*, Ex. H
4 (RVR) at 23793-94. But the confidential disclosures provided to all the men
5 does not appear in the original:
6
7 " *Id.*, Ex. H (RVR) at 023783;
8 Ex. I (RVR) at 23953; Ex. J (RVR) at 24123; Ex. K (RVR) at 24287
9 (emphasis added). The italicized phrase does not appear in the note. *Id.*, Ex. H (RVR) at
10 23792-94. It seems to have been added by the gang investigator but attributed to the confidential
11 source. The disclosure also masks
12
13 . *Compare id.*, Ex. H RVR) at 23793 *with id.* at 23783.
14
15 . *Id.*, Ex. H (RVR) at 023663-64; Ex. I (RVR) at 23833; Ex. J (RVR)
16 at 24002; Ex. K (RVR) at 24166.
17 is also inaccurately disclosed:
18
19 The confidential disclosure provided to , however,
20 does not provide these words, but rather the investigator's interpretation. *See, e.g., id.* at 023785
21
22
23
24
25 *See, e.g., id.* at 023785.
26 **5.** , and **6.** were both found guilty of
27 with an STG nexus. Meeropol Decl., Ex. L (RVR) at 19-
28 20; Ex. M (RVR) at 14-15. The men were told that a confidential source "



." *Id.*, Ex. L (RVR) at 12; Ex. M (RVR) at 7 (emphasis added). However, the source did not provide the italicized information. *Id.*, Ex. N (CM) at 5. Those key facts appear to have been provided by the investigator. *Id.* at 9. Moreover, confidential information was not disclosed to the men. *See id.* at 7 (."). The SHO does not appear to have noticed either of these errors, and relied on the fabricated confidential evidence in finding both men guilty. *Id.*, Ex. L (RVR) at 20; Ex. M (RVR) at 15.

7. , **8.** , **9.** , and **10.** were also found guilty of with an STG nexus based on confidential information disclosed to appear stronger than it actually is. *See generally*, Meeropol Decl., Ex. O (RVR); Ex. P (RVR); Ex. Q (RVR); Ex. R (RVR). Each man was told that , without any information about or any non-confidential evidence. *Id.*, Ex. O (RVR) at 7225-26; Ex. P (RVR) at 7292-93; Ex. Q (RVR) at 7404-05; Ex. R (RVR) at 7337-38. The disclosures were not only hopelessly vague, but also imply that the men were , when according to the confidential memoranda, the sources . *Compare, e.g., id.*, Ex. O (RVR) at 7248, 7254 with *id.* at 7258, 7263.[4]

[4] The research is clear that photo lineups can be done properly or improperly, and when done improperly, they are unreliable; it is for this reason that California now mandates the use of scientifically-sound eyewitness identification procedures for photo lineups. *See* 15 Cal. Pen. Code § 859.7 (West 2020) (requiring, inter alia, the use of blind or blinded administration, pre-procedure instructions, unbiased composition, and collection of a contemporaneous confidence statement). When a prisoner is told that he has been identified by name, rather than through a photo lineup, he loses the opportunity to ask questions as to the procedures used during that lineup, to make an argument as to reliability.



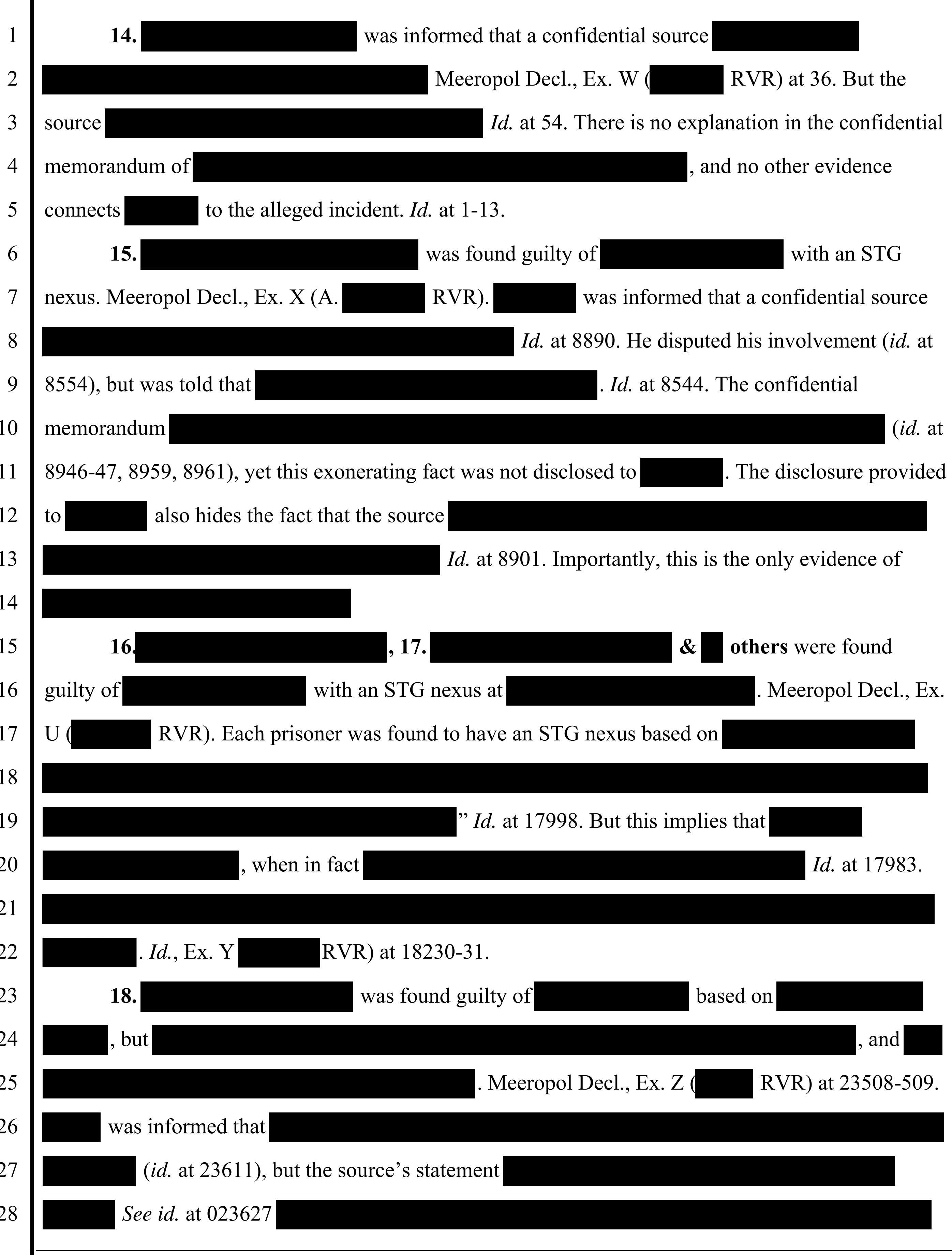
1 received disclosures implying that
2 , when it appears that ; the third
3 confidential memorandum simply restates the evidence from the earlier two. *Id.* at 7248-7256, 7267-
4 7269. He was also told that
5 (*id.* at 7278), but actually the source did not
6 who the investigator
7 . *Id.* at 7283. Similarly, was told that
8 (*id.* at 7287), but the corresponding
9 confidential memorandum says nothing of the kind. *See id.* at 7289-90.
10 And while the disclosures provided to the men make it seems as though
11 , in reality . , for
12 example, was told that
13 (*see e.g.,* Meeropol Decl., Ex. R (RVR) at 7337-38), but according to the confidential
14 memoranda, (*id.* at 7377);
15 *Id.* at 7373, 7337. Because this important contradiction between
16 is masked by the disclosures, the men could not use it to challenge the sources' reliability.
17 Information from was also inaccurately disclosed to ; he was told that
18 the source (*id.*
19 at 7384); but the confidential memorandum shows that . *Id.* at 7388-7394.
20 The SHO relied on the inaccurate disclosures to find guilty. *Id.* at 7350.
21 **11.** also received inaccurately disclosed confidential information.
22 He was told that
23 and that
24 Meeropol Decl., Ex. S (RVR) at 16742, 16728. These sources were actually
25 and according to the confidential memorandum, includes no
26 information about . *Id.* at 016734, 016736. It merely indicates that
27
28 *Id.*

1 . *Id.* at 016774-75. In contrast to the confidential disclosure, nothing in the confidential
2 memorandum indicates that *Id.* at 16733-
3 16782. The SHO relied on the inaccurate information in the disclosures to find guilty. *Id.* at
4 16711.

5 **12.** was found guilty of , and the STG
6 nexus was based entirely on inaccurately disclosed confidential information. Meeropol Decl., Ex. T
7 (RVR). was told that
8
9
10 *Id.* at 21905. The corresponding confidential
11 memorandum includes *none* of these statements. *Id.* at 22045. The SHO relied on this fabricated
12 confidential information to find an STG nexus. *Id.* at 21905.

13 The RVR also inaccurately reports . *Compare id.* at 21892 (referring to
14 ") with
15 *id.* at 22042 ("
16
17 ""). Even more problematically, another prisoner— —
18
19 *See Id.*, Ex. U (RVR) at 18218.

20 Similarly, **13.** RVR failed to disclose that
21 Meeropol Decl., Ex. V (RVR). was told that
22 (*id.* at 25), but in reality the
23 confidential source *Id.* at 46.
24 (*id.* at 48), CDCR also inaccurately disclosed
25 this fact to . *Id.* at 26. Because did not know that the confidential information
26 allegedly about him was actually , he had no
27 opportunity to challenge identity.
28



14. was informed that a confidential source Meeropol Decl., Ex. W (RVR) at 36. But the source *Id.* at 54. There is no explanation in the confidential memorandum of , and no other evidence connects to the alleged incident. *Id.* at 1-13.

15. was found guilty of with an STG nexus. Meeropol Decl., Ex. X (A. RVR). was informed that a confidential source *Id.* at 8890. He disputed his involvement (*id.* at 8554), but was told that . *Id.* at 8544. The confidential memorandum (*id.* at 8946-47, 8959, 8961), yet this exonerating fact was not disclosed to . The disclosure provided to also hides the fact that the source *Id.* at 8901. Importantly, this is the only evidence of

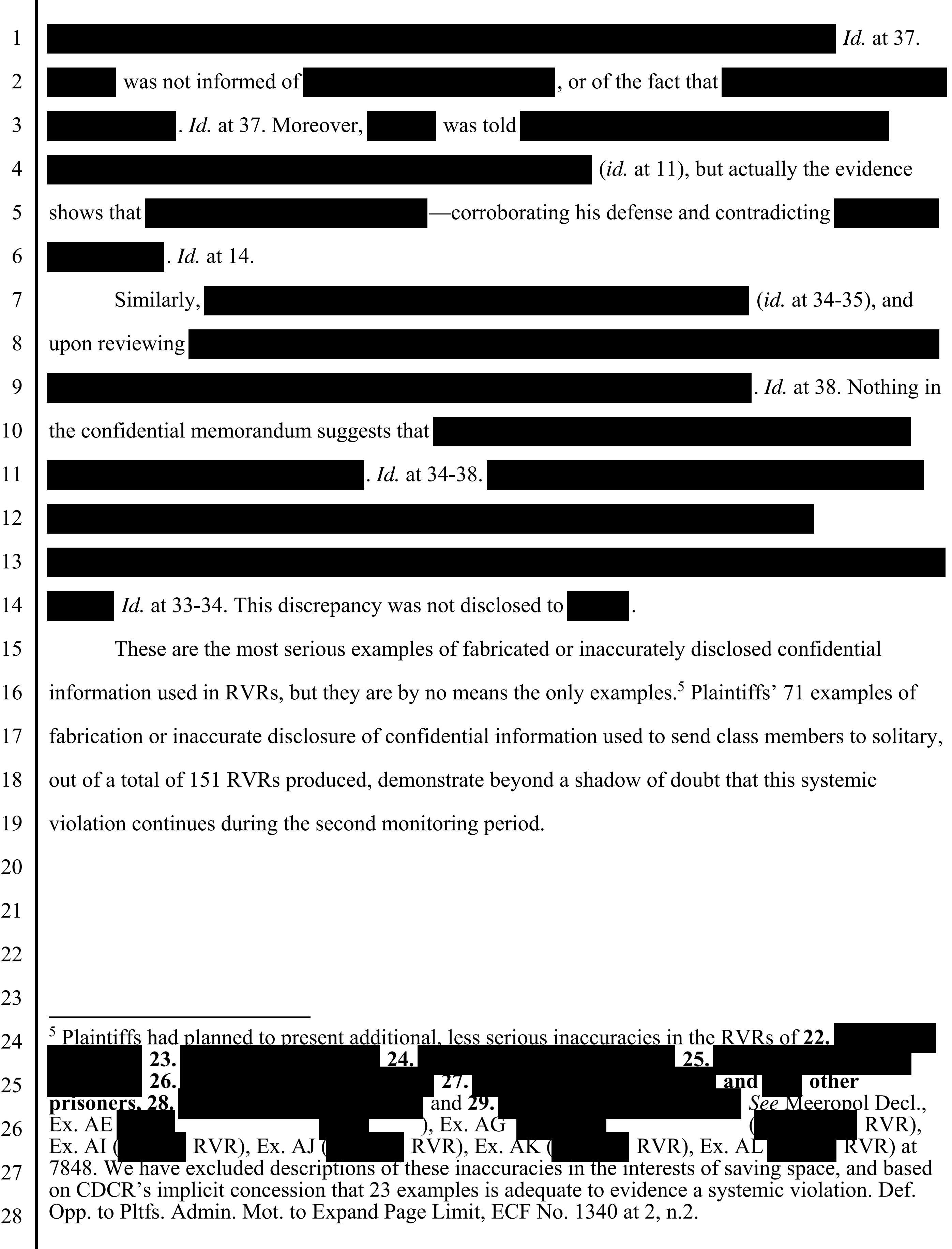
16. , **17.** **&** **others** were found guilty of with an STG nexus at . Meeropol Decl., Ex. U (RVR). Each prisoner was found to have an STG nexus based on ” *Id.* at 17998. But this implies that , when in fact *Id.* at 17983. . *Id.*, Ex. Y RVR) at 18230-31.

18. was found guilty of based on , but , and . Meeropol Decl., Ex. Z (RVR) at 23508-509. was informed that (*id.* at 23611), but the source's statement *See id.* at 023627

The SHO relied on the confidential information disclosure forms, rather than reviewing the confidential information itself, so he did not catch this erroneous description. *Id.* at 23531. When interviewed about the (*id.* at 23630), yet this was not disclosed to . And while a was documented in a later confidential memorandum, CDCR has acknowledged that the *SHO did not even bother to review that memo*. *See id.* at 23630-31; *Id.*, Ex. AA (7.30.20 ltr).

19. **.** Even where Plaintiffs have previously pointed out to CDCR *specific* failures to accurately disclose confidential information, that problem persists. For example, Plaintiffs showed in the first extension motion that exculpatory confidential information—indicating that —should have been disclosed to prisoners facing RVRs. *See* Mot. for Extension of Settlement Agreement, Nov. 20, 2017 (filed under seal) at 16. CDCR argued this failure was harmless, because the men highlighted in Plaintiffs' first extension motion ended up being found guilty of . *See* Defendants' Opposition to Plaintiffs' Motion to Extend Jurisdiction, March 23, 2018 (filed under seal) at 16. But was found guilty of , based on the same confidential information, during the second monitoring period, and CDCR *once again failed to disclose the exonerating information*. Meeropol Decl., Ex. AB (RVR) at 26-37, 46, 62. The RVR thus demonstrates CDCR's total failure to remedy the violations set forth in this Court's January 2019 extension order.

20. and **21.** received confidential disclosures informing them that (Meeropol Decl., Ex. AC (RVR) at 11; Ex. AD (RVR) at 27), but the confidential memorandum shows that this was the conclusion of the gang investigator, not the source. . *Id.*, Ex. AC (Cabrera RVR) at 34-37. *Id.* at 34-35.



Id. at 37. was not informed of , or of the fact that . *Id.* at 37. Moreover, was told (*id.* at 11), but actually the evidence shows that —corroborating his defense and contradicting . *Id.* at 14.

Similarly, (*id.* at 34-35), and upon reviewing . *Id.* at 38. Nothing in the confidential memorandum suggests that . *Id.* at 34-38. *Id.* at 33-34. This discrepancy was not disclosed to .

These are the most serious examples of fabricated or inaccurately disclosed confidential information used in RVRs, but they are by no means the only examples.[5] Plaintiffs' 71 examples of fabrication or inaccurate disclosure of confidential information used to send class members to solitary, out of a total of 151 RVRs produced, demonstrate beyond a shadow of doubt that this systemic violation continues during the second monitoring period.

[5] Plaintiffs had planned to present additional, less serious inaccuracies in the RVRs of **22.** **23.** **24.** **25.** **26.** **27.** **and** **other prisoners, 28.** and **29.** *See* Meeropol Decl., Ex. AE), Ex. AG (RVR), Ex. AI (RVR), Ex. AJ (RVR), Ex. AK (RVR), Ex. AL RVR) at 7848. We have excluded descriptions of these inaccuracies in the interests of saving space, and based on CDCR's implicit concession that 23 examples is adequate to evidence a systemic violation. Def. Opp. to Pltfs. Admin. Mot. to Expand Page Limit, ECF No. 1340 at 2, n.2.

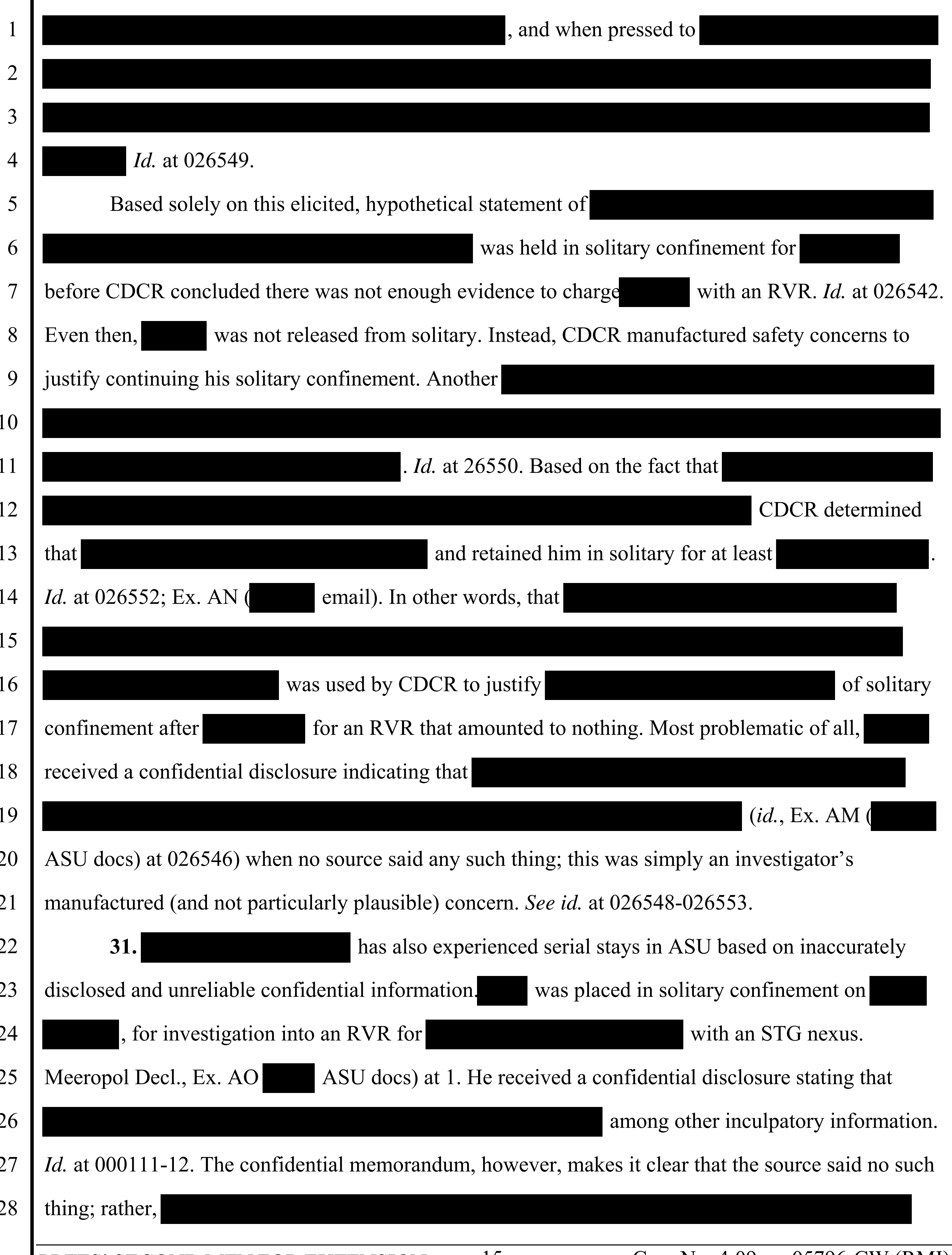
B. CDCR Systemically Places Prisoners in ASU for Investigation Based on Fabricated and Inaccurately Disclosed Confidential Information.

Along with evidence of fabricated and inaccurate disclosures used to find class members guilty of SHU-eligible RVRs, Plaintiffs provided evidence during the first monitoring period of individuals held in administrative segregation based on similarly faulty confidential disclosures who were awaiting RVRs, or waiting for their RVRs to be adjudicated. *See, e.g.,* Pltfs. Mot. for Ext., at 17. To determine the breadth of misuse of confidential information pre-RVR, Plaintiffs negotiated in the second monitoring period for the production of documents relevant to validated prisoners who were housed in an Administrative Segregation Unit (ASU) for over 60 days pending an investigation into a SHU-eligible offense with a nexus to a Security Threat Group that relies on confidential information. ECF No. 1223, ¶ 11. The parties' compromise required Plaintiffs to identify individuals who fit all these categories.[6] Plaintiffs identified 16 candidates for this production during the one-year period, but only five met all the criteria. *See* Meeropol Decl. at ¶ 3.

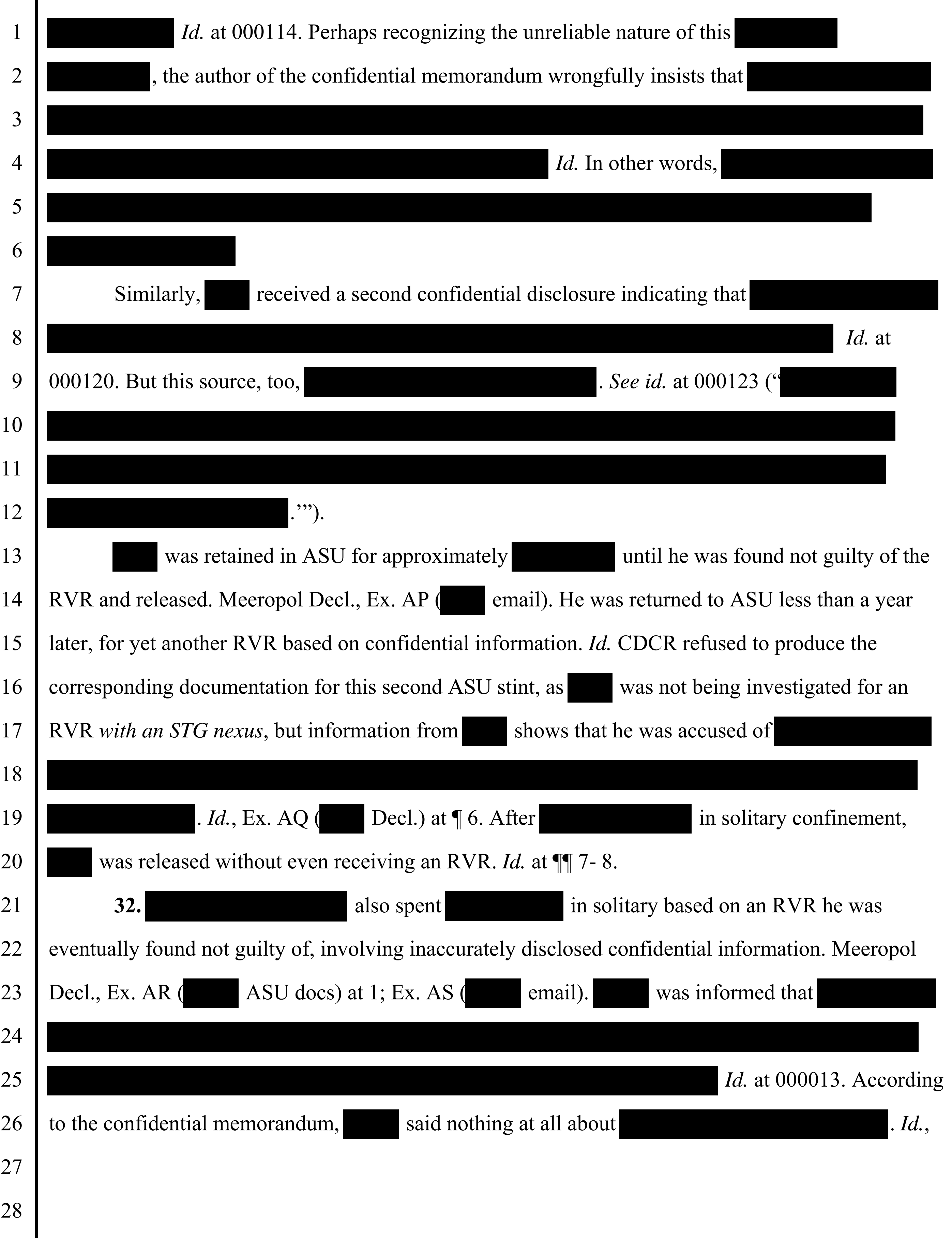
With respect to the five packets of documents CDCR did produce, Plaintiffs identified substantial issues with CDCR's use of confidential information for *all five* individuals. This 100% error rate indicates a systemic and far-reaching problem in the way CDCR utilizes confidential information to place prisoners in isolation before charging them with an RVR.

30. [REDACTED], for example, was placed in ASU on [REDACTED], pending investigation into [REDACTED] with an STG nexus. Meeropol Decl., Ex. AM ([REDACTED] ASU docs) at 026538. [REDACTED] ASU Placement Notice stated that [REDACTED] *Id.* However, the confidential memorandum documenting the conversation makes it clear that [REDACTED] said no such thing. Rather, it shows that [REDACTED] was interviewed by a CDCR staff member about [REDACTED]

[6] Plaintiffs initially sought information about *all* class members held in prolonged administrative segregation for investigation based on confidential information, but CDCR refused. Undoubtedly many more prisoners than Plaintiffs were able to identify have experienced this problem. [REDACTED], for example, described below, did not meet all the criteria for production, but Plaintiffs were able to show the misuse of confidential information just from the documents he received.



1 , and when pressed to
2
3
4 *Id.* at 026549.
5 Based solely on this elicited, hypothetical statement of
6 was held in solitary confinement for
7 before CDCR concluded there was not enough evidence to charge with an RVR. *Id.* at 026542.
8 Even then, was not released from solitary. Instead, CDCR manufactured safety concerns to
9 justify continuing his solitary confinement. Another
10
11 . *Id.* at 26550. Based on the fact that
12 CDCR determined
13 that and retained him in solitary for at least .
14 *Id.* at 026552; Ex. AN (email). In other words, that
15
16 was used by CDCR to justify of solitary
17 confinement after for an RVR that amounted to nothing. Most problematic of all,
18 received a confidential disclosure indicating that
19 (*id.*, Ex. AM (
20 ASU docs) at 026546) when no source said any such thing; this was simply an investigator's
21 manufactured (and not particularly plausible) concern. *See id.* at 026548-026553.
22 **31.** has also experienced serial stays in ASU based on inaccurately
23 disclosed and unreliable confidential information. was placed in solitary confinement on
24 , for investigation into an RVR for with an STG nexus.
25 Meeropol Decl., Ex. AO ASU docs) at 1. He received a confidential disclosure stating that
26 among other inculpatory information.
27 *Id.* at 000111-12. The confidential memorandum, however, makes it clear that the source said no such
28 thing; rather,

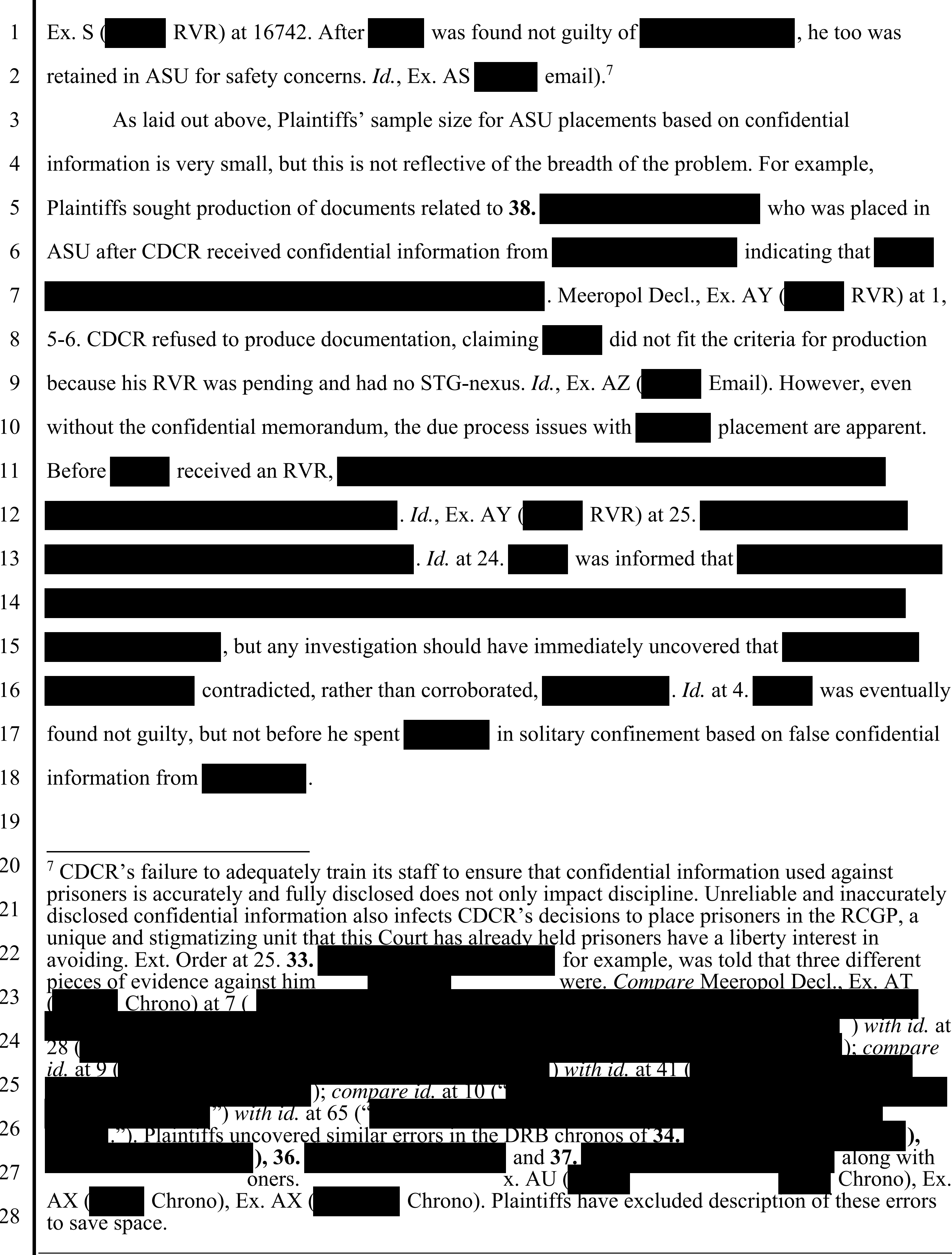


Id. at 000114. Perhaps recognizing the unreliable nature of this , the author of the confidential memorandum wrongfully insists that *Id.* In other words,

Similarly, received a second confidential disclosure indicating that *Id.* at 000120. But this source, too, . *See id.* at 000123 (" .'").

was retained in ASU for approximately until he was found not guilty of the RVR and released. Meeropol Decl., Ex. AP (email). He was returned to ASU less than a year later, for yet another RVR based on confidential information. *Id.* CDCR refused to produce the corresponding documentation for this second ASU stint, as was not being investigated for an RVR *with an STG nexus*, but information from shows that he was accused of . *Id.*, Ex. AQ (Decl.) at ¶ 6. After in solitary confinement, was released without even receiving an RVR. *Id.* at ¶¶ 7- 8.

32. also spent in solitary based on an RVR he was eventually found not guilty of, involving inaccurately disclosed confidential information. Meeropol Decl., Ex. AR (ASU docs) at 1; Ex. AS (email). was informed that *Id.* at 000013. According to the confidential memorandum, said nothing at all about . *Id.*,



Ex. S (RVR) at 16742. After was found not guilty of , he too was retained in ASU for safety concerns. *Id.*, Ex. AS email).[7]

As laid out above, Plaintiffs' sample size for ASU placements based on confidential information is very small, but this is not reflective of the breadth of the problem. For example, Plaintiffs sought production of documents related to **38.** who was placed in ASU after CDCR received confidential information from indicating that . Meeropol Decl., Ex. AY (RVR) at 1, 5-6. CDCR refused to produce documentation, claiming did not fit the criteria for production because his RVR was pending and had no STG-nexus. *Id.*, Ex. AZ (Email). However, even without the confidential memorandum, the due process issues with placement are apparent. Before received an RVR, . *Id.*, Ex. AY (RVR) at 25. . *Id.* at 24. was informed that , but any investigation should have immediately uncovered that contradicted, rather than corroborated, . *Id.* at 4. was eventually found not guilty, but not before he spent in solitary confinement based on false confidential information from .

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[7] CDCR's failure to adequately train its staff to ensure that confidential information used against prisoners is accurately and fully disclosed does not only impact discipline. Unreliable and inaccurately disclosed confidential information also infects CDCR's decisions to place prisoners in the RCGP, a unique and stigmatizing unit that this Court has already held prisoners have a liberty interest in avoiding. Ext. Order at 25. **33.** for example, was told that three different pieces of evidence against him were. *Compare* Meeropol Decl., Ex. AT (Chrono) at 7 ( ) *with id.* at 28 ( ); *compare id.* at 9 ( ) *with id.* at 41 ( ); *compare id.* at 10 (" ") *with id.* at 65 (" ."). Plaintiffs uncovered similar errors in the DRB chronos of **34.** **),** **), 36.** and **37.** along with oners. x. AU (Chrono), Ex. AX (Chrono), Ex. AX (Chrono). Plaintiffs have excluded description of these errors to save space.

1 **39.** [redacted] also did a prolonged stint in solitary based on information
2 which was never disclosed to him and appears to have been false. He was placed in ASU on [redacted]
3 [redacted], in connection with a [redacted] investigation without any disclosure of the evidence supporting
4 that placement. Meeropol Decl., Ex. BB ([redacted] Decl.) at 2: ¶¶ 6-7, and 7. On [redacted],
5 while [redacted] was still in ASU without having received an RVR, CDCR's Auditor (to whom
6 [redacted] had appealed) issued an Auditor's Action noting that [redacted]
7 [redacted]. *Id.* at 21. This did not occur. *Id.* at 8. [redacted] was
8 released from ASU on [redacted], after [redacted] in solitary, because he had already spent as
9 long in ASU as he would have served in SHU had he actually received and been found guilty of an
10 RVR. *Id.* He was never informed of the results of the investigation. *Id.* at ¶ 12. Shortly after he was
11 placed in general population, he was returned to administrative segregation on phony safety concerns.
12 *Id.* at ¶ 10.

13 **C. CDCR Systemically Fabricates and Alters Informant Statements in Confidential**
14 **Memoranda Drafted by Gang Investigators.**

15 After the Court's 2019 Order extending the Settlement Agreement, Plaintiffs' counsel also
16 sought to obtain investigator recordings of interviews with informants to compare what the informant
17 said at the interview with the confidential memorandum meant to summarize it. Plaintiffs' resulting
18 review of recordings and transcripts of confidential interviews uncovered that not only is information
19 from the confidential memorandum summarized inaccurately in the disclosures provided to prisoners,
20 but the underlying confidential memorandum itself often misstates the information provided by the
21 confidential informant.

22 Generally, a confidential memorandum is prepared by CDCR staff at the conclusion of a
23 confidential source interview "to document that investigation and interview." Meeropol Decl., Ex. BC
24 (CDCR Interrogatory Responses) at 2. Problematically, CDCR policy and practice does not require
25 that confidential memoranda include or summarize all relevant material or all potentially exonerating
26 material; rather, "staff drafting confidential memoranda include information from an interview with a
27 confidential source that relates to the subject of the investigation, *as determined by the staff member*, in
28 his or her expertise and depending on the circumstances of the investigation." *Id.* at 6-8 (emphasis

added). The author of the confidential memorandum has discretion in making this determination (*id.* at 11) and there is *no* supervisory system in place to make sure that all relevant information is included and accurately reported. *Id.* at 12-15. Given CDCR's lack of any quality controls, and the fact that the same CDCR investigators previously shown to inadequately draft confidential disclosures also draft confidential memoranda,[8] it is not surprising that Plaintiffs' review of this process uncovered a pattern of fabricated confidential evidence.

CDCR only produced six confidential source interviews; a close review shows that CDCR officials fabricated confidential information from every single informant. *All* of the confidential memoranda differ from what the informant actually said in significant ways.[9] As with the inaccuracies in confidential disclosures, frequently the confidential memoranda are more damning than justified by the informant's words.

40. ██████ was found guilty of ██████ based in part on information from a confidential source. Meeropol Decl., Ex. BF (██████ RVR) at 1920-21. The source's interview was audio-recorded and then summarized in a confidential memorandum. Comparing the recording to the memorandum reveals not only several exaggerations, but also an outright fabrication: the confidential memorandum states that the source "██████ ██████ *Id.* at 2146. But in the recording, the source said *nothing* about ██████. Meeropol Decl. at ¶ 106.

Other key information is exaggerated. ██████ was initially charged with "██████ ██████" (Meeropol Decl., Ex. BF (██████ RVR) at 1912) based on alleged statements that the source observed ██████ *Id.* at 1911, 2144, 2146 (emphasis added). But what the source actually said is that ██████ ██████ Meeropol Decl. at ¶ 107. And according to the confidential memorandum, the source described observing ██████

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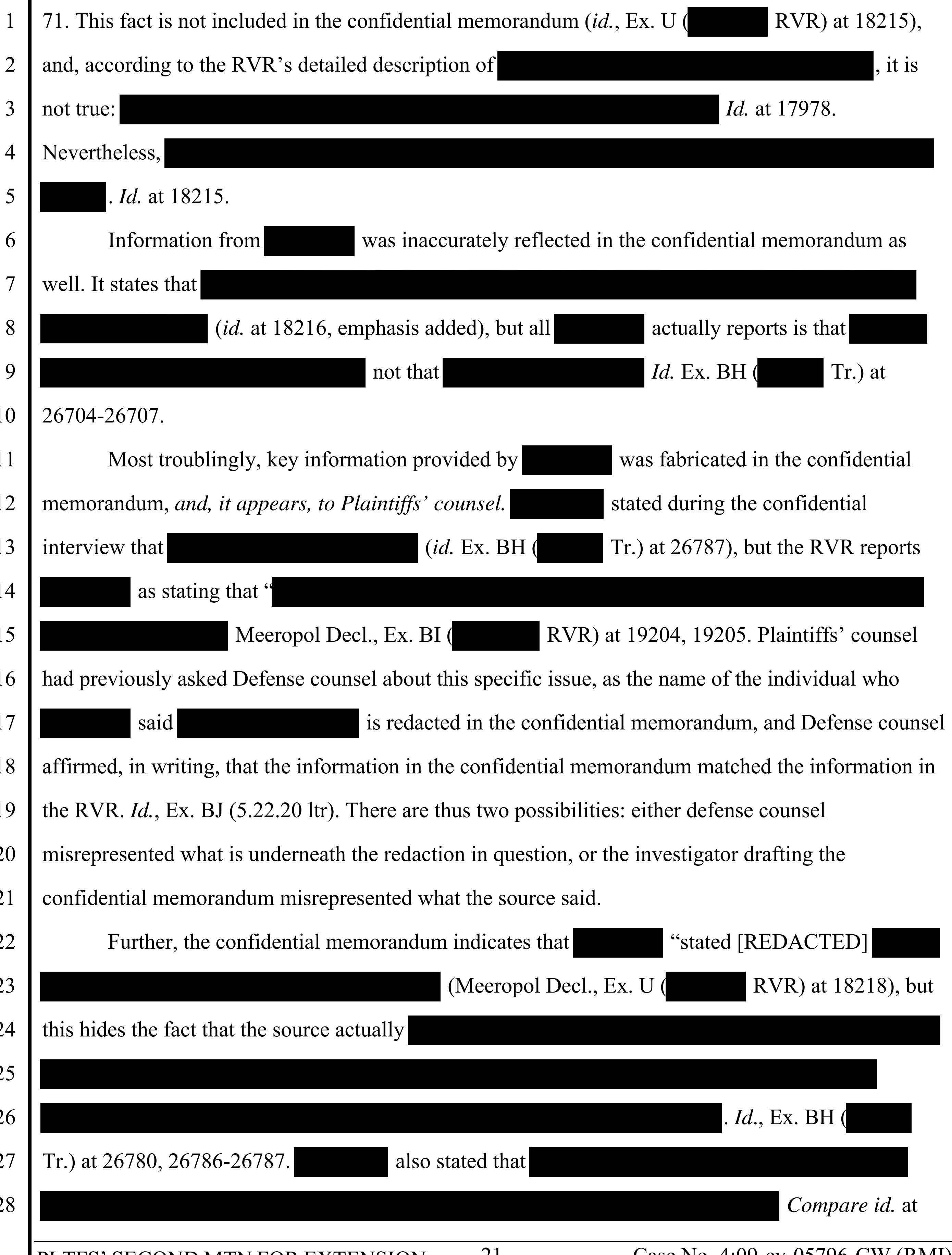
[8] See for example, Meeropol Decl., Ex. AC (██████ RVR) at 12, 43; Ex. BD (██████ Decl.) at 8.

[9] One of the transcripts CDCR produced was so heavily redacted that Plaintiffs are unable to compare it to the corresponding confidential memorandum. *See* Jt. Ltr. Brief to the Court, Sept. 15, 2020 (filed under seal). Plaintiffs were unable to challenge the redactions in time to use the transcript in this motion, but will supplement the evidence on Reply.

1 *Id.*, Ex. BF (C. RVR) at 2146 (emphasis added). The
2 italicized information cannot be heard in the recording. Meeropol Decl. at ¶ 108. Finally, as with
3 several of the confidential disclosures described above, the confidential memorandum makes it seem as
4 though the source (*id.,* Ex. BF (RVR) at 2146); when at
5 least one of these individuals was instead . *Id.* at ¶ 109.

6 In section A, supra, Plaintiffs describe the problems with **3**.
7 disclosure, leading to his being found guilty of
8 based on unreliable and inaccurate confidential information. Meeropol Decl., Ex. G (RVR)
9 at 24312-13, 24323. The transcript of the confidential interview with the source shows that the
10 confidential memorandum, too, includes fabrications. The confidential memorandum reports that the
11 source stated that
12 . *Id.* at 24405. According to the transcript, however, the source did *not*
13 *Id.*, Ex. BG (Tr.) at
14 26626-27. The confidential memorandum also reports the source as saying that
15 (*id.*, Ex. G (RVR) at
16 24406), but the source said nothing about . *Id.*, Ex. BG (Tr.)
17 at 26640-41. And the confidential memorandum fails to report that the source's first response to the
18 question of
19 . *Id.* at 26641. Finally, according to the confidential
20 memorandum, a confidential source
21 . *Id.* Ex. G (RVR) at 24404. But the source said nothing about
22 *Id.*, Ex. BG (Tr.) at 26633.

23 The RVR involving **16.** **17.** **and** **others** found guilty of
24 with an STG nexus at is also described above in section A. The
25 recording of the confidential interview with several of the sources shows that important information
26 was not included in the confidential memorandum and other key information was fabricated. For
27 example, according to the transcript of the interview,
28 Meeropol Decl., Ex. BH (Tr.) at 26670-



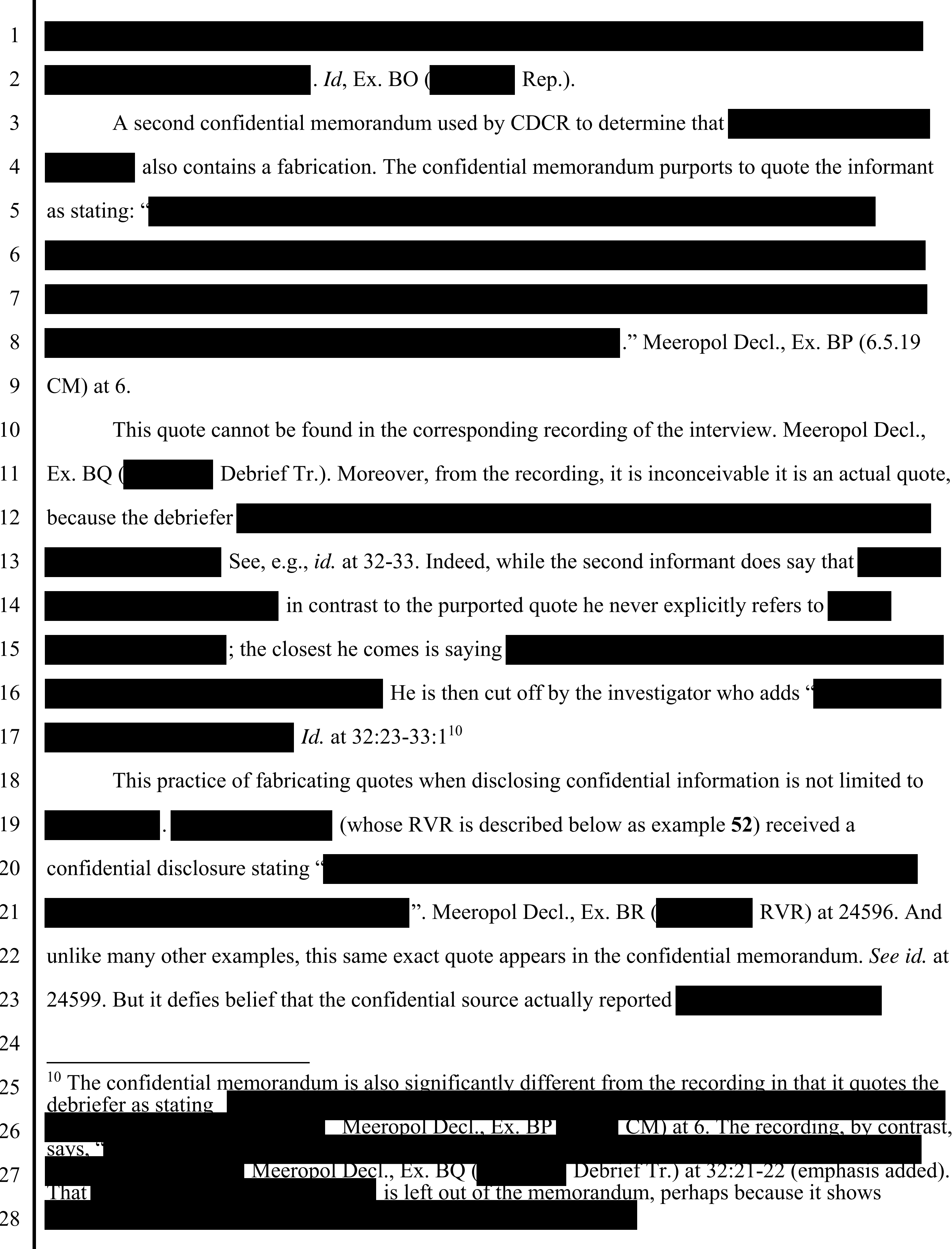
71. This fact is not included in the confidential memorandum (*id.*, Ex. U (RVR) at 18215), and, according to the RVR's detailed description of , it is not true: *Id.* at 17978. Nevertheless, . *Id.* at 18215.

Information from was inaccurately reflected in the confidential memorandum as well. It states that (*id.* at 18216, emphasis added), but all actually reports is that not that *Id.* Ex. BH (Tr.) at 26704-26707.

Most troublingly, key information provided by was fabricated in the confidential memorandum, *and, it appears, to Plaintiffs' counsel.* stated during the confidential interview that (*id.* Ex. BH (Tr.) at 26787), but the RVR reports as stating that " Meeropol Decl., Ex. BI (RVR) at 19204, 19205. Plaintiffs' counsel had previously asked Defense counsel about this specific issue, as the name of the individual who said is redacted in the confidential memorandum, and Defense counsel affirmed, in writing, that the information in the confidential memorandum matched the information in the RVR. *Id.*, Ex. BJ (5.22.20 ltr). There are thus two possibilities: either defense counsel misrepresented what is underneath the redaction in question, or the investigator drafting the confidential memorandum misrepresented what the source said.

Further, the confidential memorandum indicates that "stated [REDACTED] (Meeropol Decl., Ex. U (RVR) at 18218), but this hides the fact that the source actually . *Id.*, Ex. BH (Tr.) at 26780, 26786-26787. also stated that *Compare id.* at

1 26781 *with id.*, Ex. U (RVR) at 18215, 18220. Later, in the interview, repeatedly
2 stated that . *Id.*, Ex. BH (Tr.) at 26792-93. These
3 contradictions were not included in the confidential memorandum and the investigator found the
4 information from reliable. *Id.* at 18218.
5 So too, informant materials produced by Defendants pertaining to **41.**
6 claim illustrate that confidential memoranda are made to appear more damning
7 than what the informant actually said. For example, one confidential memorandum relied on by CDCR
8 officials to over his strong opposition states that "
9
10
11 " Meeropol Decl., Ex. BK (Debrief) at 61 (emphasis added). Yet when CDCR was
12 ordered to produce the recording of the interview in which the informant reportedly said this, it turned
13 out that the interview did not contain *any* statement about . *Id.*, Ex. BE (
14 Sealed Tr.) at 9-12. CDCR claimed that t
15 *Id.* at 11-12. However, when CDCR produced , it stated
16 something very different. When asked about , the informant wrote:
17 *Id.*, Ex. BL (Autobiography) at 4096. The
18 autobiography contains nothing about nor does
19 it contain the quote that "
20 This fabrication is critical because found debriefer claims that
21
22 " insufficient to warrant . Meeropol Decl., Ex. BM (2.5.16
23 DRB) at 11. The DRB's decision to the contrary was based on claims that
24 . *Id.*, Ex. BN (8.4.17
25 DRB).
26
27 *Id.*, Ex. BL (Autobiography). Defendant's expert, Gang Investigator
28



1
2 . *Id*, Ex. BO (Rep.).
3 A second confidential memorandum used by CDCR to determine that
4 also contains a fabrication. The confidential memorandum purports to quote the informant
5 as stating: "
6
7
8 ." Meeropol Decl., Ex. BP (6.5.19
9 CM) at 6.
10 This quote cannot be found in the corresponding recording of the interview. Meeropol Decl.,
11 Ex. BQ (Debrief Tr.). Moreover, from the recording, it is inconceivable it is an actual quote,
12 because the debriefer
13 See, e.g., *id.* at 32-33. Indeed, while the second informant does say that
14 in contrast to the purported quote he never explicitly refers to
15 ; the closest he comes is saying
16 He is then cut off by the investigator who adds "
17 *Id.* at 32:23-33:1[10]
18 This practice of fabricating quotes when disclosing confidential information is not limited to
19 . (whose RVR is described below as example **52**) received a
20 confidential disclosure stating "
21 ". Meeropol Decl., Ex. BR (RVR) at 24596. And
22 unlike many other examples, this same exact quote appears in the confidential memorandum. *See id.* at
23 24599. But it defies belief that the confidential source actually reported
24

25 [10] The confidential memorandum is also significantly different from the recording in that it quotes the debriefer as stating
26 Meeropol Decl., Ex. BP CM) at 6. The recording, by contrast, says, "
27 Meeropol Decl., Ex. BQ (Debrief Tr.) at 32:21-22 (emphasis added). That is left out of the memorandum, perhaps because it shows
28

1 And handwritten notes from the gang investigator's interview with
2 refer only to " *Id.*,
3 Ex. BS (Notes).
4 Shockingly, CDCR has admitted that it utilizes quotation marks in confidential memoranda in a
5 manner inconsistent with the rest of the English-speaking world. According to CDCR sometimes a
6 "quotation is not intended to reflect the exact language…". *See* Meeropol Decl., Ex. BC (CDCR
7 Interrogatory Responses) at 3.
8 **D. The Evidence Presented Above Constitutes a Systemic Due Process Violation.**
9 All the evidence presented above demonstrates CDCR's fabrication and inadequate disclosure
10 of confidential information continues to be systemic in nature. During the second monitoring period, it
11 has affected nearly half of the RVRs produced (71 out of 151), four out of five of the ASU packets
12 produced, and all six of the confidential recordings/documentation. *See supra*. And while more
13 evidence of the systemic nature of this violation is not necessary, CDCR's destruction of confidential
14 source interview recordings after it was on notice that the recordings were relevant evidence amounts
15 to spoliation, and permits an inference that the destroyed recordings would have confirmed the
16 systemic nature of that particular type of fabrication.
17 A party seeking an adverse inference based on the spoliation of evidence must establish three
18 elements: "(1) that the party having control over the evidence had an obligation to preserve it at the
19 time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind;' and (3) that
20 the evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find
21 that it would support that claim or defense." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d
22 1132, 1138 (N.D. Cal. 2012).
23 "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice
24 that the documents were *potentially* relevant to the litigation before they were destroyed.'" *Leon v. IDX*
25 *Sys Corp*. 464 F. 3d 951, 959 (9th Cir. 2006) (internal citations omitted) (emphasis in original). The
26 court need not find that the spoliating party acted in bad faith; willfulness or fault can suffice. *Unigard*
27 *Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 n.2 (9th Cir. 1992) (citation
28 omitted); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329-30 (9th Cir. 1993) ("Surely a finding of bad faith

will suffice, but so will simple notice of potential relevance to the litigation") (internal quotation marks omitted).

The duty to preserve documents is triggered not by the initiation of litigation or the request by an adverse party for a litigation hold, but rather by an "objective standard" of whether it was "reasonably foreseeable" that the documents could be relevant to litigation in the near future, even where the complaint has not yet been filed. *Apple Inc.,* 881 F. Supp. 2d at 1145; *Micron Tech v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed Cir. 2011). Here, CDCR's preservation duty with respect to recordings of confidential interviews was triggered when Defendants were put on notice on November 20, 2017, that Plaintiffs were challenging CDCR's systemic falsification of confidential disclosures. At that point it should have been clear to CDCR that recordings of confidential interviews were *potentially* relevant to the litigation. And there can be *no doubt* that CDCR had a preservation duty as of February 6, 2019, when Plaintiffs' counsel requested that Defendants produce "not only the confidential memoranda but also recordings and/or transcripts of informant interviews."[11] Meeropol Decl., Ex. CG (2.6.2019 Email). Yet Defendants did not change their retention policy until October 2019, when a litigation hold was put in place. Before that, CDCR permitted its agents absolute discretion to destroy recordings of informant interviews, unless the recording was relevant to a criminal murder prosecution. *Id.*, Ex. BT (Alfaro Dep.) at 55-58.

Also relevant to the "willfulness" inquiry is Defendants' misleading statements to counsel and the Court regarding whether any recordings were made during the relevant period. Initially, Defense counsel indicated [REDACTED], but [REDACTED]

[REDACTED]

Meeropol Decl., Ex. BU (10.17.19 ltr.) at 1 (emphasis added). This was untrue. At the time of CDCR's statement to the Court, institution staff had unfettered discretion to record confidential source interviews if they wished, and some did so. *Id.*, Ex. BT (Alfaro Dep.) at 19; Ex. BV (Basnett Dep.) at 31, 35. Only after Plaintiffs confronted CDCR with documentary evidence that some confidential

[11] Counsel filed a motion seeking recordings of informant interviews in the [REDACTED] on [REDACTED], putting Defendants on notice that these recordings were potentially relevant to this litigation. *See* Pltfs' Mot. for Retaliation Discovery, filed under seal on [REDACTED].

source interviews *are* recorded did CDCR acknowledge this to be true. *See id.*, Ex. BW (10.18.19 ltr.) at 1; Ex. BX (12.3.19 Tr.) at 17, 19-20.[12]

Even assuming that CDCR's destruction of this evidence was merely negligent and not purposeful, an adverse inference is still appropriate. *See Apple Inc.*, 881 F. Supp. 2d at 1151 (in the absence of bad faith, adopting a less harsh sanction: a presumption that "Apple has met its burden of proving the following two elements by a preponderance of the evidence: *first*, that *relevant* evidence was destroyed after the duty to preserve arose…. and *second*, the lost evidence was favorable to Apple") (emphasis in original); *In Re Complaint of Hornblower Fleet LLC*, No. 16-2468, 2018 U.S. Dist LEXIS 209032 (S.D. Cal. Dec 11, 2018), as modified by US Dist. LEXIS 59314 (S.D. Cal. Apr. 5, 2019) (where spoliation was negligent, an adverse inference will be imposed against the spoliator in a bench trial).

It is thus appropriate for the Court to impose an adverse inference against CDCR on this motion: that Plaintiffs have met their burden of proving "by a preponderance of the evidence" that the "lost evidence was favorable" on the question of the systemic fabrication of confidential information. *See, e.g., Lewis v. Ryan*, 261 F.R.D. 513, 521-22 (S.D. Cal. 2009) (adverse inference that destroyed documents would have shown sufficient incidents of serving pork to prisoners to rise to the level of a Constitutional violation).

As the Court held in 2019, the systemic fabrication and inadequate disclosure of confidential information denies class members a meaningful opportunity to take part in their disciplinary hearings, in violation of due process. Ext. Order at 25. The law has not changed since the Court previously ruled on this issue, and thus we do not repeat our legal arguments here.

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[12] Even after this time, Defendants continued to mischaracterize their policy and practice. They repeatedly insisted that [redacted] when in fact [redacted] *Id.*, Ex. BY (DOM) at 52050.7.1.

II. CDCR'S FAILURE TO ENSURE THAT THE CONFIDENTIAL INFORMATION IT USES IS RELIABLE VIOLATES DUE PROCESS.

In its Extension Order, this Court also correctly found that "CDCR systematically relies on confidential information without ensuring its reliability." Ext. Order at 24. The evidence is overwhelming that this due process violation, too, has continued into the second monitoring period.

A. CDCR Systemically Fails to Ensure the Reliability of Confidential Information.

As shown below, CDCR staff members frequently state that confidential information is reliable because it is corroborated by another source or by non-confidential evidence, but all too often this claim of corroboration is unproven or fabricated. Other times it is not possible to tell *why* CDCR believes confidential information to be reliable, as contradicting boxes are checked on the RVR, confidential disclosure, and corresponding confidential memorandum. CDCR hearing officers continue to rely on the disclosures, rather than reviewing and making an independent assessment of the confidential information in the underlying confidential memorandum, and they prohibit prisoners from asking relevant questions designed to get at the reliability of a source.

42. [REDACTED] for example, was placed in solitary confinement for investigation after a confidential source reported that [REDACTED] [REDACTED]. Meeropol Decl., Ex. BZ ([REDACTED] ASU docs) at 26556. Although the confidential source was [REDACTED] (*id.* at 26560, 26571), [REDACTED] was told the confidential information was reliable because [REDACTED] [REDACTED]; but [REDACTED]. *Compare id.* at 26558 *with id.* at 26560, 26571.

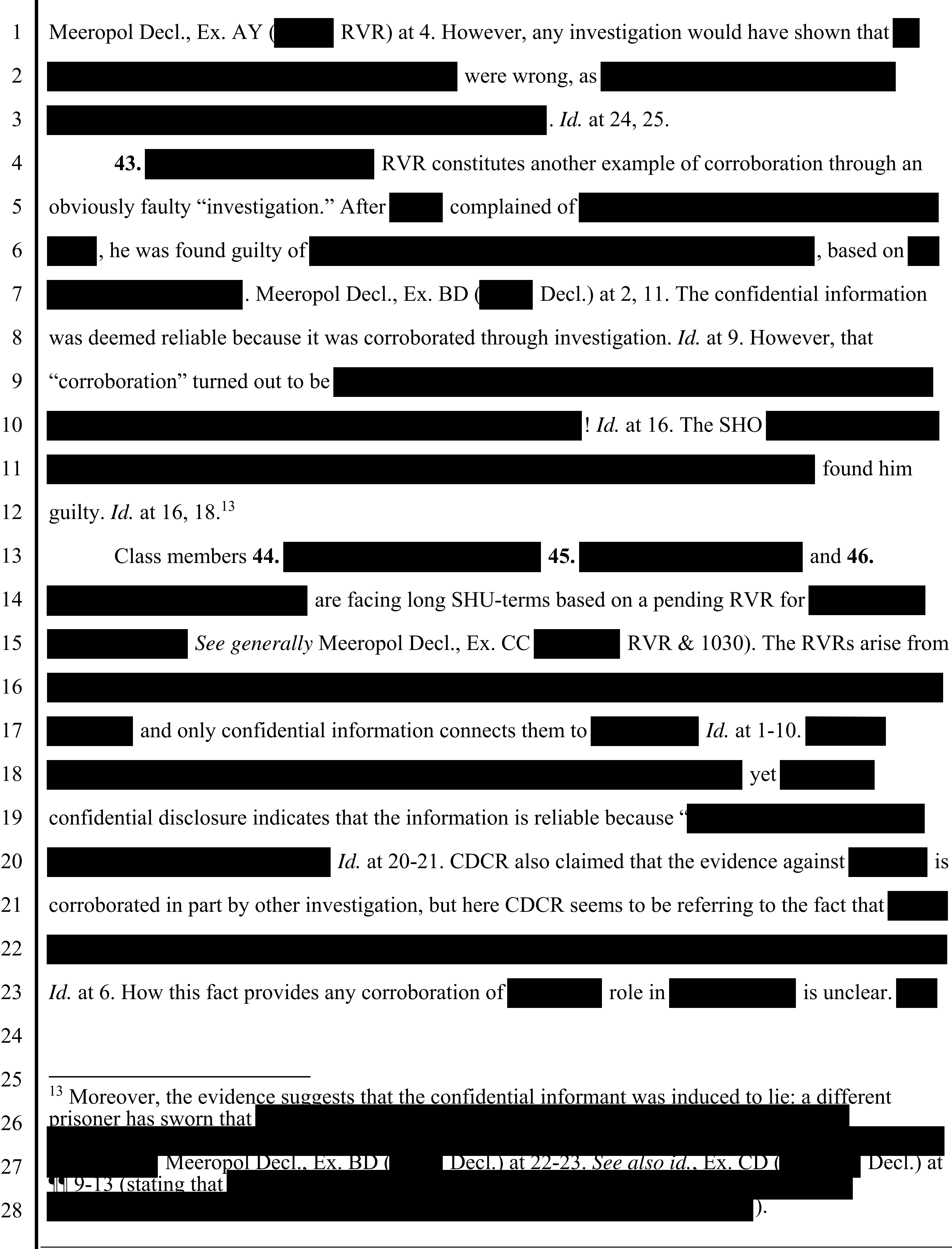
The only *potential* non-confidential evidence connecting [REDACTED]—who stated that [REDACTED] [REDACTED]—to [REDACTED] was [REDACTED]. *Id.* at 26564, 26567. [REDACTED] remained in solitary confinement for [REDACTED] while CDCR awaited [REDACTED]. *Id.*, Ex. CA ([REDACTED] Chronos). He was finally released to general population in [REDACTED], when his Minimum Eligible Release Date ("MERD") for the potential RVR expired, apparently without [REDACTED] ever arriving. *Id.* He thus served a full [REDACTED]

SHU term for an RVR he was never charged with, much less found guilty of, based on the word of .

Along with relying on unproven corroborating evidence to justify prolonged isolation based on confidential information, in many instances CDCR claims that confidential information is corroborated when it simply is not. **13.** received a confidential disclosure indicating confidential information against him was reliable because it was " " Meeropol Decl., Ex. V (RVR) at 21. But the corresponding confidential memorandum states that . *Id.* at 55. And while some of the confidential information used in the RVR—for example regarding —is corroborated by (*see id.* at 9, 11), . *Id.* at 26-27. Indeed, contradicts, rather than corroborates, . *Compare id.* at 26 ( ) *with id.* at 5 ( ). raised this contradiction (*id.* at 38), and the SHO reasoned, illogically, that *Id.* at 40.

This same lack of corroboration can be seen in **3.** RVR. As explained above, the only evidence connecting described in the RVR was . *See supra;* Meeropol Decl., Ex. G (RVR) at 24312-13. was told that this source was reliable because (*id.* of 24396) but . *Id.* at 24324-25. While the confidential memorandum states that (*id.* at 24404, 24409), CDCR has admitted that the Senior Hearing Officer (SHO) did not even review that confidential memorandum before determining that the confidential information about could be considered reliable. *Id.*, Ex. CB (9.1.20 CDCR ltr.).

So too, as described in section I.C above, **38.** was placed in ASU for based on confidential sources whose information was claimed to be corroborated by investigation.

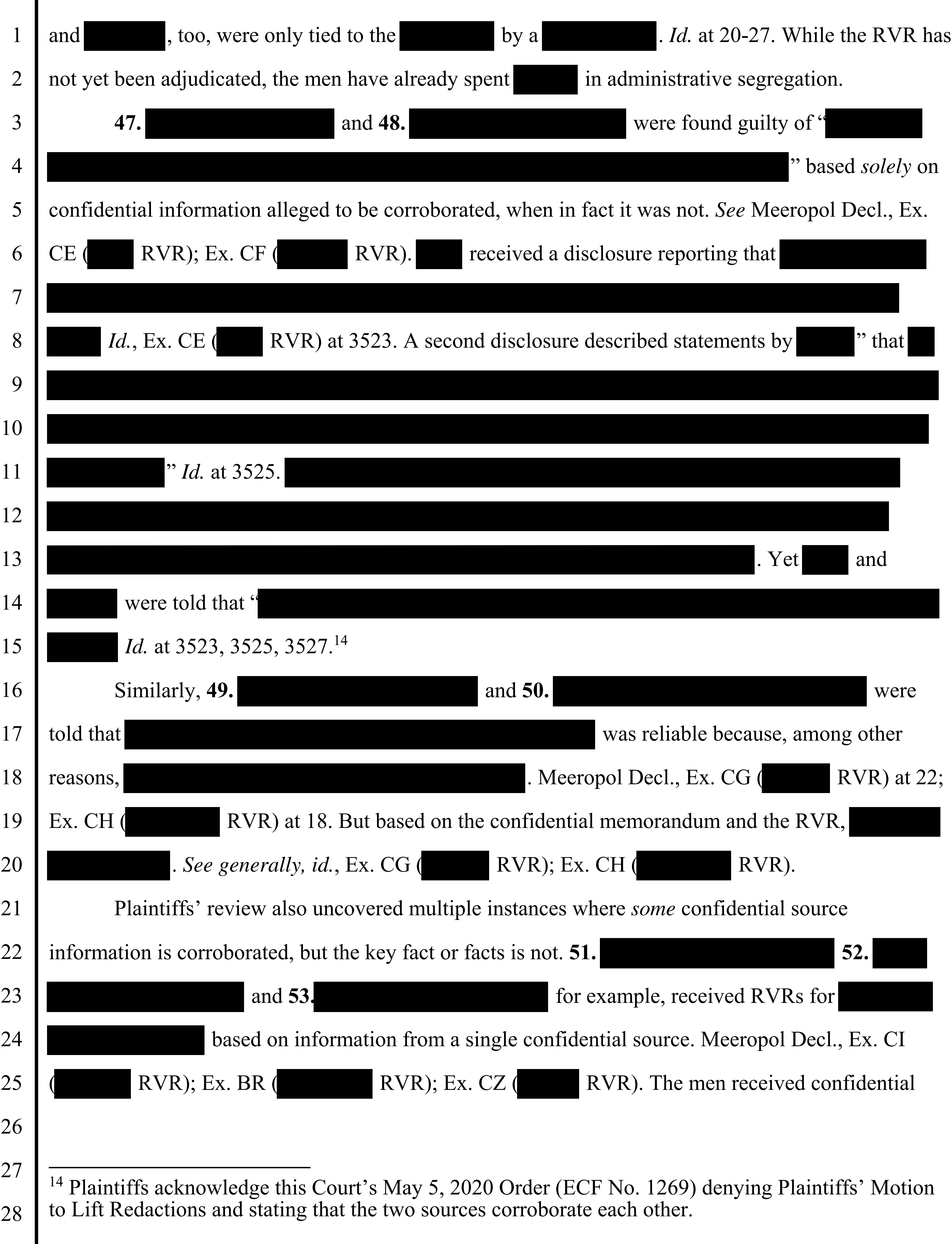


Meeropol Decl., Ex. AY (RVR) at 4. However, any investigation would have shown that were wrong, as . *Id.* at 24, 25.

43. RVR constitutes another example of corroboration through an obviously faulty "investigation." After complained of , he was found guilty of , based on . Meeropol Decl., Ex. BD (Decl.) at 2, 11. The confidential information was deemed reliable because it was corroborated through investigation. *Id.* at 9. However, that "corroboration" turned out to be ! *Id.* at 16. The SHO found him guilty. *Id.* at 16, 18.[13]

Class members **44.** **45.** and **46.** are facing long SHU-terms based on a pending RVR for *See generally* Meeropol Decl., Ex. CC RVR & 1030). The RVRs arise from and only confidential information connects them to *Id.* at 1-10. yet confidential disclosure indicates that the information is reliable because " *Id.* at 20-21. CDCR also claimed that the evidence against is corroborated in part by other investigation, but here CDCR seems to be referring to the fact that *Id.* at 6. How this fact provides any corroboration of role in is unclear.

[13] Moreover, the evidence suggests that the confidential informant was induced to lie: a different prisoner has sworn that Meeropol Decl., Ex. BD (Decl.) at 22-23. *See also id.*, Ex. CD (Decl.) at ¶¶ 9-13 (stating that).



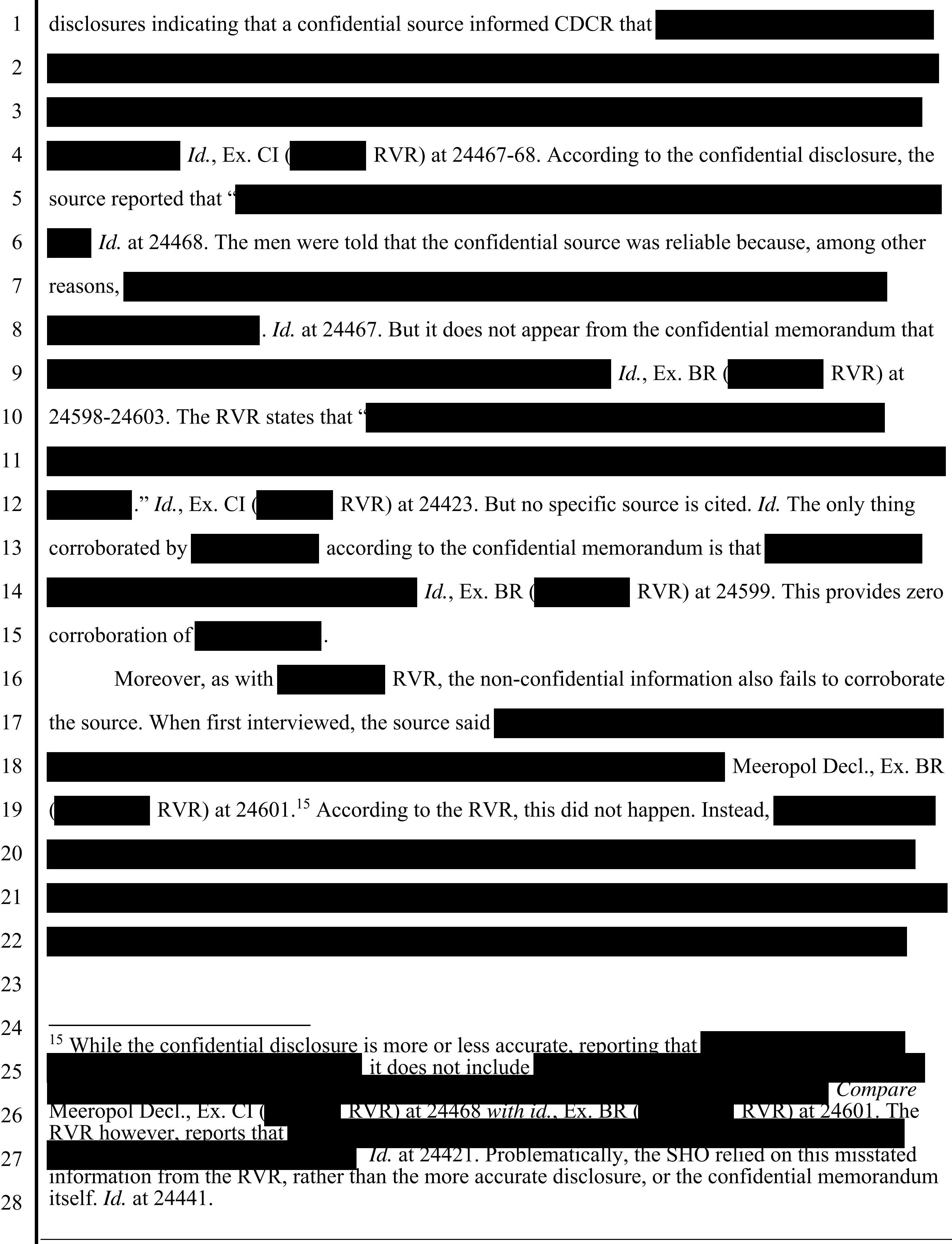
and , too, were only tied to the by a . *Id.* at 20-27. While the RVR has not yet been adjudicated, the men have already spent in administrative segregation.

47. and **48.** were found guilty of " " based *solely* on confidential information alleged to be corroborated, when in fact it was not. *See* Meeropol Decl., Ex. CE (RVR); Ex. CF (RVR). received a disclosure reporting that *Id.*, Ex. CE (RVR) at 3523. A second disclosure described statements by " that " *Id.* at 3525. . Yet and were told that " *Id.* at 3523, 3525, 3527.[14]

Similarly, **49.** and **50.** were told that was reliable because, among other reasons, . Meeropol Decl., Ex. CG (RVR) at 22; Ex. CH (RVR) at 18. But based on the confidential memorandum and the RVR, . *See generally, id.*, Ex. CG (RVR); Ex. CH (RVR).

Plaintiffs' review also uncovered multiple instances where *some* confidential source information is corroborated, but the key fact or facts is not. **51.** **52.** and **53.** for example, received RVRs for based on information from a single confidential source. Meeropol Decl., Ex. CI (RVR); Ex. BR (RVR); Ex. CZ (RVR). The men received confidential

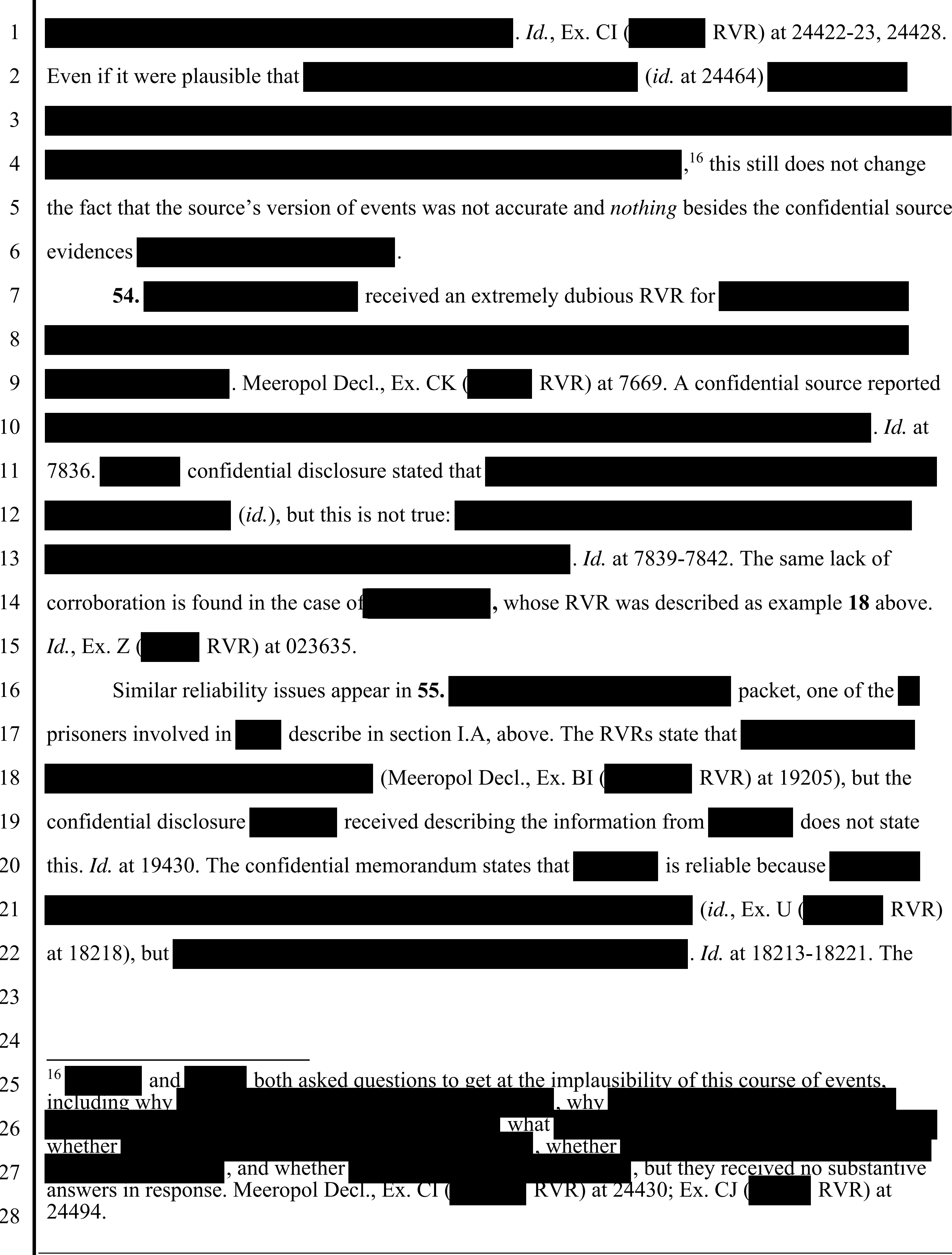
[14] Plaintiffs acknowledge this Court's May 5, 2020 Order (ECF No. 1269) denying Plaintiffs' Motion to Lift Redactions and stating that the two sources corroborate each other.



disclosures indicating that a confidential source informed CDCR that [redacted] *Id.*, Ex. CI ([redacted] RVR) at 24467-68. According to the confidential disclosure, the source reported that "[redacted] *Id.* at 24468. The men were told that the confidential source was reliable because, among other reasons, [redacted]. *Id.* at 24467. But it does not appear from the confidential memorandum that [redacted] *Id.*, Ex. BR ([redacted] RVR) at 24598-24603. The RVR states that "[redacted]." *Id.*, Ex. CI ([redacted] RVR) at 24423. But no specific source is cited. *Id.* The only thing corroborated by [redacted] according to the confidential memorandum is that [redacted] *Id.*, Ex. BR ([redacted] RVR) at 24599. This provides zero corroboration of [redacted].

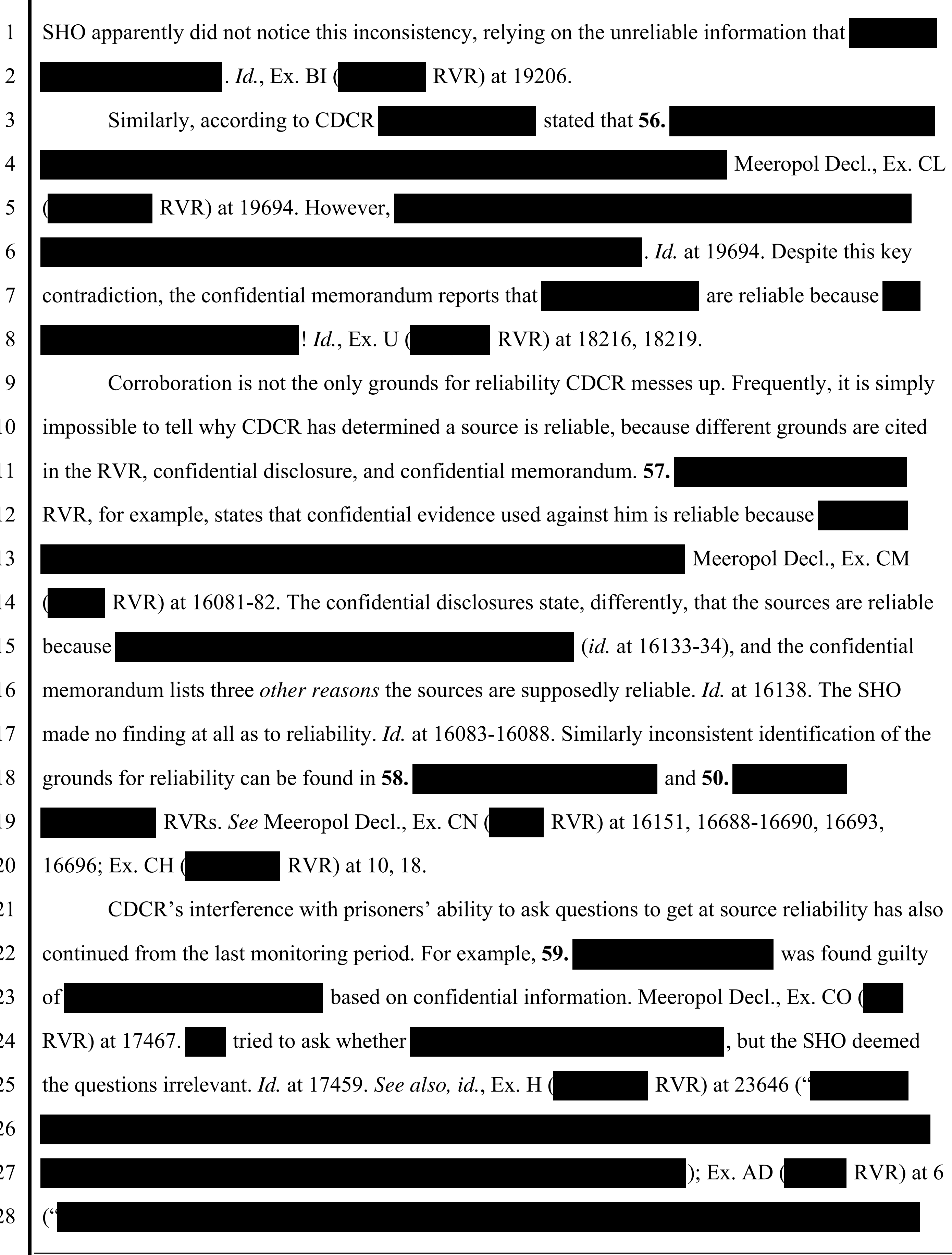
Moreover, as with [redacted] RVR, the non-confidential information also fails to corroborate the source. When first interviewed, the source said [redacted] Meeropol Decl., Ex. BR ([redacted] RVR) at 24601.[15] According to the RVR, this did not happen. Instead, [redacted]

[15] While the confidential disclosure is more or less accurate, reporting that [redacted] it does not include [redacted] *Compare* Meeropol Decl., Ex. CI ([redacted] RVR) at 24468 *with id.*, Ex. BR ([redacted] RVR) at 24601. The RVR however, reports that [redacted] *Id.* at 24421. Problematically, the SHO relied on this misstated information from the RVR, rather than the more accurate disclosure, or the confidential memorandum itself. *Id.* at 24441.

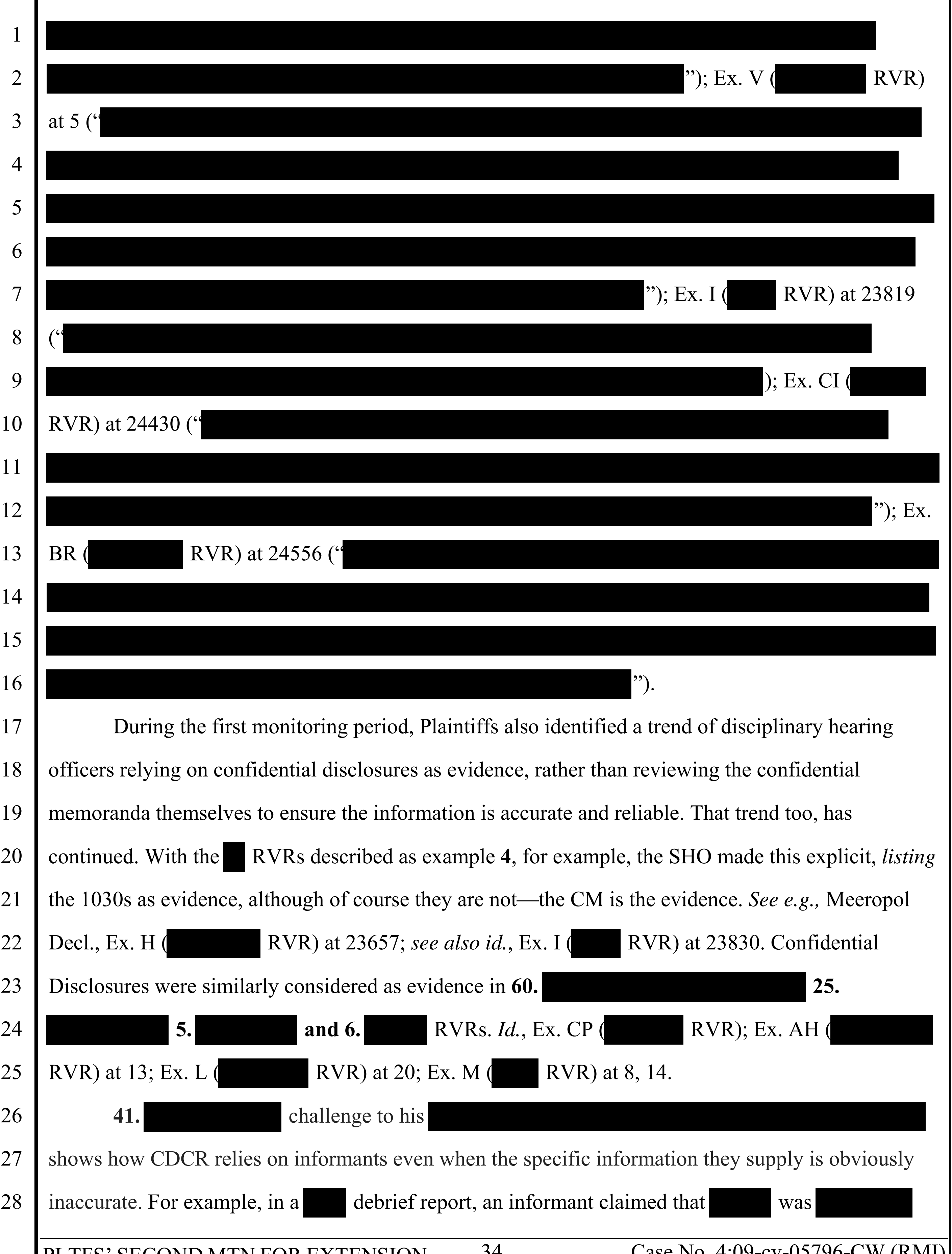


1 . *Id.*, Ex. CI (RVR) at 24422-23, 24428.
2 Even if it were plausible that (*id.* at 24464)
3
4 ,[16] this still does not change
5 the fact that the source's version of events was not accurate and *nothing* besides the confidential source
6 evidences .
7 **54.** received an extremely dubious RVR for
8
9 . Meeropol Decl., Ex. CK (RVR) at 7669. A confidential source reported
10 . *Id.* at
11 7836. confidential disclosure stated that
12 (*id.*), but this is not true:
13 . *Id.* at 7839-7842. The same lack of
14 corroboration is found in the case of **,** whose RVR was described as example **18** above.
15 *Id.*, Ex. Z (RVR) at 023635.
16 Similar reliability issues appear in **55.** packet, one of the
17 prisoners involved in describe in section I.A, above. The RVRs state that
18 (Meeropol Decl., Ex. BI (RVR) at 19205), but the
19 confidential disclosure received describing the information from does not state
20 this. *Id.* at 19430. The confidential memorandum states that is reliable because
21 (*id.*, Ex. U (RVR)
22 at 18218), but . *Id.* at 18213-18221. The
23
24

25 [16] and both asked questions to get at the implausibility of this course of events,
including why , why
26 what
whether , whether
27 , and whether , but they received no substantive
answers in response. Meeropol Decl., Ex. CI (RVR) at 24430; Ex. CJ (RVR) at
28 24494.



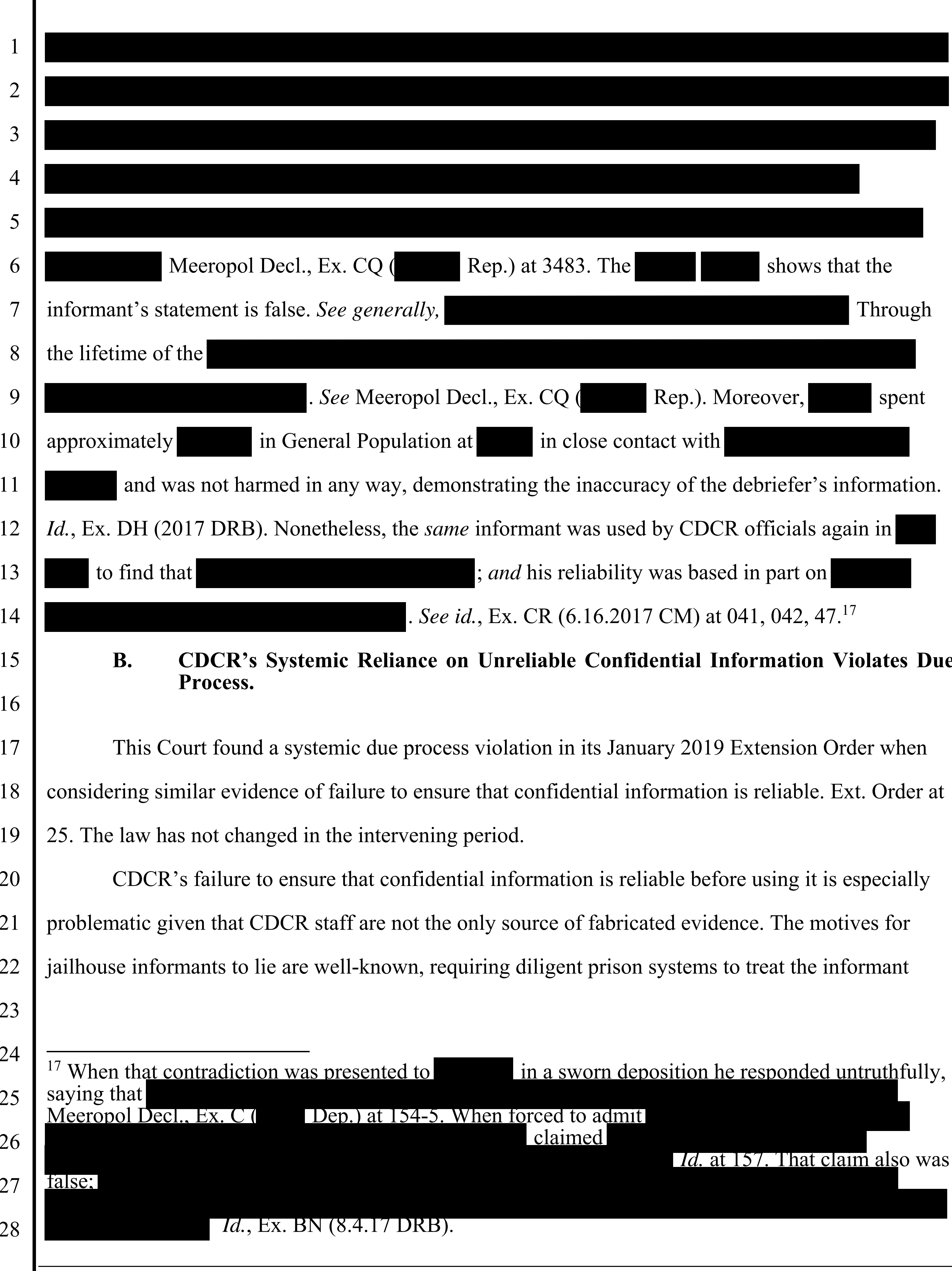
1 SHO apparently did not notice this inconsistency, relying on the unreliable information that
2 . *Id.*, Ex. BI (RVR) at 19206.
3 Similarly, according to CDCR stated that **56.**
4 Meeropol Decl., Ex. CL
5 (RVR) at 19694. However,
6 . *Id.* at 19694. Despite this key
7 contradiction, the confidential memorandum reports that are reliable because
8 ! *Id.*, Ex. U (RVR) at 18216, 18219.
9 Corroboration is not the only grounds for reliability CDCR messes up. Frequently, it is simply
10 impossible to tell why CDCR has determined a source is reliable, because different grounds are cited
11 in the RVR, confidential disclosure, and confidential memorandum. **57.**
12 RVR, for example, states that confidential evidence used against him is reliable because
13 Meeropol Decl., Ex. CM
14 (RVR) at 16081-82. The confidential disclosures state, differently, that the sources are reliable
15 because (*id.* at 16133-34), and the confidential
16 memorandum lists three *other reasons* the sources are supposedly reliable. *Id.* at 16138. The SHO
17 made no finding at all as to reliability. *Id.* at 16083-16088. Similarly inconsistent identification of the
18 grounds for reliability can be found in **58.** and **50.**
19 RVRs. *See* Meeropol Decl., Ex. CN (RVR) at 16151, 16688-16690, 16693,
20 16696; Ex. CH (RVR) at 10, 18.
21 CDCR's interference with prisoners' ability to ask questions to get at source reliability has also
22 continued from the last monitoring period. For example, **59.** was found guilty
23 of based on confidential information. Meeropol Decl., Ex. CO (
24 RVR) at 17467. tried to ask whether , but the SHO deemed
25 the questions irrelevant. *Id.* at 17459. *See also, id.*, Ex. H (RVR) at 23646 ("
26
27); Ex. AD (RVR) at 6
28 ("



"); Ex. V (RVR) at 5 (" "); Ex. I (RVR) at 23819 ("); Ex. CI (RVR) at 24430 (" "); Ex. BR (RVR) at 24556 (" ").

During the first monitoring period, Plaintiffs also identified a trend of disciplinary hearing officers relying on confidential disclosures as evidence, rather than reviewing the confidential memoranda themselves to ensure the information is accurate and reliable. That trend too, has continued. With the RVRs described as example **4**, for example, the SHO made this explicit, *listing* the 1030s as evidence, although of course they are not—the CM is the evidence. *See e.g.,* Meeropol Decl., Ex. H (RVR) at 23657; *see also id.*, Ex. I (RVR) at 23830. Confidential Disclosures were similarly considered as evidence in **60.** **25.** **5.** **and 6.** RVRs. *Id.*, Ex. CP (RVR); Ex. AH (RVR) at 13; Ex. L (RVR) at 20; Ex. M (RVR) at 8, 14.

41. challenge to his shows how CDCR relies on informants even when the specific information they supply is obviously inaccurate. For example, in a debrief report, an informant claimed that was



Meeropol Decl., Ex. CQ (Rep.) at 3483. The shows that the informant's statement is false. *See generally,* Through the lifetime of the . *See* Meeropol Decl., Ex. CQ (Rep.). Moreover, spent approximately in General Population at in close contact with and was not harmed in any way, demonstrating the inaccuracy of the debriefer's information. *Id.*, Ex. DH (2017 DRB). Nonetheless, the *same* informant was used by CDCR officials again in to find that ; *and* his reliability was based in part on . *See id.*, Ex. CR (6.16.2017 CM) at 041, 042, 47.[17]

B. CDCR's Systemic Reliance on Unreliable Confidential Information Violates Due Process.

This Court found a systemic due process violation in its January 2019 Extension Order when considering similar evidence of failure to ensure that confidential information is reliable. Ext. Order at 25. The law has not changed in the intervening period.

CDCR's failure to ensure that confidential information is reliable before using it is especially problematic given that CDCR staff are not the only source of fabricated evidence. The motives for jailhouse informants to lie are well-known, requiring diligent prison systems to treat the informant

[17] When that contradiction was presented to in a sworn deposition he responded untruthfully, saying that Meeropol Decl., Ex. C (Dep.) at 154-5. When forced to admit claimed *Id.* at 157. That claim also was false; *Id.*, Ex. BN (8.4.17 DRB).

process with significant caution and create controls to ensure that process does not incentivize falsehoods. CDCR's system does the opposite, extracting confidential information in a manner which significantly exacerbates the inherently unreliable nature of such information.

The Ninth Circuit has recognized the particularly unreliable nature of confidential informants who testify in return for some benefit. *Maxwell*, 628 F.3d at 505; *United States v. Monzon-Valenzuela*, 186 F. 3d 1181, 1183 (9th Cir. 1999) (recognizing need for cautionary informant instruction where informant provides evidence for "some personal advantage or vindication."). Therefore, it is generally accepted that in the criminal context prosecutors are required "to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases." *Maxwell*, 628 F.3d at 510. Such benefits "'cast a shadow' on [the informant's] credibility." *Id.* (quoting *Benn v. Lambert*, 283 F. 3d. 1040, 1058 (9th Cir. 2002)).

Here, it is clear that debriefing informants are often promised explicit benefits (in addition to the general advantages that CDCR's debriefing system provides) in the form of favorable treatment not received by other prisoners. *See* Meeropol Decl., Ex. BQ (Debrief Tr.) at 4550 ( ); Ex. BG (Tr.) at 026593-95, 026620, 026595: 22-24 (" "); Ex. CS (Tr.) at 027025-26 (informant is promised).

Perhaps most ominously, at the end of a debriefer interview, the interviewer asks the informant " "). *Id.*, Ex. CS (Tr.) at 027031: 21-24. This suggests that deal-making may occur before and after the interviews are recorded.[18] None of these promises of benefits in return for information are memorialized in the RVR, confidential memoranda, or disclosure, thus depriving the prisoner of an opportunity to point out the unreliability of

[18] Moreover, there is evidence that widespread and even more explicit deal-making is occurring at , where . Meeropol Decl., Ex. CD (Decl.) at ¶ 13; Ex. BD (Decl.) at ¶ 12, p.23. *See also id.*, Ex. CT (Decl.) at 15-17 (urged to provide false confidential information).

this type of evidence and impacting the hearing officer's ability to properly weigh the evidence. *Id.*, Ex. G (RVR); *Id.*, Ex. CG (RVR).

Moreover, numerous jurisdictions around the country have required systems to track informants whose testimony has proved unreliable in the past. *See* Brief of Innocence Project Amicus, Ninth Circuit Court of Appeals, *Ashker v. Brown*, No. 19-15224, Dkt. 59, at 21. CDCR, however, does not track unreliable or dishonest informants to ensure they are not used in the future. Meeropol Decl., Ex. BA (Ducart 30(b)(6) Dep.) at 190:7-11. The failure to disclose that a confidential informant has lied in the past violates due process because "the finders of fact were deprived of the fundamental inference that if [the government informant lied] about X, Y and Z, it is quite likely that he lied about Q, R and S." *Killan v. Poole*, 282 F. 3d. 1204, 1209 (9th Cir. 2002). Moreover, this failure facilitates CDCR's collection of unreliable information.

Finally, CDCR's methods of interrogating debriefers encourages informants to tell the interviewers what they want to hear, regardless of whether it is the truth. When an investigator interviews a debriefer, . Meeropol Decl., Ex. CU (5.8.17 Interview, part 1) at 15 (This puts tremendous pressure on the debriefer to tell the investigator what he wants to hear. *See id.*, Ex. CT (Decl.) at ¶¶ 11-13; Ex. CV Declaration) at ¶¶ 9-12 (""). For example, when refused to corroborate untrue information from other informants, . *Id.* at ¶ 12.

Each of these practices ensure that CDCR will frequently receive false information from informants. Given this reality, CDCR's systemic failure to properly scrutinize confidential information for reliability prior to using it to send prisoners to solitary, find them guilty of rule violations, or send them to the RCGP is particularly troubling.

III. CDCR VIOLATES DUE PROCESS BY DENYING CLASS MEMBERS A FAIR OPPORTUNITY TO SEEK PAROLE.

Class members indisputably have a liberty interest in a meaningful opportunity to earn release from incarceration through parole. As this Court held in the Extension Order, CDCR maintains old constitutionally flawed gang validations and transmits them without qualification to the parole board. By refusing to inform the parole board that the validations do not reliably indicate that a prisoner has been active on behalf of a gang, CDCR leads parole commissioners to rely on these constitutionally infirm validations to deny class members fair parole consideration.

Further, during the second monitoring period, Plaintiffs discovered that numerous class members have been confronted at their parole hearings with a slew of outdated and incurably flawed confidential information. These flawed confidential materials, many of which are years and even more than a decade old, were never revealed to the prisoners until just before appearing in front of the parole board. At that point, the confidential memoranda are used by commissioners to deny parole to prisoners who otherwise would have a much stronger opportunity for release. By keeping all this stale and untested confidential information a secret for years and only giving cursory notice to the prisoners just before the hearings, CDCR provides class members no realistic way to challenge the information, thereby violating due process.

A. Plaintiffs Have a Constitutionally Protected Liberty Interest in Parole Consideration.

As this Court previously recognized, prisoners incarcerated in California have a state-created liberty interest in parole. Ext. Order at 23; *see Roberts v. Hartley*, 640 F.3d 1042, 1045 (9th Cir. 2011). When a state creates such a liberty interest, "the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). At a minimum, a prisoner subject to parole must be allowed an opportunity to be heard and provided a statement of the reasons why parole was denied. *Id.*, citing *Greenholtz*, 442 U.S. at 16.

B. CDCR Continues to Use Unreliable Gang Validations to Deny Class Members a Fair Opportunity to Seek Parole.

In 2019, this Court properly found that the past validations were constitutionally infirm. Ext. Order at 22-23. None of the facts or law underlying that determination have changed; thus the only question is whether CDCR continues to transmit the fundamentally flawed gang validations to BPH without regard to unreliability, and whether BPH continues to view these validations as compelling evidence to deny parole. As shown below, the violation continues.

Plaintiffs have garnered new evidence which, added to the findings in the Extension Order that the validations denied a meaningful opportunity for parole, establishes that CDCR has refused to remedy the problem. *See Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F. Supp. 2d 789, 797 (C.D. Cal. 2006) (evidence of past violations can help prove a continuing violation as well as establish the likelihood of future violations), citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.,* 484 U.S. 49, 58-59 (1987).

During parole review, the simple fact of a prisoner's validation raises an irrebuttable presumption of actual gang activity or affiliation, making it a "highly significant, if not often a dispositive" factor in parole consideration. Ext. Order at 23. The current evidence shows that this presumption remains. Declaration of Samuel Miller in Support of Pltfs' Second Mot. to Ext. the SA ("Miller Decl."), Ex. 2 (Tr.) at 51, 89-90 ("); Ex. 1 (Tr.) at 131; Ex. 16 (Decl.) at ¶ 18; Ex. 18 (Decl.) at ¶ 16; Ex. 3 (Tr.) at 128; Ex. 13 (Tr.) at 76; Ex. 4 (Tr.) at 74, 112, 139; Ex. 5 (Tr.) at 19, 51; Ex. 6 (Tr.) at 27-33, 65-66; Ex. 7 (Tr.) at 112.

The fact of a validation by CDCR remains damning even where the prisoner has engaged in extensive programming and/or had a long history of discipline-free behavior. Miller Decl., Ex. 8 (Tr.) at 77-78, 185-86 ( ); Ex. 3 (Tr.) at 83-88; Ex. 16 (Decl.) at ¶¶ 5, 9; Ex. 6 (Tr.) at 82-85. When prisoners dispute their validation or the use of confidential

information, commissioners consider it evidence of dishonesty and lack of credibility, which supports the denial of parole. Miller Decl., Ex. 7 (Tr.) at 115; Ex. 3 (Tr.) at 27-33, 93; Ex. 16 (Decl.) at ¶ 5. Because BPH predictably treats CDCR validations as reliable, and treats a prisoner's attempt to dispute validation as evidence of dishonesty and lack of remorse, CDCR's unqualified transmittal of the validations interferes with the prisoner's opportunity to be heard: On past gang behavior the prisoner *has no meaningful way to object*, as the validation has pre-determined how his disavowal will be received. Ext. Order at 23.

C. CDCR Violates Due Process by Denying Class Members a Meaningful Opportunity to Challenge Confidential Information Used to Prevent Them from a Fair Opportunity to Seek Parole.

Plaintiffs present 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. CDCR prevents class members from any realistic way to challenge the alleged facts, yet makes the information fully available to the Parole Board, thereby violating due process.

1. CDCR Systemically Deprives Plaintiffs of a Meaningful Opportunity to Challenge Confidential Information Used to Deny Parole.

CDCR regularly places confidential memoranda and documentation in prisoners' files and retains it in perpetuity, even where the information is unreliable. Miller Decl. at ¶ 25; Ex. 19 (2017 Report of Significant Events, Board of Parole Hearings) at 4 ("correctional counselors provide inmates and their attorneys with a summary of information contained in the confidential portion of an inmate's institutional file upon which the Board may rely during a parole suitability hearing," including "confidential informants about criminal and gang activity in prison"). CDCR does not affirmatively inform prisoners that such documentation is being maintained in their files unless it is used for disciplinary purposes. Miller Decl. at ¶ 25 Ex. 20 (Decl.) at ¶ 5; Ex. 16 (Decl.) at ¶ 9 ("

[REDACTED]").[19] The information remains in the prisoners' files permanently. Yet, CDCR has a thirty-day time limit on filing a grievance. 15 CCR § 3482(b).

Prisoners are only notified of this confidential information and given an opportunity to contest it if a disciplinary action or other adverse departmental decision is initiated (likely through issuance of a Confidential Information Disclosure Form 1030). Miller Decl., Ex. 20 ([REDACTED] Decl.) at ¶ 5; Ex. 16 ([REDACTED] Decl.) at ¶ 9 ("[REDACTED]."). While prisoners have a limited right to view some substantive confidential information in their file (as flawed and even false as it might be, as discussed in section I above), this right is worthless where they are not told that the information is even there. Without disciplinary action triggering a prisoner's right to review the confidential information related to that action, CDCR accumulates confidential information, which gets more stale over time. CDCR neither tests the veracity or reliability of this dormant information, nor expunges it.

When CDCR is notified that a prisoner is due for a parole hearing, its staff goes through the prisoner's file and pulls confidential memoranda, chronos, and related documentation for the previous ten years or longer. Miller Decl. at ¶ 25; Ex. 20 ([REDACTED] Decl.) at ¶ 3 ([REDACTED]); Ex. 16 ([REDACTED] Decl.) at ¶ 7. CDCR then prepares the Notice—a perfunctory listing of the documents found during file review. *Id.*, Ex. 21 ([REDACTED] Ex.); Eh. 1 ([REDACTED] Tr.) at 93. The Notice is provided to the prisoner approximately ten to fifteen days prior to the parole hearing. *Id.*, Ex. 1 ([REDACTED] Tr.) at 93; Ex. 9 ([REDACTED] Tr.) at 16 ([REDACTED]); Ex. 20 ([REDACTED] Decl.) at ¶ 2; Ex 16 ([REDACTED] Decl.) at ¶ 7. Prisoners often are shocked to discover that confidential

[19] CDCR often maintains a Form 810 in prisoners' central files to provide a cursory listing of confidential information. Prisoners are not regularly notified that these listings exist and are reviewable, the listing is often incomplete, and, most importantly, unless disciplinary charges are brought, the prisoners are given no reason to even think to conduct a file review. Miller Decl., Ex. 16 ([REDACTED] Decl.) at ¶¶ 15-16; Ex. 18 ([REDACTED] Decl.) at ¶ 14 (stating that [REDACTED].

1 information has been sitting in their file for years, and that it is now being disclosed to interfere with
2 their opportunity to seek parole. *Id.*, Ex. 3 (Tr.) at 94 (
3 "); Meeropol Decl., Ex.
4 CT (Decl.); Miller Decl., Ex. 18 (Decl.
5 A glance at any sample Notice plainly reveals that the listings barely describe the events in
6 question, and often are completely opaque, providing far less detail than necessary to protect
7 institutional security. For example, the Notice provided to Mr. included
8 where the only description provided was: "
9 Miller Decl., Ex. 20 (Decl., ex. thereto);
10 Meeropol Decl., Ex. CD (Decl.) at ¶ 5; Miller Decl., Ex. 18 (Decl., ex. thereto); Ex.
11 16 (Decl., Ex. B thereto). The Notice is so scant that it prevents prisoners from even belatedly
12 attempting to challenge the confidential informant or explain their side of the story. Mr.
13 explains: "
14
15
16 ." Miller Decl., Ex. 16 (Decl.) at ¶ 6; Ex. 3 (Tr.) at 27; Ex. 20 (
17 Decl.) at ¶ 4; Ex. 16 (Decl.) at ¶ 11; Meeropol Decl., Ex. CD (Decl.) at ¶ 5; Miller
18 Decl., Ex. 10 (. Tr.) at 92-93. As a result, the colloquy between prisoner and commissioner
19 often becomes farcical, with commissioners blaming the prisoner for failing to admit to past behavior
20 where the prisoner is mystified as to what incident is even being discussed. Ex. 10 (Tr.) at 94
21 ("
22 "); Ex. 11
23 (Tr.) at 77-78 (commissioner: "
24 ."). The level of disclosure provided in a
25 1030 highlights by contrast how scant and deficient the Notice is. *Compare* Miller Decl., Ex. 17
26 (1030) *with* Ex. 16 (Decl.) at 70.
27 All confidential items on the list are made fully available to the Parole Board, even where the
28 source information has been deemed unreliable, there is no corroboration, or there is no other evidence

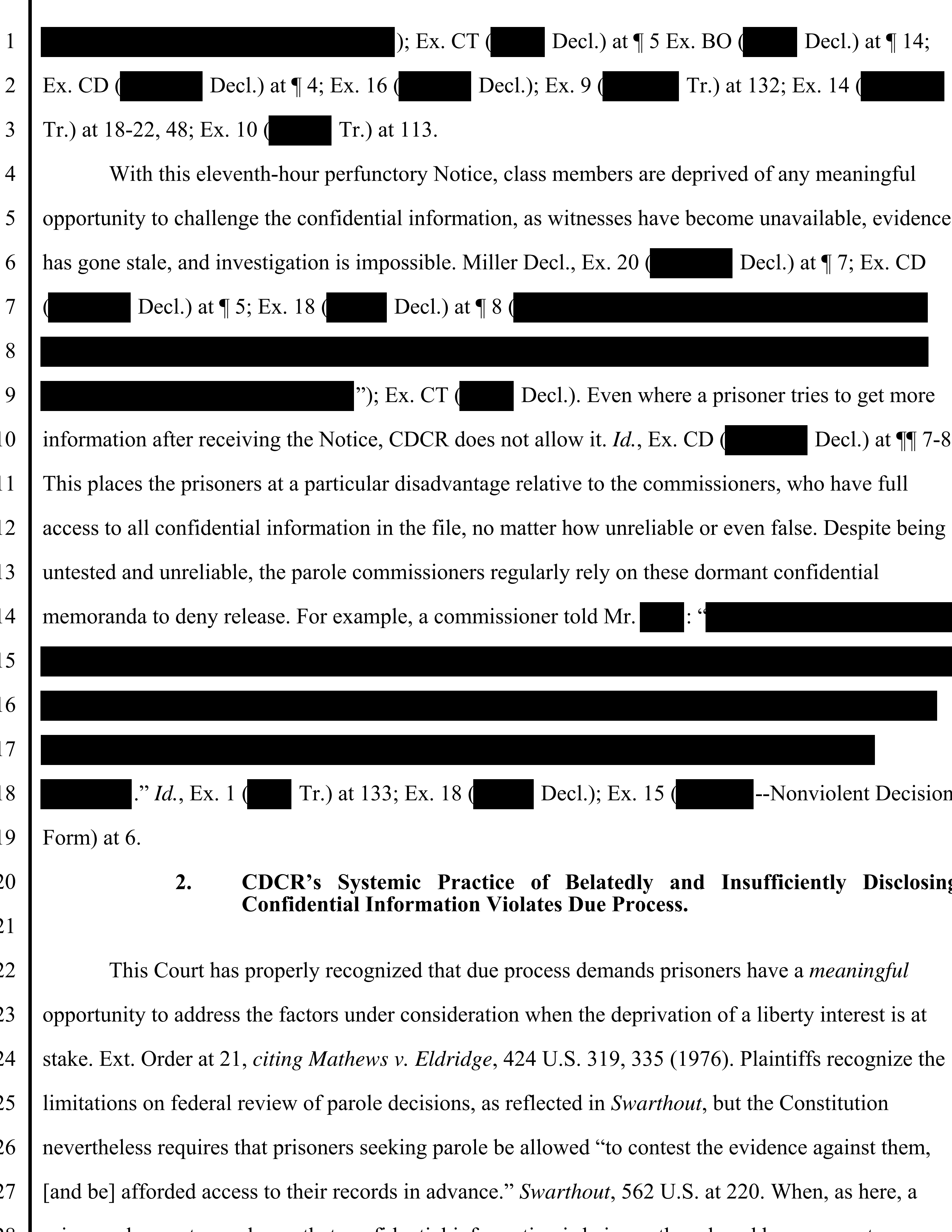
to support the information. Miller Decl. at ¶ 25; Ex. 16 (Decl.) at 22; Ex. 12 (Tr.) at 10. It is clear the commissioners give credence to this confidential information simply because it comes unqualifiedly from CDCR. *Id.*, Ex. 13 (Tr.) at 165 (

"); Ex. 11 (Tr.) at 77-78, 93-96; Meeropol Decl., Ex. CD (Decl.) at ¶ 6 ( ); Ex. 16 (Decl.) at ¶ 12 and 38, 53; Ex. C (Decl.) at ¶ 10.[20]

Furthermore, CDCR's own treatment of the confidential information creates a strong inference it is either unreliable or, at a minimum, unremarkable. Certainly, if CDCR (or the district attorney) felt that reliable information supported an allegation of serious misconduct or criminal activity, disciplinary action would be initiated. Title 15 section 3312(a)(3) states: "When misconduct is believed to be a violation of law or is not minor in nature, *it shall be reported* on a Rules Violation Report (RVR)." (emphasis added). Yet, Plaintiffs' evidence shows that despite confidential information alleging serious misconduct (*e,g*., narcotics trafficking, assault, gang recruitment), these prisoners were *not* issued RVRs. The *only* information at issue on this motion concerning the flawed Notice is material that has *not* been acted upon. The reliability of the information therefore must be suspect.

By keeping these confidential memoranda for years unbeknownst to the prisoners, CDCR builds and maintains a collection (at times a trove) of what becomes stealth evidence when the time comes for parole review. Miller Decl., Ex. 18 (Decl.) at ¶ 5 (

[20] As discussed above, CDCR admits that confidential information sometimes is inaccurate and/or uncorroborated. Miller Decl., Ex. 22 (Hubbard depo.) at 156:24-157:11; 159:5-17; Ex. 10 (Tr.) at 65-66 . In fact, most confidential information comes from debriefers, i.e., " ." *Id.*, Ex. 3 (Tr.) at 91; Ex. 16 (Decl.) at 54).



); Ex. CT (Decl.) at ¶ 5 Ex. BO (Decl.) at ¶ 14; Ex. CD (Decl.) at ¶ 4; Ex. 16 (Decl.); Ex. 9 (Tr.) at 132; Ex. 14 (Tr.) at 18-22, 48; Ex. 10 (Tr.) at 113.

With this eleventh-hour perfunctory Notice, class members are deprived of any meaningful opportunity to challenge the confidential information, as witnesses have become unavailable, evidence has gone stale, and investigation is impossible. Miller Decl., Ex. 20 (Decl.) at ¶ 7; Ex. CD (Decl.) at ¶ 5; Ex. 18 (Decl.) at ¶ 8 ("); Ex. CT (Decl.). Even where a prisoner tries to get more information after receiving the Notice, CDCR does not allow it. *Id.*, Ex. CD (Decl.) at ¶¶ 7-8. This places the prisoners at a particular disadvantage relative to the commissioners, who have full access to all confidential information in the file, no matter how unreliable or even false. Despite being untested and unreliable, the parole commissioners regularly rely on these dormant confidential memoranda to deny release. For example, a commissioner told Mr. : " ." *Id.*, Ex. 1 (Tr.) at 133; Ex. 18 (Decl.); Ex. 15 (--Nonviolent Decision Form) at 6.

2. CDCR's Systemic Practice of Belatedly and Insufficiently Disclosing Confidential Information Violates Due Process.

This Court has properly recognized that due process demands prisoners have a *meaningful* opportunity to address the factors under consideration when the deprivation of a liberty interest is at stake. Ext. Order at 21, *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiffs recognize the limitations on federal review of parole decisions, as reflected in *Swarthout*, but the Constitution nevertheless requires that prisoners seeking parole be allowed "to contest the evidence against them, [and be] afforded access to their records in advance." *Swarthout*, 562 U.S. at 220. When, as here, a prisoner does not even know that confidential information is being gathered, and has no way to

challenge potentially fabricated confidential facts or uncover the true facts, he is at "a severe disadvantage in propounding his own cause [] or defending himself from others." *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

CDCR's systemic practice of keeping dormant untested, unreliable, and stale confidential information, never disclosing it to the prisoner until just before a parole hearing, and even then disclosing only a cursory and often useless notification, violates this fundamental guarantee of due process. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding … [is] an opportunity to present their objections."); *Mathews*, 424 U.S. at 345-46 (due process safeguard includes "full access to all information relied upon by the state agency"); *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("immutable" principle is that "evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").

CDCR's belated cursory notice 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.[21] *See Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069-70 (government cannot allow "secret information [to be used] as a sword" against those harmed by it; "[w]ithout any opportunity for confrontation, there is no adversarial check on the quality of the information on which the [government] relies"), *citing U.S. ex. rel. Knauff v. Shaughnessy,* 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."); *United States v. Solomon*, 422 F.2d 1110, 1121 (7th Cir. 1970) (at a minimum, due process requires detailed disclosure of the grounds in government documentation of any "secret information" that are pertinent to post-conviction action). This is especially problematic where the confidential information already carries an inference of unreliability—as noted above, *none* of the

[21] Since CDCR prevents prisoners from knowledge of all confidential information not used for disciplinary purposes, this evidence also would include exculpatory material which, if revealed, could alter their results on parole. *See Chavis v. Rowe*, 643 F.2d 1281, 1286-7 (7th Cir. 1981) (*Wolff* due process requirements violated by denial of exculpatory witness statements).

information at issue here has been deemed by CDCR reliable or significant enough to initiate or support any kind of disciplinary proceeding, even though most of the allegations, if reasonably believable, would mandate such action. 15 CCR § 3312(a).

Two temporal problems exacerbate the inadequate disclosure. The time lag (often years) between when the confidential memo goes into the file and when the Notice is provided makes it literally impossible for the prisoners to marshal facts. *See Mullane,* 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process."); *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069. The temporal problem after the Notice is that the short time (generally a few weeks) between its transmittal and the parole hearing prevents the prisoner from having time to file a grievance or conduct any investigation. *See Mullane*, 339 U.S. at 314 ("notice must be of such nature as reasonably to convey the required information, [citation omitted] and it must afford a reasonable time for those interested to make their appearance"); 15 CCR § 3483(i) (providing CDCR 60 calendar days to respond to a prisoner grievance).

By preventing class members from any realistic opportunity to challenge confidential information used against them in the parole process, CDCR impairs the prisoners' liberty interest in seeking release from incarceration and violates due process.

IV. CDCR'S FAILURE TO PROVIDE RCGP PRISONERS WITH A MEANINGFUL OPPORTUNITY FOR RELEASE TO GENERAL POPULATION IS A SYSTEMIC VIOLATION OF DUE PROCESS.

The RCGP unit was meant to be a transitional placement for class members whose safety would be at risk in general population. SA, ¶¶ 27-28. Prisoners in the RCGP are there through no fault of their own; but rather because they are thought to be targeted for violence by other prisoners. Thus, the unit was created to provide enhanced social interaction and programing while prisoners work toward release to general population. *Id.*

Pursuant to the Settlement, a prisoner may be sent to the RCGP based on the Departmental Review Board (DRB) finding a "substantial threat to their personal safety" should they be sent to general population. SA, ¶ 27. Thereafter, prisoners' housing is reviewed every 180 days, at which time the Institutional Classification Committee (ICC) is required to "verify whether there continues to be a

demonstrated threat to the inmate's personal safety." *Id.* If no verified continued threat exists, the ICC refers the case to the DRB for potential release to general population. *Id.*

This Court found in the Extension Order that Plaintiffs have a liberty interest in avoiding the RCGP based on Plaintiffs' evidence that RCGP placement is prolonged and singular, that it limits parole eligibility and access to social interaction because of its remote location in the far northern part of the State, and because the unit is stigmatizing. Ext. Order at 25. These factors, in combination, render RCGP placement "atypical and significant" in comparison to the ordinary incidents of prison life, *Sandin v. Conner*, 515 U.S. 472, 484 (1995), which has only become clearer since the Extension Order, as demonstrated in Section A below.

In addition, Plaintiffs' evidence and detailed case studies in Section B show that once prisoners are placed in the RCGP, there is often no way out; thus, CDCR's promise of periodic review of RCGP placement is meaningless. Far from the transitional unit contemplated by the Settlement, the RCGP is, for many prisoners housed there, a "[REDACTED]" from which the only ways out are "[REDACTED]." Declaration of Carmen Bremer in Support of Pltfs' Second Mot. to Ext. the SA ("Bremer Decl."), Ex. a ([REDACTED] Tr.) at 2.

A. Plaintiffs Have a Liberty Interest in Avoiding RCGP Placement.

The Due Process Clause protects prisoners from any restraint that "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. In the Ninth Circuit, determining what "condition or combination of conditions or factors would meet the [*Sandin*] test requires case by case, fact by fact consideration." *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Under this fact-intensive analysis, as this Court already found, the RCGP imposes an atypical and significant hardship warranting due process protections because of its physical restrictions, the duration of prisoners' placement there, the unusualness of being transferred there, and the stigma inherent in the unit.

1. RCGP Placement Is Atypical and Significant.

The RCGP is atypical and significant because it imposes exceptional deprivations on prisoners placed there, including minimal opportunity for visits and limited social interaction and job opportunities. The RCGP's location at Pelican Bay is especially onerous for prisoners whose case

factors make them eligible for placement at lower security level facilities but have no choice but to be housed at the most restrictive facility in the state. *See*, *e.g.*, Bremer Decl., Ex. b ([redacted] DRB Chrono) at 5; Ex. c ([redacted] DRB Chrono) at 7; Ex. d ([redacted] DRB Chrono) at 7; Ex. kk ([redacted] DRB Chrono) at 6 (all indicating prisoner has a Level II placement score). And although Defendants have opened a second unit for some prisoners with safety concerns at Corcoran State Prison in Unit 4A1L B ("COR 4A1L B"), only a handful of prisoners with ADA-qualifying medical disabilities are eligible to be housed there; CDCR refuses requests by PBSP RCGP prisoners to transfer there to be closer to family.[22] Bremer Decl., Ex. e ([redacted] DRB Chrono) at 6; Ex. f (email from CDCR counsel) at 2.

a. RCGP Prisoners Have Limited Contact Visits.

RCGP prisoners are allowed bi-weekly contact and non-contact visits, but most prisoners receive very few visits, if any, because of the RCGP's remote location at PBSP combined with CDCR's decision to restrict RCGP prisoners' contact visits—unlike those of GP prisoners—to Thursdays and Fridays, when loved ones are working. *See* Bremer Decl., Ex. k ([redacted] Decl.) at ¶¶ 7-8; Ex. l ([redacted] Decl.) at ¶ 10; Ex. j ([redacted] Decl.) at ¶ 3; Ex. m ([redacted] Decl.) at ¶ 3; Ex. n ([redacted] Tr.) at 17:18-18:15; *see also*; *Serrano v. Francis*, 345 F.3d 1071, 1078-79 (9th Cir. 2003) (analyzing existence of liberty interest based not on what amenities and privileges were theoretically available, but on prisoner's ability to take advantage of them).

b. RCGP Prisoners Have Limited Social Interaction and Job Opportunities.

Prisoners in the RCGP do not enjoy nearly the same level of social interaction as those housed in GP; interactions are limited to programming groups, each comprised of only [redacted] to [redacted] prisoners. Bremer Decl., Ex. o (CDCR Letter) at 2. Interaction outside of one's group is not allowed. *Id.*, Ex. l ([redacted] Decl.) at ¶ 5. The situation is even worse for prisoners on walk-alone status—

[22] COR 4A1L B is not remote, but Plaintiffs still have a liberty interest in avoiding being housed there. Indeed, with the exception of contact visits (prisoners in COR 4A1L B do get at least one weekend day of contact visiting), each of the remaining factors applies equally to prisoners in COR 4A1L B. Bremer Decl., Ex. h ([redacted] Decl.) at ¶¶ 4, 8-9 (limited job opportunities and social interactions); *id.* at ¶¶ 15-60, 20 (placement is prolonged and stigmatizing). And the fact that there were only [redacted] prisoners in the unit as of May 2020 makes the designation that much more isolating and unusual. Bremer Decl. at ¶ 9; Ex. g (COR 4A1LB charts).

comprising [REDACTED] [REDACTED] the RCGP population, Bremer Decl. at ¶ 28, Ex. z—who do not program with anyone. *Id.*, Ex. l ([REDACTED] Decl.) at ¶ 7; Ex. m ([REDACTED] Decl.) at ¶ 4.

There are also limited job opportunities for RCGP prisoners. Bremer Decl., Ex. l ([REDACTED] Decl.) at ¶¶ 12-14; Ex. m ([REDACTED] Decl.) at ¶ 5; Ex. k ([REDACTED] Decl.) at ¶¶ 9-10. Although RCGP prisoners are eligible for jobs, "[REDACTED]" *Id.*, Ex. l ([REDACTED] Decl.) at ¶ 12; *see also* Ex. k ([REDACTED] Decl.) at ¶ 9. This bars RCGP prisoners from achieving a higher privilege group level, which requires a full-time job and influences important aspects of prisoners' lives, such as telephone access. 15 CCR § 3044(d)-(j).[23]

These harms are uniquely acute for *Ashker* class members in the RCGP, who previously spent years in SHU, since prisoners released from long-term SHU confinement demonstrate particular psychological disturbances that last even after their release from segregation. Bremer Decl., Ex. q (Stanford Report) at 4. Though these effects are persistent, increased social interaction and having a job are two factors that help prisoners overcome them. *Id.* at 15, 22, 25. Thus, the lack of social interaction and job opportunities leads to a particularly significant and atypical hardship for class members in the RCGP.

2. RCGP Placement Is Prolonged.

RCGP placement is also atypical and significant because it is prolonged. The duration of a given restriction factors significantly into the liberty interest analysis. *Keenan*, 83 F.3d at 1089 ("[t]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards."); *Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014) (duration was the "crucial factor distinguishing" the IMU from the ordinary incidents of prison life); *Clark v. California*, No. 96-1486, 1996 U.S. Dist. LEXIS 21630, *28 (N.D. Cal. Oct. 1, 1996) ("length of confinement" factors in determining liberty interest).

RCGP placement is indefinite; only around [REDACTED]% of the prisoners who have been housed there since the unit opened in January 2016 have been released to GP. Bremer Decl., Ex. r (letter from

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[23] In contrast, GP prisoners may be able to achieve a higher privilege status even without a full-time job by participating in other educational or rehabilitative programming unavailable in the RCGP. *Id.*; Bremer Decl., Ex. l ([REDACTED] Decl.) at ¶ 14; Ex. k ([REDACTED] Decl.) at ¶ 10.

CDCR counsel) at 2 (of [redacted] inmates who had been endorsed to RCGP since March 2020, only [redacted] were released to GP);[24] Ex. s (RCGP charts) ([redacted] more prisoners endorsed to RCGP and COR 4A1L B during 4Q); Ex. t (email from CDCR counsel) at 1 ([redacted] more class member released to GP during 4Q). For those who remain and are unwilling to either debrief or request housing in a non-designated programming facility (NDPF) that houses protective-custody inmates, the assignment to RCGP could be permanent, therefore "push[ing RCGP] designation over the *Sandin* threshold." *Aref v. Lynch*, 833 F.3d 242, 257 (D.C. Cir. 2016). *See also Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Harden-Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008).

3. Placement in the RCGP Is Stigmatizing.

As the Ninth Circuit has recognized, a stigmatizing classification gives rise to a liberty interest requiring procedural protections. *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997). Prisoners in the RCGP face a serious stigma, contributing to their liberty interest in avoiding transfer there because of a perception among prisoners that one's placement in RCGP is definitive evidence that he requires protective custody. Bremer Decl., Ex. u ([redacted] Decl.) at ¶ 3; Ex. l ([redacted] Decl.) at ¶¶ 19-21. This perception, whether true or not, makes RCGP prisoners "wanted m[e]n" among the prison population. *Id.*, Ex. u ([redacted] Decl.) at ¶ 3; Ex. h ([redacted] Decl.) at ¶¶ 15-16 (same for COR 4A1L B).

Indeed, CDCR's own documents from the second monitoring period reflect that the stigma for [redacted] in RCGP is so strong [redacted] [redacted]. *Id.*, Ex. w ([redacted] ICC Chrono) at 2 ("[redacted]

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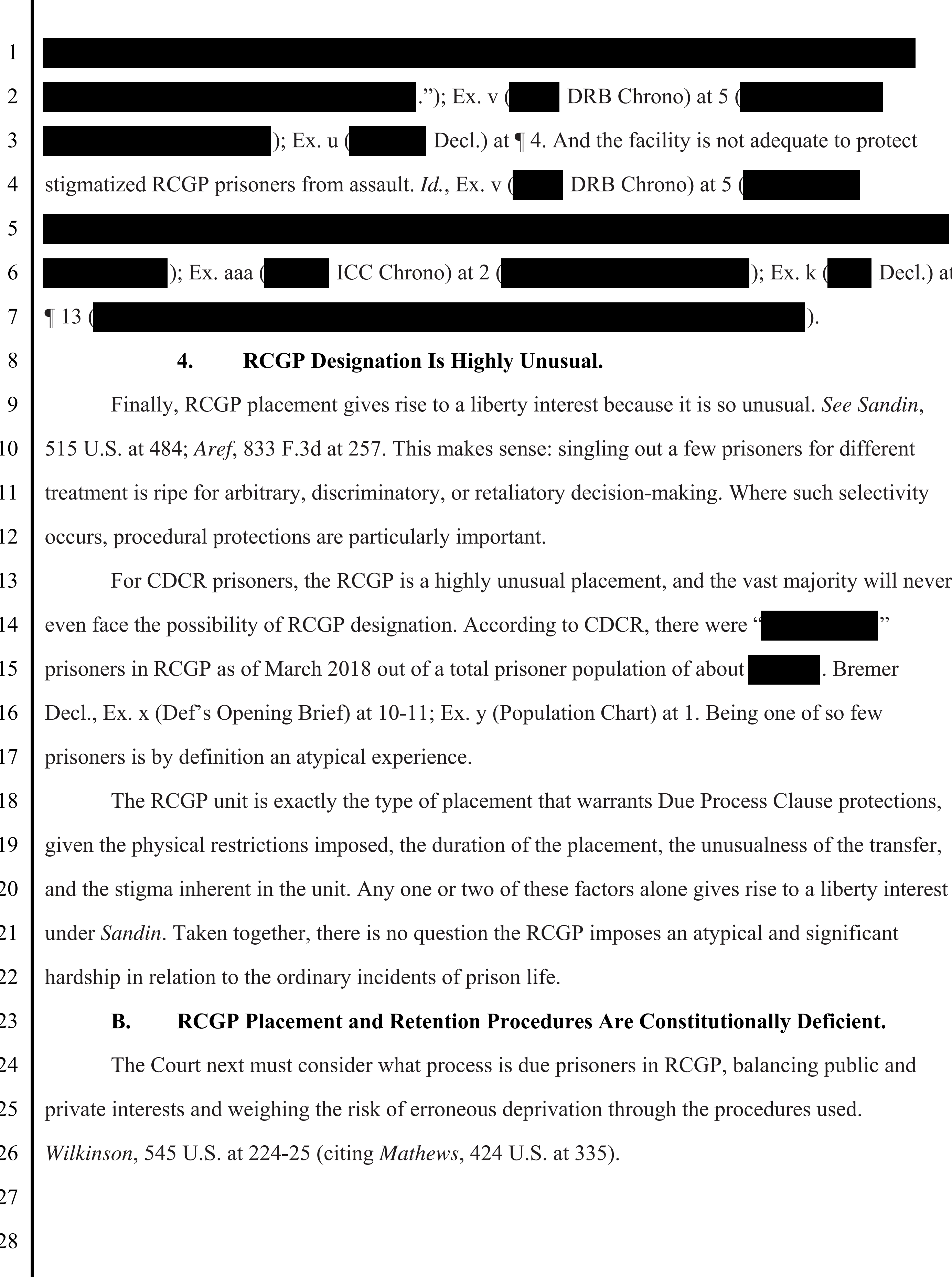
[24] CDCR states that another [redacted] prisoners were released to "[redacted]"—[redacted] to non-designated programming facilities and [redacted] to sensitive needs yards. *Id.* While these facilities may have "[redacted]" conditions, they house protective custody prisoners and, therefore, carry a stigma that endangers prisoners' safety. *See, supra,* Section IV.A.3. For prisoners unwilling to accept the implications of that stigma, release to an *actual* GP yard is their only way out. Of course, debriefing is not a viable option for most because "[t]estifying against, or otherwise informing on, gang activities can invite one's own death sentence." *Wilkinson*, 545 U.S. at 227. Nor is it an option for many prisoners to request housing in a NDPF, also called a 50/50 yard, because it is akin to protective custody in terms of stigma. *See* Bremer Decl., Ex. j ([redacted] Decl.) at ¶ 5. These two "options" for release do not affect a determination that RCGP placement is prolonged.



.”); Ex. v (DRB Chrono) at 5 ( ); Ex. u (Decl.) at ¶ 4. And the facility is not adequate to protect stigmatized RCGP prisoners from assault. *Id.*, Ex. v (DRB Chrono) at 5 ( ); Ex. aaa (ICC Chrono) at 2 ( ); Ex. k (Decl.) at ¶ 13 ( ).

4. RCGP Designation Is Highly Unusual.

Finally, RCGP placement gives rise to a liberty interest because it is so unusual. *See Sandin*, 515 U.S. at 484; *Aref*, 833 F.3d at 257. This makes sense: singling out a few prisoners for different treatment is ripe for arbitrary, discriminatory, or retaliatory decision-making. Where such selectivity occurs, procedural protections are particularly important.

For CDCR prisoners, the RCGP is a highly unusual placement, and the vast majority will never even face the possibility of RCGP designation. According to CDCR, there were “ ” prisoners in RCGP as of March 2018 out of a total prisoner population of about . Bremer Decl., Ex. x (Def’s Opening Brief) at 10-11; Ex. y (Population Chart) at 1. Being one of so few prisoners is by definition an atypical experience.

The RCGP unit is exactly the type of placement that warrants Due Process Clause protections, given the physical restrictions imposed, the duration of the placement, the unusualness of the transfer, and the stigma inherent in the unit. Any one or two of these factors alone gives rise to a liberty interest under *Sandin*. Taken together, there is no question the RCGP imposes an atypical and significant hardship in relation to the ordinary incidents of prison life.

B. RCGP Placement and Retention Procedures Are Constitutionally Deficient.

The Court next must consider what process is due prisoners in RCGP, balancing public and private interests and weighing the risk of erroneous deprivation through the procedures used. *Wilkinson*, 545 U.S. at 224-25 (citing *Mathews*, 424 U.S. at 335).

1. **Prisoners' Private Interest in Avoiding RCGP Is Significant.**

Prisoners already have their liberty curtailed by definition; thus, the first *Mathews* factor—the private interest at stake—must be evaluated "within the context of the prison system and its attendant curtailment of liberties." *Wilkinson*, 545 U.S. at 225. Given the unique restrictions imposed by, stigma and danger associated with, and prolonged duration of placement in the RCGP demonstrated above, the private interest in avoiding the unit is substantial.

CDCR itself has implicitly recognized the significance of the deprivations imposed by the RCGP. *See*, *e.g.*, Bremer Decl., Ex. aa (CDCR Design and Construction Guidelines) at 45; Ex. bb (PBSP Operational Procedure) at 3 (both recognizing the importance of providing programming opportunities and full-time work assignments); Ex. cc (Lewis Tr.) at 119:19-21 ("[REDACTED] ."); Ex. dd (Giurbino Tr.) at 149:2-16 ([REDACTED]). And the serious stigma associated with RCGP placement discussed above has the potential to tarnish the prisoner for life. *See infra* at IV.A.3.

2. **There Is Currently a Significant Risk of Erroneous Deprivation.**

RCGP prisoners face a serious risk of erroneous deprivation under current procedures: CDCR makes inconsistent and arbitrary decisions in the safety threat review process that result in wrongful retention of prisoners in the unit on a systemic basis. Thus, the second *Mathews* factor weighs heavily in support of a finding that stronger procedural protections are necessary.

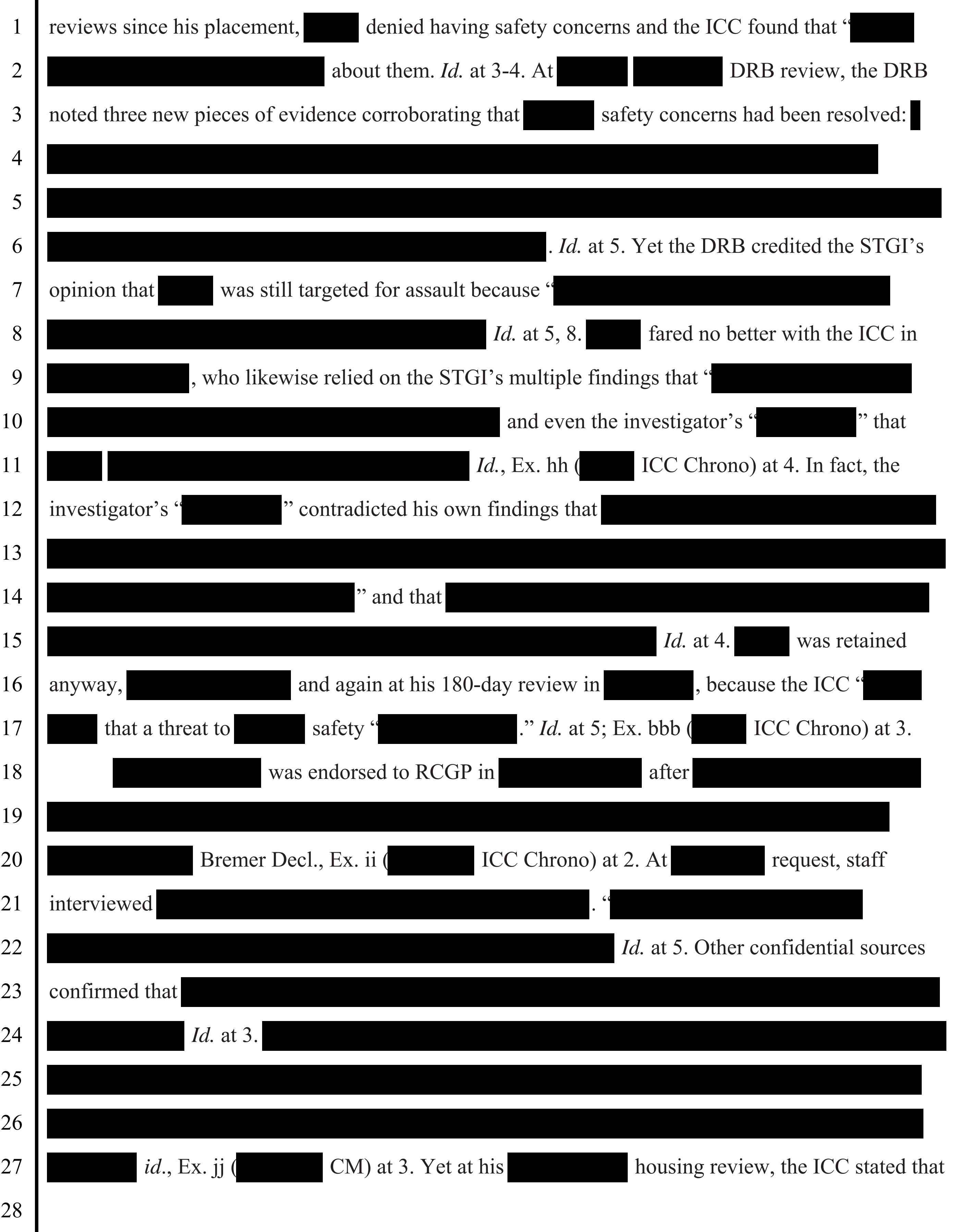
a. **DRB and ICC Decisionmakers Deny Prisoners Meaningful Review and a Fair Opportunity for Rebuttal.**

It is axiomatic that a prisoner is entitled to meaningful periodic review of his placement in restricted housing, and that such review cannot simply be rote or pretextual. *Wilkinson*, 545 U.S. at 225-26 ("[A] fair opportunity for rebuttal" is "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations"); *Brown v. Oregon Dep't of Corr.*, 751 F.3d 983 (9th Cir. 2014); *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (ASU "may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates"). Yet the record shows that prisoners are continually denied release

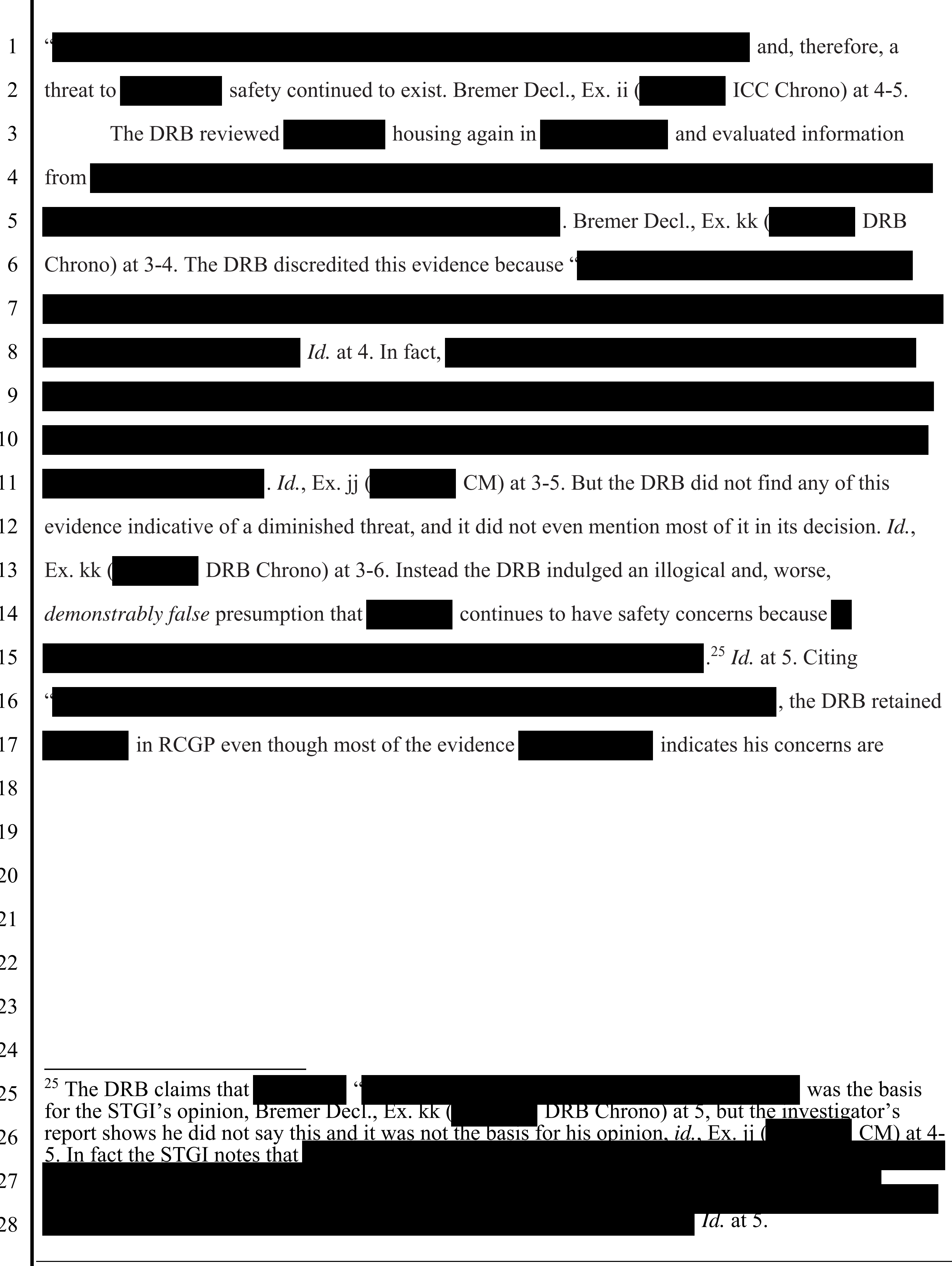
1 from the RCGP based on rote and meaningless reviews whereby officials simply assume that
2 restrictive housing must continue despite substantial evidence to the contrary. *See*, *e.g.*, Ex. 1 (
3 Decl.) at ¶ 28 ("
4 ."). The following detailed case studies epitomize this
5 systemic problem.

6 was endorsed to the RCGP in because the DRB found he had
7 safety concerns with for being suspected of
8 . Bremer Decl., Ex. d (DRB Chrono) at 2. But in
9 , Pelican Bay staff discovered
10
11 *Id.* at 3-4. CDCR's gang investigator (the STGI) noted "
12
13
14 and thus concluded
15 ." *Id.* at 4. The DRB
16 nevertheless retained at his review because the STGI found that "
17 *Id.* at 7. The ICC again rubber-stamped
18 this finding at review even though there was "
19 , he " ," and
20 . *Id.*, Ex. ee (ICC Chrono) at 1-2. At his next ICC review in , the ICC
21 noted that a
22 *Id.*, Ex. ff (ICC Chrono) at 2. Notwithstanding this
23 new evidence corroborating that no longer had safety concerns, and although there was once
24 again " , the ICC *still* retained him in RCGP because it
25 found " *Id.* at 2-3.

26 was endorsed for placement in RCGP in based on "historic safety
27 concerns" involving
28 . Bremer Decl., Ex. gg (DRB Chrono) at 2-3. At each of his 180-day ICC



1 reviews since his placement, denied having safety concerns and the ICC found that "
2 about them. *Id.* at 3-4. At DRB review, the DRB
3 noted three new pieces of evidence corroborating that safety concerns had been resolved:
4
5
6 . *Id.* at 5. Yet the DRB credited the STGI's
7 opinion that was still targeted for assault because "
8 *Id.* at 5, 8. fared no better with the ICC in
9 , who likewise relied on the STGI's multiple findings that "
10 and even the investigator's " " that
11 *Id.*, Ex. hh (ICC Chrono) at 4. In fact, the
12 investigator's " " contradicted his own findings that
13
14 " and that
15 *Id.* at 4. was retained
16 anyway, and again at his 180-day review in , because the ICC "
17 that a threat to safety " ." *Id.* at 5; Ex. bbb (ICC Chrono) at 3.
18 was endorsed to RCGP in after
19
20 Bremer Decl., Ex. ii (ICC Chrono) at 2. At request, staff
21 interviewed . "
22 *Id.* at 5. Other confidential sources
23 confirmed that
24 *Id.* at 3.
25
26
27 *id.*, Ex. jj (CM) at 3. Yet at his housing review, the ICC stated that
28



1 " and, therefore, a
2 threat to safety continued to exist. Bremer Decl., Ex. ii (ICC Chrono) at 4-5.
3 The DRB reviewed housing again in and evaluated information
4 from
5 . Bremer Decl., Ex. kk (DRB
6 Chrono) at 3-4. The DRB discredited this evidence because "
7
8 *Id.* at 4. In fact,
9
10
11 . *Id.*, Ex. jj (CM) at 3-5. But the DRB did not find any of this
12 evidence indicative of a diminished threat, and it did not even mention most of it in its decision. *Id.*,
13 Ex. kk (DRB Chrono) at 3-6. Instead the DRB indulged an illogical and, worse,
14 *demonstrably false* presumption that continues to have safety concerns because
15 .[25] *Id.* at 5. Citing
16 " , the DRB retained
17 in RCGP even though most of the evidence indicates his concerns are
18
19
20
21
22
23
24

25 [25] The DRB claims that " was the basis
26 for the STGI's opinion, Bremer Decl., Ex. kk (DRB Chrono) at 5, but the investigator's report shows he did not say this and it was not the basis for his opinion, *id.*, Ex. jj (CM) at 4-5. In fact the STGI notes that
27
28 *Id.* at 5.

resolved.[26] *Id.*, Ex. kk (DRB Chrono) at 6. There was no new information demonstrating a threat to safety when the ICC reviewed his housing again in , but he was again retained. *Id.*, Ex. ll (ICC Chrono) at 2.

That these individuals are continually retained by numerous ICCs and DRBs despite their positive programming and substantial evidence they have resolved their safety concerns demonstrates the rote, pretextual nature of these reviews, based on blind indulgence of "assumptions," not on review of the actual evidence. This is only the tip of the iceberg; the ICC retained class members in RCGP during the second monitoring period, despite there being no new evidence of a demonstrated threat to their safety, because it "cannot state that such threat no longer exists." Bremer Decl. at ¶ 59. The ICC merely accepts the STGI's assumption that safety concerns continue and does no real review of the record. *Id.*, Ex. nn (ICC Chrono) at 4 ("); Ex. 1 (Decl.) at ¶ 28 (" ."). And it is frequently apparent from the ICC's own description that the opinion it rubber-stamped did not result from any meaningful evaluation of whether historical issues in fact remain a threat. *See*, *e.g.*, *id.*, Ex. ee (ICC Chrono) at 2 ("

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[26] *id.*, Ex. jj (CM) at 5. But *Id.* at 4. And the relevant inquiry of whether can safely program in GP *now* is certainly better informed by than it is by a . *Id.*, Ex. kk (DRB Chrono) at 5. But the STGI's report shows the , not the and it does not confirm whether . *Id.*, Ex. mm (CM) at 2.

1
2); Ex. oo ICC Chrono) at 1-2 ("
3
4 "); Ex. aaa (ICC Chrono) at 2 (similar re CM dated
5 , Safety Investigation); Ex. ccc (ICC Chrono) at 2 (similar re CM dated ,
6 Safety Investigation).

7 Setting aside whether this practice violates the Settlement, it does not satisfy due process; rote
8 indulgence of an assumption that historical safety concerns continue independent of a review of the
9 evidence is not meaningful review, nor does it provide "a fair opportunity for rebuttal." *Wilkinson*, 545
10 U.S. at 225-26. *See also Isby v. Brown*, 856 F.3d 508, 528 (7th Cir. 2017) (finding genuine fact dispute
11 whether periodic reviews take into account "any updated circumstances in evaluating the need for
12 continued confinement, given the length of Isby's segregation, his long stretches of time without any
13 disciplinary issues, and *the rote repetition of the same two boilerplate sentences following each*
14 *review*," and warning that "while submission of new evidence or a full hearing may not be necessary to
15 meet the requirements of due process [ ], an actual review—i.e., *one open to the possibility of a*
16 *different outcome*—certainly is") (emphasis added); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir.
17 2015) ("The ICC has merely rubber-stamped Appellant's incarceration" in ASU, "*listing in rote*
18 *repetition the same justification every 30 days*.") (emphasis added and internal quotation marks
19 omitted).

20 **b. RCGP Prisoners Are Denied Adequate Notice of the Factual Basis**
21 **for Their RCGP Retention.**

22 Notice of the factual basis leading to a decision, and a full and fair opportunity for rebuttal are
23 "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations."
24 *Wilkinson*, 545 U.S. at 225-26. Notice must be meaningful, in that it "provid[es] the inmate [with] a
25 basis for objection before the next decisionmaker or in a subsequent classification review." *Wilkinson*,
26 545 U.S. at 226. Notice "also serves as a guide for future behavior." *Id.*; *see also Greenholtz*, 442 U.S.
27 at 15 (prisoners denied parole given notice of the reason "as a guide to the inmate for his future
28 behavior").

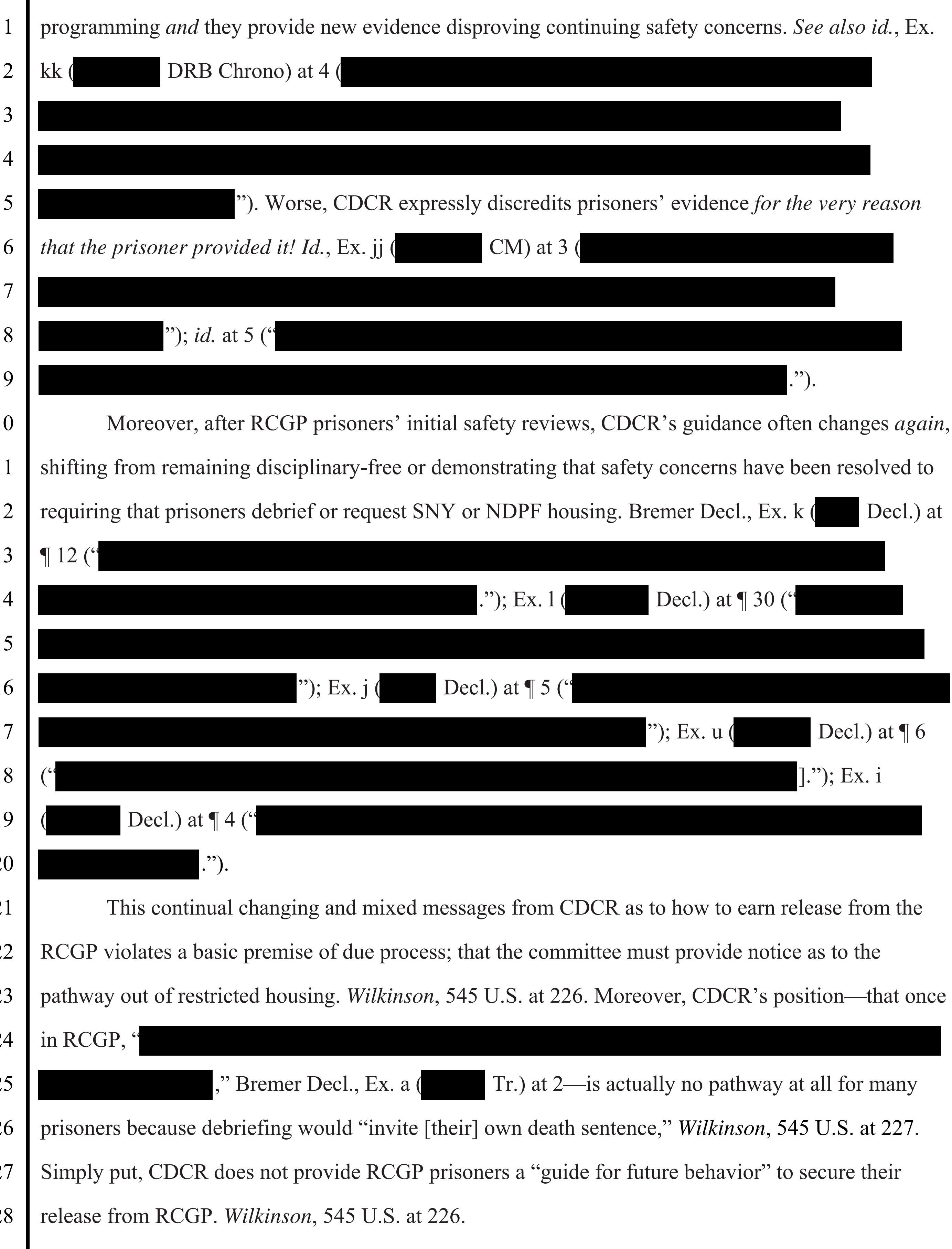
CDCR tells RCGP prisoners at their initial DRB safety reviews that they can demonstrate eligibility for release to GP by positively programming for six months. Bremer Decl., Ex. k (Decl.) at ¶ 12; Ex. m (Decl.) at ¶ 7; Ex. u (Decl.) at ¶ 5. This makes sense considering the RCGP's transitional purpose and that programming successfully with other prisoners in RCGP evidences an ability to do so in GP as well. But this notice is misleading; even where prisoners have programmed positively in the RCGP for more than six months, they continue to be retained. *Id.*, Ex. ee (ICC Chrono) at 2 ("   ); Ex. k (Decl.) at ¶ 12   .").[27]

RCGP prisoners are further misled at their 180-day ICC reviews, where they are told *they* must demonstrate their safety concerns have been resolved to gain release to GP. *See*, *e.g*., Ex. l (Decl.) at ¶ 24   .").[28] Requiring prisoners to affirmatively disprove they have safety concerns already abdicates the ICC's duty under the Settlement to verify that historical concerns continue to be a demonstrated threat.[29] SA ¶ 27. It is also misleading because, as the case studies above illustrate, the ICC and DRB routinely retain prisoners even when they have been positively

[27] *See also id.*, Ex. nn (ICC Chrono) at 4; Ex. pp (ICC Chrono) at 2; Ex. qq (ICC Chrono) at 5; Ex. rr (ICC Chrono) at 3; Ex. ss (ICC Chrono) at 3; Ex. tt (ICC Chrono) at 2; Ex. uu (ICC Chrono) at 2; Ex. ccc (ICC Chrono) at 2 (each retaining prisoner despite noting that he programs and interacts with other inmates).

[28] *See also id.*, Ex. oo (ICC Chrono) at 1; Ex. vv (ICC Chrono) at 2; Ex. nn (ICC Chrono) at 3; Ex. ww (ICC Chrono) at 2; Ex. xx (ICC Chrono) at 4; Ex. yy (ICC Chrono) at 2 (all retaining prisoners because there is no new information to *disprove* historical safety concerns).

[29] Magistrate Judge Vadas found in March 2018 that Plaintiffs did not prove a violation of the Settlement Agreement based on this practice during the initial monitoring period. ECF No. 989 at 5. But that is a different issue than whether the ICC's practice violates due process. And Plaintiffs did not previously offer the evidence in this motion demonstrating that the ICC actually disregards evidence that safety concerns have been resolved.



programming *and* they provide new evidence disproving continuing safety concerns. *See also id.*, Ex. kk (DRB Chrono) at 4 ("). Worse, CDCR expressly discredits prisoners' evidence *for the very reason that the prisoner provided it! Id.*, Ex. jj (CM) at 3 ("); *id.* at 5 (" .").

Moreover, after RCGP prisoners' initial safety reviews, CDCR's guidance often changes *again*, shifting from remaining disciplinary-free or demonstrating that safety concerns have been resolved to requiring that prisoners debrief or request SNY or NDPF housing. Bremer Decl., Ex. k (Decl.) at ¶ 12 (" ."); Ex. l (Decl.) at ¶ 30 (" "); Ex. j (Decl.) at ¶ 5 (" "); Ex. u (Decl.) at ¶ 6 ("]."); Ex. i (Decl.) at ¶ 4 (" .").

This continual changing and mixed messages from CDCR as to how to earn release from the RCGP violates a basic premise of due process; that the committee must provide notice as to the pathway out of restricted housing. *Wilkinson*, 545 U.S. at 226. Moreover, CDCR's position—that once in RCGP, " ," Bremer Decl., Ex. a (Tr.) at 2—is actually no pathway at all for many prisoners because debriefing would "invite [their] own death sentence," *Wilkinson*, 545 U.S. at 227. Simply put, CDCR does not provide RCGP prisoners a "guide for future behavior" to secure their release from RCGP. *Wilkinson*, 545 U.S. at 226.

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c. Safety Threat Reviews Lack Sufficient Checks and Balances.

CDCR requires multiple levels of review to *release* a prisoner from the RCGP, but no further review is required to retain a prisoner. After the DRB approves RCGP placement, the decision is final. SA, ¶ 27. The DRB is the only body that may reverse that decision or approve any transfer. *See, e.g.*, Bremer Decl., Ex. c (█████ DRB Chrono) at 9; Ex. b (█████ DRB Chrono) at 7; Ex. e (█████ DRB Chrono) at 7.[30] Even if the ICC finds at a 180-day review that a prisoner no longer faces a safety threat, the case must be referred to the DRB. SA, ¶ 27. Yet if at any point the ICC or DRB elects to *retain* the prisoner in RCGP, there is no further check on that decision, and the process terminates until the following 180-day review. *Id*. Thus, a recommendation to remove a prisoner from the RCGP requires a heightened two-tiered review, but a recommendation to retain him does not. In *Wilkinson*, the Supreme Court noted with approval Ohio's three-tiered review process that requires the inverse: if a reviewing body elects to remove the prisoner from OSP placement, that decision is final. *Wilkinson*, 545 U.S. at 227. But if the recommendation is to retain him in the OSP, that decision must go through another level of review. *Id*. at 217, 227. Unlike CDCR's, this multi-layered review system "guards against arbitrary decisionmaking." *Id*. at 226.

Here, a multi-layered review process is particularly important because the record illustrates the particular arbitrariness and meaninglessness of the unreviewable ICC reviews denying prisoners release from the RCGP. *See supra at* IV.B.2.a. That the ICC hearings are generally meaningless requires that DRB reviews occur frequently. Yet the DRB hearings which might correct erroneous ICC decisions do not take place, at the earliest, until the two-year anniversary of a prisoner's assignment to RCGP and again every two years after that, 15 CCR § 3378.9(b), which is too infrequent to satisfy due process. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986) ("We do not believe that annual review sufficiently protects plaintiffs' liberty interest"); *see also McQueen v. Tabah*, 839 F.2d 1525, 1529 (11th Cir. 1988) (11 months without review states due process claim). And in practice class members' DRB reviews have been chronically delayed—by as much as █ months and an average of █

[30] However, the DRB control is lifted if the prisoner enters the debriefing program. Bremer Decl., Ex. e (█████ DRB Chrono) at 7; Ex. b (█████ DRB Chrono) at 7; Ex. c (█████ DRB Chrono) at 9.

months when Plaintiffs first raised the issue with CDCR in January 2020. Bremer Decl. at ¶ 60. The DRB cleared its backlog in [redacted], but the substantial delays incurred by then only magnified the deprivation of RCGP prisoners' due process rights. *Id.*; Ex. zz (email from CDCR counsel) at 1.

3. Additional Procedures Would Safeguard Against Erroneous Deprivations.

Mathews next instructs the court to consider "the probable value, if any, of additional or substitute procedural safeguards." *Wilkinson*, 545 U.S. at 224-25. Here, providing meaningful and accurate notice, a meaningful hearing, and multiple levels of review would significantly reduce CDCR's pattern of erroneous RCGP placement. CDCR's own procedures indicate that even adding one additional level of review to RCGP placement decisions substantially reduces erroneous placements. The ICC was responsible for an initial recommendation regarding *Ashker* class members' need for RCGP placement when they were first released from SHU under the Settlement, and the DRB was required to review the ICC's recommendation before transfer. SA, ¶ 27. Of [redacted] prisoners recommended for RCGP placement by the ICC, the DRB approved only [redacted]—or [redacted] percent. Bremer Decl. at ¶ 2. Yet the ICC has the authority to make unchecked decisions to *retain* prisoners in the RCGP, with the DRB only getting involved once every two years. The dramatic decrease in RCGP placements when a two-tiered system for *approving* RCGP retention is utilized supports a finding that additional procedures are necessary to correct and prevent further erroneous deprivations of liberty.

4. Government Interests Would Be Better Served by Implementing Meaningful Procedures.

The final *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Wilkinson*, 545 U.S. at 224-25. Here, the government's interests would be served by implementing meaningful procedures. More robust procedures would very likely lead to a reduction in the RCGP population, thereby offsetting any initial modest increase in required resources. A smaller number of prisoners in the unit would enable CDCR to offer more meaningful educational and vocational programming per prisoner—both of which are currently in short supply because the unit is overburdened. *See supra* section IV.A.1.b. Additionally, if the population of the unit were reduced,

CDCR would be better able to manage the sensitive protection needs of the prisoners who truly have ongoing substantial safety concerns.

V. PLAINTIFFS ARE ENTITLED TO EXTENSION OF THE SETTLEMENT AND A SPECIFIC REMEDY FOR THESE CONSTITUTIONAL VIOLATIONS.

It has now been five years since the parties settled this case, during which countless class members have been unjustly returned to SHU, trapped in the RCGP, and denied a meaningful opportunity to seek parole. Having succeeded on the first extension motion on this issue, and having now presented further compelling evidence of continued violations and Defendants' refusal to reform their policy and practice, Plaintiffs are entitled not only to continued monitoring but also to remedies which could cure these continuing and systemic constitutional violations.

First, given CDCR's longstanding failure to ensure the accurate disclosure and reliability of confidential information, Plaintiffs propose (1) the audio-recording of all confidential source interviews unless an investigator explains in writing why recording would interfere with the integrity of the interview; (2) maintenance of all investigator notes and recordings; (3) new training and written guidelines to ensure that confidential memoranda accurately and *fully* document the confidential interviews, including the inclusion of any potentially inculpatory information; (4) the creation of an independent monitor to review the department's use of confidential information; and (5) a mechanism for prisoners who are currently serving solitary terms based on confidential information to appeal those disciplinary proceedings to an independent fact-finder.

Second, Plaintiffs ask that the Court order that CDCR issue a directive for all class members scheduled to appear before the Parole Board as follows:

> A prisoner's old gang validation, on its own, should not be assumed to reliably indicate that the inmate was active with a prison gang, as many prisoners were previously validated without such evidence, and the District Court has ruled that the validations were made in systemic violation of constitutional due process. Instead, as the Board of Parole Hearing commissioners evaluate the totality of case factors, they should consider only overt acts of recent gang activity, as opposed to indications or labels of association or affiliation.

Third, With respect to CDCR's systemic practice of maintaining confidential information in secret, Plaintiffs ask that the Court order that CDCR must provide contemporaneous notice to prisoners whenever confidential information is placed in their file, regardless of whether it is being used in a

disciplinary proceeding. This notice must be as detailed as possible without damaging institutional security, and include: (a) a detailed description of the information provided by the confidential informant; (b) the date the information was provided to the Department; (c) the date of the events or actions referred to in the informant's report; (d) the location where the information was provided by the informant; (e) the name of the officer who obtained and recorded the informant's report; (f) the source and nature of the informant's personal knowledge of the events or actions; (g) the investigative steps taken by the receiving officer or other department official to confirm the facts reported and the informant's personal knowledge; (h) the informant's previous record of confidential information, including instances of information not meeting standards of reliability; (i) the evidence used to corroborate the information, including a summary notice if the information is corroborated by another in-custody confidential informant; or, if corroboration is provided by a nonconfidential informant, or by physical evidence, that information be fully disclosed in the notice; and (j) a signed statement by the decisionmaker that the decisionmaker has made a determination regarding the corroboration of the confidential information. Additionally, for all past confidential information for which the prisoner has not been contemporaneously notified, Defendants should be ordered to either (a) prevent the disclosure of such material to BPH, or (b) notify BPH at the same time the Notice is provided to the prisoner that all confidential information that previously has been undisclosed to the prisoner should be deemed presumptively unreliable since it has not been contemporaneously subjected to any test of credibility, corroboration, accuracy, or truthfulness.

Finally, with respect to the RCGP, Plaintiffs propose: (a) adoption of a multi-tiered RCGP classification and verification review system in which any decision or recommendation to place or retain a prisoner in the RCGP must be confirmed by at least one other reviewing body, and (b) implementation of criteria that the DRB and the ICC will adhere to at each safety review, which specifies the factors to be considered, and the weight afforded to each. Alternatively, Defendants could fix the due process issue by relieving the burdens imposed by the RCGP that give rise to a liberty interest, including by: (a) re-locating the RCGP, or establishing an additional RCGP unit that is centrally located to relieve the burdens imposed by the remoteness of PBSP; (b) providing greater opportunities for increased social interaction with other prisoners by allowing prisoners in

programming groups to interact with prisoners in other groups or other housing units in controlled settings, or through a chain link fence; and (c) offering RCGP prisoners the opportunity to have contact visits on weekends.

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Respectfully submitted,

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