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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TODD ASHKER, et al.,

Plaintiffs,

v.

GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Defendants.

Case No.: 4:09-cv-05796-CW (RMI)

**CLASS ACTION**

**PLAINTIFFS' RESPONSE AND CROSS-OBJECTION RE FIRST EXTENSION OF SETTLEMENT AGREEMENT**

Judge: Honorable Claudia Wilken

## I. THE MAGISTRATE JUDGE CORRECTLY FOUND THAT DEFENDANTS VIOLATED DUE PROCESS BY SYSTEMICALLY MISUSING CONFIDENTIAL EVIDENCE TO RETURN CLASS MEMBERS TO THE SHU.

The Magistrate Judge correctly found that Plaintiffs proved by a preponderance of the evidence that CDCR systemically uses fabricated, inaccurately disclosed, and unreliable confidential evidence to return *Ashker* class members to solitary confinement. Extension Order, ECF No. 1122 ("Ext. Order") at 24-25. Defendants mischaracterize Plaintiffs' evidence as mere "human error" in "failing to include every fact in a confidential disclosure form," (Defendants' Objections, ECF No. 1345 ("Obj.") at 5) but the bulk of Plaintiffs' evidence involves confidential information that was *not* accidentally overlooked; it was instead altered to appear more damning than it is. *See* Ext. Order at 5-6 (confidential disclosure harmonizes accounts from two different informants that actually conflict in material ways); *id.* at 6 (exculpatory part of informant's account not disclosed, instead replaced by inculpatory statement informant never uttered); *id.* at 15 (confidential disclosure indicates positive identification by informant; in reality, informant shown two photo arrays and did not identify prisoner in either); *id.* at 17 (describing multiple instances where CDCR officials portray their own investigatory conclusions as statements of informants) and many, many more.

Similarly, Defendants' reference to "periodic errors in *recording* reliability determinations" (Obj. at 5, emphasis added), fails to grapple with the reality of the Magistrate Judge's findings of multiple instances in which CDCR relies on "corroborating" sources which did not actually exist, among many other errors in *determining, not just recording,* reliability. Ext. Order at 8-11, 17.

Magistrate Judge Illman correctly found that this systemic fabrication, inaccurate disclosure, and use of unreliable confidential information violates due process (*id.* at 24), as providing a prisoner with fabricated information about what an unidentified informant said denies the prisoner the ability to "marshal the facts and prepare a defense" guaranteed by *Wolff v. McDonnell.* 418 U.S. 539, 564 (1974). And relying on a corroborating source that does not exist, or refusing to permit class members to challenge the reliability of confidential information (Ext. Order at 24), violates *Zimmerlee v. Keeney*'s emphasis on "the importance of reliability" when using confidential information. 831 F.2d 183, 186 (9th Cir. 1987).

The Settlement explicitly provides for a 12-month extension of the District Court's jurisdiction upon evidence that continuing and systemic due process violations "exist" as "alleged in" Plaintiffs' Complaints, or "as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by this Agreement." Settlement Agreement ("SA"), ECF No. 424-2 ¶ 41. As this Court observed when considering the likelihood of Defendants' success on appeal, "[b]ecause the settlement agreement requires CDCR to take certain steps to ensure that the use of confidential information against inmates 'is accurate' (*see, e.g.* SA ¶ 34), these violations arise out of the reforms contemplated by the settlement agreement, and therefore constitute a proper ground for extending the settlement agreement under paragraph 41." Order Granting Mot. for De Novo Determination, ECF No. 1198 at 29; *see also* Ext. Order at 26. Defendants ask this Court to ignore the requirements of paragraph 34 altogether (Obj. at 4), but they provide no explanation or basis for the Court to do so; nor does CDCR explain why it agreed to produce highly confidential material for Plaintiffs' review during the monitoring period if CDCR's use of that confidential information were irrelevant to the SHU reforms. *See* SA ¶ 37(h).[1]

## II. THE MAGISTRATE JUDGE CORRECTLY FOUND THAT DEFENDANTS VIOLATED DUE PROCESS BY TRANSMITTING CONSTITUTIONALLY FLAWED GANG VALIDATIONS TO THE PAROLE BOARD WITHOUT QUALIFICATION.

Defendants' objections to the Magistrate Judge's findings and recommendations regarding CDCR's use of old constitutionally flawed gang validations are without merit. First, judicial estoppel is inapplicable here because estoppel only applies when a party has taken a position "clearly inconsistent" with its earlier position. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). Defendants attempt to manufacture inconsistency based on Plaintiffs' statement during

[1] While Magistrate Judge Illman rested exclusively on a finding that the confidential information due process violation exists *as a result* of the Settlement's reforms, those violations were also "alleged in" Plaintiffs' Complaints, thus giving rise to an alternate ground for extension. SA ¶ 41. The Complaint is replete with allegations that confidential information was being used to validate prisoners, which led to their placement or retention in the SHU. Second Amended Compl., ECF No. 136, ¶¶ 16, 17, 21, 93, 108-110, 118, 119. Paragraphs 15 and 34 of the Settlement Agreement were designed to ensure that prisoners would only be placed in the SHU based on reliable, accurate information that they had committed serious misconduct. Had the Complaint included no allegations regarding misuse of confidential information, there would have been no reason for the parties to include paragraphs 34 and 37(h) in the Settlement.

settlement approval that they did "not seek to change parole policies." Obj. at 2. Plaintiffs took no different position in the Extension Motion and have never challenged BPH policies or decisions. ECF Nos. 905, 1002; *see also* Ext. Order at 13, 22. Rather, Plaintiffs' entire challenge is to CDCR's actions – *i.e.*, its continued retention of the old validations and their unqualified transmittal to BPH. Defendants also base their estoppel argument on a false assertion that Plaintiffs seek to "nullify" the old validations. Obj. at 2. In fact, Plaintiffs have made clear that "the request for expungement could be satisfied by CDCR issuing a directive that past validations are not reliable and should not be given consideration for parole purposes." ECF No. 1002 at 36.[2]

Second, Defendants argue that Plaintiffs presented "no evidence" of a due process violation relating to parole. Obj. at 4. In reality, Plaintiffs presented parole transcripts of twelve class members, along with extensive related documentation, showing that gang validation is a significant factor in parole consideration and risk rating; and Plaintiffs made the uncontested point that *no* recent parole applications by validated prisoners had been granted. ECF No. 908 ¶¶ 42-57 & Ex. 41-54. Magistrate Judge Illman carefully reviewed this evidence and properly found that "gang validation is a highly significant, if not often a dispositive factor in parole consideration, and that when prisoners dispute their validation at their parole hearings, Commissioners consider the challenge itself to constitute evidence of dishonesty and a manifestation of a lack of remorse or credibility." Ext Order at 23. Plaintiffs also provided extensive evidence to support the Magistrate Judge's finding that "CDCR's old process for gang validation was constitutionally infirm." ECF No. 908 ¶¶ 2-39 & Exs. 1-38; Ext. Order at 22.

Third, Plaintiffs' parole claim rests on solid legal ground. CDCR's treatment of the old validations paints unconstitutionally garnered evidence with the patina of reliability, and its unqualified transmittal of these validations to BPH violates due process by denying prisoners a meaningful opportunity to be heard and by creating systemic bias in the parole system. *See Mathews v.*

[2] This Court already has rejected Defendants' argument that substantial compliance in one area of the Agreement should prevent Plaintiffs' from seeking relief in other areas. ECF No. 632 at 9, citing *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016) ("Like terms in a contract, distinct provisions of consent decrees are independent obligations, each of which must be satisfied before there can be a finding of substantial compliance.").

*Eldridge*, 424 U.S. 319, 344 (1976); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979). Defendants complain that Plaintiffs' right to a "*meaningful*" opportunity to be heard is legally "tenuous" (Obj. at 4), but due process requires that prisoners have advance access to their records and the right to "contest the evidence against them." *Pearson v. Muntz*, 639 F.3d 1185, 1191 (9th Cir. 2011), citing *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011); *Branham v. Davison*, 433 Fed. Appx. 491, 492 (9th Cir. 2011). Due process similarly guarantees an unbiased decision-maker. *O'Bremski v. Maass*, 915 F.2d 418, 422 (9th Cir. 1990); *Woods v. Valenzuela,* 734 Fed. Appx. 394, 396 (9th Cir. 2017); *Coleman v. Board of Prison Terms,* No. Civ. S-96-0783LKK/PA, 2005 WL 4629202, at *4 (E.D. Cal. Dec. 2, 2005). CDCR's continued retention of the old validations and their unqualified transmittal to BPH significantly and negatively tips the scales against the prisoner, infecting the parole process with systemic bias. *See Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (where "evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised"); *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992).

Fourth, Defendants object that the parole claim is outside the parameters set by Paragraph 41 of the Agreement. However, the specific claim at the time of the Complaint *and* now is that CDCR's flawed validations have deprived class members of a fair opportunity to seek parole. This issue was included in the Complaint *both* to establish a liberty interest *and* the Eighth and Fourteenth Amendment claims. ECF No. 388 ¶¶ 230, 237, 249, 256, 261. On that basis, this Court has observed that the Complaint "contains allegations that gang validation could and did ultimately result in the denial of a fair opportunity for parole." ECF No. 1198 at 29; *see also* Ext. Order at 26.[3]

Defendants also argue that CDCR does not literally "transmit" the files to BPH, but this is wordplay. Title 15 provides that *CDCR* "*release*" case records files containing gang validation and

[3] As an alternative ground under Paragraph 41, the parole violation arises from CDCR's reforms under the Settlement. The parties' agreement to end CDCR's policy of status-based SHU placements resulted in some class members going to BPH only to find that the same validations that originally put them in SHU and led to a *de-facto* parole bar now prevent them from gaining parole in a new way, *i.e.*, due to CDCR's unqualified transmission of the validations to BPH. To the extent the violation has changed, it is because the Settlement removed the intervening step of SHU placement, precipitating a shift in *how* validations affect parole.

other information to BPH. 15 C.C.R. § 3370(e) (emphasis added).[4] CDCR created the unconstitutional validations, maintains them in prisoner files subjecting them to transfer to BPH, and refuses to qualify those transmissions with a simple notice of their unreliability.

## III. THE MAGISTRATE JUDGE CORRECTLY FOUND A LIBERTY INTEREST IN AVOIDING RCGP, BUT THIS COURT SHOULD REJECT THE FINDING THAT PLAINTIFFS DID NOT PROVE A DUE PROCESS VIOLATION.

Magistrate Judge Illman correctly found there is a liberty interest in avoiding the RCGP based on evidence that placement there is prolonged and singular, it limits parole eligibility and access to social interaction, and it is stigmatizing. Ext. Order at 25. Defendants object to that determination, claiming that CDCR "takes care" to ensure RCGP prisoners "receive opportunities for exercise, social interaction, and education comparable to inmates in other high-security general-population units." Obj. at 5. But Plaintiffs presented abundant evidence showing this is not the case. Ext. Order at 11. And while effectively conceding that RCGP placement *is* "significantly different from general population," Defendants further contend, without explanation, "that is not the legal standard, and the factors the judge considered were not proper." Obj. at 5. But the Magistrate Judge correctly applied *Wilkinson* to find, based on the factors above in combination, that RCGP placement is "unique" and "sufficiently different" in relation to "the ordinary incidents of prison life" to create a liberty interest. Ext. Order at 21, 25 (*citing Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Sandin v. Connor*, 515 U.S. 472, 484 (1995)). There is nothing improper about the Magistrate Judge's analysis, and this Court should adopt it.

But the Magistrate Judge's recommended finding that Plaintiffs have not shown a systemic due process violation, Ext. Order at 25, should not be adopted, as Plaintiffs demonstrated that CDCR's promise of periodic review of RCGP placement is meaningless and that prisoners have no way to earn their release to general population. Plaintiffs showed that many prisoners were transferred to the RCGP based, at least in part, on a factor that Defendants never said they would consider—that the prisoners' release to general population would pose a threat to *institution* security. Ext. Order at 11. Plaintiffs also

[4] The statement in the Shaffer Declaration (ECF No. 1345-1) that "CDCR does not transmit documents to the Board," even if considered by this Court in its discretion, is thus irrelevant.

produced evidence of many instances in which the Institutional Classification Committee used an overly restrictive presumption to retain prisoners in the RCGP, finding that even when there was no evidence of a continuing threat to a prisoner's safety if released to general population, it could not categorically state that no such threat still exists. *Id.* at 12-13. And Plaintiffs produced evidence that CDCR actively misleads prisoners about how to secure return to general population, suggesting that participating in programming and remaining incident-free for six months will result in transfer, but the prisoners are instead retained in RCGP based on an essentially irrebuttable presumption that the threat continues. *Id* at 12.

The Magistrate Judge held that this evidence did not rise to the level of a "systemic" due process violation, as Plaintiffs did not present "detailed case-studies" to show that RCGP placement and retention decisions "are in fact arbitrarily made." Ext. Order at 25. But due process does not merely require decisions that are not arbitrary; it requires notice of the reason for the placement, an opportunity to be heard, and meaningful periodic review. *Wilkinson*, 545 U.S. at 226; *see generally Brown v. Oregon Dep't of Corr.*, 751 F. 3d 983 (9th Cir. 2014), *see also Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) ("[A]dministrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of period review of the confinement of such inmates."); *Williams v. Hobbs,* 662 F. 3d 994, 1007 (8th Cir. 2011). Defendants must, among other things, provide a prisoner with an explanation for their placement and retention in RCGP and "a guide for future behavior." *Wilkinson*, 545 U.S. at 226 (*citing Greenholtz*, 442 U.S. at 15); *see also Toevs v. Reid*, 685 F.3d 903, 913-14 (10th Cir. 2012). Plaintiffs demonstrated Defendants' systemic failure to meet these standards; the Court should reject the Magistrate Judge's recommended finding and hold that Defendants' RCGP placement and retention procedures violate due process.

## IV. CONCLUSION

This Court should adopt the Magistrate Judge's recommendation to extend the Settlement Agreement and the Court's jurisdiction over this matter, and should rule that Defendants' RCGP placement and retention procedures violate due process.

DATED: September 30, 2020

Respectfully submitted,

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