

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

TODD ASHKER, et al.,
Plaintiffs,
v.
GAVIN C. NEWSOM, et al.,
Defendants.

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

ORDER

Re: Dkt. No. 905

Pending before the court is Plaintiffs’ Motion for Extension of the Settlement Agreement Based On Systemic Due Process Violations (dkt. 905), Defendants’ Response in Opposition (dkt. 985-3), Plaintiffs’ Reply (dkt. 1002), Plaintiff’s Supplemental Brief (Dkt. 1027), and Defendants’ Response to the Supplemental Brief (dkt. 1084-3).¹ For the reasons stated below, the court will grant Plaintiffs’ Motion and extend the Settlement Agreement for a period of 12 months.

INTRODUCTION

This case has a lengthy procedural history that is now approaching ten years. For present purposes, it is unnecessary to begin any earlier than a description of the substance of the two claims presented in Plaintiffs’ Second Amended Complaint. *See Am. Compl.* (dkt. 136) at 40-45. First, due to the cumulative effects of prolonged solitary confinement, attended with windowless cells that are sealed off from contact with other prisoners, a prohibition on social phone calls or contact visits with family members, as well as the deprivation of good time credits or general or

¹ Un-redacted copies of Plaintiffs’ Motion (dkt. 898-4), Defendants’ Response (dkt. 985-7), Plaintiff’s Reply (dkt. 1000-4), Plaintiffs’ Supplemental Brief (dkt. 1025-4), and Defendants’ Response to the Supplemental Brief (dkt. 1084-4) have all been filed under seal.

1 educational programming which causes the denial of an opportunity for parole, Plaintiffs advanced
2 an Eighth Amendment claim to the effect that class members had been denied the basic needs of
3 normal human contact, environmental and sensory stimulation, acceptable levels of mental and
4 physical health, physical exercise, sleep, nutrition, and meaningful daily or periodic activity. *Id.* at
5 40-43. Second, Plaintiffs claimed that class members have been denied due process due to the
6 absence of any meaningful and timely periodic reviews of their identification by prison authorities
7 as “active” gang members on which their continued long-term and indefinite detention at the
8 Pelican Bay Special Housing Unit (“SHU”) was premised, as well as meaningful notice of what
9 they must do to earn release; instead, Plaintiffs contend that class members’ prolonged
10 confinement under such conditions is a coercive means of inducing prisoners to serve as
11 informants, and that their identification as active gang members occurs without reliable evidence.
12 *Id.* at 44-46. As to the class members, the court has previously certified the Eighth Amendment
13 Class as including all inmates who are now or will be in the future, assigned to the Pelican Bay
14 SHU for a period of more than ten continuous years; and the Due Process Class as all inmates who
15 are assigned to an intermediate term at the Pelican Bay SHU on the basis of gang validation, under
16 the policies and procedures in place as of September 10, 2012. *See Order* (dkt. 317) at 21.

17 Thereafter, the Parties resolved this case and executed a comprehensive Settlement
18 Agreement (dkt. 424-2) in which a process was created for the release of prisoners that had been
19 held in the SHU based on gang validation to general population units, that is, unless they had been
20 found guilty of a SHU-eligible rule violation with a gang nexus within the prior two years. *Id.* at
21 9-11. The Settlement Agreement also describes certain modifications to the Step Down Program,
22 which is intended as a gang diversion program, as well as providing for the means and
23 circumstances under which prisoners would be transferred to a Restrictive Custody General
24 Population (“RCGP”) facility with increased opportunities for human interaction and participation
25 in educational programs. *Id.* 6-9, 11-12. Regarding the use of confidential information in the
26 prison disciplinary process, the Settlement Agreement provides that the disclosure and reliability
27 standards set forth in Section 3321 of Title 15 of the California Code of Regulations shall apply.
28 *Id.* at 14. As for dispute resolution and enforcement concerning any current or ongoing Eighth or

1 Fourteenth Amendment violations, the Settlement Agreement provides a procedure through which
2 such allegations of non-compliance and motions for enforcement of the Settlement Agreement
3 would be developed and presented. *Id.* at 19-21. Further, the Settlement Agreement allowed for a
4 two-year monitoring period during which Defendants agreed to provide Plaintiffs' counsel the
5 information and documentation necessary to determine Defendants' compliance. *Id.* at 14-17.
6 Lastly, the Settlement Agreement provides that, unless Plaintiffs file a motion for an extension
7 within 30-days of the expiration of the two-year monitoring period, the Agreement and the court's
8 jurisdiction over the matter shall automatically terminate. *Id.* at 17-18. The standard of review for
9 evaluation of such a motion for extension of the Settlement Agreement would be satisfied if
10 Plaintiffs demonstrate by a preponderance of the evidence that current and ongoing systemic
11 violations of the Eighth Amendment or Fourteenth Amendment of the United States Constitution
12 exist as alleged in Plaintiffs' Second Amended Complaint or Supplemental Complaint or as a
13 result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by the
14 Settlement Agreement. *Id.*

15 If the court's jurisdiction and this Agreement are to be extended by Plaintiffs' motion, the
16 Settlement Agreement provides that they shall both automatically terminate at the end of the
17 extension period, which is not to exceed 12 months, and the case shall then be dismissed unless
18 Plaintiffs once again make the same evidentiary showing described above. *Id.* at 18. The
19 Agreement also provides that any successive extensions shall not exceed twelve months in
20 duration, and that any extension shall automatically terminate if Plaintiffs fail to meet the requisite
21 evidentiary burden. *Id.* Also, in the event of an extension of the Settlement Agreement and the
22 court's jurisdiction over the matter beyond the initial 24-month period, Defendants' obligations of
23 production of any agreed upon data and documentation to Plaintiffs' counsel will be extended for
24 the same period, and the role and duties of the magistrate judge in the dispute resolution process
25 shall continue coextensively with that of the Agreement, but in no event shall those roles and
26 duties extend beyond the termination of the court's jurisdiction. *Id.*

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1 ***Plaintiffs' Arguments and Evidence for Extension of the Settlement Agreement***

2 Plaintiffs argue that that the Settlement Agreement should be extended because the
3 California Department of Corrections and Rehabilitation (“CDCR”) continues to violate prisoners’
4 due process rights in three distinct ways. *See generally* *Pls.’ Mot.* (dkt. 905). First, Plaintiffs
5 contend that CDCR systemically misuses confidential information in two ways in order to return
6 class members to solitary confinement; namely, by failing to ensure the accuracy of the
7 confidential information disclosures during the disciplinary process, and by engaging in a pattern
8 of perfunctory and *pro forma* reliability determinations as to that information. *Id.* at 14-38.
9 Second, Plaintiffs argue that CDCR violates due process by placing and retaining class members
10 in RCGP without adequate procedural protections. *Id.* at 39-56. Lastly, Plaintiffs also submit that
11 CDCR violates due process by using unreliable gang validations to deny class members a fair
12 opportunity to seek parole. *Id.* at 57-73. Subsequently, Plaintiffs filed supplemental briefing
13 identifying what was described as further evidence of CDCR’s pattern of fabricating and
14 inadequately disclosing confidential information in the prisoner disciplinary process, as well as
15 CDCR’s pattern of failing to ensure the reliability of such information. *Pls.’ Supp. Br.* (dkt. 1027)
16 at 4-15.

17 *Plaintiffs' Evidence of the Systemic Misuse of Confidential Information:*

18 In support of the contention that CDCR systemically misuses confidential information to
19 return class members to solitary confinement, Plaintiffs offer evidence of CDCR’s failure to
20 provide accurate disclosures, as well as evidence of CDCR’s pattern of flawed reliability
21 determinations. *Pls.’ Mot.* (dkt. 898-4 *SEALED*) at 18-38.² Beginning with the inaccurate
22 disclosure problem, Plaintiffs’ Motion for Extension of the Settlement Agreement describes
23 incidents of inaccurate, inadequate, or otherwise improper disclosures in nine separate disciplinary
24 matters occurring in four different prisons, involving fifteen prisoners, nine separate alleged

25 _____
26 ² Because the court previously found that this evidence contains confidential information, the
27 release of which would harm institutional safety and security, as well as potentially compromising
28 ongoing investigations, the un-redacted copies of the pleadings describing this evidence have been
filed under seal. *See e.g., Order* (dkt. 920) (granting permission for portions of Plaintiffs’ Motion
and its exhibits to be filed under seal). Accordingly, the court will describe this evidence in
generic terms and only with the degree of specificity required for the present purpose.

1 conspiracies, and various levels of CDCR officials. *Id.* at 18-27.

2 In the case of one prisoner (“Person-1”) who was found guilty of conspiring to murder a
3 fellow inmate, including a finding of the involvement of a gang nexus, Plaintiffs allege this
4 finding to have been based on fabricated confidential information. *Id.* at 18. According to Person-
5 1’s rule violation report (“RVR”), two confidential informants (“CI-1” and “CI-2”) claimed that
6 Person-1 had ordered the murder of another prisoner (“Victim-1”), who was in fact killed by other
7 inmates. *Id.* The RVR provides that CI-1 maintained that the reason for the murder was Person-1’s
8 belief that Victim-1 was an informant, and that CI-2 believed the killing to have been motivated
9 by Person-1’s belief that Victim-1 had engaged in trafficking of prison contraband without sharing
10 the profits with Person-1. *Id.* A disclosure form, summarizing this information was provided to
11 Person-1, which Plaintiffs received directly from Person-1. *Id.* On the other hand, the RVR packet
12 for Person-1 that was produced to Plaintiffs during the monitoring period contained only a second
13 disclosure, dated almost three weeks later, in which CI-1 and CI-2 reportedly provided a more
14 consistent account as to why the murder was ordered, with CI-1’s account being changed to
15 suggest that Victim-1 was believed to be an informant *and* had engaged in the trafficking of
16 contraband without sharing profits with Person-1. *Id.* at 18-19. However, the confidential
17 memorandum, making no mention of profits from the contraband sales as to CI-1’s account,
18 instead provides that CI-1 maintained that Person-1 had made up the fact that Victim-1 was an
19 informant, and that the true cause of Person-1’s animus towards the victim was a perception that
20 Victim-1 had not shown an appropriate level of respect for Person-1. *Id.* at 19. The confidential
21 memorandum also makes clear that both disclosures omitted two reasons propounded by CI-2 for
22 the murder, namely the fact that Victim-1 reportedly inadvertently disclosed some information
23 about a profit-sharing agreement he had with Person-1 to a third party, and also the fact that there
24 was a dispute between Person-1 and Victim-1 as to how to handle the displeasure of certain other
25 prisoners regarding the victim’s introduction of contraband to a particular part of the facility. *Id.*

26 In a second disciplinary matter, also involving Person-1, the same two confidential
27 informants, CI-1 and CI-2, provided information on the basis of which Person-1 was later found
28 guilty of the attempted murder of another prisoner (“Victim-2”). *Id.* at 20. Here, Plaintiffs again

1 point to a discrepancy between the RVR and the disclosure form provided to Person-1, and the
2 information in the confidential memorandum. *Id.* Person-1 was told that CI-1 stated that Victim-2
3 lost some contraband belonging to another prisoner (“Prisoner-1”), and that Prisoner-1 told
4 Person-1 about the loss, at which point Person-1 ordered Prisoner-1 to attack Victim-2; also,
5 Person-1 was told that CI-2 corroborated this account to some extent by maintaining that the
6 contraband belonged jointly to Prisoner-1 and another inmate (“Prisoner-2”) and that they jointly
7 informed Person-1 of its loss, whereupon Person-1 ordered Prisoner-1 to attack Victim-2. *Id.* at
8 20. However, according to the confidential memorandum (which, of course, was not provided to
9 Person-1), CI-2 stated that Prisoner-2 was alone when he informed Person-1 about the loss, and
10 that Person-1 told Prisoner-2 to handle the situation himself. *Id.* Again, the discrepancy is such
11 that Person-1’s disclosure appears to harmonize two accounts from two confidential sources, while
12 concealing from Person-1 the fact that those accounts in fact differed. *Id.*

13 In a third disciplinary matter, involving four prisoners found guilty of conspiring to murder
14 another prisoner with a gang nexus, a different sort of discrepancy appears between the
15 confidential memorandum of a CI’s statement and the disclosures given to the alleged
16 conspirators. *Id.* at 20-21. The four prisoners received a disclosure indicating that a CI had stated
17 that while the target of this conspiracy had already been determined guilty by the hierarchy of a
18 particular prison gang, and that his fate was still being contemplated, but that it was almost certain
19 that his killing would be sanctioned. *Id.* at 21. Instead, the confidential memorandum documenting
20 the interview of the CI makes no mention of any certainty that the killing would be sanctioned;
21 thus, it appears that this portion of the CI’s account was concocted by the author of the disclosure
22 form. *Id.* at 21-22. According to the CDCR’s first confidential memorandum for this matter, the CI
23 not only did not maintain that the prison gang hierarchy was certain to sanction the killing, but
24 instead, had maintained the hierarchy had not yet reached a decision, and that until they would
25 arrive at a decision, the would-be victim was to be left alone, and indeed respected as a
26 confederate. *Id.* at 22. Thus, in this disciplinary matter, the potentially exculpatory part of the CI’s
27 account was never disclosed, and instead it appears to have been replaced by an inculpatory
28 statement that the CI never uttered. *Id.*

1 A fourth disciplinary matter involved a validated prison gang associate (“Prisoner-2”) who
2 was found guilty of conspiring to commit a battery with a gang nexus based on the content of an
3 intercepted note that had been passed between other prisoners. *Id.* at 23. Prisoner-2 received an
4 RVR and disclosure form indicating that the author of the note had identified Prisoner-2 as a
5 person occupying a position of authority within a prison gang, and identifying two prisoners who
6 were to be assaulted. *Id.* However, the confidential memorandum reflects that the author of the
7 note had not identified Prisoner-2 by name, instead, the note attributed the gang-status and the
8 plan to assault two prisoners to a nickname that bore no resemblance to Prisoner-2’s name, nor did
9 the note or the confidential memorandum include any information linking Prisoner-2 to the
10 nickname used in the note. *Id.* Thus, Prisoner-2 was not only left unaware that he had not been
11 identified by name, but in fact the contrary had been indicated to him through the materially
12 inaccurate disclosure form; and thus, Prisoner-2 was unable to challenge the issue of identity in
13 the disciplinary proceeding because the issue had been concealed from him. *Id.* at 23-24.

14 In a fifth disciplinary matter, another prisoner (“Prisoner-3”) was found guilty of
15 conspiring to commit murder with a gang nexus. *Id.* at 24. The RVR and disclosure given to
16 Prisoner-3 maintained that a confidential source with first-hand knowledge had stated that
17 Prisoner-3 ordered the murder of two other prisoners for a number of reasons and with the
18 sanction of other prison gang associates. *Id.* However, as it turned out, the confidential source was
19 merely a recording of a phone call between Prisoner-3 and some other person, wherein Prisoner-3
20 appears to be aware of the reasons for several assaults, but providing no indication that Prisoner-3
21 either ordered the assaults or that the intended result was homicide rather than battery. *Id.* The
22 RVR indicates corroboration by a second confidential source, however, the copy of the
23 confidential memorandum received by Plaintiffs’ counsel contained redactions that rendered it
24 impossible for this corroboration to be confirmed or refuted. *Id.*

25 In a sixth disciplinary matter, two other prisoners were found guilty of conspiracy to
26 commit a murder with a gang nexus and were provided with a disclosure regarding an intercepted
27 note that provided that a group of people, all of whose names had been redacted, had agreed to
28 “remove” someone themselves. *Id.* The recitation of the purported contents of this note included a

1 parenthetical annotation containing the name of a particular prisoner as the intended target of the
2 conspiracy, however, this information constituted CDCR’s interpretation and it later proved to be
3 false. *Id.* In material that was subsequently disclosed to Plaintiffs’ counsel, CDCR acknowledged
4 that the note in fact related to an entirely different intended target, and that this information had
5 never been disclosed to the prisoners who were found guilty of this conspiracy. *Id.* at 24-25. The
6 mistaken interpretation of this note, which resulted in the incorrect disclosure of details about a
7 conspiracy pertaining to one intended victim, came to light upon CDCR’s receipt of a confidential
8 letter from another prisoner in which a different intended victim was identified. *Id.* at 25. Rather
9 than bringing this discrepancy to the attention of the prisoners involved in the disciplinary matter,
10 CDCR provided them with new disclosures that claimed, again incorrectly, that the letter merely
11 confirmed CDCR’s initial interpretation of the note as to the original intended target. *Id.*

12 In a seventh disciplinary matter, Plaintiffs contend that in the course of a prison fight
13 involving a large number of participants, certain prisoners were accused of attempted murder of
14 correctional officers, but that their confidential disclosures omitted the exculpatory portions of the
15 informants’ accounts – such as an informant’s statement that the accused prisoners did not have
16 any weapons and had not appeared to target any officers. *Id.* In an eighth disciplinary matter, one
17 not involving a prison gang nexus, a prisoner was accused of an attempted murder and the
18 disclosure received in advance of the disciplinary hearing stated only that corroborated
19 information identified this prisoner as the assailant. *Id.* at 26. In the ninth matter, a prisoner was
20 found guilty of conspiracy to commit murder and the only disclosure given in advance of the
21 disciplinary hearing was that a confidential source had identified the prisoner as a gang-member
22 and responsible for planning and coordinating the conspiracy to assault a member of the staff. *Id.*
23 at 26.

24 *Plaintiffs’ Evidence of Systemic Flaws in CDCR’s Reliability Determinations:*

25 Plaintiffs offer evidence from seven disciplinary matters in an effort to demonstrate that
26 “[c]ompounding its failure to accurately and fully disclose confidential information, CDCR
27 systemically relies on such evidence without ensuring its reliability,” and, as a result, many of the
28 prisoners described below are claimed to have been improperly returned to solitary confinement.

1 *Id.* at 27-28.

2 In the first disciplinary matter, a prisoner was found guilty of conspiracy to commit a
3 murder with a gang nexus following a violation report that was based on a confidential
4 memorandum in which it was reported that an informant claimed to have been instructed by the
5 prisoner to kill someone as a result of a drug debt. *Id.* at 28-29. At the disciplinary hearing, the
6 prisoner attempted to defend the case by pointing out that the same confidential memorandum
7 formed the basis of an identical violation report for another prisoner, and that the hearing officer in
8 that case had determined this informant to be unreliable. *Id.* at 29. Nevertheless, and without any
9 explanation of substance, the hearing officer noted that this was a different hearing and that the
10 confidential information was reliable; as a result, the prisoner was found guilty. *Id.*

11 In a second matter, a review board found that a prisoner should be placed in RCGP based
12 on the prisoner's own statements about threats against him, statements that were given while in an
13 agitated state to an investigator who deemed the statements to be unreliable. *Id.* at 30-31. During
14 the course of this review, the prisoner submitted declarations challenging the existence of such
15 threats; however, the CDCR reviewing authority ultimately decided to place the prisoner in RCGP
16 by relying on his initial statements, notwithstanding the fact that they had previously been deemed
17 unreliable. *Id.* at 31.

18 In a third case involving three rounds of hearing officer reviews, a prisoner was repeatedly
19 found guilty of conspiracy to commit a murder with a gang nexus based on information provided
20 by one informant who had named the prisoner, and another who had not named him. *Id.* at 31. The
21 first hearing officer found the prisoner guilty, noting that both informants had named him. *Id.* at
22 32. The matter then became the subject of two subsequent hearings, where, again, it was noted that
23 both informants had named this prisoner as a participant in the conspiracy. *Id.* The disclosure form
24 that had been provided to the prisoner likewise indicated that both informants had named him,
25 however, the undisclosed confidential memorandum indicated that the prisoner had only been
26 specifically named by one informant. *Id.* The disclosure, on the other hand, went so far as to relate
27 that one of the reasons that one informant had been deemed reliable was that another informant
28 had independently provided the same information. *Id.*

1 The fourth exemplar disciplinary matter involved two prisoners who were respectively
2 found guilty of attempted murder and conspiracy to commit murder, both with a gang nexus,
3 stemming from a physical fight with a third prisoner in which no weapons were used and from
4 which the victim was reported to have been able to walk away. *Id.* at 33-34. The evidence relied
5 upon to implicate one prisoner in the conspiracy, and for the finding of a gang nexus as to the
6 other prisoner, was the account of an informant. *Id.* at 34. However, whereas the disclosure
7 provided indicated that this informant's account was found to be reliable because another
8 confidential source had independently provided the same information, that was not the case. *Id.*

9 In a fifth case, a prisoner was found guilty of conspiring to commit the murder of another
10 inmate, who was in fact attacked by two other inmates, based on reports from several informants
11 that were in the nature of non-firsthand information, as well as a writing found in the prisoner's
12 cell. *Id.* at 34-35. One informant was said to have reported that he heard that the victim may have
13 been suspected of a transgression of prison gang rules, and that the others were asking each other
14 if this prisoner was in fact a person of influence within a particular gang. *Id.* at 35. The hearing
15 officer in this case, however, also based the finding of guilt as to the conspiracy on a piece of
16 writing in the prisoner's cell about how pressure creates diamonds, and how in a recent
17 opportunity to shine, all had run from the pressure except for two, from which the hearing officer
18 inferred a reference to the stabbing attempt of the inmate by two assailants. *Id.* at 35-36.

19 In a sixth case, a prisoner was found guilty of an unfulfilled conspiracy to commit murder
20 with a gang nexus based on the report of an informant that was deemed reliable. *Id.* at 36. The
21 disclosure given to the prisoner stated that the informant had been found reliable because another
22 confidential source had independently provided the same information, however, no such
23 information appeared anywhere in the disciplinary documents that were produced. *Id.* at 37. When
24 the prisoner attempted to question the correctional officer that had authored the confidential
25 memorandum as to what the other corroborating informant had said, the hearing officer deemed
26 the inquiry to be irrelevant and refused to allow the questions. *Id.* Later, this was the subject of a
27 rehearing before a different hearing officer, however, again, the prisoner was found guilty and the
28 hearing officer refused to allow any questions relating to the reliability of the informants because

1 of the stated reason that the hearing officer could not independently review the reliability
2 determinations of CDCR personnel. *Id.* at 37-38. Lastly, in the seventh exemplar of disciplinary
3 matters with flawed reliability determinations, a prisoner was found guilty of conspiring to
4 distribute a controlled substance with a gang nexus based only on being named as an un-indicted
5 conspirator in an indictment. *Id.* at 38. Although the prisoner defended the matter on the ground
6 that the contents of an indictment are not evidence, the hearing officer did not address the
7 argument. *Id.*

8 *Plaintiffs' Evidence of Due Process Violations in RCGP Placement and Retention:*

9 When the RCGP unit came into being as a result of the Settlement Agreement in this case,
10 Defendants established the unit in Northern California, at Pelican Bay State Prison. *Id.* at 40.
11 Plaintiffs begin by suggesting that the prison's remote location provides an independent hardship
12 as it renders family visitation impractical. *Id.* Plaintiffs then present evidence that while RCGP
13 prisoners are permitted to have bi-weekly contact and non-contact visits, that most prisoners
14 receive few if any visits due to the remote location and the policy of not permitting weekend
15 contact visits. *Id.* at 41-43. Plaintiffs also present evidence that, as compared to general population
16 housing units, RCGP prisoners have more curtailed social interactions, fewer job opportunities,
17 and that RCGP placement limits parole eligibility. *Id.* at 43-45. Additionally, Plaintiffs submit
18 evidence that RCGP placement is prolonged, stigmatizing, and also highly unusual. *Id.* at 45-49.

19 In support of the contention that CDCR's classification and verification procedures for the
20 RCGP result in deprivations of adequate notice and meaningful review, Plaintiffs tender evidence
21 to establish that the current classification system's deficiencies give rise to serious risks of
22 erroneous and unnecessary deprivations of recognized liberty interests due to unwarranted RCGP
23 classification or retention. *Id.* at 50. First, Plaintiffs submit that pursuant to Paragraph 27 of the
24 Settlement Agreement, prisoners may only be placed in the RCGP if the Departmental Review
25 Board ("DRB") finds by a preponderance of the evidence that there exists a substantial threat to
26 the safety of that prisoner if placed in general population. *Id.* However, Plaintiffs present evidence
27 of nine cases where prisoners were transferred to the RCGP "at least in part" on a finding that their
28 release to general population would pose a threat to the security of the institution. *Id.* at 51.

1 Plaintiffs then submit that institutional security, as opposed to safety concerns relating to the
2 individual prisoner, constitutes “a flagrant violation of the purpose of the RCGP, and constitutes
3 clear evidence that several have been transferred to the RCGP on incorrect grounds, and thus have
4 been erroneously deprived of their liberty.” *Id.* Plaintiffs also provide evidence that in six cases,
5 the CDCR’s Institution Classification Committee (“ICC”) used a restrictive presumption to retain
6 prisoners in the RCGP by finding in some cases that while there is no evidence of a continuing
7 threat to a prisoner’s safety if released to general population, that nevertheless it could not be
8 categorically stated that no such threat still exists. *Id.* at 51-52.

9 Plaintiffs also present evidence in support of the contention that not only does CDCR fail
10 to give prisoners adequate notice about how to go about securing their return to general
11 population, but that it actively misleads the prisoners in this regard. *Id.* at 52. A number of
12 prisoners’ accounts are presented wherein the prisoners submit that they were told that
13 participation in RCGP programs and remaining incident free for a 6-month period would result in
14 them being returned to general population, but that they were nevertheless retained in RCGP based
15 on the presumption that a safety threat continues. *Id.* at 52. Additionally, Plaintiffs submit
16 evidence from a number of prisoners’ cases to support the contention that class members are
17 denied meaningful review in the RCGP classification and retention context due to CDCR’s
18 apparent disregard of the prisoners’ own statements about whether or not there exist risks to their
19 safety. *Id.* at 53.

20 Regarding the contention that CDCR’s safety threat reviews lack sufficient procedural
21 protections to avoid arbitrary decision-making, Plaintiffs submit that, pursuant to Paragraph 27 of
22 the Settlement Agreement, once the DRB approves RCGP placement, the decision becomes final
23 and can only be reversed by the DRB. *Id.* at 53-54. Thus, if during a 180-day review, the ICC
24 finds that a particular prisoner no longer faces any risk to his safety, the case must still be referred
25 back to the DRB for a decision as to whether to approve or deny the transfer to general population.
26 *Id.* Accordingly, Plaintiffs complain that a two-tier review system must be navigated for a
27 prisoner’s recommended release from RCGP to be effectuated, but not so for the prisoner’s
28 retention in RCGP. *Id.* Plaintiffs also submit evidence from a number of prisoners to support the

1 contention that the 180-day reviews before the ICC are not meaningful hearings because prisoners
2 are often retained in RCGP custody simply for the stated reason that because the review has
3 uncovered no new information, the ICC can not categorically conclude that such threat no longer
4 exists. *Id.* at 54-55.

5 Plaintiffs then submit two proposed solutions. The first would be to overhaul CDCR's
6 procedures for RCGP classification and retention such that they would provide "meaningful and
7 accurate notice, a meaningful hearing, and multiple levels of review." *Id.* at 55-56. The second
8 would be to alleviate the conditions that render RCGP so different from general population by
9 addressing the following concerns: the fact that there is only one RCGP unit and it is located in a
10 remote area making visitation difficult; the desire for reduced numbers of prisoners in the unit to
11 allow for better participation in educational programs; the desire for increased opportunities for
12 social interaction among prisoners; and, the desire for contact visits on weekends. *Id.* at 55-57.

13 *Plaintiffs' Evidence of Systemic Due Process Violations Affecting Denials of Parole:*

14 Plaintiffs contend that the Second Amended Complaint alleged that an unwritten CDCR
15 policy effectively prevented any prisoner housed in SHU from being granted parole, and since the
16 Settlement Agreement provided that gang validation alone shall no longer form the basis of an
17 indeterminate SHU sentence, that class members are still being systemically denied a meaningful
18 opportunity for parole consideration due to the same gang validations on which their SHU
19 sentences were based. *Id.* at 58-59. The problem, as Plaintiffs see it, is two-fold: first, CDCR relies
20 on decisions made under an old gang validation system to find class members ineligible for parole
21 under a California Constitutional Amendment enacted in 2016; and, second, CDCR's failure to
22 expunge these old validations from its system, or to otherwise inform the Parole Board as to their
23 lack of reliability, has effectively resulted in a continuation of *de facto* parole disqualification for
24 class members. *Id.*

25 As to the problems plaguing the old process for gang validation, Plaintiffs submit that a
26 gang investigator would gather information, sometimes without even meeting with the prisoner
27 involved, and that once a file that included at least three "source items" (pieces of information)
28 was assembled, it was forwarded to the Office of Correctional Safety ("OCS") which had final

1 authority on the question of gang validation. *Id.* at 60. During the validation process, class
2 members were not heard by the OSC, and so Plaintiffs contend that under those procedures, there
3 was no meaningful opportunity to be heard – that is, if the gang investigator gathers information
4 sometimes without even meeting with the prisoner involved, and if that prisoner is also not heard
5 by the OSC, then there is no real opportunity for rebuttal. *Id.* at 60-61. Further, Plaintiffs present
6 evidence that gang investigators’ findings were rarely, if ever, rejected by the OSC. *Id.* at 61-62.

7 Plaintiffs also submit evidence that CDCR’s notice to class members about how to avoid
8 revalidation was misleading. *Id.* at 62-63. Prisoners were told that a validated gang affiliate would
9 not be revalidated if he were found “inactive,” that is, by having avoided involvement in gang
10 “activity” for a period of at least six years. *Id.* at 63. However, CDCR’s interpretation of the word
11 “activity” also included something described as, “non-action piece[s] of evidence.” *Id.* Thus,
12 Plaintiffs provide evidentiary examples of a number of prisoners’ old gang validations, based on
13 pure association or even abstract concepts, rather than conduct, that continue to operate as a *de*
14 *facto* disqualifier for meaningful parole consideration. *Id.* at 63-64. A number of prisoners have a
15 validation based on the appearance of their name on a list of alleged gang members. *Id.* at 63.
16 Others were validated for having received correspondence (regardless of the content) or artwork, a
17 birthday card, or other possessions from a validated gang member. *Id.* at 64. One prisoner was
18 validated for having a photograph of his former cellmate, who was a validated gang member. *Id.*
19 Some prisoners were validated based on the nature of the artwork they possessed (such as art
20 containing Aztec or Mayan images), or because of having been seen speaking to a gang member
21 or being mentioned in a gang member’s correspondence (regardless of the substance or context),
22 or because of having certain tattoos, books by certain authors, or, in one case, for having a
23 pamphlet in Swahili. *Id.*

24 Plaintiffs then submit that because parole represents a state-created liberty interest, and
25 because due process requires a fair set of procedures for its vindication, a prisoner subject to
26 parole should be given a meaningful opportunity to be heard. *Id.* at 67. Plaintiffs note that in 2016,
27 the California Constitution was amended (“Proposition 57”) to provide that those convicted of
28 nonviolent felonies would be eligible for parole consideration after completing the full term for

1 their primary offense, and that it was incumbent on CDCR to promulgate regulations thereunder.
2 *Id.* at 68. Plaintiffs add that CDCR then promulgated a screening process that disqualified any
3 prisoner who had been placed in a security housing unit within the previous five years due to
4 involvement with a prison gang. *Id.* at 68-69. Thus, Plaintiffs submit that CDCR is using its old
5 and constitutionally-defective gang validations to categorically bar class members from
6 Proposition 57 relief. *Id.* at 69. Plaintiffs provide two evidentiary examples of class members who
7 were considered disqualified for parole consideration under Proposition 57 due to serving
8 indeterminate SHU sentences based on gang validation. *Id.*

9 Plaintiffs add that the prior validations also affect parole decisions regarding class
10 members convicted of violent crimes. *Id.* at 70. Plaintiffs provide evidence from a number of class
11 members' parole transcripts in support of the contention that gang validation is a significant, if not
12 often dispositive, factor in parole consideration. *Id.* at 70-71. Further, Plaintiffs also provide
13 evidence that when prisoners dispute their validation at their parole hearings, commissioners
14 consider the challenge itself to constitute evidence of dishonesty and a manifestation of a lack of
15 credibility or remorse. *Id.* at 71-72. Plaintiffs conclude by noting that they "do not challenge
16 Parole Board procedures or decisions; it is CDCR's continued retention of the old validations and
17 their unqualified transmittal to BPH [Board of Parole Hearings] that is the problem." *Id.* at 72.

18 *Plaintiffs' Supplemental Evidence of Systemic Fabrication of Confidential Information:*

19 Following a subsequent order directing additional document production (*see* dkt. 970),
20 Plaintiffs filed a *Supplemental Brief* to present new evidence in support of extending the
21 Settlement Agreement. *Pls.' Supp. Br.* (dkt. 1027) at 4. Plaintiffs submit that close to half of the
22 110 complete disciplinary files provided for review in the supplemental production manifest
23 problems with fabricated or inadequately disclosed confidential information, or with flawed
24 reliability determinations. *Id.*

25 In the case of three prisoners found guilty of attempted murder with a gang nexus based on
26 identification in a photographic line-up by a confidential source; Plaintiffs submit that, in reality,
27 one of the three prisoners had never been identified at all, and another was only identified weeks
28 later after the source had failed to identify him the first time. *Id.* (dkt. 1025-4 *SEALED*) at 6. As

1 to the prisoner that was never identified at all, his violation report and disclosure indicates a
2 positive identification by the informant; however, the underlying confidential memorandum
3 indicates that the informant was shown a photographic array the day after the incident, and another
4 array two weeks later, neither of which resulted in the identification of this prisoner. *Id.* As to the
5 other prisoner, he was similarly told that an informant had identified him in a photographic array
6 when in fact the informant had failed to identify him in the first array (identifying two others
7 instead), and had only identified him, as well as several others, two weeks later when shown
8 another array. *Id.* at 7. As to the third prisoner, who had in fact been identified in the initial array,
9 he was told that the confidential source had also informed authorities that the attempted murder
10 was for the benefit of a prison gang; however, the underlying confidential memorandum contains
11 no information to indicate that the informant had provided any information about a possible gang
12 nexus. *Id.* at 7.

13 In the case of a prisoner found guilty of conspiring to murder another inmate based on
14 confidential information, the prisoner was told that an informant indicated that the prisoner had
15 conspired with another to murder someone for the benefit of a prison gang. *Id.* However, the
16 underlying confidential memorandum states that the only evidence against this prisoner is that he
17 provided information he discovered about the victim to others. *Id.* at 7-8. In another case, a
18 prisoner was alleged to have occupied a leadership role in a gang after his failure to obey a general
19 command to get down on the ground appeared to be mirrored by other prisoners in the exercise
20 yard. *Id.* at 8. The prisoner was told that the evidence against him included two confidential
21 sources that had stated that if this prisoner had made a move against the guard who had ordered
22 him to get down, other nearby gang members would have rushed to his aid; however, according to
23 the underlying confidential memorandum, there were not two sources, there was only one, and that
24 person stated that he did not witness the event in question. *Id.* at 8-9. In yet another case, a
25 prisoner was found guilty of battery with a gang nexus based on confidential information and his
26 disclosure informed him that an informant had identified him and the victim as belonging to rival
27 gangs; the confidential memorandum, on the other hand, contains no information to indicate that
28 the accused prisoner was a gang affiliate. *Id.* at 9.

1 Plaintiffs then provide several evidentiary examples where corroborating sources appear in
2 disclosures to prisoners but not in the underlying confidential materials. In one disciplinary matter,
3 a prisoner was accused of participation in a large fight based, in part, on a report by a single
4 informant, however, the disclosure provided to that prisoner stated incorrectly that another
5 confidential source independently provided the same information. *Id.* at 9-10. In another case, a
6 prisoner was found guilty of assault with a gang nexus; his disclosure stated that confidential
7 information had been received that the prisoner, acting on behalf of a gang, had threatened to beat
8 another inmate for not showing the gang his case-related papers, and that this information was also
9 independently provided by another source – again, according to the confidential memorandum,
10 there was no other source. *Id.* at 10.

11 Plaintiffs then present evidence from another series of cases where documents are
12 indicative of CDCR officials portraying their own investigatory conclusions as the statements of
13 informants. *Id.* at 11-12. For example, one prisoner was convicted of battery with a gang nexus
14 and was informed through his disclosure that an informant had identified him as perpetrating the
15 beating on behalf of a gang, however, the confidential memorandum provides that the informant
16 did not even name the prisoner, instead, the gang investigator’s own conclusion appears to have
17 been the source of the identification. *Id.* at 11. Plaintiffs also present evidence in cases where
18 exculpatory evidence was not disclosed. *Id.* at 12-13. In one instance, a prisoner was not informed
19 that the confidential materials contained an informant’s report that contradicted the reports of two
20 other informants regarding the prisoner’s participation in a fight. *Id.* In another case, a prisoner
21 was convicted of participating in a fight for a gang-related reason, and where the prisoner asserted
22 a different reason, one unrelated to gangs, corroborating information to that effect appeared in the
23 confidential memorandum but was omitted from the disclosure. *Id.* at 13.

24 As to Plaintiffs’ contention that CDCR’s disclosures of confidential information are often
25 so vague as to make it impossible for the prisoners to mount a defense, Plaintiffs present a number
26 of cases where the disclosures contain no detail. In one case, a prisoner was found guilty of
27 beating another inmate with a gang nexus, despite statements to the contrary from both the victim
28 and the offender. *Id.* at 14. The prisoner was found guilty on the basis of a single confidential

1 informant, and the disclosure received stated only that confidential information had been received
2 that identified the prisoner as having been involved with a battery in a particular part of the prison.
3 *Id.* Lastly, Plaintiffs also present additional cases to bolster their original evidentiary presentation
4 regarding CDCR's flawed reliability determinations. *Id.* at 15-17. For example, in one case, a
5 prisoner was found guilty of issuing a threat based on evidence from multiple confidential sources
6 that were summarily deemed reliable, the prisoner's disclosures revealed that one informant had
7 corroborated the account of another when in fact they were the same person. *Id.* at 16.

8 ***Defendants' Arguments and Evidence Against Extending the Settlement Agreement***

9 Defendants respond primarily by argument rather than evidence. As to Plaintiffs' first
10 contention, Defendants respond by couching it as an attempt to undermine the CDCR disciplinary
11 process by challenging the use of confidential information; that the court lacks jurisdiction to
12 review CDCR disciplinary findings because the challenge is outside the scope of the pleadings or
13 the Settlement Agreement; and, that Plaintiffs have incorrectly interpreted the confidential
14 information at the root of their challenge, contending that CDCR uses neither unreliable nor
15 fabricated evidence in prisoner disciplinary proceedings. *Defs.' Opp.* (dkt. 985-3) at 15-26.
16 Defendants' response to the second contention is that Plaintiffs' challenge to the operations of the
17 RCGP should be rejected procedurally as falling outside the scope of the Settlement Agreement,
18 as well as on their merits because RCGP placement does not implicate due process or any liberty
19 interest; because its location and the facets of its operation do not violate due process or the
20 Settlement Agreement; and because Plaintiffs have not shown that prisoners have been assigned to
21 the RCGP facility any longer than necessary. *Id.* at 26-35. Defendants' response to the third
22 contention maintains that parole decisions are not an appropriate ground upon which to extend the
23 Settlement Agreement because Plaintiffs' Complaint did not allege that gang validations were
24 resulting in parole denials; and because the subsequent changes to state law regarding parole were
25 not contemplated by the Settlement Agreement and thus were not amongst the issues that were
26 litigated and settled in this case. *Id.* at 11-15. Subsequently, Defendants filed a response to
27 Plaintiffs' supplemental briefing in which they invoked the doctrine of waiver as to Plaintiffs'
28 suggestion that the use of fabricated or unreliable information in disciplinary proceedings

1 constitutes a due process violation. Defendants argue that Plaintiffs are not allowed to second-
2 guess the factual findings of prison officials; and that, in any event, the CDCR disciplines prisoner
3 misconduct only based on sufficient and reliable evidence. *Defs. ' Supp. Resp.* (dkt. 1084-3) at 2-
4 10.

5 Defendants respond to Plaintiffs' claim that constitutionally infirm gang validations
6 operate as a *de facto* bar to meaningful parole consideration by contending that Plaintiffs have
7 focused only on certain portions of various prisoners' parole transcripts. *Id.* at 12. Accordingly,
8 Defendants have submitted a large number of parole hearing transcripts. However, Defendants'
9 pleading does not discuss the contents of those transcripts or make an attempt to argue that the
10 gang validations were not a significant factor in those parole denials. Instead, Defendants simply
11 state that the gang validations were not dispositive because "the full transcripts show that each
12 inmate was allowed an opportunity to be heard and that the Board gave each inmate a statement as
13 to why he was denied parole." *Id.* at 12, 15.

14 DISCUSSION

15 The Parties agree that the standard for extending the Settlement Agreement is outlined in
16 the termination and extension provisions of Paragraph 41. *See Pls. ' Mot.* (dkt. 905) at 13; *Defs. ' Opp.*
17 *Opp.* (dkt. 985-3) at 9. The Settlement Agreement provides, in pertinent part, that following the
18 end of the 24-month primary term of the Agreement, Plaintiffs can seek an extension of the
19 Agreement, and the court's jurisdiction over the matter, for up to 12 months, by demonstrating by
20 a preponderance of the evidence that there exist current and ongoing systemic due process or
21 Eighth Amendment violations as alleged in Plaintiffs' Second Amended Complaint or as a result
22 of CDCR's reforms to its Step Down Program or the SHU policies contemplated by the
23 Agreement. *Sett. Agmt.* (dkt. 424-2) at 17-18. Thus, in the present instance, the court must decide
24 whether Plaintiffs have shown, by a preponderance of the evidence, that (1) there exist current and
25 ongoing systemic due process violations; and (2) that they are as alleged in the operative
26 complaint, or that they have resulted from CDCR's reforms under the Agreement. Because
27 Defendants have primarily proceeded by argument rather than evidence, the court does not need to
28 weigh one set of evidence against another in order to determine which constitutes a

1 preponderance. Instead, the only task at hand is to evaluate Plaintiffs' evidence in light of
2 Defendants' arguments.

3 *Current and Ongoing Systemic Due Process Violations*

4 Generally speaking, the aim of due process is protection of the individual against arbitrary
5 government action. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*,
6 129 U.S. 114, 123 (1889)). Once society has validly convicted an individual of a crime, and
7 therefore established its right to punish, the demands of due process, and the degree of protection
8 from arbitrary action, are reduced accordingly (*see e.g., Ford v. Wainwright*, 477 U.S. 399, 429
9 (1986) (O'Connor, J., dissenting)); however, that is not to say that due process would not still be
10 violated when a prison disciplinary hearing results in a finding of guilt even though no evidence
11 was presented. *See, e.g., Burnsworth v. Gunderson*, 179 F.3d 771, 774 (9th Cir. 1999). In the
12 context of prisons, due process still protects against arbitrary action in prison disciplinary
13 proceedings, but provides less protection than would be the case in a criminal prosecution. *Ponte*
14 *v. Real*, 471 U.S. 491, 495 (1985). Nevertheless, it ensures that inmates have a right to call and
15 present witnesses and documentary evidence before a prison disciplinary board. *Id.* Furthermore,
16 the information that forms the basis of a prison disciplinary action must possess some indicia of
17 reliability to satisfy due process. *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987)
18 (uncorroborated hearsay statement of a confidential informant is insufficient to satisfy due
19 process). In evaluating whether "some evidence" exists, the inquiry focuses on whether there is
20 any evidence in the record that could support the conclusion reached by the disciplinary board,
21 without assessing the witnesses' credibility or reweighing the evidence. *Superintendent v. Hill*,
22 472 U.S. 445, 455-456 (1985); *see also Bruce v. Ylst*, 351 F.3d 1283, 1287 (9th Cir. 2003); *Munoz*
23 *v. Rowland*, 104 F.3d 1096, 1098 (9th Cir. 1997); *Powell v. Gomez*, 33 F.3d 39, 40 (9th Cir.
24 1994); and, *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990).

25 Thus, a statement by a confidential informant would satisfy due process provided that the
26 record contained facts from which it could be reasonably concluded that the information was
27 reliable, and the record contained a prison official's statement that safety prevented the disclosure
28 of the inmate's name. *Zimmerlee v. Keeney*, 831 F.2d 183, 186-87 (9th Cir. 1987). Reliability may

1 be established by: (1) the oath of the investigating officer appearing before the committee as to the
2 truth of his report that contains confidential information; (2) corroborating testimony; (3) a
3 statement on the record by the chairman of the reviewing committee that he had firsthand
4 knowledge of sources of information and considered them reliable based on the informant's past
5 record; or (4) an *in camera* review of the documentation from which credibility was assessed. *Id.*

6 As to placement and retention in a unique facility such as the RCGP unit, before invoking
7 the procedural protections of the Due Process Clause of the Fourteenth Amendment, which
8 protects against deprivations of life, liberty, or property, it must first be established that one of
9 these interests is at stake. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). While the Constitution
10 itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of
11 confinement (*see Meachum v. Fano*, 427 U.S. 215, 225 (1976) (no liberty interest arising from
12 Due Process Clause itself in transfer from low to maximum security because confinement in any
13 state institution is within the normal range of custody)), the “touchstone of the inquiry into the
14 existence of a protected, state-created liberty interest in avoiding [more] restrictive conditions of
15 confinement is not the language of regulations regarding those conditions but the nature of those
16 conditions themselves in relation to the ordinary incidents of prison life.” *Id.* at 223 (internal
17 quotation marks omitted). Once a liberty interest is established, as to the evaluation of a claimed
18 deprivation of due process, the framework established in *Mathews v. Eldridge*, 424 U.S. 319, 335
19 (1976) requires consideration of three distinct factors: (1) the private interest that will be affected
20 by the official action; (2) the risk of an erroneous deprivation of such interest through the
21 procedures used, and the probable value, if any, of additional or substitute procedural safeguards;
22 and, (3) the Government's interest, including the function involved and the fiscal and
23 administrative burdens that the additional or substitute procedural requirement would entail.
24 *Wilkinson*, 545 U.S. at 224-25; *see also Vasquez v. Rackauckas*, 734 F.3d 1025, 1044 (9th Cir.
25 2013).

26 In the context of parole hearings, due process entitles prisoners to a fair hearing, and a
27 statement of reasons for a parole board's decision. *Miller v. Or. Bd. of Parole & Post-Prison*
28 *Supervision*, 642 F.3d 711, 716 (9th Cir. 2011) (citing *Swarthout v. Cooke*, 562 U.S. 216, 220

1 (2011) (“When, however, a State creates a liberty interest [such as parole], the Due Process Clause
 2 requires fair procedures for its vindication – and federal courts will review the application of those
 3 constitutionally required procedures.”). Finally, and of key importance to the disputes at the heart
 4 of the currently pending motion, it should be noted that a fundamental requirement of due process
 5 is not only “the opportunity to be heard” that was described in *Grannis v. Ordean*, 234 U.S. 385,
 6 394 (1914), but “the opportunity to be heard at a meaningful time and in a meaningful manner.”
 7 *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

8 Plaintiffs argue that that the Settlement Agreement should be extended because CDCR
 9 continues to violate prisoners’ due process rights in three distinct ways: through the systemic
 10 misuse of confidential information in order to return class members to solitary confinement; by
 11 placing and retaining class members in RCGP without adequate procedural protections; and, by
 12 using unreliable gang validations to deny class members a fair opportunity to seek parole. *See*
 13 *generally Pls.’ Mot.* (dkt. 905). In support of these arguments, Plaintiffs have lodged the above-
 14 described evidence of denials of due process in each of these contexts.

15 Defendants, in essence, respond by contending that Plaintiffs have not demonstrated due
 16 process violations, or that the matter is simply beyond the court’s purview. As to Plaintiffs’
 17 argument that unreliable gang validations are used to effectively deny class members meaningful
 18 parole hearings, Defendants submit that the parole transcripts show that the prisoners were all
 19 given an opportunity to be heard and a statement of reasons for the denial of parole, and that this is
 20 all the process they are due. *Def.’ Opp.* (dkt. 985-3) at 11-12. Defendants also argue that the
 21 prisoners’ gang validations were not dispositive in those parole hearings. *Id.* 15. However,
 22 Defendants do not address the contention that class members are systemically being denied
 23 *meaningful* parole hearings at which they may challenge a gang validation, or even *meaningful*
 24 notice about how to go about challenging the designation in the future. As mentioned above,
 25 Plaintiffs have provided the court with ample evidentiary examples that demonstrate that the
 26 CDCR’s old process for gang validation was constitutionally infirm (for example, because
 27 CDCR’s interpretation of the word “activity” also included something described as, “non-action
 28 piece[s] of evidence”). As a result, prisoners’ validations were sometimes based on as little as the

1 appearance of their name on a list of alleged gang members, or for having received
 2 correspondence (regardless of the content) or artwork, a birthday card, or other possessions from a
 3 validated gang member, or for having a photograph of a former cellmate who was a gang member,
 4 or for the artwork they possessed (such as art containing Aztec or Mayan images), or for speaking
 5 to a gang member or being mentioned in a their correspondence (regardless of the substance or
 6 context), or for having books by certain authors or a pamphlet in Swahili. Plaintiffs also provide
 7 evidence from a number of class members' parole transcripts in support of the contention that
 8 gang validation is a highly significant, if not often a dispositive factor in parole consideration, and
 9 that when prisoners dispute their validation at their parole hearings, Commissioners consider the
 10 challenge itself to constitute evidence of dishonesty and a manifestation of a lack of remorse or
 11 credibility.

12 Given that the state has created a liberty interest in parole, fair procedures must be in place
 13 for its vindication. Thus, it is no answer for Defendants to simply state that class members were
 14 given an opportunity to be heard, instead, due process required "the opportunity to be heard at a
 15 meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. Accordingly, the court
 16 finds that Plaintiffs have carried their burden to show systemic due process violations in the use of
 17 unreliable gang validations to effectively bar class members a meaningful opportunity for parole.

18 Regarding Plaintiffs' contention that CDCR is systemically violating due process and
 19 returning class members to solitary confinement through the misuse of confidential information in
 20 disciplinary proceedings, Defendants argue: (1) that this court lacks jurisdiction to review CDCR's
 21 disciplinary findings; (2) that Plaintiffs are merely second-guessing the CDCR's use of
 22 confidential information; (3) that Plaintiffs misinterpret the confidential information because
 23 CDCR does not use fabricated evidence; and, (4) that CDCR does not use unreliable evidence.
 24 *Defs.' Opp.* (dkt. 985-3) at 15-26. Starting with Defendants' argument that this court lacks
 25 jurisdiction to review CDCR's disciplinary findings, the argument is without merit. First, the court
 26 is not taking it upon itself to review CDCR's disciplinary findings for the purpose of affirming or
 27 reversing those decisions; instead, the court is merely reviewing evidence concerning CDCR's
 28 disciplinary *process*, submitted pursuant to a provision in a settlement agreement to which

1 Defendants are a party. Second, Paragraph 41 of the Settlement Agreement makes it incumbent on
2 Plaintiffs to submit such materials (if at all), and likewise incumbent upon this court to review
3 them in the context of adjudicating motions to extend the Agreement, and thus establishes the
4 court's jurisdiction to effect such a review.

5 Turning to Defendants' contention that Plaintiffs are merely second-guessing or
6 misinterpreting CDCR's use of confidential information, Defendants submit that "the evidence
7 shows that inmates are provided sufficient notice to contest disciplinary charges and that they do
8 so." *Id.* at 18. The court disagrees. The court notes that Defendants do not offer any competing
9 interpretation of this body of evidence, nor do they direct the court to any facts or additional
10 information from which it could be concluded that some or all of the above-described apparent
11 failures to conduct *meaningful* disciplinary hearings were mitigated by the existence of some
12 competent piece of evidence on which a finding of guilt may have reasonably been based.
13 Plaintiffs, on the other hand, present evidence pertaining to a number of disciplinary matters
14 occurring in a number of different prisons, involving many prisoners, and various levels of CDCR
15 officials. In doing so, Plaintiffs demonstrate that, time and again, the shield of confidentiality for
16 informants and their confidential accounts is used to effectively deny class members any
17 meaningful opportunity to participate in their disciplinary hearings, and resulting in their return to
18 secured housing units – effectively frustrating the purpose of the Settlement Agreement.

19 Defendants also contend that Plaintiffs' reliability demands are unwarranted, and that in
20 any event, CDCR does not use unreliable information in disciplinary proceedings. *Id.* at 23-26.
21 The evidence before the court paints a different picture. Plaintiffs present evidence from a number
22 of other disciplinary matters in support of their argument that CDCR systemically relies on
23 confidential information without ensuring its reliability, thus, improperly returning class members
24 to solitary confinement and frustrating the purpose of the Settlement Agreement. In a number of
25 cases, an informant had been determined to be reliable purportedly because his account had been
26 independently corroborated by a second informant, except that there was no second informant, a
27 fact that remained confidential. Additionally, Plaintiffs present evidence that class members'
28 attempts to challenge the reliability of an informant's account at their disciplinary hearings were

1 foreclosed as “irrelevant.” Accordingly, the court finds that Plaintiffs have shown by a
2 preponderance of the evidence that systemic due process violations are manifest in CDCR’s
3 misuse of confidential information in disciplinary proceedings, resulting in a return of class
4 members to solitary confinement, and a frustration of the purpose of the Settlement Agreement.

5 Lastly, regarding Plaintiffs’ argument that RCGP classification and retention is effected
6 with such a lack of procedural protections as to manifest systemic due process violations, the court
7 finds this argument unpersuasive. The court does agree with Plaintiffs that RCGP classification or
8 retention implicates a liberty interest because Plaintiffs have provided evidence that RCGP is
9 sufficiently different from general population (i.e., RCGP limits prisoners’ parole eligibility, is
10 singular, remotely located, prolonged, and stigmatizing), however, the court finds that Plaintiffs’
11 complaints about RCGP designation and retention do not rise to the level of “systemic” due
12 process violations as contemplated by the Settlement Agreement. Plaintiffs contend that certain
13 prisoners are housed in RCGP for an improper reason – namely, due to threats to institutional
14 safety rather than their personal safety. However, even if that were an “improper” reason, which
15 does not appear to be a matter governed by the Settlement Agreement, it does not rise to the level
16 of a systemic denial of due process. Further, Plaintiffs present evidence that class members have
17 been told that participation in RCGP programs and remaining incident free for a 6-month period
18 would result in their return to general population, but that they were nevertheless retained in
19 RCGP based on a presumption that a safety threat continues. In this regard, the court finds that
20 Plaintiffs’ evidence – largely the fact that RCGP prisoners deny that there is any risk to their
21 safety – is insufficient to demonstrate a systemic due process violation. After all, the CDCR is far
22 better situated than any single prisoner to determine whether or not there is a risk to a prisoner’s
23 safety in one or another institution or unit. Lastly, while Plaintiffs suggest that the structure and
24 interaction of the DRB and the ICC could benefit from an overhaul such as to avoid the possibility
25 of arbitrary decision-making, Plaintiffs do not provide any detailed case-studies (as was the case
26 with the claims above) to show that RCGP placement and retention decisions are in fact arbitrarily
27 made, let alone evidence that would demonstrate systemic due process violations in this context.
28 Accordingly, the court finds that Plaintiffs have not satisfied their evidentiary burden to

1 demonstrate that RCGP classification and retention is effected with such a lack of procedural
2 protections as to manifest systemic due process violations.

3 ***Relationship Between Due Process Violations & Operative Complaint or Settlement Agreement***

4 Plaintiffs have demonstrated by a preponderance of the evidence that current and ongoing
5 systemic due process violations exist – namely, the systemic misuse of confidential information in
6 what appear to be meaningless disciplinary hearings such as to return class members to solitary
7 confinement, and by using unreliable gang validations to deny class members a fair opportunity to
8 seek parole. Accordingly, the court must decide whether the due process violations that exist are
9 “as alleged in Plaintiffs’ Second Amended Complaint or Supplemental Complaint or as a result of
10 CDCR’s reforms to . . . the SHU policies contemplated by this Agreement.” *Sett. Agmt.* (dkt. 424-
11 2) at 17-18.

12 The court finds that both of the currently ongoing sets of due process violations at issue are
13 as alleged in Plaintiffs’ Second Amended Complaint or as a result of CDCR’s reforms to its SHU
14 policies contemplated by the Agreement. First, as to unreliable gang validations being used to
15 deny class members a meaningful parole hearing, Plaintiffs’ operative complaint alleged that these
16 same unreliable gang validations, which had caused them to be placed in indefinite solitary
17 confinement, unfairly deprived them (among other things) of a fair opportunity to seek parole. *See*
18 *Am. Compl.* (dkt. 136) at 40-45. Second, as to the systemic misuse of confidential information in
19 disciplinary hearings to return class members to solitary confinement, by its nature this claim is
20 intertwined with CDCR’s reforms of its SHU policies as a result of the Settlement Agreement. If
21 the Settlement Agreement was executed for the purpose of ending indeterminate SHU sentences at
22 the root of which was unreliable confidential information, and wherein CDCR agrees to abide by
23 its regulations regarding the use of confidential information but often fails to do so, then systemic
24 due process violations resulting in the return of class members to the SHU effectively frustrates
25 the purpose of the agreement. Accordingly, the court finds that misusing confidential information
26 in disciplinary proceedings to return class members to solitary confinement is related to, and is a
27 result of, the CDCR’s reforms to its SHU policies under the Settlement Agreement.

28 //

CONCLUSION

For the above-stated reasons, Plaintiffs' Motion For Extension of the Settlement Agreement Based on Systemic Due Process Violations (dkt. 905) is GRANTED. The Settlement Agreement, and the court's jurisdiction, is herewith extended for a period of 12 months from the date of this order.

IT IS SO ORDERED.

Dated: January 25, 2019



ROBERT M. ILLMAN
United States Magistrate Judge

United States District Court
Northern District of California

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