

1 XAVIER BECERRA  
 Attorney General of California  
 2 ADRIANO HRVATIN  
 Supervising Deputy Attorney General  
 3 CASSANDRA J. SHRYOCK  
 State Bar No. 300360  
 4 Deputy Attorneys General  
 455 Golden Gate Avenue, Suite 11000  
 5 San Francisco, CA 94102-7004  
 Telephone: (415) 510-3622  
 6 Fax: (415) 703-5843  
 E-mail: Cassandra.Shryock@doj.ca.gov  
 7 *Attorneys for Defendants*

8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 10 OAKLAND DIVISION

12 **TODD ASHKER, et al.,**  
 13  
 14 Plaintiffs,  
 15  
 16 **GOVERNOR OF THE STATE OF**  
**CALIFORNIA, et al.,**  
 17  
 18 Defendants.

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

**DEFENDANTS’ OBJECTIONS TO THE  
 FINDINGS AND RECOMMENDATION  
 OF THE MAGISTRATE JUDGE (ECF  
 No. 1122)**

Judge: The Honorable Claudia Wilken  
 Action Filed: December 9, 2009

19 This settled lawsuit challenged conditions in CDCR’s Security Housing Units (SHU) and a  
 20 now-discontinued policy of housing inmates in SHU based solely on gang validation. The  
 21 Settlement Agreement provided that the Agreement and court supervision would automatically  
 22 end 24 months after preliminary approval. (ECF No. 424-2 ¶¶ 37 & 41.) Plaintiffs could only  
 23 obtain an extension by proving, by a preponderance of the evidence, “that current and ongoing  
 24 systemic violations of the Eighth Amendment or the Due Process Clause ... exist as alleged in  
 25 Plaintiffs’ [complaints] or as a result of CDCR’s reforms to its Step Down Program or the SHU  
 26 policies contemplated by this Agreement.” (*Id.* ¶¶ 41, 43.)

27 Plaintiffs moved to extend the Agreement, arguing (1) CDCR violates due process by  
 28 informing the Board of Parole Hearings (BPH) about gang validations (the parole claim);

1 (2) CDCR violates due process by misusing confidential information in disciplinary proceedings  
 2 (the misuse claim); and (3) CDCR's procedures for RCGP placement and retention violate due  
 3 process (the RCGP claim). (*See generally* ECF No. 898-3.) The magistrate judge recommends  
 4 granting the motion as to the first two claims and denying it as to the third. (ECF No. 1122 at 23–  
 5 26.) Defendants object to findings related to all three recommendations.

## 6 ARGUMENT

### 7 **I. THE MAGISTRATE JUDGE ERRONEOUSLY INTERPRETED PARAGRAPH 41 TO** 8 **ENCOMPASS PLAINTIFFS' PAROLE AND MISUSE ISSUES.**

9 The Court can only extend the Settlement for the reasons specified in paragraph 41. In  
 10 resolving the first two grounds raised in the Extension Motion, the magistrate judge erred by  
 11 failing to apply judicial estoppel and by misconstruing paragraph 41.

#### 12 **A. Plaintiffs Are Judicially Estopped From Relying on the Parole Claim in** 13 **Their Extension Motion.**

14 Judicial estoppel is intended to prevent a party from gaining an unfair advantage by taking  
 15 inconsistent positions at various stages of a lawsuit. *Milton H. Greene Archives, Inc. v. Marilyn*  
 16 *Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012). Before applying estoppel, courts consider:  
 17 (1) whether the party's past and current positions are clearly inconsistent; (2) whether the party  
 18 successfully persuaded the court to accept the earlier position; and (3) whether the party would  
 19 obtain an unfair advantage, or the other party would be unfairly prejudiced, if estoppel is not  
 20 applied. *Id.* at 994–95 (citation omitted).

21 All three elements are present. First, Plaintiffs' position in the Extension Motion—that  
 22 using past validations in parole proceedings violates due process—is clearly inconsistent with  
 23 their position when the parties sought approval of the Agreement. Both parties had acknowledged  
 24 that the Agreement would not exonerate past gang validations, and Plaintiffs confirmed they “did  
 25 not seek to change parole policies.” (ECF No. 486 at 17–18.) But now Plaintiffs contradict their  
 26 prior position and argue the Court should extend the Agreement because CDCR did not change its  
 27 treatment of old gang validations, and BPH may consider validations in making parole decisions.  
 28 (ECF No. 898-3 at 48–64.) And as a remedy, Plaintiffs seek to nullify past gang validations for

1 purposes of parole reviews. (*Id.* at 64; ECF No. 1002 at 36.) Second, the Court approved the  
 2 Agreement, thus accepting Plaintiffs’ earlier position. *See Hamilton v. State Farm Fire & Cas.*  
 3 *Co.*, 270 F.3d 778, 784 (9th Cir. 2001). And third, denying estoppel would unfairly advantage  
 4 Plaintiffs and unfairly disadvantage Defendants. To avoid the risk that their claims would fail,  
 5 Plaintiffs agreed to settle in exchange for certain reforms to CDCR’s SHU policies—changes that  
 6 explicitly did not involve changing gang validations or parole policies. (*See* ECF No. 486 at 2–8,  
 7 10–13.) Allowing Plaintiffs to use an issue they disclaimed when entering into the Agreement to  
 8 now extend that Agreement unfairly benefits Plaintiffs and undermines the Settlement. Likewise,  
 9 failing to apply estoppel unfairly prejudices Defendants, who have already substantially complied  
 10 with the Agreement’s terms. *Ashker v. Newsom*, 968 F.3d 939 (9th Cir. 2020).

11 **B. The Parole and Misuse Issues Are Not “as Alleged in” the Complaints or**  
 12 **“as a Result of” Relevant Reforms.**

13 The magistrate judge erred in construing paragraph 41, because neither of the asserted due-  
 14 process violations on which he recommends granting the Extension Motion were “alleged in” the  
 15 complaints or “a result of” relevant reforms. First, “violations ... as alleged in” the complaints  
 16 refers to specific conduct that Plaintiffs’ complaints alleged to be a constitutional violation.  
 17 Applying that construction, the parole and misuse claims are not “as alleged” under paragraph 41.  
 18 Plaintiffs’ complaints did not allege that CDCR violated due process by transmitting gang  
 19 validations to BPH. The allegations of an “unwritten policy” of denying parole to SHU-housed  
 20 inmates was not alleged to violate due process; rather, it was one of several factors Plaintiffs  
 21 alleged in an effort to show that SHU confinement “constitute[d] an atypical and significant  
 22 hardship.” (ECF No. 136 ¶¶ 196, 199.) Similarly, the complaints did not contain any allegations  
 23 of any of the types of misuse of confidential information the magistrate judge relied on in his  
 24 recommendation. (*See* ECF No. 388 at 5–7, 20, 25–26.)

25 Second, “as a result of CDCR’s reforms to its Step Down Program or the SHU policies  
 26 contemplated by this Agreement” refers to violations that were caused by the Agreement’s  
 27 reforms to CDCR’s Step Down Program and SHU policies, not any due-process violation having  
 28 any association with any part of the Agreement whatsoever. Neither the parole claim nor the

1 misuse claim are “a result of” relevant reforms. There is no evidence that CDCR’s reforms to its  
 2 Step Down Program or SHU policies caused CDCR to “transmit” gang validations to BPH, or  
 3 caused BPH to treat those validations in a certain way. In fact, CDCR does not “transmit” any  
 4 information to BPH for inmates’ parole reviews; BPH has direct access to inmate files, and must  
 5 consider all relevant and reliable information in those files. (Decl. J. Shaffer, Sept. 23, 2020,  
 6 ¶¶ 4–8.) Similarly, there is no evidence that the reforms to the Step Down Program or SHU  
 7 policies changed how CDCR handles confidential information.

8 **II. PLAINTIFFS’ EVIDENCE DID NOT SHOW SYSTEMIC DUE-PROCESS VIOLATIONS IN**  
 9 **CONNECTION WITH CLASS MEMBERS’ PAROLE HEARINGS.**

10 Plaintiffs present no evidence that Defendants deprive class members of constitutionally-  
 11 required procedural protections during parole hearings. *See Greenholtz v. Inmates of Neb. Pen. &*  
 12 *Corr. Complex*, 442 U.S. 1 (1979). Still, the magistrate judge recommends extending jurisdiction.  
 13 First, the magistrate found that CDCR’s old gang-validation process was constitutionally infirm.  
 14 (ECF No. 1122 at 22:24–23:6.) But, Plaintiffs disavowed any such claim when they settled, and  
 15 the evidence they submitted does not prove that point. The magistrate judge then concluded that,  
 16 because BPH may rely on such “constitutionally infirm” validations, class members are denied a  
 17 *meaningful* opportunity to be heard during parole hearings, and so Defendants are violating their  
 18 due-process rights by informing BPH of those validations. Defendants are not aware of any other  
 19 court that has recognized such a tenuous legal theory. And Plaintiffs’ evidence does not show that  
 20 CDCR “transmits” validations to BPH as Plaintiffs allege (*see* Decl. J. Shaffer ¶¶ 4–8)), or that  
 21 BPH gives validations the overwhelming weight that Plaintiffs imply. To the contrary, BPH  
 22 considers all relevant and reliable evidence, and numerous factors, when making parole decisions.  
 23 (*See id.* ¶ 5; *see also, e.g.*, SEALED Decl. S. Miller ISO Mot. Ext. Settlement, Exh. 42 at 82, Exh.  
 24 43 at 117, Exh. 48 at 17, Exh. 51 at 94–98, Exh. 52 at 185–187.)

25 **III. PLAINTIFFS’ EVIDENCE DID NOT SHOW SYSTEMIC DUE-PROCESS VIOLATIONS IN**  
 26 **USE OF CONFIDENTIAL INFORMATION IN SHU-ELIGIBLE DISCIPLINARY HEARINGS.**

27 The magistrate’s conclusion that a systemic violation of due process exists based on  
 28 imperfect confidential disclosures is not legally or factually supported. The evidence does not

1 show that CDCR relies on “fabricated” evidence; it shows, at best, human error in the process of  
 2 identifying which facts in a confidential memorandum can safely be disclosed to an inmate in a  
 3 disclosure form, and which of the pre-printed reliability bases should be selected in a particular  
 4 case. Failing to include every fact in a confidential disclosure form, and periodic errors in  
 5 recording reliability determinations, does not constitute an ongoing, systemic due-process  
 6 violation. *See, e.g., Zimmerlee v. Keeney*, 831 F.2d 183, 186–87 (9th Cir. 1987).

7 **IV. THE MAGISTRATE JUDGE CORRECTLY FOUND NO DUE-PROCESS VIOLATION IN**  
 8 **THE RCGP REVIEW PROCESS, BUT ERRED IN FINDING A LIBERTY INTEREST.**

9 The magistrate judge also incorrectly found that the conditions in the RCGP give rise to a  
 10 cognizable liberty interest. This finding is contrary to the evidence presented. CDCR takes care to  
 11 ensure that all RCGP inmates (even those on walk-alone status) receive opportunities for  
 12 exercise, social interaction, and education comparable to inmates in other high-security general-  
 13 population units. (*See* ECF No. 985-5, ¶¶ 3–14; ECF No. 927-8, ¶¶ 5–9.) Even if the RCGP is  
 14 “significantly different from general population,” that is not the legal standard, and the factors the  
 15 judge considered were not proper. *See Sandin v. Connor*, 515 U.S. 472, 484 (1995).

16 **CONCLUSION**

17 This Court should reject the magistrate judge’s recommendation that the Settlement  
 18 Agreement be extended. It should instead find that Plaintiffs failed to satisfy their burden under  
 19 paragraph 41 and that the Agreement, and the Court’s jurisdiction, is terminated.

20  
 21 Dated: September 23, 2020

Respectfully submitted,

22 XAVIER BECERRA  
 23 Attorney General of California  
 24 ADRIANO HRVATIN  
 Supervising Deputy Attorney General

25 /s/ Cassandra Shryock  
 26 CASSANDRA J. SHRYOCK  
 27 Deputy Attorney General  
 28 *Attorneys for Defendants*