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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
5

6 TODD ASHKER, et al.,
7 Plaintiffs,
8 v.
9 GAVIN NEWSOM, et al.,
10 Defendants.

Case No. 09-cv-05796 CW
ORDER EXTENDING THE
SETTLEMENT AGREEMENT
(Re: Dkt. Nos. 1345, 1363)

11
12 This class action for violations of 42 U.S.C. § 1983 arises
13 out of the placement and indefinite retention of inmates by the
14 California Department of Corrections and Rehabilitation (CDCR) in
15 solitary confinement in Security Housing Units (SHU) on the basis
16 of so-called gang validation. Plaintiffs, inmates in California
17 prisons, some of whom have been in solitary confinement for more
18 than ten years, bring this class action against Defendants, the
19 Governor of the State of California, the Secretary of CDCR, the
20 Chief of CDCR's Office of Correctional Safety, and the Warden of
21 Pelican Bay State Prison, for violations of their Eighth and
22 Fourteenth Amendment rights.

23 The parties entered into a settlement agreement (SA) in
24 August 2015, whose terms, and the Court's jurisdiction to enforce
25 the same, were set to expire in twenty-four months, unless
26 Plaintiffs showed, pursuant to paragraph 41 of the settlement
27 agreement, the existence of ongoing and systemic violations under
28 the Eighth Amendment or Fourteenth Amendment as alleged in the

1 operative complaints or arising out of the SHU-related reforms
2 required by the settlement agreement. At the end of the
3 settlement agreement's twenty-four-month term, Plaintiffs moved
4 for an extension, and the undersigned referred the motion to the
5 magistrate judge for a report and recommendation subject to de
6 novo review. The magistrate judge found that Plaintiffs made the
7 requisite showing of ongoing and systemic violations, and he
8 recommends extending the settlement agreement, and along with it
9 the Court's jurisdiction over it, for twelve months. See
10 Extension Order, Docket No. 1122.

11 Now pending are objections filed by both sides to the
12 magistrate judge's findings and recommendations. The Court
13 reviews the magistrate judge's findings de novo and affirms his
14 findings in part and reverses them in part, as set forth below,
15 and it concludes that Plaintiffs have met their burden to show
16 that a twelve-month extension of the settlement agreement is
17 warranted under paragraph 41.

18 BACKGROUND

19 I. Claims and Procedural History

20 Plaintiffs Todd Ashker and Danny Troxell had lived in
21 solitary confinement in Pelican Bay's SHU for over two decades.
22 Compl. ¶¶ 16-18. On December 9, 2009, they filed this lawsuit
23 challenging the conditions of their confinement. Their pro se
24 complaint charged various CDCR officials with violating their
25 First, Fifth, Eighth, and Fourteenth Amendment rights. Id. ¶ 8.

26 On September 10, 2012, after securing counsel, Ashker and
27 Troxell filed a second amended complaint (2AC) converting this
28 suit into a putative class action and joining eight other long-

1 term SHU inmates as plaintiffs. 2AC ¶ 1, Docket No. 136. In
2 their 2AC, Plaintiffs assert that lengthy exposure to the
3 conditions inside the Pelican Bay SHU violates the Eighth
4 Amendment's ban on cruel and unusual punishment. Id. ¶¶ 177-92.
5 Specifically, they allege that "the cumulative effect of
6 extremely prolonged confinement, along with denial of the
7 opportunity of parole, the deprivation of earned credits, the
8 deprivation of good medical care, and other crushing conditions
9 of confinement at the Pelican Bay SHU" have caused them
10 significant harm, both physically and psychologically. Id. ¶¶
11 180-81. They claim that SHU inmates are forced to "languish,
12 typically alone, in a cramped, concrete, windowless cell, for 22
13 and one-half to 24 hours a day" without access to "telephone
14 calls, contact visits, and vocational, recreational or
15 educational programming." Id. ¶ 3.

16 Plaintiffs also assert that CDCR's procedures for assigning
17 inmates to the SHU violate the Fourteenth Amendment's guarantee
18 of due process. Id. ¶¶ 193-202. According to Plaintiffs, CDCR
19 assigns inmates to the SHU based solely on their membership in or
20 association with prison gangs, without regard for the inmate's
21 "actual behavior." Id. ¶¶ 91-92. CDCR relies instead on the
22 word of confidential informants and various indicia such as
23 "gang-related art, tattoos, or written material" to determine
24 whether inmates are affiliated with a gang - a process known as
25 "gang validation." Id. ¶ 92. Inmates who have been validated as
26 gang members or associates are assigned to the SHU for an
27 indefinite term. Id. ¶¶ 92-94. Once inside the SHU, inmates
28 receive periodic reviews every six months to determine whether

1 they should be released into the prison's general population.
2 Id. ¶¶ 96-97. Plaintiffs allege that these reviews are
3 essentially "meaningless," because they require inmates to
4 "debrief" - that is, to renounce their membership in the gang and
5 divulge the gang's secrets to prison officials - in order to
6 secure release. Id. ¶¶ 96-97, 7. Plaintiffs contend that
7 debriefing is not a viable option for most inmates, who either
8 know no such secrets or believe that debriefing "places [them]
9 and their families in significant danger of retaliation" from
10 other prisoners or their associates outside. Id. ¶ 7. CDCR also
11 conducts reviews of SHU inmates' gang affiliation status every
12 six years to determine whether they are still "active" gang
13 members or associates. Id. ¶¶ 102-04. As with the six-month
14 reviews, however, Plaintiffs aver that this process typically
15 only leads to the inmates' release from the SHU if inmates are
16 willing to debrief. Id. Plaintiffs allege, in short, that they
17 have effectively been denied "information about an actual path
18 out of the SHU, besides debriefing." Id. ¶ 117. They allege
19 that they "are entitled to meaningful notice of how they may
20 alter their behavior to rejoin general population, as well as
21 meaningful and timely periodic reviews to determine whether they
22 still warrant detention in the SHU." Id. ¶ 200.

23 Plaintiffs' 2AC seeks declaratory and injunctive relief. In
24 particular, Plaintiffs request "alleviation of the conditions of
25 confinement" in the SHU, meaningful review of the continued need
26 for solitary confinement of all inmates who have been in the SHU
27 for over six months, and release from the SHU of every inmate who
28

1 has spent over ten years there. Id. at ¶¶ 45-46; 202. They have
2 not asserted any claims for monetary damages.

3 Defendants moved to dismiss the complaint in December 2012.
4 The Court denied the motion in April 2013. Docket No. 191.

5 On May 2, 2013, Plaintiffs moved for class certification
6 under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2).
7 The motion remained pending for nearly a year at the parties'
8 request while they engaged in settlement negotiations. On May
9 14, 2014, however, the parties notified the Court that they were
10 not able to reach a settlement. On June 2, 2014, the Court
11 granted in part and denied in part Plaintiffs' motion for class
12 certification. The Court certified two classes under Rules
13 23(b)(1) and 23(b)(2): (1) a Due Process Class comprised of all
14 inmates who are assigned to an indeterminate term at the Pelican
15 Bay SHU on the basis of gang validation, under the policies and
16 procedures in place as of September 10, 2012; and (2) an Eighth
17 Amendment Class comprised of all inmates who are now, or will be
18 in the future, assigned to the Pelican Bay SHU for a period of
19 more than ten continuous years. Order at 21, Docket No. 317.

20 On October 17, 2014, CDCR permanently implemented the
21 Security Threat Group (STG) policy, first piloted in October 2012.
22 See 15 Cal. Code Regs. § 3000, et seq.; Settlement Agreement ¶ 6,
23 Docket No. 424-2. This policy alters aspects of CDCR's gang
24 validation process and its practice of imposing indeterminate
25 terms in Pelican Bay's SHU. The STG policy, in part, allows
26 Pelican Bay's SHU inmates to "step down" from the most restrictive
27 placement in the SHU to less restrictive housing conditions,
28 provided that the inmates fulfill certain obligations.

1 On March 9, 2015, the Court granted Plaintiffs' motion to
2 file a supplemental complaint, which alleges an additional Eighth
3 Amendment claim on behalf of a putative class of gang-validated
4 inmates who were housed at Pelican Bay's SHU for more than ten
5 years and who have been or will be transferred, under the Step
6 Down Program, to a SHU at another CDCR facility. Order, Docket
7 No. 387; Supp. Compl., Docket No. 388. In this pleading,
8 Plaintiffs allege that their prolonged placement in any
9 combination of SHUs constitutes cruel and unusual punishment.
10 The Court ruled that the new allegations in the Supplemental
11 Complaint would not be litigated until after the conclusion of
12 the trial based on the 2AC allegations. Order at 11, Docket No.
13 387; Order, Docket No. 393.

14 On September 2, 2015, the parties jointly moved for
15 preliminary approval of a settlement agreement that would resolve
16 all claims in the 2AC and the Supplemental Complaint. The Court
17 granted preliminary approval to the settlement agreement on
18 October 14, 2015, and it granted final approval on January 26,
19 2016. Docket Nos. 445, 488. In accordance with the settlement
20 agreement, the Court retained jurisdiction to enforce it. Docket
21 No. 488 at 2.

22 II. Relevant Terms of the Settlement Agreement

23 The key terms of the settlement agreement, as relevant to
24 the present motion, include the following: (1) requiring CDCR to
25 no longer place inmates in any SHU or administrative segregation
26 solely on the basis of gang validation; (2) requiring that no
27 inmates be placed in the SHU for a disciplinary term unless they
28 are found guilty in a disciplinary hearing of a new SHU-eligible

1 offense; (3) requiring the creation of the Restrictive Custody
2 General Population Unit (RCGP), in which inmates released from
3 the SHU pursuant to the terms of the settlement agreement shall
4 be placed if there is a substantial threat to their personal
5 safety; (4) requiring the Institution Classification Committee
6 (ICC) to review the placement of inmates in the RCGP during its
7 180-day reviews by verifying whether there continues to be a
8 demonstrated threat to the inmates' personal safety and, if not,
9 referring the inmates to the Departmental Review Board (DRB) for
10 housing placement; (5) requiring CDCR to adhere to the standards
11 for the use of and reliance on confidential information set forth
12 in Title 15 of the California Code of Regulations, section 3321,
13 and to train staff to ensure that confidential information used
14 against inmates "is accurate"; and (6) requiring CDCR to produce
15 to Plaintiffs, for monitoring purposes, documents relating to
16 determinations as to whether class member have been found "guilty
17 of a SHU-eligible offense," including "redacted confidential
18 information." See SA ¶¶ 13-37, Docket No. 424-2.

19 Paragraph 41 of the settlement agreement permits Plaintiffs
20 to seek an extension of the agreement and the Court's
21 jurisdiction over this matter of not more than twelve months; to
22 obtain the extension, Plaintiffs must demonstrate "by a
23 preponderance of the evidence" that current and ongoing systemic
24 violations of the Eighth or Fourteenth Amendments occur as
25 alleged in the Second Amended Complaint, or the Supplemental
26 Complaint, or as a result of CDCR's reforms to its Step Down
27 Program or the SHU policies contemplated in the agreement. Id. ¶
28 41. In the event that an extension beyond the initial twenty-

1 four months is granted, CDCR's obligations with respect to the
2 production of documents would be extended for the same period.
3 Id. ¶ 44. In the absence of this showing, the settlement
4 agreement and the Court's jurisdiction "shall automatically
5 terminate[.]" Id. ¶ 41. The agreement permits Plaintiffs to
6 seek to extend indefinitely the settlement agreement and the
7 Court's jurisdiction so long as they make the requisite showing
8 just described, with each extension lasting no more than twelve
9 months. Id. ¶ 43.

10 III. Motion to Extend the Settlement Agreement

11 On November 20, 2017, Plaintiffs moved for an extension of
12 the settlement agreement under paragraph 41 on the basis of
13 current and ongoing systemic violations of the Due Process Clause
14 of the Fourteenth Amendment. Docket No. 898-4. Plaintiffs
15 advanced three independent categories of due process violations,
16 with each being sufficient to warrant an extension: (1)
17 Defendants' ongoing and systemic misuse of, and lack of accurate
18 disclosures regarding, confidential information; (2) Defendants'
19 ongoing and systemic failure to provide adequate procedural
20 protections prior to the placement and retention of class members
21 in the RCGP based on demonstrated threats to inmates' personal
22 safety; and (3) Defendants' ongoing and systemic retention and
23 use of old gang validations for parole purposes. Id. at 1.
24 Defendants opposed the motion.

25 The undersigned referred the motion to the magistrate judge
26 and, on January 25, 2019, that judge granted Plaintiffs' motion
27 to extend the settlement agreement, finding that Plaintiffs had
28 satisfied their burden under paragraph 41 based on two of the

1 three types of due process violations they advanced in their
2 motion. Docket No. 1122. Specifically, the magistrate judge
3 found that Plaintiffs showed by a preponderance of the evidence
4 that ongoing and systemic due process violations existed as a
5 result of: (1) Defendants' misuse of, and lack of sufficient
6 disclosures regarding, confidential information; and (2)
7 Defendants' retention and use of old gang validations for parole
8 purposes. Extension Order at 26, Docket No. 1122. The
9 magistrate judge further found that these systemic violations
10 were alleged in the 2AC or were the result of the reforms to SHU
11 policies and practices required by the settlement agreement and,
12 as such, they constituted proper bases for extending the
13 settlement agreement. Id. The magistrate judge found that
14 Plaintiffs had shown that class members have a liberty interest
15 in avoiding RCGP placement, but that Plaintiffs had not shown by
16 a preponderance of the evidence that Defendants had engaged in
17 ongoing and systemic due process violations in connection with
18 the placement and retention of class members in the RCGP based on
19 concerns for their personal safety.

20 The parties agreed to take the position that the magistrate
21 judge's order on Plaintiffs' extension motion would be a "final
22 order subject to appellate review[.]" Joint Notice at 2, Docket
23 No. 1129. Defendants filed a notice of appeal to the Ninth
24 Circuit on February 6, 2019, and Plaintiffs filed a notice of a
25 cross-appeal on February 25, 2019. Docket Nos. 1126, 1130, 1131.

26 On August 3, 2020, the Ninth Circuit held that the
27 magistrate judge's order on Plaintiffs' extension motion was not
28 a final order under 28 U.S.C. § 636(c)(1). Opinion, Docket No.

1 1309. The court of appeals remanded the action to the
2 undersigned "to consider construing the magistrate judge's
3 extension order as a report and recommendation and afford the
4 parties reasonable time to file objections." Id. at 17.

5 Consistent with the Ninth Circuit's opinion, the Court
6 construes the magistrate judge's order on Plaintiffs' extension
7 motion as a report and recommendation under 28 U.S.C.
8 § 636(b)(1)(B). The Court permitted both sides to file objections
9 to the report and recommendation. The parties have objected to
10 all of the magistrate judge's findings.

11 LEGAL STANDARD

12 Where a district judge refers a matter to a magistrate judge
13 for a report and recommendation under 28 U.S.C. § 636(b)(1)(B),
14 the district court

15 shall make a de novo determination of those
16 portions of the report or specified proposed
17 findings or recommendations to which
18 objection is made. A judge of the court may
19 accept, reject, or modify, in whole or in
20 part, the findings or recommendations made
by the magistrate judge. The judge may also
receive further evidence or recommit the
matter to the magistrate judge with
instructions.

21 28 U.S.C. § 636(b)(1).

22 "The Fourteenth Amendment's Due Process Clause protects
23 persons against deprivations of life, liberty, or property; and
24 those who seek to invoke its procedural protection must establish
25 that one of these interests is at stake." Wilkinson v. Austin,
26 545 U.S. 209, 221 (2005). A court "need reach the question of
27 what process is due only if the [plaintiff] establish[es] a
28 constitutionally protected . . . interest." Id. If the

1 plaintiff makes a showing that a cognizable interest is at stake,
2 the court then considers "the question of what due process is
3 due" to satisfy the Constitution. Id.

4 DISCUSSION

5 Each of the magistrate judge's findings and recommendations
6 with respect to all three of the categories of alleged violations
7 of due process that formed the basis of Plaintiffs' extension
8 motion are subject to an objection. Specifically, Defendants
9 object to the magistrate judge's finding that Plaintiffs showed
10 ongoing and systemic violations of due process under the
11 Fourteenth Amendment (1) based on Defendants' alleged misuse and
12 insufficient disclosures of confidential information presented in
13 proceedings held to determine whether class members should be
14 sent to the SHU for disciplinary terms; and (2) based on their
15 retention of old gang validations that pre-dated the settlement
16 agreement, which were used or could have been used in determining
17 whether class members should be released on parole. Plaintiffs
18 object to the magistrate judge's finding that they failed to show
19 ongoing and systemic due process violations based on Defendants'
20 alleged failure to provide adequate procedural protections to
21 class members prior to their placement or retention in the RCGP
22 in light of concerns for their personal safety.

23 Because the standard of review is de novo, the Court
24 considers the arguments and evidence presented to the magistrate
25 judge with respect to each of the three categories of alleged due
26 process violations that formed the basis of Plaintiffs' extension
27 motion as if no decision had been rendered by the magistrate
28 judge. See Dawson v. Marshall, 561 F.3d 930, 933 (9th Cir. 2009)

1 ("De novo review means that the reviewing court do[es] not defer
2 to the lower court's ruling but freely consider[s] the matter
3 anew, as if no decision had been rendered below.") (citation and
4 internal quotation marks omitted).

5 As noted, the settlement agreement can be extended by twelve
6 months only if Plaintiffs show, by a preponderance of the
7 evidence, that (1) "current and ongoing systemic violations of
8 the Eighth Amendment or the Due Process Clause of the Fourteenth
9 Amendment exist"; and (2) such violations "exist as alleged in
10 Plaintiffs' Second Amended Complaint or Supplemental Complaint or
11 as a result of CDCR's reforms to . . . the SHU policies
12 contemplated by this Agreement." SA ¶ 41.

13 Below, the Court evaluates each of the three categories of
14 alleged due process violations that form the basis of Plaintiffs'
15 extension motion by considering, first, whether each category of
16 alleged due process violations would fall within the scope of the
17 operative complaints or would "result" from the SHU reforms
18 required by the settlement agreement. If the answer is yes, the
19 Court will then consider whether Plaintiffs have shown, by a
20 preponderance of the evidence, that the alleged due process
21 violations "exist" on a "current and ongoing systemic" basis.
22 Only if the answer is yes to both of these inquiries can the due
23 process violations in question serve a basis for extending the
24 settlement agreement under paragraph 41.¹

25 _____
26 ¹ Defendants cite several orders previously entered in this
27 action in connection with motions brought by Plaintiffs to
28 enforce various aspects of the settlement agreement, none of
which involved alleged due process violations. Defendants argue
that these orders are relevant to the determination of
Plaintiffs' extension motion and that Plaintiffs now seek to "re-

1 The practices, procedures, and events discussed in this order
2 are those that were discussed in the parties' briefs in
3 connection with Plaintiffs' extension motion and that existed as
4 of the time the extension motion was briefed in 2017 and 2018.
5 The Court uses the qualifier "current" in this order to describe
6 them.

7 I. RCGP Placement and Retention

8 Plaintiffs argue that Defendants are violating class
9 members' due process rights in an ongoing and systemic way by
10 placing or retaining them in the RCGP without adequate procedural
11 protections. Plaintiffs argue that class members have a liberty
12 interest in avoiding placement or retention in the RCGP because
13 the conditions in the RCGP are considerably more restrictive and
14 onerous than those in the general prison population, and the
15 duration of class members' confinement therein is indeterminate.
16 Plaintiffs further contend that Defendants have failed to provide
17 class members with adequate procedural protections prior to
18 placing or retaining them in the RCGP, because Defendants have
19 not implemented the RCGP procedures set forth in the settlement
20 agreement in a "fair and meaningful way." Docket No. 898-4 at 4,
21 30. Specifically, Plaintiffs argue that Defendants fail to
22 provide inmates with meaningful and accurate notice about why
23 they are placed or retained in the RCGP, a meaningful hearing,
24

25 _____
26 litigate" them. The Court disagrees. None of the orders (or the
27 enforcement motions that gave rise to them) that Defendants cite
28 address or resolve the question at issue here, which is whether
Plaintiffs have shown that an extension of the settlement
agreement is warranted under paragraph 41 based on ongoing and
systemic due process violations. Accordingly, the orders that
Defendants cite are irrelevant to the analysis here.

1 and multiple levels of review for decisions to retain them in the
2 RCGP.

3 Defendants do not dispute that the RCGP placements about
4 which Plaintiffs complain are those of class members under
5 paragraph 27 of the settlement agreement. Defendants argue that
6 Plaintiffs cannot show any due process violations arising out of
7 class members' placement or retention in the RCGP because inmates
8 with safety concerns do not have a liberty interest in avoiding
9 transfer to the RCGP and, even if they did have such a liberty
10 interest, the inmates placed in the RCGP received sufficient due
11 process in accordance with the procedures set forth in the
12 settlement agreement.

13 A. Whether the alleged due process violations are within
14 the scope of the complaints or settlement-agreement
reforms

15 Plaintiffs argue that the alleged violations of due process
16 arising from class members' placement or retention in the RCGP
17 can be a basis for extending the settlement agreement under
18 paragraph 41 because they exist "as a result of" the SHU reforms
19 required by the settlement agreement.

20 The settlement agreement required Defendants to modify their
21 SHU policies so that inmates who had been placed there prior to
22 the settlement agreement could be released from the SHU as soon
23 as possible pursuant to the terms of the agreement. Paragraph 27
24 of the settlement agreement also required Defendants to establish
25 the RCGP to, in relevant part, house class members who, upon
26 their release from the SHU, are determined to face a substantial
27 threat to their personal safety if they were released to the
28 general prison population. SA ¶ 27. Once inmates are placed in

1 the RCGP for concerns for their safety, their RCGP placement must
2 be reviewed every 180 days by the ICC, and during each such
3 review, the ICC "shall verify whether there continues to be a
4 demonstrated threat to the inmate's personal safety." Id. If
5 such a threat is found, the prisoners will be retained in the
6 RCGP without further automatic review. Id. If the ICC finds
7 that such a threat no longer exists, the prisoners must be
8 referred to the DRB for a housing determination. Id.

9 The Court finds that the due process violations that
10 Plaintiffs allege in connection with the RCGP arise out of the
11 reforms required by the settlement agreement, namely those
12 governing the placement and retention of class members in the
13 RCGP under paragraph 27, after their release from the SHU, on the
14 basis of threats to their safety. Accordingly, the due process
15 violations that Plaintiffs allege can be a basis for extending
16 the settlement agreement under paragraph 41.

17 As noted, Defendants do not dispute that the placement and
18 retention of the prisoners discussed in Plaintiffs' extension
19 motion is governed by paragraph 27 of the settlement agreement.
20 Defendants argue that the alleged due process violations at issue
21 cannot serve as a reason for extending the settlement agreement
22 under paragraph 41 because Plaintiffs are precluded from arguing
23 that the very terms and procedures for RCGP placement and
24 retention to which they agreed violate due process.

25 Defendants misapprehend the nature of the due process
26 violations about which Plaintiffs now complain, which arise from
27 the way in which Defendants are implementing the reforms to which
28 the parties agreed. The purpose of paragraph 41 is to allow

1 Plaintiffs to seek an extension of the settlement agreement based
2 on due process violations that may arise out of the reforms
3 required by the settlement agreement, including the
4 implementation of the reforms. The due process violations at
5 issue, therefore, fall squarely within the scope of paragraph 41.

6 B. Whether the alleged due process violations exist on an
7 ongoing and systemic basis

8 1. Liberty interest

9 The Court first considers whether Plaintiffs have shown that
10 prisoners have a liberty interest in avoiding placement or
11 retention in the RCGP. The parties agree that this analysis is
12 governed by Sandin v. Conner, 515 U.S. 472 (1995).

13 In Sandin, the Supreme Court held that prisoners could
14 establish a liberty interest in avoiding certain prison conditions
15 if they show that such conditions "impose[] atypical and
16 significant hardship on the inmate in relation to the ordinary
17 incidents of prison life." Id. at 484. Sandin, therefore,
18 requires a comparison between the conditions of the confinement at
19 issue (here, the conditions in the RCGP) relative to other
20 alternative conditions of confinement that represent "the ordinary
21 incidents of prison life." Id.

22 Neither the Supreme Court nor the Ninth Circuit has defined
23 the prison conditions that are the appropriate basis for
24 comparison. See Brown v. Oregon Dep't of Corr., 751 F.3d 983,
25 988 (9th Cir. 2014) ("We have noted that [t]he Sandin Court seems
26 to suggest that a major difference between the conditions for the
27 general prison population and the segregated population triggers
28 a right to a hearing, but have not clearly held that conditions

1 in the general population, as opposed to those in other forms of
2 administrative segregation or protective custody, form the
3 appropriate baseline comparator.”) (internal citation and
4 quotation marks omitted).

5 The parties disagree as to what the alternative conditions
6 of confinement that represent the “ordinary incidents of prison
7 life” would be here. Defendants argue that they are the
8 conditions in “other high-security units,” while Plaintiffs argue
9 that they are the conditions in the general prison population.

10 The Court finds that the conditions in the general prison
11 population are the appropriate basis for comparison relative to
12 the conditions in the RCGP, because it is undisputed that class
13 members who were placed in the RCGP because of concerns for their
14 safety otherwise would have been placed in the general population
15 following their release from the SHU. This finding is consistent
16 with Sandin, which provides that the relevant comparison is that
17 “between inmates inside and outside” the segregation placement at
18 issue. See 515 U.S. at 486-87; see also Reyes v. Horel, No. C
19 08-4561 RMW, 2012 WL 762043, at *4 (N.D. Cal. Mar. 7, 2012)
20 (holding that the proper comparison under Sandin is “between the
21 conditions where the plaintiff is to be housed and where the
22 general prison population is housed”). Accordingly, for the
23 purpose of resolving Plaintiffs’ extension motion, the Court
24 considers whether the conditions in the RCGP impose “atypical and
25 significant hardship” on prisoners relative to “the ordinary
26 incidents of prison life” as experienced by prisoners in the
27 general prison population.

28

1 Factors relevant to whether conditions impose atypical and
2 significant hardship on prisoners include: (1) the duration of
3 the conditions; (2) the degree of restraint imposed; and (3)
4 whether the state's action will affect the duration of the
5 inmate's sentence. Sandin, 515 U.S. at 486-87.

6 Plaintiffs argue that class members have a liberty interest
7 in avoiding placement or retention in the RCGP under Sandin
8 because, relative to the conditions that prisoners experience in
9 the general population, the RCGP imposes atypical and significant
10 hardship on prisoners housed there because of (1) physical
11 restrictions, including minimal contact visits with family and
12 friends as a result of Defendants' prohibition on contact visits
13 during weekends for RCGP inmates, and the RCGP's remote location
14 in Pelican Bay in California, which makes it more difficult for
15 family and friends to travel there on weekdays; (2) limited
16 social interaction, as RCGP inmates' interactions are limited to
17 their programming group, each of which is comprised of only nine
18 to twelve prisoners; (3) limited job opportunities and limited
19 access to educational or rehabilitative programming, which in
20 turn impacts RCGP inmates' eligibility for telephone access,
21 family visits, and parole; (4) the duration of the placement,
22 which is indeterminate, as inmates can be deemed to have safety
23 concerns in perpetuity; (5) the stigma associated with being
24 placed in the RCGP, as other inmates target RCGP prisoners based
25 on the assumption that they committed a sex crime, a crime
26 against an elderly person, or broke an STG code or rule; and (6)

1 the potential for placement on walk-alone status while in the
2 RCGP.² See Docket No. 898-4 at 31-38; Docket No. 1000-4 at 18-19.

3 Plaintiffs argue that the conditions in the RCGP are
4 substantially similar or worse than the conditions that the
5 District of Columbia Circuit recognized as giving rise to a
6 liberty interest in Aref v. Lynch, 833 F.3d 242, 256 (D.C. Cir.
7 2016).

8 In Aref, the court of appeals held that prisoners had a
9 liberty interest in avoiding placement in Communication
10 Management Units (CMU), which housed prisoners who required
11 heightened monitoring of their communications as a result of
12 having a history of, or propensity for, communications with
13 extremist groups or conducting illicit activities outside of the
14 prison. Id. at 246. The court of appeals found that the
15 defining aspect of the CMU was that prisoners held therein had
16 "more limited and less private communications compared to general
17 population inmates"; specifically, all visits with family had to
18 be non-contact, through a glass wall; all visits were live-
19 monitored and recorded; all written correspondence was inspected
20 and more limited in permissible quantity; and phone calls were
21 limited to immediate family members. Id. at 246-47.

22
23
24 ² Defendants argue that due process violations cannot be
25 established by virtue of the RCGP's location, or the level of
26 social interaction or employment that RCPG inmates can have while
27 in the RCGP. This argument is misplaced. Plaintiffs are not
28 attempting to establish due process violations by showing that
the location of the RCGP is remote, or that RCGP inmates do not
receive enough social interaction or employment opportunities.
Plaintiffs address these circumstances only in the context of
whether prisoners have a liberty interest in avoiding the RCGP.

1 The court of appeals further found that prisoners housed in
2 CMU experienced “significantly less deprivation” than prisoners
3 held in administrative segregation³, because, unlike prisoners in
4 administrative segregation, CMU prisoners were allowed spaces
5 with other CMU inmates for sixteen hours a day; they had access
6 to educational and professional opportunities; they could keep as
7 many possessions as inmates in the general population; they had
8 no added restrictions on exercise; and they were allowed more
9 phone calls and visits than prisoners in administrative
10 segregation. Id. at 257. Indeed, other than the restrictions
11 affecting visits and calls with family and visitors, the CMU
12 “essentially function[ed] as self-contained general population
13 housing unit[s].” Id. at 247 (citation and internal quotation
14 marks omitted). Nevertheless, the court of appeals found that
15 the indefinite length of CMU placement, which could be permanent,
16 in combination with the unusual restrictions on visits and other
17 contacts with family and other visitors, weighed in favor of
18 finding that prisoners had a liberty interest in avoiding
19 placement in the CMU. The court of appeals reasoned that, even
20 though the deprivations in the CMU were “not extreme,” they would
21 necessarily “increase in severity over time,” as it would become
22 increasingly difficult for prisoners to maintain relationships
23 with family members and others as the length of their confinement
24 in the CMU increased. Id.

25

26

27 ³ In the District of Columbia Circuit, courts compare the
28 challenged conditions to the conditions in administrative
segregation, and not the conditions in the general prison
population. See Aref, 833 F.3d at 254.

1 The conditions in the RCGP, when considered in combination,
2 are even more restrictive than those that the District of
3 Columbia Circuit held gave rise to a liberty interest in Aref.

4 First, Plaintiffs showed, and Defendants did not dispute,
5 that RCGP inmates' contact visits are limited to weekdays,
6 whereas the same is not true for inmates in the general
7 population at Pelican Bay. This undisputed limitation on contact
8 visits, which is atypical relative to inmates in the general
9 population, has resulted in very limited contact visits for RCGP
10 inmates in light of the fact that Pelican Bay is located in a
11 remote part of California. The Court is persuaded, as a matter
12 of common sense, that the ban on weekend contact visits for RCGP
13 inmates makes it less feasible for family and friends who live in
14 other parts of California to make the trip to Pelican Bay.
15 Second, Plaintiffs showed, and Defendants did not meaningfully
16 dispute⁴, that class members' placement in the RCGP is
17 indeterminate, because it is not clear when the threats to class
18 members' safety will be deemed to no longer exist. These two
19 conditions, when considered in combination, impose on prisoners
20 an atypical and significant hardship relative to the general
21 prison population that is materially similar to that which gave
22 rise to a liberty interest in Aref. These two conditions,
23
24

25 ⁴ Defendants argue that placement in RCGP is not
26 indeterminate because paragraph 27 of the settlement agreement
27 provides that inmates can be released if the ICC determines that
28 the threat to the inmates' safety no longer exists. Defendants
miss the point. Placement in the RCGP is indeterminate because
neither the prisoners nor the prison know in advance when the
threat to the prisoners' safety will no longer exist.

1 therefore, are sufficient to support a finding that prisoners
2 have a liberty interest in avoiding RCGP placement under Aref.

3 Third, RCGP inmates can be placed on walk-alone status for
4 some, if not all, of their time in the RCGP. This constitutes a
5 third factor that, when combined with the two others, supports a
6 finding that prisoners are subject to conditions that are more
7 restrictive and onerous than those that gave rise to a liberty
8 interest in Aref. Defendants did not dispute that prisoners are
9 placed on walk-alone status during "an orientation and
10 observation period" upon their placement in the RCGP and can
11 remain on walk-alone status for as long as they are in the RCGP
12 if the ICC determines that they cannot program safely with other
13 inmates. See Docket No. 985-7 at 22. It is also undisputed that
14 the proportion of RCGP inmates on walk-alone status has increased
15 over time, with the majority of RCGP inmates now on walk-alone
16 status. Berg Decl. ¶¶ 5-9; see also Docket No. 1000-4 at 18-19.
17 Prisoners on walk-alone status cannot socialize or program with
18 other RCGP prisoners in compatible groups, like RCGP inmates who
19 are not on walk-alone status can. Id. In other words, the
20 programming and socializing that Defendants contend makes being
21 in the RCGP substantially similar to being in the general
22 population are diminished or essentially non-existent for inmates
23 on walk-alone status. Plaintiffs showed, and Defendants did not
24 dispute, that diminished opportunities for programming, in turn,
25 can negatively impact inmates' eligibility for parole, see Docket
26 No. 1004-4 at 26-27, which in turn can lengthen the duration of
27 inmates' sentences.

1 Defendants attempt to distinguish Aref on the basis that the
 2 prisoners were placed in the CMU because of suspected terrorism,
 3 whereas here the prisoners' placement in the RCGP is based on
 4 concerns for their safety. See Docket No. 985-7 at 25 n.10.
 5 Defendants do not explain why this purported distinction would
 6 affect the liberty-interest analysis. The placements here, as
 7 well as those in Aref, were made for administrative reasons, as
 8 opposed to disciplinary reasons. They are, therefore, similar in
 9 the way that matters.

10 Defendants also argue that RCGP is "less restrictive than
 11 administrative segregation" as a result of the conditions and
 12 programming opportunities available to RCGP inmates⁵, and that any

13
 14
 15 ⁵ Under paragraph 27 of the settlement agreement, inmates
 placed in the RCGP have the right to the following programming
 and privileges:

16 Programming for those inmates transferred to
 17 or retained in the RCGP will be designed to
 18 provide increased opportunities for positive
 social interaction with other prisoners and
 staff, including but not limited to:

19 Alternative Education Program and/or small
 20 group education opportunities; yard/out of
 cell time commensurate with Level IV GP in
 21 small group yards, in groups as determined
 by the Institution Classification Committee;
 22 access to religious services; support
 services job assignments for eligible
 inmates as they become available; and
 23 leisure time activity groups. Contact
 visiting shall be limited to immediate
 24 family and visitors who have been pre-
 approved in accordance with existing Title
 25 15 visiting regulations, and shall occur on
 the schedule set forth in Attachment A.
 26 Other privileges provided in the RCGP are
 also set forth in Attachment A. CDCR policy
 27 is that inmate movement, programming, and
 contact visits within the RCGP shall not
 28 require the application of mechanical
 restraints; any application of restraints

1 restrictions imposed on RCGP inmates are necessary to keep them
2 safe. See Docket No. 985-7 at 22-23. The Court is not
3 persuaded. First, the availability of programming opportunities
4 does not impact the fact that the minimal opportunities for
5 contact visits for RCGP inmates, the indeterminate nature of the
6 confinement in the RCGP, and the possibility of placement on
7 walk-alone status, in combination, are more than sufficient under
8 Aref to find a liberty interest. The inmates placed in the CMU
9 in Aref likewise had access to programming opportunities; the
10 District of Columbia Circuit nevertheless held that inmates had a
11 liberty interest in avoiding placement in the CMU for the reasons
12 discussed above. Second, whether any of the aforementioned
13 restrictions are necessary to keep RCGP inmates safe is
14 irrelevant to the liberty interest analysis. See Wilkinson, 545
15 U.S. at 224 (holding that the "necessity" of "harsh conditions"
16 is irrelevant to the consideration of whether such conditions
17 "give rise to a liberty interest in their avoidance").

18 Accordingly, the Court finds that Plaintiffs have shown that
19 prisoners have a liberty interest in avoiding placement or
20 retention in the RCGP, as in Aref, in light of the diminished
21 opportunities for contact visits while in the RCGP relative to
22 the general prison population, in combination with the
23 indeterminate duration of placement in the RCGP, and the
24 possibility of placement on walk-alone status while in the RCGP.

25
26
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28 _____
shall be in accordance with existing Title
15, section 3268.2.

1 2. Constitutional sufficiency of procedures

2 Having determined that class members have a liberty interest
3 in avoiding placement or retention in the RCGP, the Court now
4 turns to the question of what process is due to inmates whom
5 Defendants seek to place or retain in the RCGP under paragraph 27.

6 Because the requirements of due process are "flexible and
7 cal[1] for such procedural protections as the particular situation
8 demands," the Supreme Court has "declined to establish rigid rules
9 and instead ha[s] embraced a framework to evaluate the sufficiency
10 of particular procedures." Wilkinson, 545 U.S. at 224-25
11 (citations and internal quotation marks omitted). This framework,
12 established in Mathews v. Eldridge, 424 U.S. 319 (1976), requires
13 consideration of three distinct factors:

14 First, the private interest that will be
15 affected by the official action; second, the
16 risk of an erroneous deprivation of such
17 interest through the procedures used, and
18 the probable value, if any, of additional or
19 substitute procedural safeguards; and
20 finally, the Government's interest,
21 including the function involved and the
22 fiscal and administrative burdens that the
23 additional or substitute procedural
24 requirement would entail.

25 Wilkinson, 545 U.S. at 224-25 (quoting Mathews, 424 U.S. at 335).

26 Placement in the RCGP based on concerns for class members'
27 safety under paragraph 27 is administrative, not disciplinary.
28 Where that is the case, the State's interest, which is the third
of the Mathews factors, becomes "a dominant consideration" in
determining whether the procedures in place are Constitutionally
sufficient. Accordingly, in light of the significant weight that
must be accorded to the State's interest in this context, the
procedures to be followed before placing inmates in administrative

1 segregation need not be "formal, adversary-type procedures" such
2 as those required in the context of disciplinary segregation;
3 instead, they can be "informal, nonadversary procedures" such as
4 those set forth in Hewitt v. Helms, 459 U.S. 460, 473-76 (1983),
5 abrogated in part on other grounds in Sandin, 515 U.S. at 472.
6 These informal, nonadversary procedures include notice of the
7 reason for placement, an opportunity to be heard, and periodic
8 review. Id.

9 Plaintiffs argue that Defendants are violating class
10 members' due process rights in connection with their placement or
11 retention in the RCGP under paragraph 27 because Defendants do
12 not follow, or have not meaningfully implemented, the procedures
13 set forth in paragraph 27 of the settlement agreement and are
14 thereby depriving inmates of notice of the reason for RCGP
15 placement or retention and meaningful periodic review. As noted
16 above, paragraph 27 provides the DRB with the discretion to house
17 inmates in the RCGP instead of in the general population if it
18 determines that there are threats to their personal safety. SA ¶
19 27. The settlement agreement further requires the ICC to
20 consider the placement during its 180-day reviews by verifying
21 whether there continues to be a demonstrated threat to the
22 inmates' personal safety; if not, the inmates must be referred to
23 the DRB for a housing determination. Id.

24 Plaintiffs argue that Defendants fail to provide inmates
25 with meaningful notice of the reason for RCGP placement or
26 retention because, even though RCGP placement based on paragraph
27 27 should be made only if there are threats to the security of
28 the inmate, the DRB and the ICC "often consider factors in the

1 RCGP reviews that are irrelevant to the existence of a safety
2 threat [to the prisoner], or simply use the wrong standard.”
3 Docket No. 898-4 at 42. For example, Plaintiffs’ evidence showed
4 that Defendants have relied on findings that releasing prisoners
5 to the general population would pose a threat to the safety of
6 the institution even though paragraph 27 does not contemplate the
7 safety of the institution as a reason for keeping prisoners in
8 the RCGP. Id.; Bremer Decl., Ex. N, M. Rather, under paragraph
9 27, it is the safety of the prisoners that is the relevant
10 consideration. Plaintiffs’ evidence also showed that Defendants
11 failed to provide inmates with accurate notice of how to gain
12 release from the RCGP under paragraph 27. Plaintiffs’ evidence
13 showed that CDCR told prisoners that participating in programming
14 and remaining incident-free for six months would result in
15 transfer out of the RCGP, Docket No. 898-4 at 43; Bremer Decl.,
16 Ex. A, B, F, J, K, which is inconsistent with paragraph 27, which
17 permits Defendants to retain inmates in the RCGP only if the ICC
18 verifies that “there continues to be a demonstrated threat to the
19 inmate’s personal safety,” SA ¶ 27.

20 Plaintiffs next argue that Defendants failed to provide
21 inmates with meaningful periodic review of their RCGP placement
22 because the ICC has failed to verify during the 180-day reviews
23 that a demonstrated threat to inmates’ safety continues to exist.
24 Plaintiffs’ evidence showed that, instead of evaluating whether a
25 safety concern continues to exist, the ICC operates under what
26 appears to be a presumption that historical threats to prisoners’
27 safety continue to exist in the absence of affirmative evidence
28

1 that the threats have abated. Docket No. 898-4 at 42; Bremer
2 Decl., Ex. N. This is also contrary to paragraph 27.

3 Plaintiffs contend that Defendants' failure to provide
4 prisoners with adequate notice and meaningful periodic review
5 creates a high risk of erroneous placement or retention in the
6 RCGP, particularly because no further automatic review is
7 required under paragraph 27 if the ICC or DRB decides to retain
8 prisoners in the RCGP. Docket No. 898-4 at 43-45.

9 Defendants do not dispute that the placement or retention of
10 the prisoners discussed in Plaintiffs' extension motion is
11 governed by paragraph 27 and that such placement or retention
12 should have been on the basis of existing threats to their safety
13 only. Further, Defendants do not meaningfully address, much less
14 dispute, any of the specific incidents described by Plaintiffs in
15 their extension motion, thereby implicitly conceding that they
16 failed to provide meaningful notice to prisoners of the reasons
17 for RCGP placement and retention and meaningful periodic review of
18 RCGP retention. See Docket No. 985-7 at 29-30.

19 In light of the absence of a dispute with respect to the
20 incidents that Plaintiffs have described, the Court finds that
21 Plaintiffs have shown that Defendants have failed to provide
22 prisoners meaningful notice of the reason for RCGP placement and
23 retention and meaningful periodic review.

24 Wilkinson, 545 U.S. at 221, illustrates why these failings by
25 Defendants support a finding that the current procedures for
26 placing and retaining inmates in the RCGP pursuant to paragraph
27 27, as implemented, are Constitutionally insufficient.

28

1 In that case, the Supreme Court considered whether Ohio's
2 procedures for placing and retaining inmates for administrative
3 reasons in the Ohio State Penitentiary (OSP), a supermax facility,
4 were adequate in providing prisoners with due process under
5 Mathews. The procedures required Ohio to (1) provide "written
6 notice summarizing the conduct" triggering review for placement in
7 the OSP; (2) provide the prisoner an opportunity to attend and
8 offer a fair rebuttal at the hearing during which a Classification
9 Committee evaluates whether the prisoner should be placed in the
10 OSP; (3) provide "multiple levels of review for any decision
11 recommending OSP placement, with the power to overturn the
12 recommendation at each level"; and (4) provide a placement review
13 within thirty days of the initial placement in the OSP, and an
14 annual review thereafter. 545 U.S. at 223-26.

15 The Supreme Court held that these procedures were sufficient
16 under the three-factor Mathews balancing test because (1) the
17 inmates had a "more than minimal" interest in avoiding erroneous
18 placement in the OSP (first Mathews factor); (2) the State's
19 interest in ensuring prison security was a "dominant
20 consideration" (third Mathews factor); and (3) the procedures in
21 place created a low risk of erroneous placement in the OSP, in
22 relevant part because the inmates received "notice of the factual
23 basis" for OSP placement and a fair opportunity for rebuttal,
24 because of the multiple levels of review for any decision
25 recommending OSP placement, and because of the automatic thirty-
26 day review following the initial OSP placement. Id.

27 Here, in contrast to Wilkinson, and based on the undisputed
28 incidents described above, the procedures currently in place, as

1 implemented, do not result in the provision of meaningful notice
 2 of the reasons for RCGP placement or retention, or in the
 3 provision of meaningful review of RCGP placement or retention.
 4 Accordingly, the Court finds that the current procedures for
 5 placing and retaining prisoners in the RCGP under paragraph 27, as
 6 implemented, create a high risk⁶ of erroneous RCGP placement or
 7 retention and are therefore Constitutionally inadequate under
 8 Mathews and Wilkinson.

9 Defendants argue, conclusorily, that no due process
 10 violations exist because "CDCR is abiding" by the settlement
 11 agreement and Plaintiffs agreed to the terms of the settlement
 12 agreement. However, it is undisputed that Defendants have failed
 13 to provide meaningful notice to inmates of the basis for RCGP
 14 placement or retention that is consistent with the terms of
 15 paragraph 27, and to provide meaningful review of RCGP retention
 16 as required by paragraph 27. Further, Plaintiffs' alleged due
 17 process violations arise out of Defendants' failure to
 18 meaningfully implement paragraph 27, and such failures can give
 19 rise to due process violations that would permit an extension of
 20 the settlement agreement under paragraph 41.

24 ⁶ Plaintiffs showed, and Defendants did not dispute, that no
 25 further automatic review is required under paragraph 27 if the
 26 ICC or DRB decides to retain prisoners in the RCGP. The lack of
 27 automatic review as to determinations to keep prisoners in the
 28 RCGP further increases the risk of erroneous RCGP retention. Cf.
Wilkinson, 545 U.S. at 223-26 (holding that procedures minimized
 the risk of erroneous placement in the OSP in part because they
 required multiple levels of review for any decision recommending
 OSP placement, in addition to the yearly review of OSP
 placement).

1 Defendants next contend that Plaintiffs cannot show due
2 process violations by merely "disagree[ing] with CDCR's findings
3 regarding inmates' safety concerns," Docket No. 985-7 at 29.
4 This argument misapprehends the basis of the alleged due process
5 violations here. Plaintiffs are not challenging the ultimate
6 determinations of the DRB or ICC with respect to whether security
7 concerns exist to place or keep class members in the RCGP under
8 paragraph 27; instead, Plaintiffs challenge the lack of
9 procedural protections afforded to class members in connection
10 with RCGP placement or retention, and the resultant risk of
11 erroneous RCGP placement or retention.

12 The Court finds, based on the foregoing, that Plaintiffs have
13 shown that the current procedures, as implemented, are
14 Constitutionally deficient under Mathews and that such
15 deficiencies give rise to ongoing and systemic due process
16 violations. Accordingly, the settlement agreement can be extended
17 under paragraph 41 as a result of ongoing and systemic due process
18 violations arising out of class members' placement or retention in
19 the RCGP under paragraph 27.

20 As noted, the magistrate judge found that Plaintiffs had not
21 met their burden to show ongoing and systemic due process
22 violations arising out of RCGP placement or retention, but the
23 Court respectfully disagrees with that finding in light of the
24 undisputed evidence discussed above.

25 II. Misuse of Confidential Information

26 Plaintiffs argue that ongoing and systemic due process
27 violations of class members' rights occur as a result of the way
28 in which Defendants disclose and rely upon confidential

1 information in connection with disciplinary proceedings that
2 could lead to the placement of class members in the SHU for
3 having committed a SHU-eligible offense. Plaintiffs note that
4 these disciplinary proceedings, and Defendants' use of
5 confidential information therein, are governed by and arise from
6 the reforms required by the settlement agreement. Plaintiffs
7 contend that the alleged due process violations at issue are of
8 two types: (1) those arising out of Defendants' inaccurate or
9 insufficient disclosure of confidential information used against
10 class members in the proceedings, which deprived class members of
11 the ability to mount a defense during their disciplinary
12 hearings; and (2) those arising out of Defendants' reliance upon
13 confidential information that Defendants failed to evaluate for
14 reliability. Plaintiffs explain that they discovered these
15 alleged due process violations by reviewing the documents and
16 information that Defendants are required to disclose to
17 Plaintiffs for monitoring purposes under paragraph 37(h) of the
18 settlement agreement.

19 Defendants argue that the alleged due process violations
20 just described cannot be a basis for extending the settlement
21 agreement under paragraph 41 because they are neither alleged in
22 the 2AC nor the result of the SHU reforms required by the
23 settlement agreement. Defendants further argue that, even if the
24 alleged due process violations at issue could serve as a basis to
25 extend the settlement agreement under paragraph 41, Plaintiffs
26 have not met their burden to show that the alleged violations
27 amount to ongoing and systemic due process deprivations, because
28 Plaintiffs' evidence shows, "at best, human error" in Defendants'

1 disclosure and reliance upon confidential information, and
2 because “[f]ailing to include every fact in a confidential
3 disclosure form, and periodic errors in recording reliability
4 determinations, does not constitute an ongoing, systemic due-
5 process violation.” Docket No. 1345 at 4-5.

6 A. Whether the alleged due process violations are within
7 the scope of the complaints or settlement-agreement
8 reforms

9 As noted, prior to the settlement agreement, placement in
10 the SHU had been on the basis of gang validation status. The
11 settlement agreement modified the process for placing class
12 members in the SHU by requiring that any such placement be based
13 on a conviction for an SHU-eligible offense after a disciplinary
14 hearing. SA ¶¶ 13-17. Paragraph 34 of the settlement agreement
15 requires CDCR to comply with California regulations that govern
16 the use and disclosure of confidential information and to train
17 staff to ensure that confidential information used against
18 inmates “is accurate.” Under paragraph 37(h), for monitoring
19 purposes, Defendants are required to produce to Plaintiffs’
20 counsel documents relating to determinations as to whether a
21 class member has been found “guilty of a SHU-eligible offense,”
22 including “redacted confidential information.” SA ¶ 37(h).

23 Plaintiffs argue that the due process violations they allege
24 with respect to Defendants’ use of confidential information are a
25 proper ground for extending the settlement agreement under
26 paragraph 41 because they arise out of the reforms required by
27 the portions of the settlement agreement just described.

28 The Court agrees. By its plain terms, the settlement
agreement requires Defendants to take certain steps to ensure

1 that confidential information used against inmates "is accurate"
2 and in compliance with California regulations regulating the use
3 and disclosure of confidential information. See SA ¶¶ 24, 34,
4 37(h). This would include the use of confidential information
5 against inmates in connection with the disciplinary proceedings
6 described in the settlement agreement, pursuant to which a class
7 member can be found guilty of committing a SHU-eligible offense
8 and placed in the SHU for a disciplinary term for that offense.
9 Id. ¶¶ 13-17. Accordingly, any alleged violations of class
10 members' due process rights that arise from Defendants' failure
11 to comply with these requirements arise out of the SHU reforms
12 contemplated by the settlement agreement, and therefore
13 constitute a proper ground for extending the settlement agreement
14 under paragraph 41.

15 Defendants argue that the alleged due process violations in
16 question are not the result of the SHU policy changes that CDCR
17 agreed to implement pursuant to the settlement agreement, because
18 "there is no evidence that the reforms to the Step Down Program
19 or SHU policies changed how CDCR handles confidential
20 information." Docket No. 1345 at 4. This argument is
21 unpersuasive. It ignores the provisions of the settlement
22 agreement that require Defendants to train their staff to ensure
23 that their use of confidential information "is accurate" and in
24 compliance with the California regulations governing the use of
25 confidential information. SA ¶ 34. It also ignores the
26 provisions that require Defendants to produce, for monitoring
27 purposes, documents to Plaintiffs' counsel about STG-eligible
28 convictions, including any confidential information relied upon

1 in "find[ing] the inmate guilty of the SHU-eligible offense." SA
2 ¶ 37(h). Defendants' interpretation of the settlement agreement
3 gives no effect to these provisions, and is not viable for that
4 reason. Defendants do not explain why the settlement agreement
5 requires them to produce to Plaintiffs for monitoring purposes
6 documents containing confidential information relied upon during
7 disciplinary hearings if the settlement agreement had not
8 addressed their obligations as to the use of confidential
9 information in disciplinary hearings.

10 In light of the foregoing, the Court concludes that the
11 alleged due process violations in question result from the SHU-
12 related reforms required by the settlement agreement and can,
13 therefore, serve as a basis for extending the settlement
14 agreement under paragraph 41.

15 B. Whether the alleged due process violations exist on an
16 ongoing and systemic basis

17 1. Liberty interest

18 The Court next considers whether class members have a
19 liberty interest in avoiding placement in the SHU.

20 This Court previously held when denying Defendants' motion
21 to dismiss that Plaintiffs had alleged a liberty interest in
22 avoiding placement in the SHU in light of Defendants' failure to
23 argue otherwise. See Docket No. 191 at 12. Defendants do not
24 contend at this juncture that Plaintiffs lack such an interest.
25 Accordingly, in light of Defendants' implicit concession that
26 prisoners do have such an interest, the Court concludes that
27 Plaintiffs have a liberty interest in avoiding disciplinary
28 placement in the SHU. See Zimmerlee v. Keeney, 831 F.2d 183, 186

1 (9th Cir. 1987) (“The parties do not discuss and we assume that
2 Zimmerlee has a protected liberty interest in not being subject
3 to disciplinary segregation.”).

4 2. Constitutional sufficiency of procedures

5 The procedures required to satisfy due process when placing
6 prisoners in segregation vary primarily depending on whether the
7 segregation is for disciplinary purposes or administrative
8 purposes. See Madrid v. Gomez, 889 F. Supp. 1146, 1272 (N.D.
9 Cal. 1995) (noting that “the amount of process due depends, in
10 significant part, on whether the prisoner’s transfer to the SHU
11 is characterized as disciplinary or administrative”).

12 The placement at issue here is placement in the SHU based on
13 a conviction for STG-eligible offenses and is, therefore,
14 disciplinary in nature.

15 “Prison disciplinary proceedings are not part of a criminal
16 prosecution and the full panoply of rights due a defendant in
17 such proceedings does not apply.” Wolff v. McDonnell, 418 U.S.
18 539, 556 (1974). “The Supreme Court in Wolff spelled out the
19 minimum procedural protections that the Due Process Clause
20 requires when substantial liberty interests are being deprived in
21 the prison setting; [the Ninth Circuit] subsequently held that
22 the Wolff requirements must be met in the disciplinary
23 segregation context.” Walker v. Sumner, 14 F.3d 1415, 1419 (9th
24 Cir. 1994), overruled on other grounds by Sandin, 515 U.S. at 472
25 (citations omitted). Even if state regulations provide prisoners
26 with more extensive procedural protections, Wolff requirements
27 nevertheless control the inquiry of whether the prisoners’ due
28 process rights were violated. Id. (“[W]e need not consider

1 whether the prison complied with its own regulations. Walker's
2 right to due process was violated only if he was not provided
3 with process sufficient to meet the Wolff standard.").

4 Wolff established five procedural
5 requirements. First, written notice of the
6 charges must be given to the disciplinary-
7 action defendant in order to inform him of the
8 charges and to enable him to marshal the facts
9 and prepare a defense. Second, at least a
10 brief period of time after the notice, no less
11 than 24 hours, should be allowed to the inmate
12 to prepare for the appearance before the
13 Adjustment Committee. Third, there must be a
14 written statement by the factfinders as to the
15 evidence relied on and reasons for the
16 disciplinary action. Fourth, the inmate
17 facing disciplinary proceedings should be
18 allowed to call witnesses and present
19 documentary evidence in his defense when
20 permitting him to do so will not be unduly
hazardous to institutional safety or
correctional goals. Fifth, [w]here an
illiterate inmate is involved . . . or where
the complexity of the issue makes it unlikely
that the inmate will be able to collect and
present the evidence necessary for an adequate
comprehension of the case, he should be free
to seek the aid of a fellow inmate, or . . .
to have adequate substitute aid . . . from the
staff or from a[n] . . . inmate designated by
the staff. The Court specifically held that
the Due Process Clause does not require that
prisons allow inmates to cross-examine their
accusers, nor does it give rise to a right to
counsel in the proceedings[.]

21 Id. (internal citations and quotation marks omitted).

22 In addition to purely procedural protections, due process
23 also requires prison officials to have an evidentiary basis for
24 their decisions to confine inmates to disciplinary segregation.
25 See Superintendent, Massachusetts Correctional Institution v.
26 Hill, 472 U.S. 445, 455 (1985) (Hill).

1 a. Insufficient disclosures

2 Plaintiffs argue that Defendants failed to provide class
3 members with accurate and complete disclosures of confidential
4 information that was relevant to charges made against them for
5 STG-eligible offenses, which could have or did result in their
6 placement in the SHU. Plaintiffs argue that the inaccurate and
7 incomplete disclosures at issue violated class members' due
8 process right to have adequate notice of the charges against them
9 and to marshal the facts and prepare a defense.

10 Plaintiffs represent, and Defendants do not dispute, that
11 CDCR regulations require that information obtained from
12 confidential informants be documented in a confidential
13 memorandum, which is not disclosed to the inmates; the inmates
14 are provided a summarized version of the confidential memorandum
15 (i.e., a disclosure form), which lacks any confidential
16 information that cannot be disclosed to the inmates, such as the
17 name of the confidential informant.

18 Plaintiffs' evidence showed many instances in which
19 disclosure forms attributed to confidential informants statements
20 that the confidential informants did not actually make. The
21 statements attributed to the confidential informants, which
22 Plaintiffs argue were simply "fabricated" by Defendants,
23 incriminated class members of committing STG-eligible offenses.
24 Plaintiffs' evidence also showed many instances in which
25 disclosure forms failed to disclose confidential information that
26 was exculpatory or that class members could have used during
27 their disciplinary hearings to defend themselves against the
28 charges against them.

1 For example, the disclosure forms provided to prisoner 1
2 stated that two confidential informants both said that prisoner 1
3 wanted prisoner 2 killed, in part because prisoner 2 had not
4 provided prisoner 1 with his cut of the proceeds from contraband.
5 Docket No. 898-4 at 9-10; Meeropol Decl., Ex. A, B, C. However,
6 the confidential memorandum that the disclosure forms were
7 supposed to summarize does not state that one of the informants
8 said that prisoner 1 wanted prisoner 2 killed because he had not
9 provided him with a cut of the proceeds from contraband. Id.
10 The confidential informant gave a different reason entirely for
11 why he thought prisoner 1 wanted prisoner 2 killed. Id.

12 Defendants do not dispute that the statements attributed to
13 one of the confidential informants in the disclosure forms
14 provided to prisoner 1 were not actually made by the confidential
15 informant; nor do Defendants dispute that the disclosure forms
16 provided to prisoner 1 contained inaccurate information about
17 what this confidential informant actually said against prisoner
18 1. See Docket No. 985-7 at 14-15. Defendants argue that what
19 matters is that prisoner 1's "order was carried out" and prisoner
20 2 "was stabbed." Id. at 14. Defendants further argue that
21 prisoner 1 was provided with sufficient information in the
22 disclosure forms to satisfy due process requirements because such
23 forms revealed that two confidential informants had accused
24 prisoner 1 of ordering prisoner 2's assault, and Defendants were
25 not required to disclose more than that because the reasons why
26 prisoner 1 purportedly ordered prisoner 2 to be assaulted were
27 "irrelevant." Id. For the reasons discussed in more detail
28 below, the inaccurate disclosures that Defendants provided to

1 prisoner 1 violated his due process rights because they deprived
2 him of the ability to challenge or otherwise raise questions as
3 to the reliability of confidential information that could have
4 been or was used against him.

5 As another example, the disclosure forms provided to four
6 prisoners (prisoners 3, 4, 5, and 6), who were accused of
7 conspiring to murder another inmate, attributed incriminating
8 statements to a confidential informant that the informant did not
9 actually make. See Docket No. 898-4 at 11-13; Meeropol Decl.,
10 Ex. E, F. Further, the forms omitted information that the
11 confidential informant actually did provide to Defendants that
12 was exculpatory. Id. Specifically, the disclosure forms failed
13 to disclose to the four prisoners that the confidential informant
14 stated that the inmate who was the alleged victim of the murder
15 conspiracy had not been ordered murdered by the four co-
16 conspirators. Id.

17 Defendants do not dispute that the disclosure forms provided
18 to these four prisoners contained statements attributed to a
19 confidential informant that the informant did not make, and they
20 also do not dispute that these forms failed to disclose the
21 exculpatory evidence just discussed. For the reasons discussed
22 in more detail below, these incomplete and inaccurate disclosures
23 violated the prisoners' due process rights because they deprived
24 the prisoners of the ability to challenge or otherwise raise
25 questions as to the reliability of confidential information that
26 could have been or was used against them.

27 As another example, the disclosure form that was provided to
28 prisoner 7, who allegedly conspired to commit battery with an

1 STG-nexus, stated that intercepted prisoner notes identified
2 prisoner 7 by name as ordering the assault of two other inmates.
3 Docket No. 898-4 at 14-15; Meeropol Decl., Ex. G, H. But the
4 confidential note did not, in fact, identify prisoner 7 by name;
5 it instead identified a prisoner by what appears to be a
6 nickname. Id. The confidential memorandum that the disclosure
7 form was supposed to summarize does not contain any information
8 connecting prisoner 7 to the nickname that was mentioned in the
9 note. Id. The disclosure form provided to prisoner 7 did not
10 reveal that the note at issue had incriminated a prisoner
11 identified only by using a nickname. Id.

12 Defendants do not address this incident in their briefs,
13 thereby implicitly conceding that the information disclosed in
14 the disclosure form provided to prison 7 was inaccurate.

15 For the reasons discussed in more detail below, the
16 incomplete disclosures that Defendants provided to prisoner 7
17 violated his due process rights because they deprived him of the
18 ability to challenge or otherwise raise questions as to the
19 reliability of confidential information that could have been or
20 was used against him.

21 As noted above, due process requires, among other things,
22 that "an inmate receive advance written notice of the claimed
23 violation" for which he could face discipline. Zimmerlee, 831
24 F.2d at 188 (citing Wolff, 418 U.S. at 563). "Wolff provides
25 little guidance as to the specificity of notice necessary to
26 satisfy due process. However, the [Supreme] Court has stated
27 that in identifying the safeguards due process requires in this
28 context, courts should remember 'the legitimate institutional

1 needs of assuring the safety of inmates and prisoners' and avoid
2 'burdensome administrative requirements that might be susceptible
3 to manipulation.'" Id. (quoting Hill, 472 U.S. at 454-55).
4 "Whether notice satisfies due process is a question of law[.]"
5 Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 918 (9th Cir. 1995).

6 The Court finds, based on the examples described above,
7 which are representative of the evidence that Plaintiffs have
8 presented, that Plaintiffs have shown due process violations
9 arising out of Defendants' failure to provide class members with
10 adequate notice of the charges and evidence against them and by
11 failing to disclose non-sensitive information or evidence that
12 class members could have used to mount a defense at their
13 disciplinary hearings. The inaccurate or incomplete disclosures
14 that Defendants provided to class members deprived class members
15 of the ability to challenge or otherwise raise questions as to
16 the reliability of confidential information that could have been
17 or was used against them during their disciplinary hearings. See
18 Brown v. Plaut, 131 F.3d 163, 172 (D.C. Cir. 1997) ("If [an
19 inmate] was not provided an accurate picture of what was at stake
20 in the hearing, then he was not given his due process.").

21 Defendants do not meaningfully dispute that disclosures
22 provided to class members contained inaccurate information or
23 failed to disclose relevant and non-sensitive exculpatory
24 information derived from confidential sources. Further,
25 Defendants have advanced no legitimate penological reason for
26 having failed to provide class members with disclosures (without
27 revealing the identity of confidential informants or other
28 detailed information that could have revealed the identity of

1 confidential informants)⁷ that accurately reflected confidential
2 information that was relevant to the charges against them.
3 Indeed, Defendants attribute the deficiencies in the disclosures
4 that Plaintiffs have identified to "human error," thereby
5 conceding that the deficient disclosures were not the result of a
6 need to withhold information from class members for legitimate
7 institutional reasons. See Docket No. 1345 at 4-5.

8 Defendants argue that any "errors" made with respect to the
9 disclosure of confidential information are harmless because there
10 was sufficient evidence in the record to support the disciplinary
11 officers' ultimate determinations, including guilty pleas and
12 findings of guilt. This argument misses the point. Plaintiffs'
13 due process allegations here are not predicated on the theory
14 that the ultimate determination of the disciplinary officers was
15 unsupported; they are predicated instead on the theory that the
16 procedures employed were Constitutionally insufficient.

17 Accordingly, whether the ultimate determinations of the hearing
18 officers were supported by sufficient evidence is irrelevant.
19 See Edwards v. Balisok, 520 U.S. 641, 648 (1997) (noting that
20 "when the basis for attacking the judgment is not insufficiency
21 of the evidence . . . it is irrelevant" whether there is
22 sufficient evidence in the record to support the prison hearing
23 determination).

24 Defendants next argue that Plaintiffs improperly seek to
25 "second-guess prison officials" and "reverse" Defendants'

27 ⁷ Plaintiffs do not argue that Defendants should have
28 revealed names or dates or other detailed information that could
have revealed the identity of a confidential informant.

1 findings with respect to whether class members committed STG-
2 eligible offenses. See, e.g., Docket No. 985-7 at 15. But
3 Plaintiffs do not seek to vacate or alter the outcome of the
4 disciplinary hearings at issue; rather, they seek to show that
5 procedural due process violations of class members' rights
6 occurred prior to the disciplinary hearings.

7 Defendants also contend that, even if the disclosures
8 provided to class members contained inaccurate or fabricated
9 information, that would not give rise to violations of due
10 process because there is no Constitutional right to be free from
11 false disciplinary charges. See Docket No. 1084-4 at 3. This
12 argument is misplaced. The cases upon which Defendants rely to
13 support this proposition in turn rely on Sprouse v. Babcock, 870
14 F.2d 450, 452 (8th Cir. 1989) and Freeman v. Rideout, 808 F.2d
15 949, 951 (2d Cir. 1986). See id. The Eighth Circuit in Sprouse
16 and the Second Circuit in Freeman held that no due process
17 violation arises from the use of false evidence in charging a
18 prisoner if adequate procedural due process protections as
19 required by Wolff were provided to the prisoner and the prisoner,
20 therefore, had an opportunity to defend himself against the false
21 charges. Id.

22 Sprouse and Freeman, and the other cases that Defendants
23 cite that rely on Sprouse and Freeman, are inapposite. Here, the
24 information that Plaintiffs have shown was inaccurate or
25 fabricated was information that Defendants incorrectly attributed
26 to a confidential informant. Because confidential informants do
27 not testify at disciplinary hearings and their identities are not
28 disclosed in order to protect their safety or the safety of

1 others, class members had no means to determine first-hand what
2 the confidential informants actually said; class members were
3 forced to rely on the disclosure forms that Defendants provided
4 to them, which purported to summarize the confidential
5 informants' statements but did not, in fact, accurately do so.
6 Accordingly, class members never had the opportunity to defend
7 themselves against the false or inaccurate information at issue,
8 as there was no way for class members to even learn that the
9 summaries of confidential information that had been provided to
10 them were inaccurate.⁸

11 Accordingly, the Court finds that Plaintiffs have shown due
12 process violations arising out of Defendants' inaccurate or
13 insufficient disclosures of confidential information. As a
14 result of the number of incidents that are undisputed, as well as
15 Defendants' position that the incidents are harmless, the Court
16 concludes Plaintiffs have shown that these violations are the
17 result of Defendants' policies and procedures and are, therefore,
18 indicative of a systemic issue.

19 b. Insufficient reliability determinations

20 Plaintiffs argue that Defendants violated class members' due
21 process rights because hearing officers failed to independently
22 assess whether information provided by confidential informants
23 was reliable.

24 A "prison disciplinary committee's determination derived
25 from a statement of an unidentified inmate informant satisfies

26
27 ⁸ Plaintiffs' counsel learned of the inaccuracies at issue
28 because Defendants are required to produce documents to
Plaintiffs for monitoring purposes under paragraph 37(h) of the
settlement agreement.

1 due process when (1) the record contains some factual information
2 from which the committee can reasonably conclude that the
3 information was reliable, and (2) the record contains a prison
4 official's affirmative statement that safety considerations
5 prevent the disclosure of the informant's name." Zimmerlee, 831
6 F.2d at 186. The Ninth Circuit requires that the reliability of
7 the confidential informant's statement be established by: "(1)
8 the oath of the investigating officer appearing before the
9 committee as to the truth of his report that contains
10 confidential information, (2) corroborating testimony, (3) a
11 statement on the record by the chairman of the committee that he
12 had firsthand knowledge of sources of information and considered
13 them reliable based on the informant's past record, or (4) an in
14 camera review of the documentation from which credibility was
15 assessed." Id. at 186-87. "Proof that an informant previously
16 supplied reliable information is sufficient." Id. (citations
17 omitted).

18 Compliance with these procedural requirements is paramount
19 in light of the significant risk that prisoners could fabricate
20 information to settle grievances with other prisoners. See Jones
21 v. Gomez, No. C-91-3875 MHP, 1993 WL 341282, at *3 (N.D. Cal.
22 Aug. 23, 1993) ("[G]iven the differences that arise between
23 prisoners due to jealousies, gang loyalties, and petty
24 grievances, and the unfortunate discrete instances where guards
25 seek to retaliate against prisoners, to rely on statements by
26 unidentified informants without anything more to establish
27 reliability is worse than relying on no evidence: 'It is an open
28

1 invitation for clandestine settlement of personal grievances.'")
2 (citation omitted).

3 Plaintiffs' evidence showed many instances in which
4 Defendants relied upon confidential information without first
5 establishing its reliability as required by Zimmerlee.

6 For example, Plaintiffs' evidence showed that hearing
7 officers simply assume, without actually determining for
8 themselves as they are required, that information provided by a
9 confidential informant is reliable. See, e.g., Supp. Meeropol
10 Decl., Ex. 14, 31.

11 Plaintiffs also filed evidence showing that hearing officers
12 refused to allow prisoners to ask questions during disciplinary
13 hearings about the reliability of confidential informants on the
14 ground that such questions were not relevant. See Meeropol
15 Decl., Ex. NN, QQ; Supp. Meeropol Decl., Ex. 33, 34.

16 Some of Plaintiffs' evidence showed that certain
17 confidential informants had been deemed reliable on the ground
18 that another confidential source had corroborated their
19 statements, but the materials produced by Defendants to
20 Plaintiffs' counsel under paragraph 37(h) of the settlement
21 agreement did not show that there was another confidential source
22 who could have corroborated the sources at issue, see, e.g.,
23 Meeropol Decl., Ex. EE, or the documents produced show that the
24 second confidential source did not actually corroborate the first
25 informant, see, e.g., id., Ex. Z, AA, BB, CC.

26 Defendants do not meaningfully dispute any of the incidents
27 just described. Defendants argue that no due process violations
28 occurred as a result of these incidents because Plaintiffs'

1 allegations show nothing but "periodic errors in recording
2 reliability determinations," Docket No. 1345 at 5. The Court
3 disagrees. Plaintiffs' evidence shows that Defendants' errors
4 were not mere recording errors, but instead were failures to
5 undertake the reliability determinations required by Zimmerlee.

6 The Court finds, based on the incidents described above,
7 which are representative of the evidence that Plaintiffs have
8 presented, that Plaintiffs have shown ongoing and systemic due
9 process violations arising out of Defendants' failure to conduct
10 the reliability determinations required by Zimmerlee before
11 relying on evidence provided by confidential informants.

12 In light of the foregoing, the Court finds that Plaintiffs
13 have shown that the settlement agreement can be extended under
14 paragraph 41 as a result of ongoing and systemic due process
15 violations arising out of Defendants' misuse or insufficient
16 disclosures of confidential information.

17 III. Retention and Continued Use of Old Gang Validations

18 Plaintiffs argue that CDCR is engaging in ongoing and
19 systemic violations of class members' due process rights by
20 continuing

21 to maintain and rely on its old gang
22 validations, without acknowledging their
23 flawed nature. . . . Because the old
24 validation procedures violated due process,
they cannot be relied on to deprive
prisoners of their liberty interest in an
opportunity for parole[.]

25 Docket No. 898-4 at 4. The old gang validations at issue are
26 those that pre-date the settlement agreement. After the
27 settlement agreement was effectuated, Defendants modified their
28 procedures for gang validations going forward, but they did not

1 vacate the gang validations made prior to the settlement
 2 agreement. Plaintiffs argue that Defendants' retention of the
 3 old gang validations in their system without adding any
 4 qualifications to indicate to the Parole Board that they are
 5 unreliable has deprived class members of a fair opportunity for
 6 parole, because the Parole Board has and continues to rely on the
 7 gang validations for the purpose of determining whether a class
 8 member is eligible for Proposition 57 relief⁹ or for parole
 9 generally.

10 Defendants contend that the use or reliance upon the gang
 11 validations at issue for the purpose of parole eligibility is not
 12 a proper ground for extending the settlement agreement under
 13 paragraph 41. Defendants further argue that the continued use or
 14 reliance upon the old gang validations would not result in
 15 violations of due process in any event, because prisoners receive
 16 the due process the Constitution requires in connection with
 17 their parole hearings, as they receive an opportunity to be heard
 18 and a statement of reasons regarding any parole denials.

19 A. Whether the alleged due process violations are within
 20 the scope of the complaints or settlement-agreement
 reforms

21 Plaintiffs argue that the due process violations they allege
 22 with respect to Defendants' retention and continued use of gang
 23 validations in the context of parole are a basis for extending
 24

25 ⁹ Proposition 57 is an amendment to the California
 26 Constitution passed in 2016 to provide non-violent offenders with
 27 an opportunity to parole. See Cal. Const. art. I § 32(a)(1)
 28 (providing that any person convicted of a non-violent felony
 offense and sentenced to state prison shall be eligible for
 parole consideration after completing the full term of his or her
 primary offense).

1 the settlement agreement under paragraph 41 because they are
2 alleged in the 2AC and because they arise out of the reforms
3 required by the settlement agreement.

4 Defendants respond that the settlement agreement cannot be
5 extended under paragraph 41 based on the claimed due process
6 violations at issue because they are not alleged in the 2AC and
7 because the settlement agreement does not include any terms
8 modifying or prohibiting the use of old gang validations for
9 parole purposes.

10 In the 2AC, Plaintiffs allege that the old gang validations
11 were made without providing class members adequate due process.
12 See, e.g., 2AC ¶¶ 87-90, 230, 237, 249, 256, 261. They also
13 allege that the gang validations had the ultimate effect of
14 depriving class members of a fair opportunity for parole because
15 of an unwritten policy that barred prisoners housed in the SHU
16 based on gang validation from being granted parole. Id. The due
17 process violations at issue here, which are based on the theory
18 that the old gang validations continue to result in the denial of
19 a fair opportunity for parole for class members, can, therefore,
20 serve as a basis under paragraph 41 for extending the settlement
21 agreement.

22 B. Whether the alleged due process violations exist on a
23 current and ongoing systemic basis

24 1. Liberty interest

25 The Court first considers whether Plaintiffs have shown that
26 prisoners have a liberty interest in parole.

27 Plaintiffs argue, and Defendants do not dispute, that class
28 members have such an interest.

1 In light of the absence of any dispute as to this issue, the
2 Court finds that class members have a liberty interest in parole.
3 See Pearson v. Muntz, 639 F.3d 1185, 1190-91 (9th Cir. 2011)
4 (holding that "California law creates a liberty interest in
5 parole") (citation and internal quotation marks omitted).

6 2. Constitutional sufficiency of procedures

7 In Swarthout v. Cooke, 562 U.S. 216, 220 (2011), the Supreme
8 Court held that inmates are afforded sufficient procedural due
9 process in the context of parole if they are "allowed an
10 opportunity to be heard" and are "provided a statement of the
11 reasons why parole was denied." Id.

12 Plaintiffs argue that Defendants' continued retention of old
13 gang validations without any warning to the Parole Board as to
14 their flaws and unreliability deprives class members of a fair
15 opportunity for parole. Plaintiffs offer the following evidence
16 to show that the old gang validations are Constitutionally flawed
17 and unreliable.

18 First, Plaintiffs' evidence, which Defendants did not
19 dispute, showed that the procedures for generating the old gang
20 validations lacked any checks and balances to minimize the risk
21 of error. See Miller Decl., Ex. 1, Guirbino Dep. Tr. at 73, 207.
22 Specifically, the evidence showed that the Office of Correctional
23 Safety (OCS) had the exclusive authority to validate prisoners as
24 gang affiliates, and that any gang validations made by the OCS
25 were not subject to any form of review, as neither the ICC nor
26 any other entity had the authority to overturn a gang validation
27 made by the OCS. Miller Decl., Ex. 2, Ducart Dep. Tr. at 205-06;
28 Miller Decl., Ex. 3, Frisk Dep. Tr. at 31, 108-110, 124; Miller
Decl., Ex. 4, Barneburg Dep. Tr. at 70, 76; Miller Decl., Ex. 7,

1 Austin Decl. ¶ 21. Although Defendants reviewed gang validations
2 every six years, this process likewise was not subject to any
3 further review. Miller Decl., Ex. 2, Ducart Dep. Tr. at 230;
4 Miller Decl., Ex. 8, Parro Dep. Tr. at 12; Miller Decl., Ex. 3,
5 Frisk Dep. Tr. at 38; Miller Decl., Ex. 9, CDCR Operations Manual
6 of 2014 § 52070.18.4.

7 Second, Plaintiffs' evidence, which Defendants did not
8 dispute, showed that class members were not provided a meaningful
9 opportunity to rebut the gang validation evidence used against
10 them as part of the old gang validation process. Specifically,
11 class members were not heard by the OCS in the validation process
12 and the OCS's review of the validation packets prepared by the
13 Institutional Gang Investigator (IGI) was not meaningful, as it
14 involved merely accepting the gang-validation recommendations of
15 the IGI. Miller Decl., Ex. 5, Hubbard Dep. Tr. at 18, 27; Miller
16 Decl., Ex. 3, Frisk Dep. Tr. at 92-93, 25, 125-26, 129, 100-01;
17 Miller Decl., Ex. 7, Austin Decl. ¶¶ 20-21; Miller Decl., Ex. 10,
18 Giurbino Dep. Tr. at 179; Miller Decl., Ex. 4, Barneburg Dep. Tr.
19 at 176-77.

20 Third, Plaintiffs' evidence, which Defendants did not
21 dispute, showed that Defendants failed to provide accurate notice
22 to class members as to how to avoid a gang validation under the
23 old procedures. For example, the old gang validation procedures
24 provided that revalidation would not occur if the prisoners were
25 not involved in any gang "activity" for at least six years. See
26 15 Cal. Code. Regs §§ 3341.5(c)(5), 3378(e); Miller Decl., Ex. 2,
27 Ducart Dep. Tr. at 23; Miller Decl., Ex. 8, Parry Dep. Tr. at 74.
28 Plaintiffs' evidence showed that Defendants did not provide
notice to class members that the type of "activity" that could

1 lead to revalidation included "non-action," such as possessing
2 artwork from a gang affiliate, or possessing a photograph of a
3 gang affiliate. Miller Decl., Ex. 13, CDCR Validation
4 Instruction Manual of June 2011 at 12; Miller Decl., Ex. 10,
5 Giurbino Dep. Tr. at 163; Miller Decl., Ex. 14-23.

6 Fourth, Plaintiffs' evidence showed that Defendants reviewed
7 the old gang validations only every six years, which Plaintiffs
8 argue was too infrequent to satisfy due process requirements.
9 See 15 Cal. Code Regs. §§ 3341.5(c)(5), 3378(e)-(f); Miller
10 Decl., Ex. 2, Ducart Dep. Tr. at 230; Miller Decl., Ex. 8, Parry
11 Dep. Tr. at 12; Miller Decl., Ex. 3, Frisk Dep. Tr. at 38; Miller
12 Decl., Ex. 5 Hubbard Dep. Tr. at 19; Miller Decl., Ex. 35 at 2.

13 The Court finds that the undisputed incidents described above
14 show that Defendants failed to provide class members with
15 meaningful notice of how to avoid gang validation or
16 revalidation, a meaningful opportunity for rebuttal, meaningful
17 periodic review, and sufficient checks and balances to reduce the
18 risk of erroneous gang validation. Accordingly, the Court
19 concludes that Plaintiffs have shown that the procedures used to
20 generate the old gang validations, as well as the resulting old
21 gang validations themselves, are Constitutionally deficient and
22 unreliable.

23 Plaintiffs contend that these deficiencies deprive them of a
24 fair opportunity for parole for two reasons.

25 First, Plaintiffs' evidence, which Defendants did not
26 dispute, showed that, pursuant to a policy enacted in 2017,
27 Defendants have deemed ineligible for Proposition 57 parole
28 consideration any class members whose "prison record indicates
they have been placed in a security housing unit for any

1 involvement with a Security Threat Group (i.e., prison gang) in
2 the past five years." Miller Decl., Ex. 38 at 4. As a result of
3 this policy, class members who were gang-validated or found
4 "active" in a six-year review under the old procedures and were
5 still in indeterminate SHU placement in 2012 or thereafter were
6 automatically deemed ineligible for Proposition 57 parole
7 consideration. Miller Decl., Ex. 39, 40.

8 Second, Plaintiffs' evidence, which Defendants did not
9 dispute, showed that the Parole Board continues to consider the
10 old gang validations outside of the Proposition 57 context when
11 determining class members' parole eligibility. See, e.g., Miller
12 Decl. ¶¶ 42-56 & Ex. 50-52. Plaintiffs' undisputed evidence
13 further showed that the Parole Board appears to be unaware that
14 the old gang validations are Constitutionally flawed and
15 unreliable. See, e.g., Miller Decl., Ex. 52, Commissioner Dep.
16 Tr. at 193 ("[B]eing validated is no simple feat. It doesn't
17 happen overnight . . . the correctional officers are going
18 through to make sure they validate it according to the law.").

19 As noted, Defendants have not disputed the evidence just
20 described. Defendants argue only that the due process violation
21 allegations fail because Plaintiffs seek to "challenge the merits
22 of individual-inmate parole decisions," and this Court lacks
23 jurisdiction to consider any such challenges. Docket No. 985-7
24 at 6-7.

25 The Court is not persuaded. Defendants, once again,
26 misapprehend the nature of Plaintiffs' due process arguments.
27 Plaintiffs are not challenging the outcome of any parole
28 determinations; Plaintiffs, instead, challenge the continued use

1 of Constitutionally-flawed gang validations in parole proceedings
2 on the basis that doing so violates class members' procedural due
3 process rights in the context of parole.

4 In light of the undisputed evidence discussed above, the
5 Court finds that Defendants' continued retention and use of old
6 gang validations without any acknowledgement of the fact that
7 they are flawed and unreliable gives rise to violations of class
8 members' right to a meaningful hearing in the context of parole.
9 See Swarthout, 562 U.S. at 220 (holding that due process in the
10 context of parole requires, in relevant part, that inmates be
11 allowed a meaningful opportunity to be heard). Accordingly, the
12 Court finds, based on the undisputed evidence above, that
13 Plaintiffs have shown ongoing and systemic due process violations
14 that constitute a valid basis for extending the settlement
15 agreement under paragraph 41.

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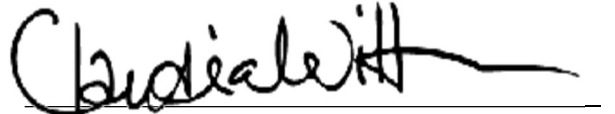
United States District Court
Northern District of California

CONCLUSION

For the reasons set forth above, the Court affirms in part and reverses in part the findings and recommendations of the magistrate judge, and it grants Plaintiffs' motion to extend the settlement agreement for twelve months pursuant to paragraph 41.¹⁰ The twelve months shall commence when this order becomes final.

IT IS SO ORDERED.

Dated: April 9, 2021



CLAUDIA WILKEN
United States District Judge

United States District Court
Northern District of California

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¹⁰ In their extension motion, Plaintiffs appear to argue that, in addition to extending the settlement agreement under paragraph 41, they are entitled to other remedies to redress the due process violations they discuss in their motion. The Court disagrees. The only issue now before the Court is whether Plaintiffs have shown that the settlement agreement should be extended by twelve months under paragraph 41. Plaintiffs have not shown that the Court can take any action under paragraph 41 other than to extend the settlement agreement.