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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 SAM JOHNSON, on behalf of himself and  
12 all others similarly situated,

13 Plaintiffs,

14 v.

15 JENNIFER SHAFFER,

16 Defendant.<sup>1</sup>  
17

No. 2:12-cv-1059 KJM AC P

ORDER

18 This class action lawsuit challenged the constitutionality of the protocol adopted  
19 by California's Board of Parole Hearings' (Board) Forensic Assessment Division (FAD) for use  
20 in the preparation of psychological evaluations, referred to as Comprehensive Risk Assessments  
21 (CRAs), to be considered in determining the suitability of class members for parole. It was  
22 settled by agreement of the parties. ECF No. 83 (hereafter "Agreement"). The court held a  
23 fairness hearing on December 18, 2015, ECF No. 161, and gave final approval to the Agreement  
24 in an order filed May 27, 2016. ECF No. 167. The case is now before the court on plaintiffs'  
25 motion to extend jurisdiction. ECF No. 175.  
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27 <sup>1</sup> Jennifer Shaffer is the sole defendant remaining in this action. *See* ECF No. 170. The  
28 Clerk of the Court will be directed to change the short title of this action to reflect this change.

1     I.     BACKGROUND

2             This action was filed on April 20, 2012. ECF No. 1. On March 31, 2014, the  
3     court certified a class consisting of California state prisoners who are serving life sentences and  
4     are eligible for parole consideration after having served their minimum terms. *See* ECF No. 40 at  
5     14; ECF No. 44 at 2.

6             Following motion practice, the court dismissed several claims and two remained.  
7     ECF Nos. 62, 68. The court characterized the two surviving claims as “(1) a Due Process  
8     violation predicated upon the denial of a fair and unbiased parole procedure (the “systemic bias”  
9     claim), as principally embodied in the First and Eleventh Claims; and (2) a Due Process violation  
10    predicated upon the denial of fair and unbiased parole panels, as principally embodied in the  
11    Tenth Claims.” ECF No. 62 at 26. As to five additional claims, the court “construed [them] not  
12    as independent causes of action but as additional factual predicates for the overarching bias  
13    claims.” ECF No. 62 at 26.

14            On September 10, 2015, the parties filed a joint motion for preliminary approval of  
15    their settlement agreement. ECF No. 79. On October 1, 2015, the court held a telephonic status  
16    conference on the motion for preliminary approval. ECF No. 82. Following the status  
17    conference, the court granted the motion, directed the parties to file a final version of the  
18    proposed settlement agreement removing paragraph 15 and incorporating deadlines for posting  
19    notice in prison housing units, postmarking comments to the court, filing final briefing and setting  
20    a date for the final fairness hearing. ECF No. 84. The Agreement was filed October 2, 2015.  
21    ECF No. 83.

22            The court received numerous comments from prison inmates. *See* ECF Nos.  
23    91-114, 116-132, 134-153, 155-157, 160. On December 18, 2015, the court held a final fairness  
24    hearing. ECF No. 161. During the hearing, the court heard from the parties regarding issues  
25    raised in the objections, including (1) whether risk assessment interviews can be recorded; (2)  
26    whether the risk assessment tools have been validated or found reliable or proper for use in  
27    predicting potential recidivism among life inmates; and (3) whether there is a procedure for  
28    objecting to factual errors and/or conclusions in CRAs. *See* Reporter’s Transcript of Proceedings

1 Re: Fairness Hearing, ECF No. 163. The court directed the parties to file further briefing  
2 concerning the validity of the risk assessment tools adopted by defendant. *Id.* at 8-9. The parties  
3 filed a joint brief and exhibits on January 8, 2016. ECF Nos. 165, 166.

4 As noted above, the court gave final approval to the Agreement in an order filed  
5 May 27, 2016. ECF No. 167. The Agreement provided for the court's continued jurisdiction  
6 over the case until January 1, 2017. ECF No. 83 ¶ D13. It further provided:

7 If within 30 days after January 1, 2017, Plaintiffs believe that  
8 Defendants have not submitted regulations to the OAL [Office of  
9 Administrative Law], completed the agreed upon presentations to  
10 the Board, and provided language to Board psychologists with  
11 instructions to include it in CRAs [Comprehensive Risk  
12 Assessments], Plaintiffs may seek an extension of the Court's  
13 jurisdiction over this matter for a period not to exceed 12 months.  
14 To receive an extension of the Court's jurisdiction, Plaintiffs must  
15 demonstrate by a preponderance of the evidence that Defendants  
16 have not materially complied with the terms of this agreement.  
17 Defendants shall have an opportunity to respond to Plaintiffs'  
18 request and present their own evidence. If Plaintiffs do not seek an  
19 extension of the Court's jurisdiction within the period noted above,  
20 or the Court denies Plaintiffs' request for an extension, this  
21 agreement and the Court's jurisdiction shall automatically  
22 terminate, and the claims in this case shall be dismissed with  
23 prejudice.

24 *Id.* ¶ D14.

25 On January 30, 2017, plaintiffs timely filed a motion to extend the court's  
26 jurisdiction. ECF No. 175. Defendant filed an opposition to the motion, ECF No. 176, and  
27 plaintiffs filed a reply. ECF No. 177. The court heard oral argument on March 10, 2017 and  
28 directed the parties to file supplemental briefs. ECF No. 178. The supplemental briefs were filed  
on March 24, 2017. ECF Nos. 182, 183. Plaintiff filed a notice of supplemental authority on  
September 22, 2017, ECF No. 184, to which defendant has responded, ECF No. 185.

## 29 II. PLAINTIFFS' MOTION

### 30 A. Plaintiffs' Opening Brief

31 Plaintiffs' motion arises principally from paragraph C7 of the Agreement, which  
32 provides:

33 7. The Board will formalize a process for prisoners or their counsel  
34 to lodged timely written objections asserting factual errors in a  
CRA (to be defined in the regulations) before their parole

1 consideration hearing occurs. If the Board receives a timely written  
2 objection in advance of a parole hearing, the Board will provide a  
3 written response within a reasonable period of time. The Board  
will submit draft regulations to reflect this process to the OAL by  
July 1, 2016.

4 ECF No. 83 ¶ C7. Plaintiffs first contend the draft regulations were not timely submitted to OAL.  
5 ECF No. 175 at 9. Second, plaintiffs contend the draft regulations are not adequate in that (1) the  
6 draft regulations fail to provide the option of recording the CRA interviews; (2) the draft  
7 regulations contain “an unreasonably narrow definition of ‘factual errors’ to which class members  
8 may object in writing, inexplicably excluding broad swaths of common errors from the pre-  
9 hearing appeals process,” *id.* at 9-10; (3) the draft regulations require class members to file  
10 objections to CRA reports no later than thirty days before their parole hearing or lose the right to  
11 object, but contain no deadlines by which the Board must provide those reports or by which the  
12 Board must address objections, *id.* at 10; and (4) the draft regulations permit factual errors in a  
13 CRA report to remain uncorrected in the file “unless the Board’s Chief Psychologist finds that  
14 those errors ‘materially impacted’ the report’s conclusions about violence risk,” *id.* at 11.  
15 Plaintiffs contend defendant failed to notify or consult counsel at any major step in development  
16 of the draft regulations, and “have ignored the concerns repeatedly raised by Plaintiffs’ counsel  
17 and class members” and have “undermine[d] the premise of the Agreement. . . .” *Id.* at 12.

18 Finally, plaintiffs contend defendant has failed to comply with paragraphs C10 and  
19 C11 of the Agreement, which provide:

20 10. All future CRAs will clarify that the Overall Risk Rating is  
21 relative to other life prisoners.

22 11. CRAs will inform the reader of the report that, generally  
23 speaking, the current recidivism rates for long term offenders are  
lower than those of other prisoners released from shorter sentences.

24 ECF No. 83 ¶¶ C10, C11.

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1           B.     Defendant's Opposition

2           In opposition to the motion, defendant contends plaintiffs have not met their  
3 threshold burden of showing material noncompliance with the Agreement by the Board.  
4 Defendant contends plaintiffs are instead “improperly seek[ing] to amend the Agreement.” ECF  
5 No. 176 at 2.

6           Defendant does not dispute that she did not submit the draft regulations to the  
7 OAL by July 1, 2016, the deadline in the agreement. ECF No. 176 at 19. She contends, however,  
8 that she delayed following the court's May 27, 2016 approval of the Agreement in order to give  
9 plaintiffs' counsel the time required by the Agreement to comment on the draft regulations, to  
10 give the Board time to respond to those comments, and to allow plaintiffs' counsel to submit  
11 additional comments to the Board's commissioners. *Id.* at 19. Defendant contends the delay does  
12 not constitute material noncompliance with the Agreement, particularly because she afforded  
13 plaintiffs' counsel all the notice and opportunity to comment on the draft regulations required by  
14 the Agreement, and the Board's commissioners considered the comments submitted by plaintiffs'  
15 counsel. *Id.* at 19-20.

16           With respect to the substance of the draft regulations, defendant contends  
17 plaintiffs' position concerning audio recordings is an impermissible attempt to alter the  
18 Agreement and that the record is clear audio recordings were not part of the Agreement. *Id.* at  
19 13-14. Defendant contends she has defined “factual error” as required by the Agreement, *id.* at  
20 14, and that the Agreement does not require the Board to establish a deadline for completing  
21 CRAs. *Id.* at 16. Defendant also contends the draft regulations “address Plaintiffs' concerns by  
22 specifically providing” for the Chief Counsel to determine whether there is time to review  
23 objections received less than thirty days prior to a parole hearing, and by allowing inmates who  
24 are not able to use the pre-hearing process because of a delayed CRA to raise their objection at  
25 the hearing and, if such an objection shows the CRA may contain a factual error, to postpone the  
26 parole hearing if necessary. *Id.* at 16-17. Defendant contends the Agreement does not require her  
27 to remove CRAs with immaterial factual errors from inmates' central files, *id.* at 17.

1 Finally, defendant contends all CRAs contain language required by paragraphs  
2 C10 and C11 of the Agreement. Specifically, defendant contends

3 All CRAs now include one of the following explanations about the  
4 inmate's risk of violence. Which explanation is used is based on the  
5 inmate's overall risk rating of either low, moderate, or high, and  
6 does not vary.

7 • Low Risk: "The inmate is a low risk of violence. He represents a  
8 non-elevated risk relative to long-term inmates and to other  
9 parolees. Low-risk examinees are expected to commit violence  
10 much less frequently than all other parolees."

11 • Moderate Risk: "The inmate is a moderate risk of violence. He  
12 represents an elevated risk relative to long-term inmates and non-  
13 elevated risk relative to other parolees. Moderate-risk examinees  
14 are expected to commit violence more frequently than Low-risk  
15 long-term parolees but less frequently than other parolees."

16 • High Risk: "The inmate is a high risk of violence. He represents a  
17 markedly elevated risk relative to long-term inmates and average  
18 risk relative to other parolees. High-risk examinees are expected to  
19 commit violence more frequently than Low- and Moderate-risk  
20 long-term parolees and similarly to other parolees."

21 *Id.* at 21. Defendant argues there is no showing this language "is inadequate or that some exact  
22 phrase must be used." *Id.*

23 C. Plaintiffs' Reply

24 In reply, plaintiffs apparently contest defendant's representation that the delay in  
25 presenting the draft regulations to the Board was due to defendant's compliance with parts of the  
26 Agreement requiring that plaintiffs' counsel be given notice and opportunity to comment. *See*  
27 ECF No. 177 at 2-3. Plaintiffs confirm each of their contentions with respect to the asserted  
28 inadequacies in the draft regulations, as well as the inadequacy of the language currently used by  
defendant to comply with paragraphs C10 and C11 of the Agreement.

D. Supplemental Briefs

At hearing, a question arose about the role certain representations made at the  
fairness hearing should play in interpretation of the Agreement. *See, e.g.*, ECF No. 181 at 7-8.  
The court directed the parties to file supplemental briefing on whether "there is authority that  
provides this Court guidance on how to address" interpretation of the Agreement if "there's a  
conflict between the four corners of the agreement and the representations made at the fairness

1 hearing.” RT 181 at 17. The parties filed their supplemental briefs on March 24, 2017. ECF  
2 Nos. 182, 183.

3 Plaintiffs contend the court “must uphold the parties’ intent as expressed in the  
4 Agreement and surrounding conduct.” ECF No. 182 at 1. Plaintiffs also contend that analysis of  
5 the Agreement itself “yields the same conclusion” as an analysis that includes interpretation of  
6 “the phrase ‘factual errors’ in its ordinary sense, by reference to the underlying litigation,  
7 settlement negotiations, and representations made to the Court...” *Id.*

8 Defendant contends the court’s review is limited to the “four corners” of the  
9 Agreement. ECF No. 183 at 2. She also contends that, while the court is not authorized to look  
10 beyond the four corners of the Agreement, all statements made by counsel at the fairness hearing  
11 “were wholly consistent with the Agreement.” *Id.*

12 On September 22, 2017, plaintiffs filed a Notice of Supplemental Authority  
13 accompanied by a district court opinion plaintiffs contend is “illustrative of the way in which this  
14 Court should interpret the settlement agreement in a manner that is consistent with the underlying  
15 litigation, the settlement agreement, and the representations Defendants make to the Court and  
16 Plaintiffs in promising a meaningful appeal process allowing challenges to factual errors.” ECF  
17 No. 184 at 2. On October 2, 2017, defendants filed a response in which they report that the order  
18 plaintiff relies on is now on appeal. ECF No. 185 at 1. This court’s reasons for considering the  
19 representations of counsel in interpreting the settlement agreement in this action are explained  
20 below.

### 21 III. ANALYSIS

#### 22 A. Standards

23 The Agreement provides:

#### 24 G. CONSTRUCTION OF SETTLEMENT

25 This Settlement reflects the entire agreement of the parties and  
26 supersedes any prior written or oral agreements between them. No  
27 extrinsic evidence whatsoever may be introduced in any judicial  
28 proceeding to provide the meaning or construction of this  
Settlement. Any modification to the terms of this Settlement must  
be in writing and signed by a Board representative and attorneys for  
Plaintiffs and Defendants to be effective or enforceable.

1           This Settlement shall be governed and construed according to  
2 California law. The parties waive any common-law or statutory  
3 rule of construction that ambiguity should be construed against the  
4 drafter of this Settlement, and agree that the language in all parts of  
5 this Settlement shall in all cases be construed as a whole, according  
6 to its fair meaning.

7           This Settlement shall be valid and binding on, and faithfully  
8 kept, observed, performed, and be enforceable by and against the  
9 parties, their successors and assigns.

10 ECF No. 83 ¶ G.

11           “An agreement to settle a legal dispute is a contract and its enforceability is  
12 governed by familiar principles of contract law.” *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir.  
13 1989). Construction and enforcement of the agreement also are governed by principles of  
14 contract law, *id.*, here, California contract law. “In California, a contract is to be interpreted ‘to  
15 give effect to the mutual intention of the parties as it existed at the time of contracting.’ Cal. Civ.  
16 Code § 1636. Interpretation begins with the contract’s language which ‘is to govern ... if the  
17 language is clear and explicit.’ *Id.* § 1638.” *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th  
18 Cir. 1990); *see also United Commercial Ins. Service, Inc. v. Paymaster Corp.*, 962 F.2d 853, 856  
19 (9th Cir. 1992) (“Under California law, the intent of the parties determines the meaning of the  
20 contract. Cal. Civil Code §§ 1636, 1638. The relevant intent is ‘objective’—that is, the intent  
21 manifested in the agreement and by surrounding conduct—rather than the subjective beliefs of the  
22 parties. *Lawyer’s Title Ins. Co. v. U.S. Fidelity & Guar. Co.*, 122 F.R.D. 567, 569 (N.D. Cal.  
23 1988); *Beck v. American Health Group Int’l*, 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237, 242  
24 (1989)).

25           Under California law, “[w]hen the parties to a written contract have agreed to it as  
26 an ‘integration’—a complete and final embodiment of the terms of an agreement—parol evidence  
27 cannot be used to add to or vary its terms.” *Masterson v. Sine*, 68 Cal.2d 222, 225 (Cal. 1968).

28           However, California also recognizes one of the broad exceptions to  
the parol evidence rule. Because “[n]o contract should ever be  
interpreted and enforced with a meaning that neither party gave it,”  
3 Arthur L. Corbin, *Corbin on Contracts* § 572B (rule no. 2) (West

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1           Supp.1991), parol evidence may be introduced to show the  
2           meaning of the express terms of the written contract.

3           *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 277 (9th Cir. 1992)  
4           (citing *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33,  
5           69 Cal. Rptr. 561, 563-65 (1968)). “To avoid completely eviscerating the parol evidence rule,  
6           however, there must be reasonable harmony between the parol evidence and the integrated  
7           contract for the evidence to be admissible.” *Id.*

8           B.     Application

9           Plaintiffs seek extension of this court’s jurisdiction based on defendant’s alleged  
10          material noncompliance with several separate provisions of the Agreement. Each is addressed in  
11          turn.

12          1.     Delay in Submission of Draft Regulations

13          Paragraph C7 of the Agreement required the Board to submit draft regulations to  
14          the OAL by July 1, 2016. It is undisputed the Board did not submit the draft regulations until  
15          October 24, 2016. The Agreement also required the following process prior to submission of  
16          draft regulations to the OAL:

17                 [T]he Board will provide class counsel with a draft of the proposed  
18                 regulation. Class counsel shall have thirty days to review the draft  
19                 and provide written comments and suggestions to the Board. The  
20                 Board will provide a written response to class counsel’s written  
21                 comments within thirty days. When the proposed regulation is  
22                 presented to the Board’s commissioners for review and a vote, class  
23                 counsel may submit additional comments and suggestions through  
24                 the Board’s public comment process. Once the regulation is  
25                 submitted to the OAL, class counsel may again submit additional  
26                 comments and suggestions through the OAL public comment  
27                 process.

28          ECF No. 83 ¶ C2.

                The record shows the following. On June 14, 2016, eighteen days after this court  
gave final approval to the Agreement, the Board provided plaintiffs’ counsel with a draft of the  
proposed regulations. ECF No. 175-3 at 2. On July 14, 2016, plaintiffs’ counsel submitted to  
defense counsel written comments and requests for modification of the draft regulations. *Id.* The  
draft regulations were presented to the Board’s commissioners on August 15, 2016. ECF No.

1 175-4 at 2. Plaintiffs' counsel attended the meeting, provided comments and "recommended  
2 tabling discussion on the regulations until the September, 2016 meeting." *Id.* at 10-11. The  
3 Board decided to table discussion of the regulations to the September 2016 meeting. *Id.* at 11.  
4 On September 16, 2016, plaintiffs' counsel submitted to defendant written objections to the draft  
5 regulations. ECF No. 175-3 at 14-21. Plaintiffs' counsel also attended the September 2016  
6 meeting and made comments. ECF No. 175-4 at 24-25. The Board voted to approve the draft  
7 regulations. *Id.* at 24. The draft regulations were submitted to OAL on October 24, 2016, and on  
8 December 19, 2016, plaintiffs' counsel submitted objections to the draft regulations. ECF No.  
9 175-3 at 22.

10 Based on the foregoing, the court finds defendant's delay in submitting the  
11 regulations to OAL does not constitute material non-compliance with the Agreement and does  
12 not, without more, provide grounds for extending this court's jurisdiction over the Agreement.

13 2. Paragraph C7: Objections to Factual Errors in CRAs

14 Paragraph C7 of the Agreement provides:

15 The Board will formalize a process for prisoners or their counsel to  
16 lodge timely written objections asserting factual errors in a CRA (to  
17 be defined in the regulations) before their parole consideration  
18 hearing occurs. If the Board receives a timely written objection in  
advance of a parole hearing, the Board will provide a written  
response within a reasonable period of time. The Board will submit  
draft regulations to reflect this process to the OAL by July 1, 2016.

19 ECF No. 83 ¶ C7. As discussed above, plaintiffs contend the draft regulations submitted to OAL  
20 are not in compliance with this provision in four ways, all material to compliance with the  
21 Agreement.

22 a) Audio Recordings

23 Plaintiffs' first contention is that the draft regulations do not provide for optional  
24 recording of the CRA interviews. Defendant counters that the Agreement does not require  
25 recording.

26 Nothing in the Agreement requires defendants to record or transcribe CRA  
27 interviews. *See* ECF No. 83, *passim*. At the final fairness hearing, the court heard from the  
28 parties on the issue of whether the risk assessment interviews should be recorded. *See* ECF No.

1 163 at 2-4. The court raised the issue in order to address objections raised by class members, a  
2 significant number of whom filed objections to the proposed settlement. *Id.* at 4. Both counsel  
3 informed the court that the parties had agreed it was “important to leave open the possibility of  
4 recording,” although they had not been able to reach agreement on how to do that. *Id.* at 4, 6.

5 Proposed findings of fact filed jointly by the parties after the fairness hearing  
6 include the following:

7 Inmate class members raised concerns about factual errors in  
8 comprehensive risk assessments and requested that psychologist  
9 interviews be recorded. Defendants do not currently have a practice  
10 of creating audio recordings of psychological interviews, and the  
11 parties have not agreed to make such recordings a component of the  
12 Amended Stipulated Settlement. However, the proposed Settlement  
13 requires a meaningful appeal process (to be established by  
14 regulations) through which individual prisoners who find factual  
15 errors in the Board’s risk assessments may submit timely written  
16 objections, to which the Board must respond in a timely manner in  
17 advance of that prisoner’s parole consideration hearing. Further,  
18 Defendants are not prevented from allowing recording of risk  
19 assessment interviews in the future.

20 ECF No. 165 at 5.

21 Finally, at hearing, defense counsel represented that, in reaching its decision not to  
22 include recording of CRA interviews in the regulations, the Board “indicated . . . that if, after  
23 getting into the preappeal – prehearing appeal process it became apparent that there was some sort  
24 of a repeated problem of these errors occurring, at that point the board could reconsider the issue  
25 of recording.” ECF No. 181 at 5.

26 In sum, while the draft regulations do not provide for recording CRA interviews,  
27 the Board has not foreclosed the possibility of recordings in the future. The Agreement requires  
28 nothing more. The court’s jurisdiction will not be extended for purposes of further supervision of  
this issue.

29 b) Definition of Factual Errors

30 Plaintiffs next contend the draft regulations “provide an unreasonably narrow  
31 definition of ‘factual errors’ to which class members may object in writing, inexplicably  
32 excluding broad swaths of common errors from the pre-hearing appeals process.” ECF No. 175  
33 at 10. The draft regulations define “factual error” as

1 an explicit finding about a circumstance or event for which there is  
2 no reliable documentation or which is clearly refuted by other  
3 documentation. Factual errors do not include disagreements with  
clinical observations, opinions, or diagnoses or clarifications  
regarding statements the risk assessment attributed to the inmate.

4 ECF No. 175-5 at 11. Plaintiffs contend this definition improperly omits “a CRA evaluator’s  
5 errors in reporting statements attributed to an interviewee” and improperly shields “clinical  
6 observations, opinions, or diagnoses” even where those are “directly based on erroneous  
7 information.” ECF No. 175 at 10. Defendants contend the definition prohibits inmates from  
8 objecting “based solely on their disagreement with the evaluator’s *professional conclusions*,  
9 which can be properly addressed during the inmate’s parole consideration” while allowing “an  
10 inmate to submit objections to a CRA where the inmate believes that a factual error materially  
11 impacted the risk assessment’s conclusion.” ECF No. 176 at 15 (emphasis in original)

12 As noted above, paragraph C7 of the Agreement provides in relevant part:

13 The Board will formalize a process for prisoners or their counsel to  
14 lodge timely written objections asserting factual errors in a CRA (to  
15 be defined in the regulations) before their parole consideration  
hearing occurs.

16 ECF No. 83 ¶ C7. At the final fairness hearing, the parties represented that (1) they had decided  
17 to work out the definition of “factual errors” as part of developing the appeals process in the  
18 regulations required by the Agreement, and (2) factual errors would require reconsideration of,  
19 though not necessarily a change in, the conclusion in a CRA. ECF No. 163 at 10.

20 The language excluding “clarifications regarding statements the risk assessment  
21 attributed to the inmate” from the draft regulations’ definition of “factual error” first appeared in  
22 an amended draft produced on or about August 4, 2016. *See* ECF No. 175 at 6; *compare* ECF  
23 No. 175-2 at 3 *with* ECF No. 175-2 at 7. In response to objections raised by plaintiffs’ counsel to  
24 this provision, defendant added a provision to the draft regulations that would allow an inmate to  
25 “have the opportunity at a hearing to object to or clarify any statements a risk assessment  
26 attributed to the inmate, or respond to any clinical observations, opinions, or diagnoses in a risk  
27 assessment.” ECF No. 175-3 at 56; ECF No. 175-5 at 13.

1           The question is whether plaintiffs have shown by a preponderance of evidence that  
2 the exclusion of CRA evaluator errors from the regulatory definition of “factual errors”  
3 constitutes “material” noncompliance with the Agreement. To answer that question, the court  
4 must determine the mutual intention of the parties in entering into the Agreement and whether the  
5 challenged provision is consistent or inconsistent with that intention.

6           The court’s task is complicated by the fact that the Agreement itself does not  
7 define “factual errors” and instead simply signals that the definition will be included in the new  
8 regulations. Because the court is guided by the principles of California law, it looks to the  
9 objective intent of the parties “manifested in the agreement and by surrounding conduct,”  
10 including representations at the fairness hearing and in the joint proposed findings of fact filed  
11 after the hearing, ECF No. 165. *See United Commercial Ins. Service, Inc.*, 962 F.2d at 856 (and  
12 citations therein).

13           At the outset, the court notes there is no meaningful dispute between the parties  
14 that “clarifications regarding statements the risk assessment attributed to the inmate” are factual  
15 statements, not professional judgments, nor could there be a dispute. Merriam-Webster defines  
16 “factual” as “1: of or relating to facts; and 2: restricted to or based on fact.”  
17 <https://www.merriam-webster.com/dictionary/factual>. “Fact” is defined in relevant part as “1: a  
18 thing done; . . . 3: the quality of being actual; . . . 5: a piece of information presented as having  
19 objective reality.” <https://www.merriam-webster.com/dictionary/fact>. Whether or not an inmate  
20 made a particular statement is a question of fact, and errors in describing those statements,  
21 whether in an initial description or a clarification of the statement, are factual errors. The  
22 question is whether exclusion of these types of “factual errors” from the pre-hearing appeal  
23 process constitutes material noncompliance with the intention of the parties in entering into the  
24 Agreement.

25           The representations at the fairness hearing demonstrate the parties’ agreement that  
26 the process for objecting to factual errors would permit objections to factual errors but not to  
27 professional conclusions, and that the conclusions of CRAs found to contain factual errors, even  
28 “an inconsequential factual error,” would be reconsidered but not necessarily altered if the factual

1 errors were not material to the conclusion. *See* ECF No. 163 at 10. In proposed findings of fact  
2 submitted jointly to the court following the fairness hearing, the parties agreed that the Agreement  
3 “requires a meaningful appeal process (to be established by regulations) through which individual  
4 prisoners who find factual errors in the Board’s risk assessments may submit timely written  
5 objections, to which the Board must respond in a timely manner in advance of that prisoner’s  
6 parole consideration hearing.” ECF No. 165 at 5. The proposed findings of fact did not contain  
7 any limitation or qualification on the type of “factual error” that could be the subject of an  
8 objection.

9           At hearing, defense counsel suggested that one of the reasons this category was  
10 excluded from the definition of factual error was because these types of objections “would have  
11 to be investigated” and would “involve a credibility determination,” which the Board’s  
12 commissioners are trained to make. ECF No. 181 at 9-10. Defense counsel explained that at a  
13 parole hearing, the Commissioners “have the inmate right in front of them instead of just a written  
14 statement, and they can talk to them and fully vet the inmate’s view. And so it’s not just ‘I didn’t  
15 say that.’ They can delve into, ‘Well, what did you say? What were the questions asked?’ They  
16 can consider what the inmate has to say and his or her demeanor as they’re asking the questions.”  
17 *Id.* at 10.

18           Whatever potential “efficiency” might be achieved, defendants’ position, to permit  
19 such objections to be raised at a parole hearing, does not conform to the parties’ mutual intention  
20 to create a process for reviewing factual errors in a CRA prior to the parole hearing. The court  
21 will extend its jurisdiction over this matter so the parties may redraft this part of the regulation to  
22 conform to their mutual intention at the time the Agreement was made, as represented to the court  
23 at the final fairness hearing.

24           Plaintiff’s second objection is without merit. The draft regulations do provide for  
25 determinations to be made whether factual errors “materially impacted” the conclusions of a CRA  
26 and, where such errors did materially impact the conclusions, ordering of a “new or revised risk  
27 assessment.” *See* ECF No. 175-5 at 11-12. The extension of the court’s jurisdiction will not run  
28 to this issue.

1 c) Timeline for CRAs, Objections and Responses

2 Plaintiffs' third contention is that the regulations do not contain a deadline by  
3 which the CRA must be completed, and that the deadline for responding to timely objections, set  
4 at ten days before a parole hearing, is inadequate. As the court has discussed, it is clear to the  
5 court that the mutual intention of the parties in drafting paragraph C7 of the Agreement was to  
6 create a process for correcting factual errors and any conclusions that flowed from material  
7 factual errors prior to an inmate's scheduled parole hearing. Completion of the CRA is the first  
8 step in this process and there must be a deadline for completion of the CRA that affords an inmate  
9 a meaningful opportunity to prepare and submit objections within the time set in the draft  
10 regulations for submission of objections. Plaintiffs also contend that the deadline for the Board's  
11 response, ten days in advance of a hearing, is not coordinated with the timeline by which they  
12 must decide whether to waive their hearings. ECF No. 175 at 10 n.1.

13 The court finds it was the mutual intent of the parties to create a meaningful  
14 pre-parole hearing process for raising, considering and resolving factual errors in CRAs.  
15 Deadlines and adequate review timelines are necessary components of that process. The court  
16 will extend jurisdiction so the parties may modify these provisions of the draft regulations.

17 d) Retention of Factual Errors in CRAs in Central Files

18 Plaintiffs' final objection to this part of the draft regulations is that they permit  
19 CRA reports that contain factual errors to remain in an inmate's central file unless the Chief  
20 Psychologist determines "that the errors 'materially impacted' the report's conclusions about  
21 violence risk." ECF No. 175 at 11. This objection is well-taken.

22 The draft regulations set forth the following process for reviewing objections.  
23 First, the Chief Counsel reviews the risk assessment to which objection has been made to  
24 determine whether it "contains a factual error as alleged." ECF No. 175-5 at 12. If the Chief  
25 Counsel finds no factual error, the Chief Counsel issues a decision explaining the results of that  
26 review. *Id.* If the Chief Counsel finds a factual error, the matter is referred to the Chief  
27 Psychologist to review the assessment and "opine whether the identified factual error materially  
28 impacted the risk assessment's conclusions regarding the inmate's risk of violence." *Id.* The

1 Chief Psychologist's determination is to be documented in an addendum to the risk assessment.  
2 *Id.* If the Chief Psychologist's determination is that the factual error did not materially impact the  
3 CRA's conclusions, the objection is to be overruled by the Chief Counsel. *Id.* If the Chief  
4 Psychologist's determination is that the factual error did materially impact the conclusions, the  
5 Chief Counsel is required to order a new or revised risk assessment, among other things. *Id.*

6 As discussed above in the section on definition of factual error, the Agreement  
7 does not limit the types of factual errors to which objections can be raised during the pre-hearing  
8 review process. Instead, the intent of the Agreement was to provide a pre-hearing process for  
9 (1) correcting factual errors found in CRAs; (2) reviewing the conclusions of CRAs that contain  
10 factual errors; and (3) changing conclusions materially affected by factual errors. At the outset,  
11 the court notes that the draft regulations attempt to limit objections that can be raised to those  
12 factual errors in a CRA that an inmate or his counsel believe "materially impact the risk  
13 assessment's conclusions regarding the inmate's risk of violence." ECF No. 175-5 at 12. For that  
14 reason, the draft regulations provide that objections will be "overruled" if the factual errors cited  
15 in the objections "did not materially impact the risk assessment's conclusions regarding the  
16 inmate's risk of violence." *Id.*

17 This provision is contrary to the mutual intention of the parties as it has been  
18 represented to this court concerning the process for correcting factual errors in CRAs.  
19 Specifically, the proposed regulation conflates correcting factual errors in CRAs with amending  
20 conclusions affected by material factual errors. The parties' representations at the fairness  
21 hearing were to the contrary, demonstrating the parties' intention that a finding of factual errors in  
22 a CRA would generate review of the CRA's conclusions and amendment if the errors were  
23 material. To conform to the parties' expressed intent, the regulations must provide some  
24 mechanism for correcting factual errors in the relevant records. This does not necessarily require  
25 issuance of a new CRA in every instance in which factual errors are found, but it does require that  
26 the regulations contain provisions for ensuring factual errors do not stand uncorrected in a manner  
27 that they could still have force in the parole process, however, inadvertently. The court's  
28



jurisdiction will be extended so the draft regulations may be amended to conform to the parties' intention to create a process for correcting factual errors in CRAs.

3. Paragraphs C10 and C11: Risk Rating and Recidivism

Finally, as discussed above, plaintiffs contend defendant has failed to comply with paragraphs C10 and C11 of the Agreement, which provide:

10. All future CRAs will clarify that the Overall Risk Rating is relative to other life prisoners.

11. CRAs will inform the reader of the report that, generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences.

ECF No. 83 ¶¶ C10, C11.

As noted above, defendant represents that:

All CRAs now include one of the following explanations about the inmate's risk of violence. Which explanation is used is based on the inmate's overall risk rating of either low, moderate, or high, and does not vary.

- Low Risk: "The inmate is a low risk of violence. He represents a non-elevated risk relative to long-term inmates and to other parolees. Low-risk examinees are expected to commit violence much less frequently than all other parolees."
- Moderate Risk: "The inmate is a moderate risk of violence. He represents an elevated risk relative to long-term inmates and non-elevated risk relative to other parolees. Moderate-risk examinees are expected to commit violence more frequently than Low-risk long-term parolees but less frequently than other parolees."
- High Risk: "The inmate is a high risk of violence. He represents a markedly elevated risk relative to long-term inmates and average risk relative to other parolees. High-risk examinees are expected to commit violence more frequently than Low- and Moderate-risk long-term parolees and similarly to other parolees."

ECF No. 176 at 21. This language does not comply with paragraphs C10 or C11 in two ways.

First, the language tendered by defendant does not make clear that the risk rating "is relative to other life prisoners" as required by paragraph C10 of the Agreement. Instead, the language compares the class member's risk to "long-term inmates and to other parolees." ECF No. 83 ¶ C10. This does not satisfy the requirement of paragraph C10 that the comparison be "to other life prisoners".

1 Second, nothing in the language provided by defendant informs the reader that  
2 “generally speaking, the current recidivism rates for long term offenders are lower than those of  
3 other prisoners released from shorter sentences” as required by paragraph C11.

4 Plaintiff has demonstrated by a preponderance of evidence that defendants have  
5 not materially complied with paragraphs C10 or C11 of the Agreement. The court’s jurisdiction  
6 will therefore be extended to permit defendant to come into compliance with these provisions.

7 In accordance with the above, IT IS HEREBY ORDERED that

- 8 1. The Clerk of the Court is directed to change the short title of this action to  
9 reflect the dismissal of all defendants except Jennifer Shaffer; and
- 10 2. Plaintiffs’ motion to extend jurisdiction, ECF No. 175, is granted in part, in  
11 accordance with this order. The court’s jurisdiction shall terminate upon  
12 compliance with this order or one year from the date of this order, whichever is  
13 sooner.

14 DATED: October 6, 2017.

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16 UNITED STATES DISTRICT JUDGE  
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