

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 TODD ASHKER et al.,

No. C 09-05796 CW

5 Plaintiffs,

ORDER ON
PLAINTIFFS' MOTION
FOR DE NOVO REVIEW
OF RETENTION OF
FOUR CLASS MEMBERS
IN SHU AND SEALING
MOTIONS

6 v.

7 GOVERNOR OF THE STATE OF
8 CALIFORNIA et al.,

9 Defendants.

(DOCKET NOS. 589,
590, 610, 620, 624
626)

10 _____/
11 Plaintiffs Todd Ashker et al. move for a de novo

12 determination of a matter the parties agreed would be decided by
13 Magistrate Judge Vadas and reviewed by this Court under 28 U.S.C.
14 § 636(b)(1)(B) regarding the retention of four class members in
15 the Security Housing Unit (SHU) (Docket No. 590). Plaintiffs also
16 move to file under seal portions of, and exhibits attached to,
17 that motion (Docket No. 589), Plaintiffs' reply (Docket No. 620)
18 and Plaintiffs' supplemental brief (Docket No. 626). Defendants
19 the Governor of the State of California et al. oppose the motion
20 regarding the four class members. Defendants also move to file
21 under seal documents supporting Defendants' Consolidated
22 Opposition to Plaintiffs' Motions for De Novo Determination of
23 Dispositive Matters (Docket No. 610) and a transcript attached to
24 their supplemental brief (Docket No. 624). As discussed below,
25 the Court GRANTS the parties' motions to seal (Docket Nos. 589,
26 620, 626, 610, 624), DENIES Plaintiffs' request for an evidentiary
27 hearing before this Court and RECOMMITS Plaintiffs' motion to
28

1 Judge Vadas to consider the parties' new information and arguments
2 (Docket No. 590).

3 I. Motions to Seal

4 a. Legal Standard

5 Pursuant to Civil Local Rule 79-5, a party seeking to file a
6 document under seal must establish that the portions sought to be
7 sealed "are privileged, protectable as a trade secret or otherwise
8 entitled to protection under the law." Civ. L.R. 79-5(b). "The
9 request must be narrowly tailored to seek sealing only of sealable
10 material, and must conform with Civil L.R. 79-5(d)." Id.

11 "Historically, courts have recognized a 'general right to
12 inspect and copy public records and documents, including judicial
13 records and documents.'" Kamakana v. City & Cty. of Honolulu, 447
14 F.3d 1172, 1178 (9th Cir. 2006) (citation omitted). "Unless a
15 particular court record is one 'traditionally kept secret,' a
16 'strong presumption in favor of access' is the starting point."
17 Id. (quoting Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d
18 1122, 1135 (9th Cir. 2003)).

19 "Two standards generally govern motions to seal documents
20 like the one at issue here. First, a 'compelling reasons'
21 standard applies to most judicial records." Pintos v. Pac.
22 Creditors Ass'n, 605 F.3d 665, 677-78 (9th Cir. 2010) (footnote
23 omitted). Resolving "a dispute on the merits . . . is at the
24 heart of the interest in ensuring the 'public's understanding of
25 the judicial process and of significant public events.'" Kamakana,
26 447 F.3d at 1179 (citation omitted). For this standard,
27 a party must "articulate compelling reasons supported by specific
28 factual findings that outweigh the general history of access and

1 the public policies favoring disclosure, such as the public
2 interest in understanding the judicial process." Id. at 1178-79
3 (brackets, quotation marks and citations omitted).

4 "On the other hand, records attached to motions that are only
5 'tangentially related to the merits of a case' are not subject to
6 the strong presumption of access." Thomas v. Magnachip
7 Semiconductor Corp., 2016 WL 3879193, at *7 (N.D. Cal.) (quoting
8 Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1101
9 (9th Cir. 2016)); see also Ctr. for Auto Safety, 809 F.3d at 1098
10 ("Most litigation in a case is not literally 'dispositive,' but
11 nevertheless involves important issues and information to which
12 our case law demands the public should have access."). "Under
13 this exception, a party need only satisfy the less exacting 'good
14 cause' standard." Ctr. for Auto Safety, 809 F.3d at 1097. As
15 Rule 26(c) states, "The court may, for good cause, issue an order
16 to protect a party or person from annoyance, embarrassment,
17 oppression, or undue burden or expense" Fed. R. Civ. P.
18 26(c).

19 b. Application to Pending Motions to Seal

20 Plaintiffs appear to base their sealing motions on
21 Defendants' designations of the materials at issue as highly
22 confidential under a protective order in this case because they
23 "contain[] highly confidential information relating to inmate
24 disciplinary proceedings that Defendants claim would harm
25 institutional safety and security." Docket No. 589-1, Declaration
26 of Carmen E. Bremer in Support of Plaintiffs' Administrative
27 Motion to File Under Seal ¶¶ 2-8. Civil Local Rule 79-5(e)(1)
28 provides, "Within 4 days of the filing of the Administrative

1 Motion to File Under Seal, the Designating Party must file a
2 declaration as required by subsection 79-5(d)(1)(A) establishing
3 that all of the designated material is sealable." Defendants have
4 not filed declarations establishing that all of the designated
5 material is sealable.

6 Whereas Plaintiffs seek to apply the "good cause" standard
7 because the material at issue is attached to a non-dispositive
8 motion, see, e.g., Docket No. 620-1, Bremer Dec. ¶ 2, and
9 Defendants' motions do not clearly articulate a standard,
10 Defendants' proposed orders would find "compelling reasons to file
11 the information [in relation to their Opposition filings] under
12 seal," Docket No. 610-4 Proposed Order Granting Defendants' Motion
13 to File Under Seal; Docket No. 624-2 Proposed Order Granting
14 Defendants' Motion to File Transcript Under Seal.

15 The Court GRANTS the parties' motions to seal and need not
16 decide whether the "good cause" or "compelling reasons" standard
17 applies because the materials at issue are sealable under either.
18 Publicly revealing any information about the rule violation
19 reports and hearings would lead to individual safety and
20 institutional security concerns.

21 II. Motion for De Novo Review of Retention of Four Class
22 Members in the SHU

23 a. Background

24 On January 20, 2015, CDCR began investigating an alleged
25 conspiracy to murder a named prisoner. Plaintiffs' Motion at 1.
26 The investigation relied, in part, on notes between prisoners that
27 CDCR found between January and April 2015. Id.
28

1 In September 2015, CDCR issued rule violation reports (RVRs)
2 to six individuals (Antonio Guillen, George Franco, Rudolpho
3 Miramontes, Donald Moran, Samuel Luna and Matt Rocha) for
4 conspiracy to murder the named prisoner. At that time, the six
5 individuals were serving indeterminate terms in the Pelican Bay
6 SHU because CDCR had "validated" them as "affiliates" of a
7 Security Threat Group (STG). Plaintiffs' Motion at 1. Franco had
8 spent nearly twenty-five years in solitary confinement; Moran had
9 spent more than twenty-one years in solitary confinement; Guillen
10 had spent more than sixteen years in solitary confinement; and
11 Luna had spent nearly eighteen years in solitary confinement.
12 Plaintiffs' Motion at 2 n.1.

13 Paragraph 25 of the Settlement Agreement states in part:

14 If an inmate has not been found guilty of a SHU-eligible
15 rule violation with a proven STG nexus within the last
16 24 months, he shall be released from the SHU and
17 transferred to a General Population level IV 180-design
18 facility, or other general population institution
19 consistent with his case factors.

20 Settlement Agreement ¶ 25. Paragraph 34 states in part:

21 CDCR shall adhere to the standards for the consideration
22 of and reliance on confidential information set forth in
23 Title 15 of the California Code of Regulations, section
24 3321. To ensure that the confidential information used
25 against inmates is accurate, CDCR shall develop and
26 implement appropriate training for impacted staff
27 members who make administrative determinations based on
28 confidential information as part of their assigned
duties, consistent with the general training provisions
set forth in Paragraph 35.

Settlement Agreement ¶ 34.

At hearings on the alleged rule violations in October and
November 2015, CDCR found each of the six individuals guilty of
conspiracy to commit murder. Plaintiffs' Motion at 2. Later, an
associate warden reversed the guilty finding as to Rocha for lack

1 of evidence. Id. CDCR submitted each case to the Del Norte
2 County District Attorney's Office; the office later declined to
3 pursue criminal charges. Id.

4 In January 2016, Plaintiffs' counsel requested a copy of the
5 confidential file used in these disciplinary hearings, to which
6 Defendants objected. Plaintiffs' Motion at 2. Judge Vadas
7 reviewed the file in camera. Id.

8 On February 1, 2016, Plaintiffs' counsel wrote to Judge Vadas
9 that these hearings involved violations of paragraph 34 of the
10 Settlement Agreement and state law regulations, and again sought a
11 copy of the confidential file. Plaintiffs' Motion at 2.

12 On March 21, 2016, CDCR indicated to Judge Vadas that it was
13 withdrawing the five remaining RVRs, planned to reissue the RVRs,
14 and planned to hold another set of hearings on the reissued RVRs.
15 Plaintiffs' Motion at 2. Separately, Judge Vadas ordered that
16 Defendants provide Plaintiffs a redacted copy of the confidential
17 file. Id.

18 On May 10, 2016, Plaintiffs filed a motion before Judge Vadas
19 to enjoin CDCR from continuing to hold the five prisoners in the
20 SHU. Paragraph 53 of the Settlement Agreement states in part:

21 If Plaintiffs contend that CDCR has not substantially
22 complied with any other terms of this Agreement that do
23 not amount to current, ongoing, systemic violations as
24 alleged in the Second Amended Complaint or Supplemental
25 Complaint of the Eighth Amendment or the Due Process
26 Clause of the Fourteenth Amendment of the United States
27 Constitution, they may seek enforcement by order of this
28 Court. . . . If the parties are unable to resolve the
issue informally, Plaintiffs may seek enforcement of the
Agreement by seeking an order upon noticed motion before
Magistrate Judge Vadas. It shall be Plaintiffs' burden
in making such a motion to demonstrate by a
preponderance of the evidence that Defendants have not
substantially complied with the terms of the Agreement.
Defendants shall have an opportunity to respond to any

1 such evidence presented to the Court and to present
2 their own evidence in opposition to Plaintiffs' motion.
3 If Plaintiffs satisfy their burden of proof by
4 demonstrating substantial noncompliance with the
5 Agreement's terms by a preponderance of the evidence,
6 then Magistrate Judge Vadas may issue an order to
7 achieve substantial compliance with the Agreement's
8 terms. An order issued by Magistrate Judge Vadas under
9 this Paragraph is subject to review under 28 U.S.C.
10 § 636(b)(1)(B).

11 Settlement Agreement ¶ 53.

12 In late May 2016, CDCR reissued RVRs against Franco, Moran,
13 Luna and Guillen for conspiracy to murder the named prisoner.
14 Plaintiffs' Motion at 4. CDCR indicated that it would not reissue
15 an RVR against Miramontes. Id. at 4 n.4. In addition to the
16 confidential file CDCR previously had provided to Plaintiffs'
17 counsel, these RVRs included "new [Confidential Disclosure Forms
18 (CDC 1030s)] disclosing more of the confidential information
19 relevant to the charges." Id. at 4.

20 On June 10, 2016, Judge Vadas heard argument on Plaintiffs'
21 motion. Judge Vadas determined as a threshold jurisdictional
22 matter that, under paragraphs 49 and 53, "this is the exact issue
23 that should be brought to [Judge Vadas] for determination. It
24 focuses on the length of time that some of the remaining . . .
25 plaintiffs . . . have in the SHU and when and how they're going to
26 be removed from the SHU." Transcript of June 10, 2016 Hearing at
27 45.

28 Initially, Judge Vadas explained that CDCR did not violate
the relevant provisions of the Settlement Agreement, but "[could
not] say any more because that portion is under seal." Id. at 46-
47. After Plaintiffs' counsel expressed concern that Judge Vadas
was ruling on the basis of information that CDCR had not provided
to Plaintiffs' counsel, Judge Vadas explained that he in fact

1 relied only on the relevant information CDCR had provided to
2 Plaintiffs' counsel. See id. at 49.

3 In an unsealed portion of the transcript, Judge Vadas stated:

4 I find that given what I have heard, especially in light
5 of the fact that a new hearing is being conducted
6 regarding this matter, that the defendants remain in
7 substantial compliance with the terms of the agreement
8 and I'm going to deny counsel's motion to enjoin CDCR
9 from continuing to retain the five prisoners in the SHU
10 until the Department has reviewed the information
11 another time.

12 Transcript of June 10, 2016 Hearing at 60.

13 Separately, regarding Plaintiffs' argument that Defendants
14 failed to provide to the four class members the evidence on which
15 Defendants relied in reissuing RVRs, Judge Vadas ordered
16 Defendants to provide new Confidential Disclosure Forms (CDC
17 1030s) and reissued RVRs to Plaintiffs no later than June 17.
18 Transcript of June 10, 2016 Hearing at 58-59.

19 On June 24, 2016, CDCR provided the four class members
20 additional Confidential Disclosure Forms, which referred to
21 evidence CDCR had discovered earlier that month. Plaintiffs'
22 Motion at 4.

23 CDCR held another set of hearings for each of the four class
24 members and each reissued RVR, resulting in a finding of guilt for
25 each one. See Plaintiffs' Motion at 5.

26 b. Standard of Review

27 This Court reviews de novo Magistrate Judge Vadas's decision.
28 Settlement Agreement ¶ 53 ("An order issued by Magistrate Judge
Vadas under this Paragraph is subject to review under 28 U.S.C.
§ 636(b)(1)(B)."). "A judge of the court may accept, reject, or
modify, in whole or in part, the findings or recommendations made

1 by the magistrate judge. The judge may also receive further
2 evidence or recommit the matter to the magistrate judge with
3 instructions." 28 U.S.C. § 636(b)(1).

4 c. Substantial Compliance

5 The Court understands Plaintiffs to seek to "demonstrate by a
6 preponderance of the evidence that Defendants have not
7 substantially complied with the terms of the Agreement."
8 Settlement Agreement ¶ 53. As Plaintiffs argue, "substantial
9 compliance" means more than "taking significant steps toward
10 compliance" Rouser v. White, 825 F.3d 1076, 1082 (9th
11 Cir. 2016). "[I]n California a party is deemed to have
12 substantially complied with an obligation only where any deviation
13 is 'unintentional and so minor or trivial as not substantially to
14 defeat the object which the parties intend to accomplish.'" Id.
15 (quoting Wells Benz, Inc. v. United States, 333 F.2d 89, 92 (9th
16 Cir. 1964) (citation and some quotation marks omitted)). "This
17 standard doesn't require perfection. . . . Deviations are
18 permitted so long as they don't defeat the object of the decree."
19 Id. (citation omitted). The Court also considers whether
20 Defendants have complied with each term of the Agreement. See id.
21 at 1081 ("Like terms in a contract, distinct provisions of consent
22 decrees are independent obligations, each of which must be
23 satisfied before there can be a finding of substantial
24 compliance.").

25 d. Discussion

26 i. Jurisdiction and Alternative Forms of Relief

27 Defendants, as a threshold matter, contend that Plaintiffs'
28 motion circumvents the usual process for prisoners to challenge

1 disciplinary findings: petitions for writs of habeas corpus or
2 civil rights suits filed under 42 U.S.C. § 1983. Defendants'
3 Opposition at 7-8. Defendants also argue that paragraph 53 of the
4 Settlement Agreement does not support Plaintiffs' position and
5 that Plaintiffs do not address paragraph 51—"The parties shall
6 agree on a mechanism by which CDCR shall promptly respond to
7 concerns raised by Plaintiffs' counsel regarding individual class
8 members." Defendants' Opposition at 8 n.4.

9 The Court, however, must determine whether Plaintiffs
10 demonstrate that Defendants are not in substantial compliance with
11 the terms of the Settlement Agreement, including paragraph 25's
12 limitations on when and how Defendants may place an inmate in the
13 SHU on the basis of a SHU-eligible rule violation determination.
14 See Settlement Agreement ¶ 25. Judge Vadas determined that review
15 is appropriate under paragraphs 49 and 53. See Transcript of June
16 10, 2016 Hearing at 45. The existence of alternative processes to
17 challenge disciplinary findings does not preclude this review.
18 Nor does the parties' failure to agree to a mechanism through
19 which Defendants could respond to class members' concerns pursuant
20 to paragraph 51 preclude review of Plaintiffs' motion. Thus, the
21 Court considers Plaintiffs' motion.

22 ii. Mootness, Ripeness and Evidence before Judge Vadas
23 Plaintiffs argue that procedural due process was denied when
24 CDCR denied the four class members relevant, favorable and
25 potentially exculpatory evidence without providing sufficient
26 reason for doing so. See Zimmerlee v. Keeney, 831 F.2d 183, 186-
27 88 (9th Cir. 1987); Piggie v. Cotton, 344 F.3d 674, 678 (7th Cir.
28 2003); Cal. Code Regs. tit. 15, § 3321(b)(3). In turn, Plaintiffs

1 seek a declaration that both sets of RVRs "violate CDCR's
2 regulations on the use of confidential information, the Settlement
3 Agreement and constitutional due process protections."
4 Plaintiffs' Motion at 5-6. Defendants counter that any claims
5 relating to the initial RVRs are moot now that CDCR has reissued
6 and reheard each RVR. Plaintiffs respond that Defendants
7 voluntarily reissued the RVRs, but have not cured the procedural
8 due process issues. Plaintiffs' Reply at 4. If Defendants'
9 actions did not correct earlier procedural due process violations,
10 then Plaintiffs' claims would not be moot. Thus, the Court must
11 consider whether there remain uncorrected procedural due process
12 violations.

13 To the extent that Plaintiffs allege violations of Settlement
14 Agreement paragraph 34 arising from CDCR's use of confidential
15 information in reissuing and rehearing the RVRs, Defendants argue
16 that Plaintiffs failed to present this issue to Judge Vadas and,
17 thus, failed to comply with the Settlement Agreement's dispute
18 resolution procedures. See Settlement Agreement ¶¶ 48-50, 52-53.
19 Plaintiffs respond that the Court must review the new RVRs to
20 determine whether Defendants have cured procedural due process
21 violations and so, as a practical matter, must review the new RVRs
22 that Judge Vadas has not reviewed to rule on this motion.
23 Plaintiffs' Reply at 5. Plaintiffs explain that they did not
24 present the new RVRs to Judge Vadas before the June 10, 2016
25 hearing only because Defendants delayed reissuing those RVRs until
26 May 31, 2016, and did not produce them to Plaintiffs' counsel
27 until after the June 10 hearing. Plaintiffs point out that
28 Defendants would have this Court review Judge Vadas's ruling on

1 sufficiency of the evidence, but not review his ruling on
2 procedural due process violations, without providing meaningful
3 reason to distinguish between the two. Plaintiffs' Reply at 6.
4 Plaintiffs then note that Defendants make no argument against the
5 merits of Plaintiffs' position on procedural issues. Plaintiffs'
6 Reply at 6-7.

7 Regarding the evidentiary basis for each rule violation,
8 Plaintiffs acknowledge that CDCR relied on information from a new
9 confidential informant when it reissued and reheard the RVRs, but
10 argue that there are contradictions in the record arising from the
11 new information and reliability concerns regarding that
12 information. Plaintiffs seek a ruling for the release of the four
13 class members from solitary confinement or, in the alternative, an
14 evidentiary hearing regarding the new information. Defendants
15 counter that Plaintiffs, in effect, ask this Court to reweigh the
16 evidence on which CDCR relied in reaching its rule violation
17 determinations.

18 Finally, Plaintiffs argue that CDCR has violated state
19 regulations regarding time bars for issuing RVRs and that "the
20 timing of the old and new RVRs suggests that CDCR is misusing the
21 disciplinary process to maintain the alleged co-conspirators in
22 SHU without justification." Plaintiffs' Motion at 19. See Cal.
23 Code Regs. tit. 15, § 3320(a).

24 "[A] district court has discretion, but is not required, to
25 consider evidence presented for the first time in a party's
26 objection to a magistrate judge's recommendation." United States
27 v. Howell, 231 F.3d 615, 621 (9th Cir. 2000).

28

1 The Court DENIES Plaintiffs' request for an evidentiary
2 hearing and RECOMMITS this motion to Judge Vadas to review the new
3 evidence and the parties' arguments. The process envisioned in
4 the Settlement Agreement and Judge Vadas's experience and
5 expertise cut in favor of referring the matter to Judge Vadas to
6 decide the issues in the first instance.

7 III. Conclusion

8 The Court GRANTS the parties' motions to seal (Docket Nos.
9 589, 620, 626, 610, 624), DENIES Plaintiffs' request for an
10 evidentiary hearing before this Court and RECOMMITS Plaintiffs'
11 motion to Judge Vadas to consider the new evidence and the
12 parties' arguments (Docket No. 590).

13 IT IS SO ORDERED.

14 Dated: September 6, 2016



CLAUDIA WILKEN
United States District Judge